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Tollett v. State, 272 So. 2d 490 (Fla. 1973)

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perty protection section of the no-fault law might ultimately be revived by the legislature. The question remains whether the legislature will follow the suggestion of the court, or will be content to leave property protection outside the no-fault statute.[50]

Criminal Law—WIRETAPPING—CONSENTING PARTY TO CONVERSATION RECORDED BY POLICE WITHOUT WARRANT REQUIRED TO VERIFY AT TRIAL CONSENT TO RECORDING PRIOR TO ITS ADMISSION AGAINST OTHER PARTY TO CONVERSATION.—*Tollett v. State*, 272 So. 2d 490 (Fla. 1973).

While jailed for possession of marijuana, Ted Tollett became friendly with a cellmate, Jesse Davis. Captain Campbell of the Leon County Sheriff's Department asked Davis " 'to help me with Mr. Tollett on making a buy.' "[1] Although he initially refused, Davis ultimately agreed to cooperate. After Tollett was released, Davis, under Campbell's direction, telephoned him four times. Three of the calls originated from Campbell's office, where they were recorded; Davis placed the fourth call from the county jail while Campbell listened on an extension. Acting upon telephoned instructions, Tollett came to the jail allegedly to sell drugs to Davis. Later Tollett went to a motel room to discuss the possible sale of his unborn child with a potential buyer, who in reality was an undercover agent. The conversation between Tollett and the agent also was recorded. Tollett and his wife were then charged both with attempting to sell an unborn child and with dispensing contraband at the Leon County Jail. At trial the state played the recorded conversations to the jury over defense objections. Davis never appeared in court, nor was his absence explained. Tollett was convicted of dispensing contraband and LSD to a prisoner; he and his wife were convicted of attempting to sell the unborn child.

Holding that the trial court properly allowed the recordings to be played before the jury, the First District Court of Appeal affirmed the

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50. Allowance of tort claims when the value of property damage does not exceed $550 will probably not substantially increase automobile accident litigation. The expense involved in pursuing a claim of less than $550 would almost neutralize the potential recovery. Partly for this reason, the Chairman of the House Insurance Committee will probably recommend that the property protection section of no-fault not be re-enacted. Chairman Birchfield believes that property protection is not an essential part of an effective no-fault system. Interview with Representative William Birchfield, Chairman of the House Insurance Committee, in Tallahassee, Florida, October 31, 1973.

1. 272 So. 2d at 491.

convictions.[2] The Florida Supreme Court reversed in a four-three decision written by Justice Ervin. Jurisdiction for certiorari was based upon a conflict between the First District Court of Appeal decision and the Third District's decision in *Walker v. State*.[3] The supreme court paraphrased the rule in *Walker* to require that a participant to a communication recorded by the police verify at trial his consent to the recording prior to its admission as evidence[4]—a requirement rejected by the First District.[5] The court placed primary emphasis upon the new language of article I, section 12, of the 1968 Florida constitution, a search and seizure provision which provides for the exclusion of evidence obtained by "the unreasonable interception of private communications."[6] Justice Ervin concluded that when warrant-

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2. Tollett v. State, 244 So. 2d 458 (Fla. 1st Dist. Ct. App. 1971).

3. 222 So. 2d 760 (Fla. 3d Dist. Ct. App. 1969).

4. 272 So. 2d at 494. The existence of this rule in the Third District was not entirely clear. Justice Adkins, dissenting in *Tollett*, argued that corroboration was not contested in *Walker*; rather, the new rule "merely adds another qualification to the admissibility of recorded statements." *Id.* at 497. In fact, corroboration was not a pivotal issue in *Walker*, since the consenting party did take the witness stand. Although an earlier decision, Hajdu v. State, 189 So. 2d 230 (Fla. 3d Dist. Ct. App. 1966), turned principally upon a trespass theory, the court there reversed a conviction obtained through the efforts of a bugged informer who neither testified herself, nor recorded her conversations with the defendant. *Hajdu* was interpreted in Koran v. State, 213 So. 2d 735, 736 (Fla. 3d Dist. Ct. App. 1968), to require actual testimony by the consenting party as to the consent. Perhaps a better characterization of the Third District's rule is that a recording to which one party consents is admissible, and "[t]his is particularly true when the recording is used to corroborate the testimony of [the] consenting party to the recording." Parnell v. State, 218 So. 2d 535, 541 (Fla. 3d Dist. Ct. App. 1969). *See* Alea v. State, 265 So. 2d 96 (Fla. 3d Dist. Ct. App. 1972). *See also* Gomien v. State, 172 So. 2d 511 (Fla. 3d Dist. Ct. App. 1965).

5. 244 So. 2d at 461. The district court held that Captain Campbell's testimony regarding what Davis did rather than what he said was sufficient to establish consent and to overcome hearsay objections. *Id.* In dissent, Judge Rawls considered the hearsay rule violated and noted that the state did in fact ask Campbell whether Davis had given consent. *Id.* at 462. For other First District cases, see notes 9 & 10 and accompanying text *infra*.

6. FLA. CONST. art. I, § 12, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, *and against the unreasonable interception of private communications by any means,* shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, *the communication to be intercepted,* and the nature of evidence to be obtained. *Articles or information obtained in violation of this right shall not be admissible in evidence.*

(Emphasis added.) The corresponding provision in FLA. CONST. Decl. of Rts. § 22 (1885) is virtually identical to U.S. CONST. amend. IV.

For states with similar constitutional provisions, see HAWAII CONST. art. I, § 5; ILL. CONST. art. I, § 6; N.Y. CONST. art. I, § 12. *See also* art. I, § 1.05, of the proposed Delaware constitution in DEL. CODE ANN. (Noncum. Supp. 1972).

less wiretaps are implemented, the State must authenticate consent to the interception through the testimony of the consenting party before the recording of the intercepted communication can be admitted as evidence.[7]

Since the decision was based upon revised constitutional language, the court noted that federal and Florida cases decided within the context of the fourth amendment and the 1885 Florida constitution could not be considered controlling.[8] However, both Florida and federal judicial decisions already have effectively written into the original search and seizure provisions concepts similar to those now made explicit in article I, section 12. In 1959 the First District Court of Appeal, in *Griffith v. State,* [9] concluded that wiretapping—at least where consent was not involved—could violate the search and seizure and the self-incrimination sections of the Declaration of Rights of the 1885 Florida constitution, and that evidence so obtained would be inadmissible at state trials.[10] The Third District Court of Appeal obviously incorporated the *Griffith* rule in adding the further requirement that a consenting party corroborate his consent at trial.[11] Indeed, the very conflict the supreme court found between the two districts implies that both jurisdictions, while differing on the consent issue, necessarily assumed that electronic eavesdropping becomes constitutionally impermissible at some point. Otherwise, consent would not be at issue since evidence from electronic eavesdropping would be admissible no matter how it was obtained.

Although the United States Supreme Court initially determined that electronic eavesdropping failed to constitute a search or seizure within the meaning of the fourth amendment,[12] the Court gradually abandoned this rule and concluded that use of electronic devices to "seize" conversation does amount to a search.[13] As the Court noted in

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7. 272 So. 2d at 496.

8. *Id.* at 493.

9. 111 So. 2d 282 (Fla. 1st Dist. Ct. App. 1959).

10. *Id.* at 287. *See also* Barber v. State, 172 So. 2d 857 (Fla. 1st Dist. Ct. App. 1965). The *Griffith* court claimed that it was adopting the dissenting position of Olmstead v. United States, 277 U.S. 438 (1928), which found no constitutional ban on wiretapping per se. However, it affirmed the conviction on the grounds that the police, in attaching a headset to a party-line telephone, had not "tapped" defendant's line. This distinction was rejected in Lee v. Florida, 392 U.S. 378 (1968), *rev'g* 191 So. 2d 84 (Fla. 4th Dist. Ct. App. 1966).

11. *See* note 4 *supra.*

12. Olmstead v. United States, 277 U.S. 438 (1928).

13. Berger v. New York, 388 U.S. 41, 51 (1967). The Court had earlier relied on a physical trespass theory as the element that triggered fourth amendment violations. *See* Silverman v. United States, 365 U.S. 505 (1961); Goldman v. United States, 316 U.S. 129 (1942). Although it characterized electronic surveillance as a "trespassory

Katz v. United States,[14] "the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements."[15]

While the United States Supreme Court was delineating constitutional limitations upon electronic eavesdropping, it also was carving an exception to those limitations in the area of consensual eavesdropping. In *On Lee v. United States*[16] the Court held that the fourth amendment would not bar testimony by a government agent regarding a defendant's statements transmitted by a device hidden on the person of an undercover agent—even though the undercover agent himself failed to testify.[17] Subsequent decisions refined this approach by emphasizing that the defendant must assume the risk both that an individual with whom he converses might allow a third party to overhear the conversation,[18] and that the conversation might "be accurately reproduced in court, whether by faultless memory or mechanical recording."[19] Only a year prior to the Court's assertion in *Katz* that the fourth amendment "protects people—and not simply 'areas'—against unreasonable searches and seizures,"[20] the Court continued to emphasize the risk factor, by declaring in *Hoffa v. United States*[21] that the fourth amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[22]

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intrusion into a constitutionally protected area," 388 U.S. at 44, the Court in *Berger* effectively rejected the physical trespass theory while declaring a New York statute permitting court orders for eavesdropping unconstitutionally broad. Subsequently, Katz v. United States, 389 U.S. 347 (1967), crystallized this new approach: "[T]he Fourth Amendment protects people, not places." *Id.* at 351.

14. 389 U.S. 347 (1967).

15. *Id.* at 353. The natural consequence of the *Katz* rule was that "oral statements, if illegally overheard, and their fruits are . . . subject to suppression." Alderman v. United States, 394 U.S. 165, 171 (1969). *Cf.* Wong Sun v. United States, 371 U.S. 471 (1963). For application of the exclusionary rule to states, see Mapp v. Ohio, 367 U.S. 643 (1961). Lee v. Florida, 392 U.S. 378 (1968), applies the *Mapp* exclusionary rule to evidence obtained by wiretapping.

16. 343 U.S. 747 (1952).

17. *Id.* at 753-54.

18. Rathbun v. United States, 355 U.S. 107, 111 (1957), stating: "Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation."

19. Lopez v. United States, 373 U.S. 427, 439 (1963). Chief Justice Warren, in his concurring opinion, argued that the recorded statements should have been admissible only because the consenting party testified. *Id.* at 441.

20. 389 U.S. at 353.

21. 385 U.S. 293 (1966).

22. *Id.* at 302. *See also* Lewis v. United States, 385 U.S. 206 (1966); Osborn v. United States, 385 U.S. 323 (1966).

For an excellent analysis of *Katz* in light of *Hoffa* (as well as of *Lewis* and *Osborn*), see Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT.

In *United States v. White*[23] the Court's recognition that the fourth amendment extends to eavesdropping converged with its qualification that a defendant must assume the risk of electronic recording when he discusses his illegal activities with another. Although *White* could have been decided without references to *Katz*,[24] the plurality opinion nevertheless emphasized that *Katz* did not disturb the result reached in *On Lee*.[25] Stressing the misplaced confidence rule of *Hoffa*, where no electronic eavesdropping was used, the Court in *White* concluded that the fourth amendment required no different result "if the agent not only records his conversations with the defendant but instantaneously transmits them electronically to other agents . . . ."[26] The Court specifically rejected any requirement that a party consenting to electronic surveillance verify his consent at trial. The Court considered the testimony of the consenting party not critical in deciding whether the defendant's fourth amendment rights had been violated.[27]

In *Tollett* the Florida Supreme Court used *White* as a point of departure in comparing state and federal search and seizure provisions. After noting that the *White* decision was "sharply divided,"[28] the court compared the fourth amendment of the federal Constitution with article I, section 12, of the Florida constitution and concluded: "In Florida, at least, the protection of privacy in the areas of communications is constitutionally mandated in express language."[29] Thus the court decided that federal case law, including *White*, was not controlling. Instead, *Tollett* placed corroboration of a party's consent squarely within a state constitutional framework. The court insisted that this consent "must be shown through proper testimony—not hearsay."[30] If the consenting party does testify, then he "can include as

REV. 133. The author anticipates the ruling in United States v. White, 401 U.S. 745, 754 (1971), in concluding, "The brave, broad reading of the Fourth Amendment in *Katz* has a hollow ring when tested against the Court's work of the prior Term." *Id.* at 152.

Perhaps the definitive history of the consent issue through *Katz* is Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189 (1968).

23. 401 U.S. 745 (1971).

24. The events in *White* antedated the *Katz* holding, which was held not retroactive under the doctrine of Desist v. United States, 394 U.S. 244 (1969). Only four Justices joined in the *White* opinion. Justice Brennan concurred in *White* solely on the basis of retroactivity. 401 U.S. at 755. Justice Black concurred because of his belief, expressed in *Katz*, that the fourth amendment does not encompass eavesdropping at all. *Id.* at 754.

25. 401 U.S. at 750.

26. *Id.*

27. *Id.* at 754.

28. 272 So. 2d at 492; *see* note 24 *supra*.

29. 272 So. 2d at 493. See note 6 *supra* for the express language of article I, § 12.

30. 272 So. 2d at 494.

a logical concomitant to his testimony any tape or electronic recordings of such communications . . . ."[31] Otherwise, the original acquisition of those recordings in the absence of a warrant would be "unreasonable" within the language of the new article I, section 12.[32]

The court disposed of another apparent problem, a provision of Florida's new security of communications statute which requires court authorization for "the interception of wire or oral communications when none of the parties to the communication has consented to the interception . . . ."[33] The obvious converse of this provision is that when one of the parties consents, no court authorization is required.[34] Although it may have been unnecessary,[35] the *Tollett* court analyzed the above-quoted provision. It found that the "language should not be interpreted to obviate the necessity of a police officer securing a warrant" unless the consenting party himself testifies.[36] The court determined that the provision did not remove the corroboration requirement; rather, the provision was "in keeping with the intent of the new verbiage" of article I, section 12.[37]

During the last several years, over half the states have also passed new eavesdropping statutes.[38] A minority impose warrant require-

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31. *Id.*

32. *Id.* at 493. Article I, § 12 is set forth in note 6 *supra.*

33. FLA. STAT. § 934.01(4) (1971).

34. *See* FLA. STAT. § 934.03(2)(c) (1971), which provides:

> It is not unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Subsection (d) applies the same exception to those "not acting under color of law . . . unless such communication is intercepted for the purpose of committing any criminal act."

35. According to the petitioner's statement of facts, the interceptions took place in April 1969. Petitioner's Brief on the Merits at 5. The security of communications statute did not become effective until September 1 of the same year.

36. 272 So. 2d at 494.

37. *Id.* The court drew an analogy to search warrants:

> "Consents" from police informers with no substantial or requisite interest in the residence or papers or personal effects of a suspect are not legally sufficient to relieve police officers of the necessity of securing search warrants to search the dwelling, person or papers and effects of the suspect; neither should their "consents" except under the safeguards of authentication as hereinafter noted be sufficient to obviate the necessity of securing a warrant for intercepting wire or oral communications.

Id.

38. *See* notes 39-41, 43 *infra.* The following thirteen states have eavesdropping statutes which are more than twenty years old (except for minor modifications); a few date back to the nineteenth century: ALA. CODE tit. 48, § 414 (1958); ARK. STAT. ANN. § 73-1810 (1957); IDAHO CODE § 18-6705 (1948); IOWA CODE ANN. § 716.8 (1971); KY. REV. STAT. § 433.430 (1971); LA. REV. STAT. § 14.332 (1950); N.C. GEN. STAT. § 14-155 (1969);

ments upon the interception of all communications.[39] A few other states exempt law enforcement officials from an otherwise comprehensive prohibition when one party consents to the interception.[40] A majority of the new statutes,[41] as well as the Omnibus Crime Control and Safe Streets Act of 1968,[42] after which many statutes are patterned,[43]

N.D. CENT. CODE § 8-10-07 (1959); OKLA. STAT. ANN. tit. 21, § 1757 (1958); TENN. CODE ANN. § 65-2117 (1955); UTAH CODE ANN. § 76-48-11 (1953); VA. CODE ANN. § 18.1-156 (1960); WYO. STAT. ANN. § 37-259 (1957).

Six states have never had eavesdropping statutes: Indiana, Mississippi, Missouri, South Carolina, Texas and West Virginia. Hawaii's statute was repealed. *See* note 39 *infra.*

39. NEV. REV. STAT. § 200.620 (1971); N.H. REV. STAT. ANN. § 570-A:2 (Supp. 1972); WASH. REV. CODE ANN. § 9.73.030 (Supp. 1972). *See also* ME. REV. STAT. ANN. tit. 15, § 712 (Supp. 1973), which authorizes interceptions with consent, but makes the evidence therefrom excludable. *Cf.* State *ex rel.* Arnold v. County Court, 187 N.W.2d 354 (Wis. 1971), discussed p. 195 *infra.*

N.M. STAT. ANN. § 40A-12-1(C) (1972) prohibits overhearing a "communication . . . intended for another . . . without his consent." Recently enacted warrant requirements do not mention consent. *See* N.M. STAT. ANN. §§ 40A-12-1.1 to .10 (Supp. 1973).

Two statutes have been interpreted to require the consent of all parties: MD. ANN. CODE art. 35, § 93 (1971), in Robert v. State, 151 A.2d 737 (Md. 1959), and the somewhat older OKLA. STAT. ANN. tit. 21, § 1757 (1958), in Cameron v. State, 365 P.2d 576 (Okla. Crim. App. 1961).

Three statutes formerly prohibited eavesdropping without the consent of all parties. ILL. ANN. STAT. ch. 38, § 14-2 (Smith-Hurd 1964), *as amended,* ILL. ANN. STAT. ch. 38, § 14-2 (Smith-Hurd 1972) prohibited eavesdropping "without the consent of any party"; the legislature changed this to "any one party" in 1969. Haw. Laws 1967, ch. 209, § 2(a)(1) (repealed 1973) prohibited interceptions without the consent of "both the sender and the receiver." The rest of the act was repealed as well, leaving Hawaii at present with no eavesdropping statute at all. Pa. Laws 1957, ch. 411, § 1 (repealed 1972) prohibited interceptions "without the permission of the parties . . . ." Commonwealth v. McCoy, 275 A.2d 28 (Pa. 1971), interpreted this to mean all parties. PA. STAT. ANN. tit. 18, § 5702(3) (Purdon 1973) now requires "the consent of the sender or receiver."

40. CAL. PENAL CODE §§ 632(b), 633 (West 1970); DEL. CODE ANN. tit 11, § 1336 (Noncum. Supp. 1972); MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4) (1970). In People v. Murphy, 503 P.2d 594, 105 Cal. Rptr. 138 (1972), the court in dicta approved the *White* principle that the informant need not testify.

Two states prohibit interception without the consent of all parties, but in a vague fashion allow authorized interceptions. *See* MICH. COMP. LAWS ANN. §§ 750.539c, 750.539g(a) (1968); MONT. CRIM. CODE § 94-8-114(c) (1973).

41. ALASKA STAT. § 11.60.290(1) (1970); ARIZ. REV. STAT. ANN. § 13-1052(1) (Supp. 1973); COLO. REV. STAT. ANN. § 40-4-28(1) (Supp. 1967); CONN. GEN. ANN. § 53a-187(a)(1) (1972); GA. CODE ANN. § 26-3006 (1972); ILL. ANN. STAT. ch. 38, § 14-2 (Smith-Hurd 1972); KAN. STAT. ANN. § 21-4001(1)(c) (Supp. 1973); MINN. STAT. ANN. § 626A.02, subd. 2(c) (Supp. 1973); NEB. REV. STAT. § 86-702(2)(b) (1971); N.J. STAT. ANN. § 2A:156A-4(b) (1971); N.Y. CRIM. PRO. LAW § 700.05(3) (McKinney 1971); OHIO REV. CODE ANN. § 2933.58(B) (Page Supp. 1972); ORE. REV. STAT. § 165.540(5) (1971); PA. STAT. ANN. tit. 18, § 5702(3) (Purdon 1973); R.I. GEN. LAWS ANN. § 11-35-21(c)(2) (Supp. 1972); S.D. COMPILED LAWS ANN. § 23-13A-2 (Supp. 1973); WISC. STAT. ANN. § 968.31(2)(b) (1971).

42. 18 U.S.C. § 2511(2)(c) (1970).

43. *See, e.g.,* MINN. STAT. ANN. § 626A.02, subd. 2(c) (Supp. 1973); S.D. COMPILED

exempt from warrant requirements the interception of a communication when one of the parties consents. Florida's statute is typical of the majority position.[44]

Whether other states will adopt Florida's corroboration approach to the consent provisions is uncertain, since most of the state statutes have not yet been interpreted. Arguably, the new statutes contain their own restrictions upon the extent of the consent exception. For example, in *Tollett* the court implied that the statute and the new constitutional provisions complement each other, so that consent must be corroborated by testimony, not hearsay.[45] The Wisconsin Supreme Court announced a stricter standard in *State ex rel. Arnold v. County Court.*[46] Interpreting a Wisconsin provision similar to the federal statute,[47] the court said: "This section does not 'authorize' interceptions when one of the parties to the conversation has given prior consent but merely states such interception is 'not unlawful.' "[48] The Wisconsin court noted that the only "authorized" interceptions would be those accomplished through court order. Therefore, though the police could not be prosecuted for their actions, neither could they have the recordings introduced as evidence.[49]

In the developing law of consensual electronic eavesdropping, the primary issue has been whether court authorizations are in fact necessary at all. *White,* and the majority of the new statutes, seem to have settled the issue in most jurisdictions. *Tollett* offers an important qualification to the consent exception.

Under the *Hoffa* "misplaced trust" rule a criminal runs the risk that an "accomplice" may be an informer. *White* extends the "risk" to include the possibility that the accomplice will not testify, but that a recording made with his consent will be introduced instead. Fundamental to the *White* rationale is the principle that confidence mistakenly placed in an informer creates no reasonable expectation of privacy entitled to constitutional protection.[50] *Tollett* follows *Hoffa,* without extending the misplaced trust rule, by allowing the introduction of any recording or testimony based upon a "consent" interceptLAWS ANN. § 23-13A-2 (Supp. 1973).

44. The Florida provision is set forth in note 34 *supra.*

45. 272 So. 2d at 494.

46. 187 N.W.2d 354 (Wisc. 1971). *But see* State v. Wigley, 502 P.2d 819, 823 (Kans. 1972) (rejecting *Arnold*).

47. WISC. STAT. ANN. § 968.31(2)(b) (1971). For virtually identical provisions, see 18 U.S.C. § 2511(2)(c) (1971); FLA. STAT. § 934.03(2)(c) (1971).

48. 187 N.W.2d at 358.

49. *Id.*

50. 401 U.S. at 752.

tion, but only if the consenting party is present in court.[51] Unless the consenting party testifies, the court's determination of the reasonableness of the expectation of privacy by either party to the conversation will be influenced solely by self-serving statements introduced by the state that the police had obtained consent to the eavesdropping.[52] Without the presence of the consenting party the defense might be unable to refute the assertion of a police officer that consent was given voluntarily. The defendant might find himself forced to testify in an attempt to place the conversation in context. By placing the consenting party on the stand, the defendant might be able to discredit him, disprove his consent or establish a defense, such as the entrapment defense suggested in *Tollett*.[53]

The *Tollett* requirement of either a court order or corroboration by the consenting party could have another effect. A law enforcement officer planning to use a bugged informer may wish to obtain a court authorization if he doubts that the informer will be available at trial. Thus the requirement that the consenting party verify his consent may lead to the same result as would a blanket requirement for court approval of all wiretaps: rather than risk its case upon the appearance of an informant, the state may feel compelled to secure a court authorization for all consenual interceptions.[54]

Other jurisdictions may be unwilling to find a corroboration requirement either based upon their constitutional prohibitions upon search and seizure or in their statutory law relating to eavesdropping.[55] Nevertheless, one might argue that the absence of the consenting party from trial constitutes a denial of due process. In *Tollett* the court observed that "fundamental fairness—at least in view of the new provisions of Section 12 . . . —dictates [that] Davis should have been produced by the State as a witness . . . ."[56] *White* cautioned that the in-

51. 272 So. 2d at 494. The court considered it "an elementary rule of evidence" that a party can testify as to his conversations with the defendant, and that the testimony "can include as a logical concomitant . . . any tape or electronic recordings of such communications . . ." that he has made or has authorized to be made. However, if there is no testimony, the constitution requires an appropriate warrant. *Id.*

52. *See* 244 So. 2d at 462 (Rawls, J., dissenting).

53. 272 So. 2d at 495.

54. The state raised this possibility in arguing for a rehearing. Petition for Rehearing at 5.

55. Only three state constitutions (and Delaware's proposed constitution) have search and seizure provisions similar to those of Florida. *See* note 6 *supra*. For statutory material, see notes 38-41 *supra*.

56. 272 So. 2d at 495. The court made an analogy to the principles in Spataro v. State, 179 So. 2d 873 (Fla. 2d Dist. Ct. App. 1965), and Roviaro v. United States, 353 U.S. 53 (1957). In *Roviaro* the government refused to disclose the identity of an informer who, the court ruled, was so closely connected with the defendant's arrest as to make his testimony "highly material" to establishing certain defenses, including entrapment.

former's "unavailability at trial and proferring the testimony of other agents may raise evidentiary problems or pose issues of prosecutional misconduct with respect to the informer's disappearance."[57] The American Bar Association Project on Minimum Standards for Criminal Justice, while approving the consent exception,[58] voiced a similar warning that "serious abuses" might result:

> Where [electronic surveillance techniques] are employed, for example, to avoid having to place an informant on the stand whose full testimony might establish a defense of entrapment . . . a court might quite properly limit their use to corroboration.[59]

The court's decision in *Tollett* eliminates speculation over whether testimony by the absent party could have aided the defendant; thus the decision avoids problems of "fairness" of the proceeding. It provides a practical solution to the problem of consensual interceptions while balancing the sometimes competing interests of protecting privacy and catching criminals.

Criminal Law—Evidence—Prior Crime Evidence Admissible Only When Relevant to Crime Charged—*Davis v. State,* 276 So. 2d 846 (Fla. 2d Dist. Ct. App. 1973), *aff'd,* No. 43,874 (Fla., Feb. 15, 1974).

After a jury trial Cullen Davis was convicted of robbery and sentenced to ten years in prison. At the trial an employee of a cleaning establishment testified that the defendant and another man had robbed her of five dollars at gunpoint on December 27, 1971. The state then profferred further testimony of a separate and independent armed robbery; that testimony was admitted over defense counsel's objection. The testimony consisted of two eyewitness accounts of an armed robbery of a food store on December 22, 1971, which had been perpetrated by a lone man wearing a woman's bikini pants

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Also, another government agent overheard and testified about a conversation between the informer and the defendant, thereby preventing the defense from using the informer to "controvert, explain or amplify" the agent's report. *Id.* at 63, 64.

57. 401 U.S. at 754; *cf.* Lopez v. United States, 373 U.S. 427, 445 (1963) (concurring opinion of Warren, C. J.), discussed in note 19 *supra.*

58. ABA Project on Standards for Criminal Justice, Standards Relating to Electronic Surveillance § 4.1 (Approved Draft 1971).

59. ABA Project on Standards for Criminal Justice, Standards Relating to Electronic Surveillance §§ 4.1, 4.2, Commentary, at 127-28 (Tent. Draft 1968). The commentary calls this "an extrinsic abuse of an evidence gathering technique not otherwise intrinsically objectionable," *id.* at 128, thus making it similar to both the *Tollett* hearsay exception and the *Roviaro* fundamental fairness principle.