

HB

135

1-LS0427H
Luckhaupt ✓
4/28/99

4/29

CS FOR HOUSE BILL NO. 135()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE KOTT

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to use of eavesdropping and recording devices by peace
2 officers."

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * **Section 1. FINDINGS AND INTENT.** (a) The legislature finds that, in State v. Glass,
5 583 P.2d 872 (Alaska 1978), the Alaska Supreme Court held that a peace officer must obtain
6 a warrant from a judicial officer before monitoring or recording a conversation between an
7 informant and a person being investigated for having committed a crime. In its decision,
8 however, the court acknowledged the possibility of an exception to the warrant requirement
9 under certain circumstances. Glass, supra, at 881, n. 34. The legislature finds that the safety
10 of peace officers conducting undercover investigations is such a circumstance.

11 (b) The legislature finds that, in 1978, undercover peace officers rarely encountered
12 suspects armed with a firearm. However, in the ensuing years, the investigation of certain
13 crimes, particularly drug offenses, has become much more hazardous to peace officers. Drug
14 dealers are usually armed.

1 (c) The legislature finds that it is not always possible to obtain a warrant to monitor
2 a conversation during the beginning phases of an investigation. An officer may have
3 suspicions that do not rise to the level of probable cause, the standard for obtaining a warrant.
4 In order to collect sufficient evidence to obtain a warrant, the officer may have to go
5 undercover, thereby creating risk of harm to that officer. Currently, peace officers are often
6 required to perform undercover investigations of drug offenses and other crimes without
7 adequate backup protection from fellow officers, and in situations where the persons being
8 investigated are commonly armed with firearms.

9 (d) The legislature finds that by prohibiting the recording of monitored conversations
10 and prohibiting the testimony of the monitoring officer regarding the fact that the monitoring
11 occurred or the content of the monitored conversation, the intrusion on an individual's privacy
12 is minor. This minimal intrusion to protect the safety and lives of peace officers is one that
13 society acknowledges is reasonable.

14 (e) It is the intent of this legislation to allow peace officers investigating a crime or
15 making an arrest to wear monitoring devices, so that back-up law enforcement may monitor
16 the investigation and, if a dangerous situation arises, provide help and protection to the
17 undercover officer.

18 * Sec. 2. AS 09.65 is amended by adding a new section to read:

19 **Sec. 09.65.215. Immunity of peace officer for use of body wire**
20 **eavesdropping device.** (a) A peace officer who intercepts an oral communication by
21 use of an electronic, mechanical, or other eavesdropping device that is concealed on
22 or carried on the person of the peace officer and that transmits that oral communication
23 by means of radio to a receiving unit that is monitored by other peace officers, or who
24 monitors the receiving unit, is not liable for damages to a person whose oral
25 communication is intercepted if

26 (1) the interception and monitoring occurs

27 (A) during the investigation of a crime or the arrest of a person
28 for a crime;

29 (B) for the purpose of ensuring the safety of the peace officer
30 conducting the investigation or making the arrest;

31 (2) the peace officer who intercepts the oral communication is a party

1 to the communication; and

2 (3) the communication intercepted is not recorded.

3 (b) In this section,

4 (1) "intercept" has the meaning given in AS 42.20.390;

5 (2) "oral communication" has the meaning given in AS 42.20.390;

6 (3) "peace officer" has the meaning given in AS 11.81.900(b).

7 * Sec. 3. AS 12.37 is amended by adding a new section to read:

8 **Article 3A. Police Use of Body Wires.**

9 **Sec. 12.37.400. Police use of body wire.** A peace officer may intercept an
10 oral communication by use of an electronic, mechanical, or other eavesdropping device
11 that is concealed on or carried on the person of the peace officer and that transmits
12 that oral communication by means of radio to a receiving unit that is monitored by
13 other peace officers, if

14 (1) the interception and monitoring occurs

15 (A) during the investigation of a crime or the arrest of a person
16 for a crime; and

17 (B) for the purpose of ensuring the safety of the peace officer
18 conducting the investigation or making the arrest;

19 (2) the peace officer intercepting the conversation is a party to the oral
20 communication and has consented to the interception; and

21 (3) the communication intercepted is not recorded.

22 (b) A peace officer monitoring a receiving unit under (a) of this section is not
23 competent to testify in a criminal proceeding involving a party to the oral
24 communication about the contents of the oral communication that was intercepted or
25 the fact that the communication occurred.

26 * Sec. 4. AS 42.20.320(a) is amended to read:

27 (a) The following activities are exempt from the provisions of AS 42.20.300
28 and 42.20.310:

29 (1) listening to a radio or wireless communications of any sort where
30 the same are publicly made;

31 (2) hearing conversation when heard by employees of a common carrier

1 by wire incidental to the normal course of their employment in the operation,
2 maintenance, or repair of the equipment of the common carrier by wire, provided the
3 information obtained is not used or divulged in any manner by the hearer;

4 (3) a broadcast by radio or other means whether it is a live broadcast
5 or recorded for the purpose of later broadcasts of any function where the public is in
6 attendance and the conversations that are overheard are incidental to the main purpose
7 for which the broadcast is then being made;

8 (4) recording or listening with the aid of any device to an emergency
9 communication made in the normal course of operations by a federal, state, or local
10 law enforcement agency or institutions dealing in emergency services, including
11 hospitals, clinics, ambulance services, fire fighting agencies, a public utility emergency
12 repair facility, civilian defense establishment, or military installations;

13 (5) inadvertent interception of telephone conversations over party lines;

14 (6) a peace officer, or a person acting at the direction or request of a
15 peace officer, engaging in conduct authorized by or under AS 12.37;

16 (7) interception, listening, or recording of communications by a peace
17 officer, or a person acting under the direction or request of a peace officer, in an
18 emergency where the communications are received from a device that intercepts the
19 communications of a person

20 (A) barricaded and not exiting or surrendering at the direction
21 or request of a peace officer, in circumstances where there is an imminent risk
22 of harm to life or property;

23 (B) holding another person hostage; or

24 (C) threatening the imminent illegal use of an explosive;

25 (8) the interception by a peace officer of an oral communication by
26 use of an electronic, mechanical, or other eavesdropping device that is concealed
27 on or carried on the person of the peace officer and that transmits that oral
28 communication by means of radio to a receiving unit that is monitored by other
29 peace officers, if

30 (A) the interception and monitoring occurs

31 (i) during the investigation of a crime or the arrest

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of a person for a crime; and
(ii) for the purpose of ensuring the safety of the
peace officer conducting the investigation or making the arrest; and
(B) the peace officer who intercepts the oral communication
is a party to the communication and has consented to the interception; and
(C) the communication intercepted is not recorded.

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9 by means of radio to a receiving unit that is monitored by other peace officers, or who
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12 (1) the interception and monitoring occurs

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(B) for the purpose of ensuring the safety of the peace officer conducting the investigation or making the arrest;

(2) the peace officer who intercepts the oral communication is a party to the communication; and

(3) the communication intercepted is not recorded.

(b) In this section,

(1) "intercept" has the meaning given in AS 42.20.390;

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Article 3A. Police Use of Body Wires.

Sec. 12.37.400. Police use of body wire. A peace officer may intercept an oral communication by use of an electronic, mechanical, or other eavesdropping device that is concealed on or carried on the person of the peace officer and that transmits that oral communication by means of radio to a receiving unit that is monitored by other peace officers, if

(1) the interception and monitoring occurs

(A) during the investigation of a crime or the arrest of a person for a crime; and

(B) for the purpose of ensuring the safety of the peace officer conducting the investigation or making the arrest;

(2) the peace officer intercepting the conversation is a party to the oral communication and has consented to the interception; and

(3) the communication intercepted is not recorded.

(b) A peace officer monitoring a receiving unit under (a) of this section is not competent to testify in a criminal proceeding involving a party to the oral communication about the contents of the oral communication that was intercepted or the fact that the communication occurred.

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6 information obtained is not used or divulged in any manner by the hearer;

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9 attendance and the conversations that are overheard are incidental to the main purpose
10 for which the broadcast is then being made;

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13 law enforcement agency or institutions dealing in emergency services, including
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28 **(8) the interception by a peace officer of an oral communication by**
29 **use of an electronic, mechanical, or other eavesdropping device that is concealed**
30 **on or carried on the person of the peace officer and that transmits that oral**
31 **communication by means of radio to a receiving unit that is monitored by other**

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is a party to the communication and has consented to the interception; and

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Alaska State Legislature

House of Representatives

COMMITTEES
JUDICIARY COMMITTEE, CHAIR
RULES
MILITARY & VETERANS AFFAIRS
UTILITY RESTRUCTURING
ETHICS



INTERIM:
10928 EAGLE RIVER RD., SUITE 141
EAGLE RIVER, AK 99577

SESSION:
ALASKA STATE CAPITOL
JUNEAU, AK 99801

MEMORANDUM

Date: April 27, 1999

To: Jerry Luckhaupt
Legislative Legal and Research Services

From: Patrick Harman *Pat*
Representative Pete Kott's Office

Subject: HB 135 Findings

Please add a new section to HB 135 regarding Findings. Below is my cut at Findings:

- Social changes have occurred since the Glass decision was made.
- Illegal drugs are now a major social issue.
- When making arrests of drug dealers, the drug dealers are usually armed.
- Police officer safety is of concern to the citizen's of Alaska
- Monitoring undercover conversations will greatly enhance officer safety.

Attached are Annie Carpeneti's Findings, between our input and your thoughts we should have something that can assist any appeal of this bill.

If you have any questions call me at 6841.



Representative Pete Kott

JUNEAU OFFICE (907) 465-3777 TOLL FREE 1-800-861-KOTT(5688) FAX (907) 465-2819
EAGLE RIVER OFFICE (907) 694-8944 FAX (907) 694-8945 E-MAIL: representative_pete_kott@legis.state.ak.us



Draft for review

In State v. Glass, 583 P. 2d 872 (Alaska 1978), the Alaska Supreme Court held that peace officers must obtain a warrant from a judicial officer before monitoring or recording a conversation between an informant and a person being investigated for having committed a crime. In its decision, however, the court acknowledged the possibility of an exception to the warrant requirement under certain circumstances. Glass at footnote 34. We find that the safety of peace officers conducting undercover investigations is such a circumstance.

In 1978, undercover peace officers rarely encountered suspects armed with a firearm. However, in the ensuing years, the investigation of certain crimes, particularly drug offenses, has become much more hazardous to peace officers.

It is not always possible to obtain a warrant to monitor a conversation during the beginning phases of an investigation. An officer may have suspicions that do not rise to the level of probable cause, the standard for obtaining a warrant. In order to collect sufficient evidence to obtain a warrant, the officer may have to go undercover, thereby creating a risk of harm to himself or herself. Currently, peace officers are often required to perform undercover investigations of drug offenses and other crimes without adequate backup protection from fellow officers, and in situations where the persons being investigated are commonly armed with firearms.

This legislation is intended to allow peace officers investigating a crime or making an arrest to wear monitoring devices, so that back-up law enforcement may monitor the investigation and, if a dangerous situation arises, provide help and protection to the undercover officer.

By prohibiting the recording of the monitored conversations, and prohibiting the testimony of the monitoring officer regarding the fact that the monitoring occurred or the content of the monitored conversation, the intrusion on an individual's privacy is minor. This minimal intrusion to protect the safety and lives of peace officers is one that society acknowledges is reasonable.

workers over until they can resume employment; these benefits are paid contingent on the employee's participation in the development and execution of a reemployment plan. See AS 23.30.041(g)-(n). The statute makes it clear that the legislature intended these plans to include employee contact with the rehabilitation specialist, and an opportunity for the employer to monitor the employee's compliance with the plan. See AS 23.30.041(n). Although we do not hold that payment of reemployment benefits to claimants residing out of state is inappropriate, we believe that these provisions indicate a preference for residence in Alaska while the employee is participating in the plan.

If we were to hold that claimants residing out of state could collect reemployment benefits despite an employer's offer of employment in Alaska, some claimants may seek to avoid the application of that provision by leaving the state. Such opportunism would increase the cost to employers of the workers' compensation scheme, an outcome contrary to the legislature's stated desire to control costs and workers' compensation premiums. See *Williams v. State, Dept. of Revenue*, 895 P.2d 99, 104 (Alaska 1995) ("[T]he Act's purpose is 'to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of AS 23.30.'" (quoting Ch. 79, § 1, SLA 1988) (emphasis added)); *Chiropractors for Justice v. State*, 895 P.2d 962, 966, 970 (Alaska 1995) (noting the State's legitimate interest in "saving jobs by reducing workers' compensation premiums" and "the overall legislative policy of providing medical benefits to injured workers at a reasonable cost to employers."). See also AS 23.30.175 (allowing downward adjustment in workers' compensation benefits paid to claimants living in states which have a lower cost of living as compared to Alaska).

The issue in this case is whether a claimant must return to Alaska from out of state to take a job offered pursuant to AS 23.30.041(f)(1), or forego reemployment benefits. The policy considerations which underlie a limitation on reemployment benefits payments to out-of-state residents include fa-

cilitating employer monitoring of compliance with the reemployment plan and avoiding opportunistic departures by claimants. These considerations apply with equal force whether the claimant resides in another state or is a resident of a foreign country.

IV. CONCLUSION

Alaska Statute 23.30.041(f) governs the eligibility for reemployment benefits of workers' compensation claimants who move outside of the State of Alaska. The superior court and the Board are **AFFIRMED**.



STATE of Alaska, Petitioner,

v.

Edward PAGE, Jr., Respondent.

No. A-5205.

Court of Appeals of Alaska.

Feb. 9, 1996.

Hearing Granted April 22, 1996.

Defendant was charged with offenses relating to sale of cocaine. The Superior Court, Fourth Judicial District, Fairbanks, Richard D. Savell, J., suppressed videotape of defendant's activities within apartment, and State appealed. The Court of Appeals, Mannheimer, J., held that police were required to secure warrant before surreptitiously videotaping defendant's conversation in apartment with police informant even though videotape recorder's sound was turned off.

Affirmed.

1. Criminal Law §1139

Whether police had to secure warrant before they surreptitiously videotaped suspect's conversation with police informant was question of law, subject to de novo review.

2. Telecommunications ⇨511

If person engages in conversation that is protected from electronic monitoring without warrant, and if this conversation occurs in place where person has reasonable expectation of visual privacy, then police must secure warrant before surreptitiously videotaping conversation, even if they turn sound off. Const. Art. 1, §§ 14, 22.

3. Searches and Seizures ⇨26

Under Alaska Constitution, person is protected from unreasonable government intrusion whenever person manifests subjective expectation of privacy in property or activity being subjected to government scrutiny, and this expectation of privacy is one that society recognizes as reasonable. Const. Art. 1, §§ 14, 22.

4. Searches and Seizures ⇨201

Whether person manifests subjective expectation of privacy in property or activity being subjected to government scrutiny, as element of protection under Alaska Constitution, presents question of fact. Const. Art. 1, §§ 14, 22.

5. Searches and Seizures ⇨201

Whether expectation of privacy manifested by person is one that society recognizes as reasonable, as element of protection under Alaska Constitution, presents legal question, answer to which rests on constitutional intent and, ultimately, on judgment concerning proper balance to be struck between rights of individual and authority society exercises over individuals through agency of government. Const. Art. 1, §§ 14, 22.

6. Searches and Seizures ⇨26

Alaska Constitution protected defendant from surreptitious photography or videotaping, without warrant, of meeting in apartment; although there was no audio recording, videotaping of defendant's private meeting with informant was not merely de minimis invasion of his privacy. Const. Art. 1, §§ 14, 22.

7. Constitutional Law ⇨82(7)

Meaning of privacy, subject to constitutional protection, must necessarily vary de-

pending on factual context. Const. Art. 1, §§ 14, 22.

8. Constitutional Law ⇨82(7)

People who knowingly reveal private matters to other occupants of room are nonetheless entitled, as matter of constitutional right to privacy, to expect that these private matters are not being simultaneously broadcast to other locations or electronically recorded for later scrutiny. Const. Art. 1, §§ 14, 22.

9. Drugs and Narcotics ⇨185(1)

That defendant was using apartment to transact illegal business, the sale of cocaine, did not deprive him of any reasonable expectation of privacy, such that surreptitious videotaping of defendant's activities in apartment would not violate Alaska Constitution. Const. Art. 1, §§ 14, 22.

10. Searches and Seizures ⇨26

Fact that business might be discussed or transacted in private residence does not deprive occupants of their normal expectation of privacy under Alaska Constitution. Const. Art. 1, §§ 14, 22.

Petition for Review from the Superior Court, Fourth Judicial District, Fairbanks, Trial Court No. 4FA-90-1830 Cr; Richard D. Savell, Judge.

Eric A. Johnson, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Petitioner.

Marcia E. Holland, Assistant Public Defender, Fairbanks, and John B. Salemi, Public Defender, Anchorage, for Respondent.

Before BRYNER, C.J., and COATS and MANNHEIMER, JJ.

OPINION

MANNHEIMER, Judge.

In *State v. Glass*, 583 P.2d 872 (Alaska 1978), the Alaska Supreme Court held that the police must obtain a warrant before surreptitiously recording people's conversations. We are now asked to decide whether the police may surreptitiously record people's ac-

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tivities on videotape without first obtaining a *Glass* warrant if the police confine themselves to the video-recording capabilities of the electronic equipment and do not employ its audio capabilities.

Edward Page, Jr. was suspected of selling cocaine. The police hid videotaping equipment in a Fairbanks apartment and, through an informant, they arranged for Page to come there to make a delivery of cocaine.¹ The police had placed three video cameras in the apartment: one was focused on the parking area and front door to the building, another was focused on an amusement arcade across the street, and a third was housed inside a non-functioning television set in the living room of the apartment.

After he was charged, Page learned that the police had videotaped him. He asked the superior court to suppress the videotape, arguing that the police had violated *Glass* because they had not obtained a warrant before they recorded his activities.

A hearing on Page's motion was conducted on January 21, 1994, before Superior Court Judge Richard D. Savell. The State conceded that, under *Glass*, the police would have needed a warrant to record the conversation between Page and the undercover officer. However, the State argued that no warrant was needed if the police simply recorded video images of Page's conduct.

Judge Savell granted Page's suppression motion in part. The judge ruled that Page had no expectation of privacy with respect to observation of his conduct in public places (the parking lot or the arcade). However, Judge Savell ruled that Page did have an expectation of privacy when he moved inside the apartment. Judge Savell therefore suppressed the videotape recorded by the camera hidden inside the television. The State asks us to reverse that ruling.

The facts of this case are not in dispute. The State concedes that Page and the police

1. The video camera was placed in the apartment with the knowledge and consent of the manager. The manager of the apartment complex had earlier notified the police that her tenants had complained to her about drug deals being conducted in the nearby vicinity. The manager agreed to let the police use an unoccupied (but furnished)

informant were engaged in a conversation that was protected from electronic monitoring under the supreme court's decision in *Glass*. The State further concedes that there were no exigent circumstances that might excuse the police's failure to procure a *Glass* warrant. Finally, the State concedes that the conversation between Page and the police informant took place in a private residence.

[1, 2] Given these facts, the issue of whether the police had to secure a warrant before they surreptitiously videotaped Page's conversation with the police informant is a question of law. We therefore review this issue de novo. See *State v. Resek*, 706 P.2d 706, 707 (Alaska App.1985). We now hold that if a person engages in a conversation that is protected from electronic monitoring under *Glass*, and if this conversation occurs in a place where the person has a reasonable expectation of visual privacy, then the police must secure a warrant before surreptitiously videotaping the conversation, even if they turn the sound off.

[3] In *Glass*, the Alaska Supreme Court adopted a two-pronged test to be employed when construing the scope of privacy granted by Article I, Sections 14 and 22 of the Alaska Constitution. Under these sections of the state constitution, a person is protected from unreasonable government intrusion whenever (1) the person manifests a subjective expectation of privacy in the property or activity being subjected to government scrutiny, and (2) this expectation of privacy is one that society recognizes as reasonable. *Glass*, 583 P.2d at 875, 880.

[4, 5] The first prong of this test (a person's subjective expectation of privacy) presents a question of fact. However, the second prong (the reasonableness of any expectation of privacy) presents a legal question. The answer to this second prong of the test rests on constitutional intent and, ultimately, on a

apartment in order that an undercover police informant might solicit potential drug sellers and then have them return to the apartment to conduct the actual sales. The police brought in food, trash, and articles of clothing to make the apartment look "lived in".

judgement concerning the proper balance to be struck between the rights of the individual and the authority society exercises over individuals through the agency of government.

[6] The State does not contest that Page subjectively expected his activities in the apartment to be private. The remaining question "is whether that expectation of privacy is one that society is prepared to recognize as being reasonable". *Glass*, 583 P.2d at 880.

The State argues that the warrant requirement established in *Glass* to regulate police monitoring of conversations should not apply to police videotaping of non-verbal physical conduct. The State points out that much of the discussion in *Glass* focuses on the importance of free speech in a democratic society and on the chilling effect that unrestricted police monitoring would have on political and social discourse. *Glass*, 583 P.2d at 876-78.

[7] *Glass* involved the electronic monitoring of a conversation; it was thus natural that the supreme court would focus its decision on the importance of speech. But the privacy interests protected by Article I, Sections 14 and 22 of the state constitution apply to activities other than speech. As the supreme court noted in *Glass*, "The meaning of privacy of necessity must vary depending on the factual context[.]" *Id.* at 879-880.

American tort law recognizes the principle that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another . . . is subject to liability . . . for invasion of [the other person's] privacy, if the intrusion would be highly offensive to a reasonable person." *Restatement of Torts (Second)* (1976), § 652B, Vol. 3, pp. 378-79. The Restatement declares that an actionable intrusion is not limited to "physical intrusion into a place in which the plaintiff has secluded himself[;] . . . [it] may also be [accomplished] by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs". *Id.* Thus, under many circumstances, if a

person is in a place where he or she can reasonably expect privacy, tort law protects the person from unconsented-to observation or photography. See, for example, *Huskey v. National Broadcasting Company, Inc.*, 632 F.Supp. 1282, 1289 (N.D.Ill.1986) (citing the Restatement, § 652); *Cohen v. Herbal Concepts, Inc.*, 100 A.D.2d 175, 473 N.Y.S.2d 426, 427-28 (1984) (surreptitious photography), order *aff'd* 63 N.Y.2d 379, 482 N.Y.S.2d 457, 472 N.E.2d 307 (1984). But see *Muratore v. M/S Scotia Prince*, 656 F.Supp. 471, 482-83 (D.Me.1987), *rev'd in part on other grounds*, 845 F.2d 347 (1st Cir.1988); *Slessman v. American Black Hawk Broadcasting Co.*, 416 N.W.2d 685, 686-88 (Iowa 1987) (surreptitious photographing of a person in a public place is not actionable).

[8] In the present case, Page voluntarily accompanied the undercover officer to the apartment. He knew that his conduct inside that apartment would be observed by the undercover officer (whom Page believed to be a drug customer). Page can hardly claim that he expected complete visual privacy inside the apartment. However, the decision in *Glass* is premised on the legal rule that people who knowingly reveal private matters to other occupants of a room are nonetheless entitled to expect that these private matters are not being simultaneously broadcast to other locations or electronically recorded for later scrutiny.²

We therefore reject the State's argument that its videotaping of Page's private meeting with the undercover officer was a *de minimis* invasion of his privacy. Just as the Alaska Constitution (as construed in *Glass*) protected Page against surreptitious electronic monitoring or recording of his words to the undercover officer, we conclude that our state's constitution also protected Page from surreptitious photography or videotaping of that meeting. Surreptitious video monitoring and recording of people's private activities has the same "corrosive impact . . . on our sense

destine peeping". *Id.* at 20 (quoting Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* (2nd ed. 1987), § 2.4(c), Vol. 1, pp. 440-41).

2. See *Barron v. State*, 823 P.2d 17 (Alaska App. 1992), where this court recognized that a person in a restroom can not expect complete privacy from the observations of other persons in the restroom but can still expect privacy from "clan-

of security", *Glass*, 583 P.2d at 877, as surreptitious audio monitoring and recording.

[9] The State next argues that, even if people have a right to expect that their private activities will not be surreptitiously videotaped, this expectation is substantially diminished when the person's private activities are of a commercial nature. Because Page was engaged in the sale of drugs, the State contends, he had little expectation of privacy.

[10] The fact that business might be discussed or transacted in a private residence does not deprive the occupants of their normal expectation of privacy. Stripped of its trimmings, the State's argument appears to be that Page had no reasonable expectation of privacy because he was using the apartment to transact illegal business—the sale of cocaine. The supreme court answered this contention in *Glass*:

It is of course, easy to say that one engaged in an illegal activity has no right to complain if his conversations are broadcast or recorded. If, however, law enforcement officials may lawfully [use informants] to record and transcribe private conversations, nothing prevents monitoring of . . . persons not engaged in illegal activity, who have incurred [official] displeasure, have not conformed[,] or have espoused unpopular causes.

Glass, 583 P.2d at 878. In other words, because of the value our society places on individual privacy, we can not give the police unfettered discretion to decide when electronic monitoring of private conversations might be justified to detect or prevent illegal conduct. The same holds true for clandestine videotaping of non-public activities.

Given the narrow facts of Page's case, we need not completely define the relationship between the government's need to employ clandestine video surveillance as an investigative technique and the individual citizen's right to visual privacy. Instead, we confine ourselves to the circumscribed issue before us.

Page was engaged in a conversation which, the State concedes, was protected from warrantless monitoring under *Glass*. This con-

versation took place in a private apartment, a location where Page could reasonably expect that his activities would not be observed by anyone except those onlookers whose presence he was aware of. We hold that, in these circumstances, the Alaska Constitution as interpreted by the supreme court in *Glass* requires the police to secure a warrant before engaging in surreptitious videotaping of a conversation. It makes no difference that the police turn down the audio recording level on their equipment.

The decision of the superior court suppressing the videotape made inside the apartment is **AFFIRMED**.



Roger H. HAMPEL, Appellant,

v.

STATE of Alaska, Appellee.

No. A-5501.

Court of Appeals of Alaska.

Feb. 9, 1996.

Petitioner sought postconviction relief from sentence for first-degree murder. The Superior Court, Third Judicial District, Anchorage, Milton M. Souter, J., denied application for postconviction relief, and petitioner appealed. The Court of Appeals, Bryner, C.J., held that: (1) defendant was not entitled to deduction for good time credit in calculating mandatory minimum term of imprisonment for purposes of determining discretionary parole eligibility; (2) petitioner's subjective belief regarding eligibility for discretionary parole did not render plea involuntary; but (3) petitioner stated claim for prosecutorial misconduct for state's renegeing on alleged agreement not to oppose reduction in sentence.

Affirmed in part, reversed in part and remanded.

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