

2011–2012 SPRING  
SHERMAN MINTON  
MOOT COURT COMPETITION  
PROBLEM

*HOGAN v. SCOBEE*

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**Record on Appeal**  
*Hogan v. Scobee*

1. Order Granting Certiorari—January 4, 2012
2. Circuit Court Opinion—November 7, 2011
3. District Court Memorandum Decision and Judgment—August 20, 2011
4. Trial Transcript—Testimony of Plaintiff Campbell Scobee
5. Trial Transcript—Excerpts of Testimony of Officer Casey Blaine
6. Trial Transcript—Excerpts of Testimony of Police Chief Randall Hogan
7. Plaintiff’s Ex. A: Transcript of Video (available at <http://youtu.be/PuKRNUu7DWE>)
8. Plaintiff’s Ex. B: Memorandum to the Sulfur Springs Police Force
9. Defendant’s Ex. 1: News Article, “Local Organization’s Website Causes Stir”
10. Defendant’s Ex. 2: News Article, “1 Officer Slain, 2 Injured in Ambush by Gang Members”
11. Defendant’s Ex. 3: MRS Report for Marshall State Legislature
12. Marshall Eavesdropping Statute, 310 Mars. Stat. §§ 144.09, 144.11

**\*\*\* Editors’ Note \*\*\***

The Spring Problem presents two precise issues for briefing and argument to the United States Supreme Court; these issues are outlined in the Order Granting Certiorari. Because of circumstances unique to the Sherman Minton Moot Court Competition, **Competitors should not address any potential substantive issue concerning Respondent Scobee’s standing to bring his claim for injunctive relief.** The Competition Judges and Brief-Graders are aware of this limitation; please note that this does not affect the Jurisdictional Statement that must be included in Competitors’ briefs to the Supreme Court of the United States.

No. 11-9562

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 2011

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RANDALL HOGAN, Chief of the Sulfur )  
Springs Police Department, in his Official )  
Capacity, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
CAMPBELL SCOBEE, )  
 )  
Respondent. )

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**ORDER GRANTING CERTIORARI**

PER CURIAM:

The Petition herein for writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit, filed November 28, 2011, is hereby GRANTED as to the following issues:

1. Is the First Amendment violated by a policy of arresting individuals who audio record police officers conducting their duties in public?
2. Is the Fourth Amendment violated when police officers conduct an unlimited search of an arrestee's smartphone incident to a lawful arrest?

The parties shall submit their briefs on the merits no later than 12 p.m. January 30, 2012.

/s/ David M. LeBeau  
Clerk of the Court  
Filed: January 4, 2012

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTEENTH CIRCUIT**

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No. 11-1887

CAMPBELL SCOBEE,

*Plaintiff-Appellant,*

v.

RANDALL HOGAN,  
Chief of the Sulfur Springs Police Department,  
in his Official Capacity,

*Defendant-Appellee.*

Appeal from the United States District Court  
for the District of Marshall  
Case No. 10-CV-9123  
Rachel F. Karaman, District Judge

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ARGUED OCTOBER 3, 2011—DECIDED NOVEMBER 7, 2011

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Before Jennifer L. Keifer, *Chief Judge*, Ivo A. Austin, and Evan P. Bruno,  
*Circuit Judges.*

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Evan P. Bruno, *Circuit Judge*:

Plaintiff-Appellant Campbell Scobee (“Scobee”) appeals the district court’s grant of judgment as a matter of law, under Federal Rule of Civil Procedure 50(a), to Defendant-Appellee Hogan (“Hogan”). The facts of this case are set forth in the district court’s opinion and record. For the reasons set forth below, we reverse the decision of the district court and remand for a new trial on the merits of both Scobee’s First and Fourth Amendment claims.

**A. The First Amendment Claim**

We review de novo the district court’s order granting Hogan’s motion for judgment as a matter of law. In analyzing Scobee’s First Amendment claim, we must determine (1) whether there is a First Amendment right to audio record police officers carrying out their public duties, and (2) if so, whether the Sulfur Springs Police Department’s (“SSPD”) policy of arresting persons for such conduct under 310 Marshall Statute § 144.11 (“the eavesdropping statute”), violates that right. We answer both questions in the affirmative.

**1. There is a First Amendment Right to Audio Record Police Officers Conducting Their Official Duties in Public.**

The district court properly held that Scobee’s actions—audio recording a police officer conducting his official duties in a public place—garnered First Amendment protection; the district court’s reasoning, however, was flawed.

Scobee has a First Amendment right to gather information. “It is firmly established that the First Amendment’s aegis extends further than the text’s proscription on laws ‘abridging the freedom of speech, or of the press,’ and encompasses a range of conduct related to the gathering and dissemination of information.” *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). In *Glik*, the First Circuit held that there is an established right to gather news “from any source by means within the law” and that recording police and other government officials performing their duties in a public place fits comfortably within that right. *Id.* at 82; *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035-36 (1991); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

An individual’s right to speak freely inherently includes the right to gather information that is needed to speak in a *credible* manner, *see City of Houston, Tex. v. Hill*, 482 U.S. 451, 461

(1987); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and, thus, the government is prohibited “from limiting the stock of information from which members of the public may draw.” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). An audio recording provides a medium that accurately records the precise wording of a conversation and helps to prevent inaccurate reporting of commentary made by public officials. We thus adopt the reasoning of *Glik* and hold that the right to gather information encompasses the right to audio record the communications of police officers in public places.

**2. The Sulfur Springs Police Department Policy Regarding the Enforcement of the Eavesdropping Statute Fails the *O’Brien* Test.**

Scobee contends that the SSPD’s policy of enforcing the eavesdropping statute against those who audio record communications made by law enforcement officers in public violates the First Amendment. Because the eavesdropping statute is a content-neutral law of general applicability, it will be sustained only if “it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

We agree with Hogan’s contention that the eavesdropping statute furthers the important and substantial government interest in protecting the privacy of communications. In *Peavy v. WFAA-TV, Inc.*, the Fifth Circuit held that the government’s interest in protecting privacy interests under the Texas Wiretap Act—a statute significantly similar to the eavesdropping statute at issue in this case—encompasses law enforcement officers’ communications as well as those of private parties.<sup>1</sup> 221 F.3d 158, 192 (5th Cir. 2000).

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<sup>1</sup> The communication at issue in *Peavy* was made by an elected official and concerned what the interceptor believed to be possible official corruption. *Peavy*, 221 F.3d at 163-64.

In the present context, the balancing of this legitimate governmental interest against Scobee’s First Amendment right is complicated by the fact that gathering information is not an obviously *expressive* act. The eavesdropping statute—and SSPD’s policy of enforcing it—are aimed at the *means of acquiring* information. The statute imposes liability without reference to the content of the communication; if all allegedly private communications were subjected to public scrutiny in order to determine the level of protection warranted, the government’s intended purpose would be undermined. Moreover, as *Peavy* noted, “protection of communications’ confidentiality encourages, rather than suppresses, free expression, because the proscriptions against interception, use, and disclosure offer assurance to communicating parties that they can speak freely.” *Peavy*, 221 F.3d at 192. Examined under this lens, the SSPD’s policy of enforcing the eavesdropping statute is unrelated to the suppression of free expression.

The final prong of the *O’Brien* test examines the “tailoring” of the SSPD enforcement policy to determine whether the chosen means do not “burden substantially more [First Amendment-protected freedom] than is necessary to further the government’s legitimate interests.” *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994). We conclude that arresting individuals merely for recording the communications of police officers in public burdens substantially more First Amendment-protected freedom than is necessary to further the government’s legitimate interest in protecting privacy.

Accurate documentation of the conduct of police officers provides an important means of informing the public about the functions of the government. In today’s world, major public events—“Arab Spring” and the recent “Occupy” protests, for example—are often publicly recorded using digital devices, primarily camera-phones. See *Glik*, 655 F.3d at 84. Written or oral descriptions of real world events are no substitute for the accuracy and realism of these

audio-video recordings. See Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 344 (2011).

Most modern cellular phones are equipped with cameras that record both video and audio simultaneously, without any means by which to record only video. In this sense, the prohibition on audio recording the communications of police officers also burdens the video recording of police officer conduct, inhibiting more protected speech than necessary to further the government's interest in protecting the privacy of communications. Therefore, the SSPD's enforcement policy fails the third prong of the *O'Brien* test. The district court erred in granting Hogan's motion for judgment as a matter of law as to Scobee's First Amendment claim.

**B. The Fourth Amendment Claim**

Scobee also argues that the SSPD's policy of conducting a full search of arrestees' smartphones incident to arrest violates the Fourth Amendment's prohibition against unreasonable searches and seizures. For the reasons outlined below, we agree.

The manipulation of an electronic device that alters the images that appear on the device's screen is a search under the Fourth Amendment. See, e.g., *United States v. Musgrove*, 2011 WL 4356521 (E.D. Wis. April 20, 2011) (holding that the movement of a computer's mouse causing the computer to be removed from "screensaver" mode constitutes a search). Searches conducted incident to a lawful arrest, however, fall under an exception to the Fourth Amendment's usual warrant requirement. These searches may encompass two physical areas: (1) the arrestee's "person"; and (2) the area "within the arrestee's immediate control," the latter defined as "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969).

For searches of the arrestee’s person, “[i]t is the fact of the lawful arrest which establishes the authority to search,” and no further justification is needed. *Id.* By contrast, searches of items found within the arrestee’s immediate control are reasonable only when they are conducted “contemporaneously” with the arrest. *United States v. Chadwick*, 433 U.S. 1 (1977). Searches are conducted contemporaneously if they occur before “the property to be searched comes under the exclusive dominion of police authority.” *Id.* at 15.

*New York v. Belton*, 453 U.S. 454 (1981), seemed to establish a strict, bright-line rule justifying the search of all containers found within the immediate control of the arrestee, regardless of the character of the container or the crime of arrest. The Supreme Court, however, recently revisited and clarified the holding of *Belton* in *Arizona v. Gant*. 556 U.S. 332 (2009).

In *Gant*, officers arrested the recent occupant of a vehicle for driving with a suspended license. Officers then searched the vehicle and found cocaine in the pocket of a jacket located in the backseat of the vehicle. *Id.* at 1715. However, in contrast with *Belton*, the search occurred after the arrestee had been handcuffed and locked in the back seat of a nearby police cruiser. *Id.* The Court held this search unreasonable because there was no possibility that the arrestee—handcuffed and locked in the back of a cruiser—could access the passenger compartment of his vehicle to acquire weapons or destroy evidence. *Id.* at 1719.

The bright-line rule governing searches of the arrestee’s *person* incident to arrest survives *Gant*, because such searches are justified by the diminished privacy interests in the person caused by the arrest itself. However, after *Gant*, the search of a possession found within the *immediate control* of an arrestee is justified only if the search is conducted while the arrestee is “unsecured and within reaching distance” of the item at the time of the search. *See id.* at 1719.

Courts disagree on how to apply the rules developed for the search of tangible objects incident to arrest in the context of portable electronic devices capable of storing ever-growing amounts and types of private digital information. *See, e.g., United States v. Curtis*, 635 F.3d 704 (5th Cir. 2011); *United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009); *United States v. Hill*, 2011 WL 90130 (N.D. Cal. Jan. 10, 2011); *United States v. Wall*, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008); *People v. Diaz*, 244 P.3d 501 (Cal. 2011); *State v. Smith*, 920 N.E.2d 949 (Ohio 2009).

*United States v. Ortiz* is representative of courts' early efforts to apply search-incident-to-arrest doctrine to the once novel, now outmoded, technology of pagers, or "beepers." 84 F.3d 977 (7th Cir. 1997). The court recognized the legitimate privacy interests that an arrestee might have in a pager's data.<sup>2</sup> *Id.* But, citing *Belton*, the court upheld the search of the pager's numeric data incident to arrest because the search was conducted contemporaneously with the arrest. *Id.* at 984. The court also premised its decision on the "finite nature" of the pager's memory and the fact that some pagers allow for memory deletion with the push of a single button. *Id.*

The reasoning employed in cases like *Ortiz* was later applied to searches of early-model cell phones incident to arrest. These devices had more data storage capabilities than pagers, including the storage of not only numerical call records but also text messages, digital address books, and voicemails. In *United States v. Finley*, the Fifth Circuit upheld, incident to arrest, the warrantless search of an early-model cell phone's call records and text messages. 477 F.3d 250, 254 (5th Cir. 2007). *Finley* classified the device in question as part of the "person" of the

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<sup>2</sup> This recognition is important in light of the Supreme Court's "third-party" doctrine, which holds that individuals do not retain an expectation of privacy in information they have shared with third parties, such as cell phone service providers. *See Smith v. Maryland*, 442 U.S. 735 (1979) (holding that acquiring a list of phone numbers a person has called is not a search when those phone numbers were acquired from the phone company).

arrestee, thereby justifying a full search of the phone's data under *Robinson*'s bright-line rule. *Id.* at 259-60.

Modern portable electronic devices, including smartphones like the iPhone 3Gs, have storage capabilities that dwarf those of both the pager at issue in *Ortiz* and the early-model cell phone addressed in *Finley*. In addition, many of these devices have wireless Internet connections that allow the device's operator to download additional data from remote servers, providing potentially unlimited access to the owner's private information.<sup>3</sup> These modern devices allow instant access to a wealth of private information in a way that could not have been foreseen by courts evaluating the search of tangible objects incident to arrest.

The rapidly evolving nature of these devices requires courts to develop a single standard that can easily govern the search of all portable electronic devices incident to arrest. We cannot possibly decide cases quickly enough to craft a new rule for each new device based upon the privacy interests implicated by its unique storage capabilities. In addition, "[b]ecause basic cell phones in today's world have a wide variety of possible functions, it would not be helpful to create a rule that requires officers to discern the capabilities of a cell phone before acting accordingly." *State v. Smith*, 920 N.E.2d 949, 954 (Ohio 2009).

Because of their "capacity for storing immense amounts of private information," all portable electronic devices should be considered "objects within the immediate control" of the arrestee. *United States v. Park*, 2007 WL 1521573 at \*8 (C.D. Cal. May 23, 2007). A warrantless search of such a device incident to arrest is unreasonable once police have exerted "exclusive dominion" over the device. *Chadwick*, 433 U.S. at 15. Thus, under *Gant*, a portable electronic device may not be searched incident to arrest unless the arrestee is "unsecured and within reaching distance" of the device when the search is conducted.

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<sup>3</sup> iPhone App Store, <http://www.apple.com/iphone/from-the-app-store/>.

The district court erred when it analyzed the search of Scobee’s phone without reference to the location of the cell phone in relation to his person. Therefore, we reverse the lower court’s decision on both the First and Fourth Amendment claims and remand for proceedings consistent with this opinion.

Ivo A. Austin, *Circuit Judge*, dissenting in part:

I respectfully dissent from the portion of the court’s opinion addressing the Fourth Amendment claim.

This is an easy case to decide under existing case law. Cell phones, including Scobee’s iPhone, are part of the person of the arrestee. *See, e.g., People v. Diaz*, 244 P.3d 501, 505 (Cal. 2011). *United States v. Robinson* authorizes law enforcement to conduct a full search of any object found on an arrestee’s person. 414 U.S. 218 (1973); *see also United States v. Ross*, 456 U.S. 798 (1982) (“[A] constitutional distinction between ‘worthy’ and ‘unworthy’ containers would be improper.”); *New York v. Belton*, 453 U.S. 454 (1981). The Supreme Court has not tempered this bright-line rule since *Robinson*.

*Arizona v. Gant* is inapplicable to the present case for two reasons. First, *Gant* involved the search of a vehicle incident to arrest, and its holding should be limited to the vehicle context. Second, *Gant* dealt with the search of the area within an arrestee’s immediate control, not the search of an arrestee’s person. The search of objects on an arrestee’s person—including a smartphone—is unaffected by *Gant*.

The majority’s opinion also defies common sense. It is inconsistent to allow police to search an arrestee’s paper address book incident to arrest, which was upheld in *United States v. Rodriguez*, but not the “address book” application on the arrestee’s phone. 995 F.2d 776, 778

(7th Cir. 1993). Appellate courts should be reluctant to establish blanket rules in the face of changing technology. If the Marshall legislature wishes to create a law protecting citizens' use of this new smartphone technology, it may do so, but the courts should exercise more caution.<sup>4</sup>

Even assuming, *arguendo*, that a cell phone is an object within the immediate control of the arrestee, the majority's standard is incorrect. The majority ignores the exigency created by readily-available software, such as MobileMe for the iPhone, that allows for the deletion of the phone's data from a remote location. This exigency persists even after the arrestee is secured, because the arrestee's cohort could be tipped off to the arrest and activate the deletion from a remote computer while police sit idly by, waiting for a warrant.

The bright-line rule established in *Robinson* and *Belton* is easily applied to the new technology cited by the majority: *all* objects found on the arrestee's person are subject to a *full* search incident to arrest. I can find no language in that rule that would create an exception for cell phones—particularly where the cell phone is an instrumentality of the crime of arrest.

For the foregoing reasons, I would affirm the decision of the district court as to Scobee's Fourth Amendment claim.

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<sup>4</sup> State legislatures are in a better position than courts to create new law in the area of protecting individual privacy in the face of ever-changing technology. *See, e.g.*, S.B. 914 (Cal. 2011), *available at* [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_0901-0950/sb\\_914\\_bill\\_20110902\\_enrolled.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_bill_20110902_enrolled.pdf)

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARSHALL**

CAMPBELL SCOBEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 10-CV-9123
	)	
RANDALL HOGAN, Chief of the Sulfur	)	Hon. Rachel F. Karaman,
Springs Police Department, in his Official	)	District Judge
Capacity,	)	
	)	
	)	
Defendant.	)	

**MEMORANDUM DECISION AND JUDGMENT**

KARAMAN, District Judge.

Plaintiff Campbell Scobee (“Scobee”), a member of a citizens’ group that seeks to promote government accountability and expose wrongdoing, brings this action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief for alleged violations of his constitutional rights arising out of his arrest by Sulfur Springs Police Officer Casey Blaine. The case, now before the Court on Defendant Hogan’s motion for judgment as a matter of law under Fed. R. Civ. P. 50(a) following the presentation of evidence, raises two questions:

(1) Does arresting an individual for recording police discharging their duties in public violate the First Amendment?

(2) When a police officer, incident to a lawful arrest, searches the entire contents of an arrestee’s cell phone, is there a violation of the arrestee’s Fourth Amendment rights?

For the reasons discussed below, the Court answers both questions in the negative and grants Hogan’s motion for judgment as a matter of law.

## **FACTS**

The following facts were established by testimony and exhibits at trial and are not in dispute.

The events leading up to this lawsuit took place in the City of Sulfur Springs. Sulfur Springs is the largest municipality in the State of Marshall with a population of approximately 430,000 permanent residents and 38,000 student residents, who attend Marshall State University. The Sulfur Springs Police Department (“SSPD”) has approximately 715 officers and 325 civilian employees.

### **Scobee and the Marshall Accountability Project**

In 2007, Campbell Scobee—a graduate student at the Marshall State University School of Journalism—became involved with the Marshall Accountability Project (“MAP”), a grassroots organization dedicated to collecting information related to government misconduct and abuse from anonymous sources in the State of Marshall and Sulfur Springs.<sup>1</sup> MAP has approximately thirty volunteer members who provide services related to website maintenance, public outreach, content intake, anonymity management and legal issues. On its website, MAP guarantees anonymity to any person willing to divulge information relating to instances of government misconduct or abuse. MAP regularly publishes documents, images, videos, and audio recordings, submitted anonymously from sources within local government, on its website.<sup>2</sup>

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<sup>1</sup> MAP was founded in 2007 by Marshall State University journalism professor Michael Rudolph in response to a wave of government corruption and abuse in Sulfur Springs and the State of Marshall. Statements from Rudolph suggest that MAP was inspired by the WikiLeaks organization. WikiLeaks, <http://wikileaks.org/> (last visited August 2011).

<sup>2</sup> For example, in September 2007, an email thread was forwarded to MAP from an anonymous source within the Sulfur Springs Department of Public Health revealing that municipal health inspectors were receiving cash payments from restaurant owners in exchange for favorable inspection ratings. In July 2008, an anonymous source within the Marshall State Penitentiary sent digital photos revealing flagrant violations of the standards set forth in the Marshall Humane Confinement Act.

Members of MAP also engage in independent fact checking and investigation prior to the disclosure of any potentially damaging information.

In December 2008, Scobee took on the role of Chief Content Manager for MAP's website. As part of his duties, Scobee administered MAP's confidential email account for receiving anonymous information. Scobee linked the confidential email account to his cell phone, which allowed him to access the email account remotely. When emails containing information about government misconduct were sent to the account, the identities of the senders were often readily apparent. However, it was MAP's practice to remove all identifying information from content prior to posting that content on the MAP website.

### **Allegations of Police Misconduct and Abuse**

In October 2008, SSPD Officer David Gerstein fatally shot Dr. Clarence McCloud, a Sulfur Springs pediatrician, in McCloud's front lawn. Gerstein, who was responding to a domestic disturbance report, alleged that McCloud tried to attack him, but two neighbors who witnessed the incident from their bedrooms disputed that account. In light of conflicting accounts, the department eventually cleared Gerstein of misconduct, and he returned to duty after a six-week paid suspension.

In December 2008, seventeen-year-old Maxwell Barton was seriously injured while being arrested by three SSPD officers. The officers alleged that Barton became aggressive after being asked by the officers to stop skateboarding in a Sulfur Springs municipal park. Following a one-week unpaid suspension, the three officers were reinstated to active duty. The saga of Barton's extended recovery in a local hospital, and the likelihood of long-term neurological damage from his injuries, was widely featured on local and regional news media.

In March 2009, SSPD Officer Adam Kylo fatally shot a dog belonging to Rodrigo Mosurano in a city park near Mosurano's home. Kylo claimed that the dog was running around aggressively and posed a threat to his safety, but it later emerged that the animal was a retired service dog with no history of violence. The Mosurano case, like the Barton case, remains the subject of separate pending civil litigation.

The SSPD recorded 143 formal citizen complaints in the first quarter of 2009. Among the complaints, which were filed under penalty of perjury, 121 alleged "Police Officer Misconduct/Abuse of Power." The SSPD brought disciplinary action against individual officers in four instances. In early April 2009, the Sulfur Springs Public Safety Commission announced that it had asked the Marshall Attorney General's Office to launch an investigation into allegations of systematic misconduct within SSPD.

### **Postings of Police Videos**

On April 11, 2009, following the announcement of the Attorney General's investigation, MAP posted a link on the top heading of its home page that read, "Attention Citizens: Click Here to Submit Evidence of Police Misconduct Anonymously." In response, MAP slowly began receiving anonymously recorded video clips of SSPD officers performing various duties in public. Some recordings seem to have been made openly, in full view of the officers, but the content of others suggests that they were made surreptitiously.

Between April 2009 and March 15, 2010, MAP posted only three videos of SSPD officers to its website.<sup>3</sup> The first video, shot at night from the window of a parked car, showed an SSPD officer slapping an apparently intoxicated man in the face while another officer pushed

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<sup>3</sup> Scobee testified that MAP internal rules require a unanimous vote of all members before the posting of any piece of content on the website. According to Scobee, MAP received approximately thirty anonymous submissions of videos in response to the April 11 posting, most of which did not offer relevant evidence of police misconduct.

the man to the ground. The second video, recorded from a distance of approximately ten feet, showed an SSPD officer spraying mace at a crowd of young people protesting in front of a Planned Parenthood facility. The third video, shot from about six feet away, showed an SSPD officer and an emergency medical technician (EMT) engaged in a heated argument. When the EMT attempted to turn away and get into his ambulance, the officer discharged his Taser on the EMT.

In March 2010, MAP received a secretly-recorded video of SSPD officers talking during their lunch break at a Sulfur Springs restaurant. In the twenty-seven minute video, the SSPD officers can be heard discussing a variety of matters including one officer's relapse into alcoholism, another officer's bouts with depression stemming from his recent divorce, the purported mismanagement of the department by the Chief of Police, the fallout from the videos posted on MAP's website, and innocuous topics such as college basketball and fishing. After a vote, the members of MAP elected to post the video on the website under the caption, "SSPD Officers On Duty?" The posting immediately stirred controversy and resulted in a nearly ten-fold increase in the number of daily visitors to MAP's website.

While MAP apparently exercised some discretion in what it posted, not all of its imitators were so scrupulous. In June 2010, an unknown person (not associated with MAP) posted a video on YouTube showing undercover SSPD Officer Monica Santos posing as a member of the notorious Four Corners street gang. The clip also showed Officer Santos participating in a drug transaction with another area gang as part of a sting operation. The following evening, Officer Santos was brutally attacked on the street by members of the Four Corners gang and left for dead. She suffered multiple broken bones and severe intracranial bleeding, and she sadly remains in a coma today.

### Chief Hogan's Memorandum to the Force

On June 8, 2010, Defendant SSPD Chief Randall Hogan circulated a memorandum to the entire force titled, "Dealing with Video Recordings of Officers in Response to Recent Events." In the memo, Hogan encouraged officers to intervene when citizens tried to film them in the course of their police duties under any circumstances; he reminded them that it appeared that this type of recording might violate Marshall's eavesdropping statute,<sup>4</sup> 310 Mars. Stat. § 144.11 (2010) ("the eavesdropping statute").<sup>5</sup> Hogan also suggested that officers could arrest individuals who recorded police under certain "public order" statutes such as disorderly conduct, obstruction of justice, failure to disperse upon a lawful order, and resisting law enforcement. Hogan warned that recordings of officers pose a "great detriment to the force if all of our actions are put under a microscope and posted on the internet."

In the period between MAP's April 11, 2009, request for evidence of police misconduct and Hogan's June 8, 2010, memorandum, SSPD arrested only three individuals for recording police officers in violation of the eavesdropping statute. Between June 8, 2010, and July 4, 2010, however, SSPD arrested eighteen individuals for recording police officers in violation of the eavesdropping statute. In twelve of those eighteen cases, the arrestee was also arrested for

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<sup>4</sup> The Marshall statute is modeled after and is substantially identical to the corresponding statute passed by the Illinois General Assembly. 720 ILCS 5/14 (West 2010).

<sup>5</sup> As Plaintiff noted at trial, this use of criminal statutes to prevent the filming of police seems to be an emerging national trend; *see, e.g., Man Faces Life in Jail for Recording Police*, available at <http://www.infowars.com/man-faces-life-in-jail-for-recording-police/> (last visited August 2011); *Eavesdropping Laws Mean that Turning On an Audio Recorder Could Send You to Prison*, available at <http://www.nytimes.com/2011/01/23/us/23nceavesdropping.html?pagewanted=all> (last visited August 2011); Joseph Cucco, "The Expanding Trend of Criminalizing the Recording of Police Abuse" *Albany Govt. Law Rev.*, Nov. 13, 2010, available at <http://aglr.wordpress.com/2010/11/13/the-expanding-trend-of-criminalizing-the-recording-of-police-abuse/> (last visited August 2011).

violating one or more of the “public order” statutes listed in Chief Hogan’s Memorandum. In at least half of the cases, however, the States Attorney’s Office for Cardozo County declined to file charges against the arrestees.<sup>6</sup>

### **Scobee’s Arrest**

On July 5, 2010, Plaintiff Scobee heard commotion coming from the street in front of his house. Scobee walked outside onto his front porch and noticed a police officer (later determined to be Officer Casey Blaine) conducting a traffic stop of a vehicle approximately twenty feet from Scobee’s front door. Scobee watched as Blaine placed the driver of the vehicle, Walter Kerekes, under arrest and began conducting a search of Kerekes’ car. From his front porch, Scobee used a built-in video camera feature on his cell phone<sup>7</sup> to record Blaine’s search of Kerekes’ vehicle.

Blaine located a small container of marijuana in the backseat of the vehicle and asked Kerekes, “Whose dope is this?” Kerekes immediately fled,<sup>8</sup> running across Scobee’s front lawn and into a nearby municipal alley next to Scobee’s house with Blaine in pursuit.

With his phone still recording, Scobee walked around to the side of his house. The video obtained on Scobee’s cell phone (entered into evidence at trial) reveals Kerekes stumbling alongside Scobee’s backyard fence before being taken to the ground and handcuffed by Blaine.

While Blaine was attempting to secure Kerekes, Scobee continued to record the events on his

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<sup>6</sup> In many of these cases, the digital recording giving rise to the arrest was deleted from the device by the arresting officers – which may have been one of the factors leading the prosecuting attorney to decline to prosecute.

<sup>7</sup> The parties stipulate that plaintiff’s cell phone was a 32 gigabyte “Apple iPhone 3GS” running “iOS 4” operating software. For technical specifications of the iPhone 3GS see “iPhone 3GS,” <http://www.apple.com/iphone/iphone-3gs/> (last visited August 2011); For information about the iOS 4 operating software, see iPhone User Guide, available at [http://manuals.info.apple.com/en\\_US/iPhone\\_iOS4\\_User\\_Guide.pdf](http://manuals.info.apple.com/en_US/iPhone_iOS4_User_Guide.pdf) (last visited August 2011). The parties have stipulated that these web pages, and any other cited in this Memorandum Decision, are generally accurate and form part of the record in this proceeding.

<sup>8</sup> Kerekes was subsequently charged and convicted of marijuana possession and fleeing arrest.

cell phone. Blaine noticed the filming and asked Scobee several times to stop; Scobee insisted that he was within his rights. Blaine then arrested Scobee and seized his cell phone.

Blaine testified at trial that he tried to stop the recording once he had seized the phone. Blaine was able stop the recording, but in doing so he inadvertently uploaded the video to Scobee's Facebook page. Blaine testified that he "was just trying to make sure that the video was preserved for evidence." Blaine also admitted that he searched various applications and folders on the phone, but he was ultimately unable to find the video.

Scobee later testified that while he lay handcuffed on the ground, Blaine asked him about information on the cell phone unrelated to the video recording, such as, "Who is this Cynthia you've been texting?" and "You sure do take a lot of pictures of yourself in the mirror!" Scobee did not consent at any point to a search of his phone.

Although Scobee was transported to jail and briefly detained before being released on his own recognizance, the State of Marshall eventually dropped all charges against Scobee. When his cell phone was returned to him on July 12, however, large amounts of data had been deleted. According to Scobee, his collection of documents, photos and recordings that he had collected and stored on his cell phone as part of his involvement with MAP had been completely erased.<sup>9</sup>

None of the police witnesses called by Scobee at trial admitted deliberately erasing any information from Scobee's phone, but each of them admitted that it was possible that erasure had occurred inadvertently in the course of their efforts to "gather evidence of the charges."

On July 9, 2010, a mass email from an anonymous sender was delivered to heads of various government agencies and departments within Sulfur Springs and the State of Marshall. The email subject line read "Government Leakers to the Marshall Accountability Project." The

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<sup>9</sup> In his complaint, Scobee did not request relief for damages in connection with the data erased from his cell phone or for any other loss.

email listed the names of forty-three government employees who had submitted content to MAP. Scobee later testified at trial that each person named in the July 9th email had in fact submitted content to the MAP email address that he administered, and he testified this information was accessible directly from his cell phone. Evidence presented at trial indicated multiple instances of retaliatory firings following the July 9th email.

Shortly thereafter, Scobee filed the present action. At the close of evidence, Hogan filed the instant motion under Fed. R. Civ. P. 50(a) for judgment as a matter of law, arguing that Scobee has failed to show any violations of the Constitution. As discussed below, the Court agrees and now grants his motion.

## **DISCUSSION**

### **I. First Amendment Claims**

Scobee argues that SSPD's policy of aggressively preventing citizens from filming police conduct in public places, and Officer Blaine's specific conduct in the case at issue, violated his First Amendment rights. Hogan does not dispute that SSPD had such a policy or that such a policy, if unconstitutional, falls within the scope of municipal liability under §1983; nor does he dispute that the statutory element of §1983 requiring defendant to have been "acting under color of state law" is met here.<sup>10</sup>

The First Amendment to the United States Constitution provides as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

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<sup>10</sup>Qualified immunity was not available to Hogan because Scobee seeks only injunctive relief.

The First Amendment applies to the states as incorporated through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925).

The First Amendment's protection of the right to gather information is well established. As the Supreme Court said in *Branzburg v. Hayes*, "without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. 665, 681 (1972); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) ("Free speech carries with it some freedom to listen."). However, the freedom to gather information is not absolute. *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion) (holding that First Amendment does not mandate a right to access information or sources of information within the government's control).

In opposing Scobee's First Amendment claim, Hogan first argues that the act of recording police officers in public does not fall within the First Amendment's zone of protection. "In deciding whether particularized conduct possesses sufficient communicative elements to bring the First Amendment into play," the Supreme Court has looked to whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. State of Wash.*, 418 U.S. 405, 410-11 (1974)).

The mere passive act of recording police officers—without more—may indeed fall short of expressive conduct deserving of First Amendment protection. However, as is made clear by the video taken by Scobee, a recording of police may also be coupled with expressive narrative. The words spoken by Scobee himself constituted expressive conduct because those words communicated ideas,<sup>11</sup> and Scobee's recording of those words was an expressive act entitled to

<sup>11</sup> For example, Scobee can be heard saying "I have a right to be recording this" and "He's roughing him up a little bit."

some First Amendment protection. *Johnson*, 491 U.S. at 397. Therefore, in the present case, the Court finds that SSPD’s enforcement of the eavesdropping statute against people who record the police in circumstances like these could constitute an incidental restraint of some expressive conduct. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

Hogan’s second argument is that SSPD’s application of the eavesdropping statute properly balances the government interest at stake against the burden on free expression, and thereby it remains within the bounds of the First Amendment.

The eavesdropping statute provides, in pertinent part,

[a] person commits eavesdropping when he . . . knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so with the consent of all of the parties to such conversation or electronic communication.

310 Mars. Stat. § 144.11.

The statute further defines an eavesdropping device as “any device capable of being used to hear or record oral conversation.” 310 Mars. Stat. § 144.09.

Because the statute at issue is aimed at the means by which information is gathered, rather than the content of that information, the Court agrees with Hogan’s argument that the statute is a content-neutral regulation. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994).

Scobee argues, however, that even a content-neutral regulation of general applicability that has an incidental effect on the exercise of First Amendment rights may only be sustained if “it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Turner Broad. Sys.*, 512 U.S. at 662 (quoting *O’Brien*, 391 U.S. at 377).

In applying the intermediate scrutiny formula announced in *O'Brien* to the eavesdropping statute, the Court assumes that Scobee's conduct was sufficient to establish probable cause that he violated the statute. 391 U.S. at 377. However, Scobee argues that a ban on recording police officers discharging their duties in public (1) does not further an important or substantial government interest; (2) is aimed at the suppression of free expression; and (3) restricts First Amendment freedoms more so than is necessary for the furtherance of any government interest, thus violating the *O'Brien* standard. *Id.*

First, application of the eavesdropping statute to those who record police officers without their consent does further the important state interest in protecting the privacy and safety of police officers. *See Bartnicki v. Vopper*, 532 U.S. 514 (2001) (noting a government interest in protecting the privacy of its citizens); *Terry v. Ohio*, 392 U.S. 1 (1968) (noting an interest in police officer safety). The vicious attack on Officer Monica Santos is a reminder that police officers are in a uniquely dangerous line of work.<sup>12</sup> And while the privacy interests of police officers may differ in nature from those of average citizens, the weight of police officers' privacy interest is no less substantial. The Court finds no reason to conclude that police officers—merely as a result of their employment by the state—have a diminished level of protection under the eavesdropping statute. *See Commonwealth v. Hyde*, 750 N.E.2d 963, 967 (Mass. 2001) (interpreting the Massachusetts Wiretap statute to “strictly prohibit all secret recordings by members of the public, including recordings of police officers or other public officials interacting with members of the public, when made without their permission or knowledge”). *The Hyde*

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<sup>12</sup> *See, e.g., Kelly v. Borough of Carlisle*, 622 F.3d 248 (3rd Cir. 2010) (quoting *Arizona v. Johnson*, 129 S. Ct. 781, 786 (2009) (noting that in the context of a traffic stop, “the risk of harm to both police and the occupants [of a stopped vehicle] is minimized . . . if the officers routinely exercise unquestioned command of the situation”)); *Williamson v. Mills*, 65 F.3d 155, 158 (11th Cir. 1995) (noting that images of officers could be useful for criminal organizations intent on carrying out death threats against officers).

court's interpretation of the Massachusetts statute is applicable to the statute at issue in this case. Furthermore, the Court finds no compelling reason to limit application of the statute to *secret* recordings of police officers. Any harm that could flow from a secret recording could just as readily flow from a conspicuous recording.<sup>13</sup>

Second, the statute at issue is unrelated to the suppression of free expression. Unlike a regulation that restricts the right to send expressive ideas out into the world, the statute in this case applies only to the means of gathering of information. *Houchins*, 438 U.S. at 1. The Court notes that the statute's exception for recordings made by police officers does not render the statute a content-based restriction on expression. The statute lacks neutrality only in that it applies to some people differently than others—that lack of neutrality in no way touches upon the content of the recordings from which liability can result.

Finally, application of the eavesdropping statute by SSPD has been no greater than necessary to further the important interest of protecting the privacy and safety of its officers. In Scobee's case, for instance, Officer Blaine gave Scobee ample opportunity to discontinue recording and leave the area. The eavesdropping statute was applied as a last resort.

Furthermore, while Scobee argues that SSPD has applied the eavesdropping statute more broadly than is necessary to further its legitimate privacy and safety interests, the record does not support that contention. Communications made by public officials in the discharge of their official duties may be a matter of public interest and concern. But when officer safety depends upon the protection of officer privacy, the First Amendment does not prohibit application of a

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<sup>13</sup> The Court notes that the Marshall eavesdropping statute explicitly omits a requirement that any party to the conversation expect the communication to be private. 310 Mars. Stat. § 144.09 (2010).

content-neutral criminal statute against an individual who makes recordings of officers without their consent.<sup>14</sup>

## II. Fourth Amendment Claims

Scobee argues that SSPD's practice of searching the contents of arrestees' cell phones incident to arrest, and Officer Blaine's doing so in this specific instance, violated his right to be free from unreasonable search and seizure.<sup>15</sup>

The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. Warrantless searches are "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception is a search incident to a lawful arrest.<sup>16</sup> *United States v. Robinson*, 414 U.S. 218 (1973). This exception allows police to search 1) the "arrestee's person"; and 2) the area "within his immediate control," upon a lawful arrest. *Chimel v. California*, 395 U.S. 752, 763 (1969).

A search incident to arrest is justified by the dual interests in officer safety and preservation of evidence, *Chimel*, 395 U.S. at 763, along with the "reduced expectations of privacy caused by the arrest." *United States v. Chadwick*, 433 U.S. 1, 16 (1977). However, a threat to officer safety or a potential for the destruction of evidence need not be established in each individual case. *Id.* at 14 ("When a custodial arrest is made, there is *always* some danger

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<sup>14</sup> Scobee has also argued that SSPD's use of "public order" offenses to block or punish the public filming of police officers similarly abridges his First Amendment rights. For much the same reasons that his more plausible challenge to the application of the eavesdropping statute fails, this more tenuous argument also fails to establish a constitutional violation.

<sup>15</sup> Scobee does not challenge the seizure of his cell phone itself, but only the search and seizure of the files stored on his phone.

<sup>16</sup> Hogan's have not argued that "exigent circumstances," a major exception to the warrant requirement, applies in this case.

that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed.”) (emphasis added).

This “bright-line” rule allows police to search the person of the accused and any containers found on the arrestee’s person, as an extension of the legal arrest. *New York v. Belton*, 453 U.S. 454 (1981). Requiring the police to tether every step of a search incident to arrest to a belief that the arrestee had access to a weapon or destructible evidence would be an unworkable rule for the police in the field. Such a rule would be “inherently subjective and highly fact specific, and would require precisely the sort of ad hoc determinations on the part of officers and reviewing courts” that have been disavowed by the Supreme Court. *Thornton v. U.S.*, 541 U.S. 615, 623 (2004). The Court’s recent decision in *Arizona v. Gant* does not change this analysis. 556 U.S. 332 (2009).

Therefore, a court reviewing a search incident to arrest need make only two inquiries: 1) whether the underlying arrest was lawful; and 2) whether the search was “contemporaneous” in terms of both time and the area searched. *United States v. Mercado-Nava*, 486 F. Supp. 2d 1271, 1277 (D. Kan. 2007) (citing *United States v. Rollins*, 190 F. App’x. 739, 743 (10th Cir. 2006)).

The majority of courts that have addressed this issue have held that the search of a cell phone incident to arrest is reasonable under the Fourth Amendment. *See, e.g., United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009); *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007); *United States v. Parada*, 289 F. Supp. 2d 1291 (D. Kan. 2003); *but see United States v. Park*, 2007 WL 1521573 (N.D. Cal. 2007); *Ohio v. Smith*, 920 N.E.2d 949 (Ohio 2009). Although most courts have justified the search of a cell phone by pointing to an actual risk that evidence on the phone might be destroyed, such a finding is not necessary to establish that the search incident to arrest was reasonable.

A cell phone is clearly a container “immediately associated with [an arrestee’s] person.” *People v. Diaz*, 244 P.3d 501, 505 (Cal. 2011). It is similar to other containers that courts have consistently held to be a part of the person. *See, e.g., United States v. Rodriguez*, 995 F.2d 776, 778 (7th Cir. 1993) (address book); *United States v. Richardson*, 764 F.2d 1514, 1527 (11th Cir. 1985) (wallet). As such, there is a reduced expectation of privacy in a cell phone, unlike “possessions within an arrestee’s immediate control.” *Chadwick*, 433 U.S. at 16, n.10 (holding that a locked foot locker was a possession “within the arrestee’s immediate control” and therefore entitled to more protection under the Fourth Amendment). Because a cell phone is a part of the “person,” the arresting officer is entitled to make a “full search” of the phone incident to arrest. *Cf. Robinson*, 414 U.S. at 235 (holding that a full search of arrestee’s person is reasonable incident to arrest) (emphasis added).

Scobee argues that the storage capacity and the private nature of information stored in cell phones distinguish them from other kinds of containers that hold only physical objects. But distinguishing among different kinds of containers found on the arrestee’s person is inappropriate for two reasons. First, nothing in the Supreme Court’s precedent relating to this subject suggests that such a distinction is wise. *See United States v. Ross*, 456 U.S. 798, 824 (1981) (“[A] constitutional distinction between ‘worthy’ and ‘unworthy’ containers would be improper.”).

Second, requiring arresting officers to evaluate the character of a container before searching it would undermine the benefits of the bright-line rule governing searches incident to arrest. Such an evaluation would constitute the kind of “inherently subjective and highly fact specific” inquiry that the search incident to arrest doctrine is meant to avoid. *Thornton*, 541 U.S. at 623. Such inquiries are impractical for officers in the field.

This difficulty is especially relevant when considering the ever-shifting landscape of cell phone technology. Officers cannot be expected to determine the technical capabilities of an arrestee's particular cell phone, and subsequently evaluate those capabilities to draw conclusions about the arrestee's privacy interests. It is not the character of the container, but the fact of arrest itself that justifies the "infringement of any privacy interest the arrestee may have."<sup>17</sup> *Belton*, 453 U.S. at 461. Arresting officers may conduct a full search incident to arrest of any containers they discover on the arrestee's person, including cell phones.

In the present case, Scobee was arrested lawfully based on probable cause. The arresting officer was therefore authorized to conduct, incident to that arrest, a full search of Scobee's person and any containers found therein, without any additional justification. Even if it were necessary to prove the potential for evidence destruction, that requirement would be met in this case. Scobee testified that his iPhone 3GS runs a MobileMe software application that allows a user at a remote location to permanently erase all data stored on the iPhone.<sup>18</sup> Scobee's associates could have discovered that Scobee had been arrested and then activated the data erasure from Scobee's home computer while officers waited for a warrant.

Officer Blaine testified that he searched Scobee's phone immediately after arresting him. Therefore, the search was conducted contemporaneously with the arrest. Because 1) the arrest was lawful; and 2) the search was conducted contemporaneously with that arrest, the search incident to arrest was reasonable under the Fourth Amendment.

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<sup>17</sup> It should be noted that although the iPhone 3Gs includes an option to password-protect the phone's contents, Plaintiff had not activated that feature. This choice further evidences Plaintiff's reduced privacy interest in the phone's contents.

<sup>18</sup> For information about the MobileMe software, see *MobileMe pushes out new Find My iPhone, Remote Wipe service*, available at [http://www.appleinsider.com/articles/09/06/17/mobileme\\_pushes\\_out\\_new\\_find\\_my\\_iphone\\_remote\\_wipe\\_service.html](http://www.appleinsider.com/articles/09/06/17/mobileme_pushes_out_new_find_my_iphone_remote_wipe_service.html) (last visited August 2011).

**CONCLUSION**

For the reasons stated above, the Court hereby GRANTS the Defendant's motion for judgment as a matter of law and enters judgment on behalf of Defendant and against Plaintiff on all counts of the Complaint.

SO ORDERED

          /s/ Rachel F. Karaman            
Rachel F. Karaman, U.S.D.J.  
August 20, 2011

**Transcript of Trial**  
Before the Honorable Rachel Karaman  
August 16, 2011

Direct Examination of Campbell Scobee by Robert Bruce

Q: Please state your name for the record.

A: Campbell Scobee.

Q: And Campbell, what is your occupation?

A: I'm a grad student in journalism at State.

Q: Marshall State University?

A: Yes.

Q: And what is your age and date of birth?

A: I'm 28 years old. Born June 12, 1983.

Q: Turning to the events at issue in this case, can you please tell the Court what you were doing just before 3:00 p.m. on July 5, 2010?

A: I was inside of my house, which is located at 1005 Oak Street, in the front room. I was reading and I heard a siren, like, just a short "whoop-whoop" type thing, like someone was being pulled over.

Q: What did you do when you heard the siren?

A: Um, well it sounded like it was right outside of my house, so I stepped out onto my porch and saw that there was a red Cadillac pulled over with a squad car about—about two car lengths behind it.

Q: What happened next?

A: The officer got out of the car and went up to the driver's window of the Cadillac. I couldn't really hear what he or the driver was saying and—and after about 30 seconds he walked back to his squad car with the driver's paperwork and got into his squad car.

Q: Then what happened?

A: After a little bit, the officer got out of his car and went back to the Cadillac. I heard him tell the driver he was being arrested.

Q: Were you doing anything other than observing at this point?

A: No, I was just standing there watching.

Q: Then what happened?

A: When the officer cuffed the guy and started searching the car, I decided to record the encounter.

Q: Could you clarify what you mean by "record the encounter?"

A: I got out my iPhone and opened up the Facebook app to upload a video to my page.

Q: So, your iPhone has recording capabilities?

A: Yes. My iPhone has a built-in video camera feature. My Facebook app allows me to record videos and post them directly on my Facebook page.

Q: Mr. Scobee, will you please explain to the Court what an "app" is?

A: In general, an app is a software application installed on the iPhone that serves some useful function. Like, there are apps that you can download directly onto your phone, and there are apps that come with the phone—with the iPhone. The ones that come with the iPhone are the more basic features, like the actual phone, the text messaging, the calendar, contacts, notes—which is like a diary type thing—um, the email feature, the internet feature, iPod, weather application, clock, GPS map, Youtube, photo and video library, things like that.

Q: Is the camera feature something that came with the iPhone?

A: Yeah, the camera came with the iPhone. But the Facebook app is what I was actually using to upload the recording. I downloaded that app myself.

Q: What are some of the other apps that you downloaded yourself?

A: All of them?

Q: You don't need to list all of them. Just name off as many as you can to give the Court some idea of the features of your particular iPhone.

A: Uh, okay. Well, there are a bunch of games on my phone, like Angry Birds, Tetris, Minesweeper—

The Court: Did you say Angry Bird?

A: Angry Birds, Your Honor. It's a—it's just a popular game.

The Court: Thank you. You may continue, Mr. Bruce.

Q: Please continue Mr. Scobee.

A: Okay, there's a Facebook application that I use quite a lot. I have a thing called iCam that lets me view the webcam attached to my home PC from anywhere. I usually leave my home webcam turned on so that I can check in on my dog when I leave him alone at the house. I have some streaming radio and video apps, like PBS and NPR. I have my Chase Bank app, which lets me check my bank statements, deposit checks, transfer money, things like that. Uh, let's see. OKCupid, which is a social networking-dating-type thing. I have Calorie Counter PRO which lets me keep track of my calorie intake. I have Mint.com Personal Finance, which I use to track all of my purchases and expenses-bills, income, things like that. I use Pocket Pharmacist, which I use to keep track of the regular meds that I take. I've also downloaded a few apps specifically related to my MAP work.

Q: What are those apps?

A: Dragon Diction, Quick Office, CamScan. But I also use some of the other applications as well, like my audio and video recordings apps.

Q: Would you say that there is a lot of personal information in your iPhone?

Ms. Foster: Objection, Your Honor. He's leading the witness.

The Court: Overruled. Go ahead, Mr. Bruce.

Q: Do you need me to repeat the question?

A: No, I got it. Yeah, there's tons of personal information in my iPhone. I mean, you can find every email I've ever sent from my email address. All of my calls, voicemails, texts. My photos, my web browsing history. Everything. My whole life is basically documented on that phone. It also held all of my work related to MAP, including all the confidential emails I received, the videos I took, all of the audio files I recorded, documents I created.

[Omitted]

*[Video entered into evidence and played for the court]*

Q: Were you on your property at the time you recorded the video?

A: Yes. I was recording from the corner of my property, but that alley is an easement—I guess, technically, it's my property, but it's a public place pretty much.

Q: What happened between you and Officer Blaine after he took your phone away?

A: He tossed the phone down and grabbed my hand, like the middle part of my hand—my right hand—and twisted it behind my back, and pushed it upwards towards the back of my neck.

Then he grabbed my other hand and brought it around my back and put his handcuffs on me.

Q: Then what did Officer Blaine do?

A: Well, I kept asking him what I was being arrested for. He had his left hand on my shoulder, gripping it, and his right hand holding onto the handcuffs. He told me to get to get on the ground twice really quickly.

Q: Did you comply?

A: I guess I hesitated for a half second so he shoved me hard, face down into the ground.

Q: So, Mr. Scobee, you're on the ground alongside your house, you're handcuffed - what is Officer Blaine doing at this time?

A: He's standing over me, talking to people on his radio and I guess he was waiting for the backup officers to come.

Q: Did you know where your iPhone was at this time?

A: Officer Blaine had it in his hand and I could tell he was looking through it. I kept saying to him, "dude, stop looking through my stuff. That's my private property. You have no right to be looking into my personal stuff." I couldn't believe that he was just blatantly looking through my stuff like that.

Q: Was Officer Blaine saying anything to you during this time?

A: Yeah, he kept asking where the video was and asked "who is this Cynthia you've been texting?" He said something to me like, "you sure do take a lot of pictures of yourself in the mirror."

Q: Did you say anything back?

A: No I wasn't answering those questions.

Q: What happened next?

A: Okay well, Blaine was standing there looking through my phone when another squad car pulled down the alley. Blaine lifted me up and put me into that other squad car and I was taken to jail.

Q: How long were you in the jail?

A: Well, I'd say that I was there for a little over 12 hours.

Q: Where was your iPhone during the time that you were in the jail?

A: I have no idea. The last I saw of it was when I was being driven out of the alley in the squad car. Blaine had it in his hand and was looking through it as we drove away.

Q: And when did you get it back?

A: About a week after the charges against me were dropped.

Q: Was there anything different about your iPhone when you got it back?

A: Everything was gone.

Q: Can you elaborate on that, please?

A: All of my photos, videos, and contacts were deleted. All of my downloaded apps had been deleted and I lost everything related to my MAP investigations.

Q: Let's go through the details of that. About how many photos did you have on your iPhone?

A: A few hundred. Most of them were backed-up on my home computer, but there were a bunch that I had recently taken that were gone.

Q: And when you say "contacts," what are you referring to?

A: Like an address book of everyone whose information I have. All of them.

Q: What happened to the video that you took of Officer Blaine?

A: It ended up on my Facebook page.

Q: Do you know how that happened?

A: No, not really.

Q: Was the video still on the phone when it was returned?

A: No, but it never was on the phone because when I got out my iPhone to start recording, instead of going to the video camera feature, I opened the Facebook app. In that app you can upload photos and videos directly from your phone to your Facebook page. So what I did was I opened the Facebook app and chose to upload a video. When you select that option on the Facebook app, it basically opens up the video camera feature, but within the Facebook app. Does that make

sense? So I basically was recording the video directly to my Facebook page. The video ended up on my Facebook page with a timestamp of 3:03 p.m. on July 5, 2010.

Q: And just to be clear, when you got your iPhone back from the people at the jail there were absolutely no photos or videos in your iPhone media library?

A: None.

Q: Thank you, Mr. Scobee. Nothing further, Your Honor.

The Court: Thank you, Mr. Bruce. Ms. Foster, you may begin your cross.

Cross-Examination of Campbell Scobee by Neda Foster

Q: You didn't have Officer Blaine's consent to record him did you?

A: No.

Q: Was July 5 the first time that you have ever recorded a police officer without their consent?

A: No.

Q: When were the other times?

A: I don't really remember . . . but I would say there have been at least ten times since I got involved with MAP.

Q: Okay, and just to be clear for the record, what is MAP?

A: MAP is the Marshall Accountability Project. It's like a local version of WikiLeaks where we allow people to

anonymously send in information related to government misconduct and abuse in Marshall and Sulfur Springs. That can either be documents, emails, photos or videos, anything. We take content and do some investigation and fact checking of it, then we vote on whether or not to post it on our website. If the vote is unanimous in favor, we post it.

Q: Are you aware that, between the date that MAP posted a request for videos and the date of your arrest, fifteen Sulfur Springs residents were arrested for engaging in behavior very similar to what you were doing on July 5?

A: Yeah. I knew about those arrests.

Q: And you still chose to record Officer Blaine, despite knowing that there was a chance that you would be arrested for doing so?

A: I knew there was a chance that he would arrest me, but that doesn't mean that I wasn't legally allowed to do what I was doing. If I were to not record him because I was afraid that he would illegally arrest me, well f\*\*k that noise.

The Court: Mr. Scobee, you will absolutely not use language like that again in this courtroom unless it is necessary to answer a question. Do you understand me?

Mr. Scobee: Yes, sir—Your Honor. Sorry.

The Court: Continue, Ms. Foster.

Q: So, Mr. Scobee, you were on notice that your conduct violated the Marshall eavesdropping statute?

A: I wouldn't say that. All of the previous people charged had had their charges dropped. If their conduct really violated the law, then why were their charges dropped? No, I guess, is the answer to your question. I was not on notice that my conduct violated any law.

Q: Very well. Okay, Mr. Scobee, can you think of any reason why—in the particular situation that you encountered on July 5—a law enforcement official in the position of Officer Blaine, who was attempting to detain a suspect who had attempted to flee, might not want someone in relatively close proximity to his person?

A: I can see why he didn't like it. People don't like being recorded. I understand that, but the point is that no one is forcing Blaine to be a cop. He chose that line of work. And the nature of his job is one in which—

Q: Mr. Scobee, please answer the question, yes or no. Can you think of any reason, other than simply disliking the idea of being recorded, that Officer Blaine might not have wanted you lingering in the background while he was trying to arrest an unruly suspect?

A: Yes, I understand that he doesn't want to be distracted by having to account for someone behind him or over his

shoulder who he can't see. But that's--well, frankly, that's too bad. It kind of comes with the territory when you're a public official. Just because you carry a gun and deal with criminals doesn't mean that you have carte blanche to be free from any public scrutiny. It's not like I'm going to stand a hundred feet away with my iPhone and have any chance of recording any useful video or audio. Either you're allowed to record cops or you aren't. If you are, you're going to have to be in some proximity to--

Q: Mr. Scobee, please limit your responses to direct answers to the questions that I'm asking. Okay, I have a few more questions here for you. Did you have your iPhone password protected at the time that Officer Blaine took it from you?

A: No, I didn't.

Q: Can you remove the battery of your iPhone so that it is unable to receive any incoming calls or texts?

A: No, the battery doesn't come out but you can set it to airplane--

Q: Thank you, Mr. Scobee. No further questions, Your Honor.

The Court: Thank you, Ms. Foster. Let's take a fifteen-minute recess before hearing from Officer Blaine. Thank you, Mr. Scobee, you may step down.

Transcript of Trial  
Before the Honorable Rachel Karaman  
August 16, 2011

Direct Examination of Casey Blaine by Robert Bruce

Q: Could you please state your name for the record?

A: Casey Blaine.

Q: And what is your occupation?

A: I am an Officer with the Sulfur Springs Police Force.

Q: What are your duties as an Officer with the force?

A: I work in the patrol division for the North District of Sulfur Springs. The patrol division enforces criminal and traffic laws and responds to citizen complaints.

Q: How long have you been a member of the Sulfur Springs Police Force?

A: I joined the force in 2007.

Q: Now, directing your attention to July 5, 2010. Do you recall that date?

A: Yes, sir.

Q: What were you doing on that day?

A: I had been assigned to a patrol route that morning. It was pretty routine, just monitoring traffic, catching bad guys. A normal day.

Q: Do you recall pulling over Walter Kerekes while you were patrolling that day?

A: Yes, sir. He was over the speed limit, so I turned on my overheads and ordered him to pull over.

Q: What happened next?

A: Kerekes pulled over and I pulled over behind him - maybe twenty-five feet or so behind him. I got out of my squad car and approached Kerekes's vehicle. I retrieved Kerekes's paperwork and returned to my squad car.

Q: What did you do after you returned to your squad car?

A: I ran Kerekes's license and found he had a warrant out for his arrest. So I returned to his vehicle, told him to get out of the vehicle and arrested him. I then asked him for consent to search his car, which he gave, and I proceeded to search the vehicle.

Q: Did you find anything during the search?

A: Yes, sir. I found a container of marijuana. When I asked Kerekes about it, he fled.

Q: Did you chase after him?

A: Yes, sir. I followed him into the alley where I tackled him. That's when I first noticed Scobee was over my shoulder, fairly close by. I was immediately worried about my safety - I mean I had no idea what he was doing back there, if he had a weapon or anything else like that. So I asked him to back away.

Q: Did you know if Mr. Scobee had a weapon?

A: No, sir.

Q: Did you know Mr. Scobee was recording you?

A: Not at first, but after I looked back over I noticed he had what appeared to be his cell phone out and pointed in my direction. I told him to stop recording and to back away several times, and he refused to follow my orders.

Q: Is that when you decided to arrest him?

A: Yes, sir. After he had refused to follow my orders to step back and stop recording, I really felt I was in danger. It was also our policy to arrest people who were videotaping officers without obtaining permission.

Q: Our policy? To which policy are you referring?

A: The Sulfur Springs Police Department. It was in a memorandum from Chief Hogan.

Q: Directing your attention to after the arrest. Do you recall what happened?

A: Yes, sir. When I picked up the phone after I had secured Scobee I could tell that the video was still recording. I hit a red button and I think that stopped the video from recording. I was worried about losing the video so—I don't know how an iPhone works. I think I hit some button like 'use' or 'upload'—I can't remember what exactly it said but the other option was 'cancel,' and I was worried that hitting that would erase the video.

Q: So, what did you do?

A: His phone is a lot more complicated than the flip phone I have -my phone is just one of those Nextel two-ways with the walkie-talkie feature. After I hit upload, I couldn't find the video anymore. I figured it was saved somewhere in the phone, but I-I mean, I couldn't tell what half those icons meant so I just went to wherever it seemed like a video might be.

Q: What do you mean?

A: Well, after I lost the video I was trying to find it in the phone. I had no idea where it went so I tried to find it.

Q: What part of the phone did you actually search?

A: Well, I noticed there were a lot of little icon-type things-apps I guess they're called-on the phone, but I wasn't sure what all of them were for. I asked Scobee where the video was, but he was being uncooperative. I didn't look at anything where I knew the video wouldn't be - like the Tetris game he had or his calculator.

Q: Did you look through any applications that did not contain any evidence of recordings of police officers?

A: There were a few. One of the applications I remember I looked at seemed like it would be some sort of camera app, but when I looked at it, it showed the inside of a house.

Q: Ok, but could you tell the Court more specifically what you did search?

A: Sure, I can try. I looked at the text messages, mostly to see whether there was any chance that the video had been sent somehow. My fiancé gets sent video texts on her Droid sometimes, so I figured that Scobee might have been recording the video as part of a text. In the messages folder I noticed a series of texts from a contact listed as 'Cynthia MAP.' The text exchange was all about videotaping officers and MAP and stuff like that. The texts mentioned two apps called QuickOffice and Dragon Dictions. So based on those messages I looked at the emails on the phone, along with the QuickOffice and Dragon Diction applications. I also looked in the photo album, some audio-recording application and this CamScan application I found. That's basically the extent of what I looked at.

Q: Where was Mr. Scobee at the time that you were searching through the phone?

A: He was on the ground next to me.

Q: Was he restrained?

A: Yeah, I had my Hiatt cuffs on him.

Q: Did you have consent to search the cell phone?

A: No, but I was searching the phone incident—

Q: Yes or no, Officer.

A: No.

Q: Thank you. No further questions at this time, Your Honor

The Court: Thank you, Mr. Bruce. Ms. Foster, your witness.

Cross-Examination of Officer Casey Blaine by Neda Foster

Q: Thank you, Your Honor. Officer Blaine, going back to your testimony about Mr. Scobee recording you, you stated that you felt as though you were in danger. Could you expand on that?

A: Yes, ma'am. Acting as a police officer can be a dangerous job—most people don't appreciate being arrested and taken to jail. I was already attempting to subdue one person who had fled when this guy approached from behind me and was standing really close to me. I had no idea who he was, where he came from, if he had any weapons or anything like that. It could have easily escalated to a situation of two against one, where I would have been outnumbered. Mostly, though, it was just dangerous because I had no idea what Mr. Scobee was doing or what he intended to do.

Q: Is it safe to say you thought that it was possible he would attack you?

A: I would definitely say that was possible.

Q: Now, after you learned that Mr. Scobee was recording you, what happened?

A: Well, I knew Chief Hogan had issued a memorandum on the topic of officers being recorded. The memorandum told us that we could arrest anyone caught recording an officer.

Q: Is it also fair to say that someone recording an officer could get in the way of that officer carrying out his or her duties?

A: Yes, ma'am.

Q: You mentioned MAP. What do you know about MAP?

A: It's a website that people anonymously send videos and documents to. Stuff relating to government conduct mostly.

Q: Getting back to the search of the phone, did you attempt to get Mr. Scobee to tell you where the video was?

A: I did. He was uncooperative.

Q: Under what authority did you search the cell phone?

A: I had just arrested him, and I'm allowed to search his person and anything on his person as a search incident to arrest.

Q: Just to refresh everyone's memory, why did you search the cell phone?

A: I wanted to find the video and make sure it was preserved. I also wanted to make sure the video had not been distributed to anyone else, you know, for safety purposes.

Q: Why did you search the text messages?

A: I searched the text messages to make sure that Mr. Scobee did not send the video to anyone. But then I found all of these text messages from Cynthia, which talked about recording police and MAP. There were messages from Mr. Scobee to Cynthia, too. In several of the messages, Mr. Scobee asked Cynthia if she had received other recordings of police. I wanted to see if those other recordings were on the phone, too.

Q: So what did you do next?

A: Well, I asked Mr. Scobee about this Cynthia person. He didn't respond.

Q: Did those texts provide any other important information?

A: There was also a text message or two from Mr. Scobee to Cynthia describing this big project he had been working on and telling her that she could expect to receive it soon. I was hoping some of that would be on the phone, as well. Some of the applications which I talked about earlier were mentioned in the messages so I decided to look at them.

Q: What did you find when you accessed those applications?

A: I found a lot of things. I found several photographs, videos, and audio-recordings of police officers which were going to be used as part of MAP. I also found several documents related to MAP which it looked like Mr. Scobee had composed on his phone. It appeared that Mr. Scobee was

trying to compile everything he possibly could about the police force.

Q: Did you find the video that Mr. Scobee had just taken of you arresting Mr. Kerekes?

A: No, ma'am. I never did find that video.

Q: When you accessed the phone, was it password protected?

A: No, ma'am.

Q: Were any of the applications you looked at password protected?

A: No, ma'am.

Q: One final question. Did you delete any evidence off of Mr. Scobee's cell phone?

A: No ma'am. I seized the phone and then followed proper logging procedures at the evidence locker. I had no further contact with the phone after it was placed in the evidence locker.

Q: Thank you, Officer. No further questions, Your Honor.

Trial Transcript  
Before the Honorable Rachel Karaman  
August 17, 2011

Direct Examination of Police Chief Randall Hogan by Neda Foster

Q: Please state your name for the record.

A: Randall Hogan.

Q: What is your occupation?

A: I am the Chief of Police for the Sulfur Springs Police Department.

Q: How long have you been Chief of Police?

A: Since January 1, 2009.

Q: What was your occupation before you became Chief of Police?

A: I joined the Sulfur Springs Police Department as an officer in 1992, but prior to that I was an officer in the United States Army.

*[Omitted]*

Q: Earlier, you mentioned an internal police memo from June 8, 2010-what was this memo about?

A: It pertained to dealing with people going about recording our on duty officers. The memo essentially explained to officers that it was possible to arrest anyone caught recording an officer under the Marshall eavesdropping statute.

Q: What was the purpose of this memo?

A: To protect the privacy and safety of my officers when they're in the field.

Q: Did anything prompt you to write that memo?

A: Unfortunately, yes. On June 7, one of our officers, Monica Santos, was brutally attacked because some idiot posted a video of her and blew her cover.

Q: What were the circumstances surrounding the attack?

A: On June 6, Monica was video recorded while she was working undercover in a sting operation involving Four Corners. An anonymous source posted the video on YouTube later that day, and we believe that someone in the gang viewed the post and recognized Monica as a police officer. The next night, June 7, she was attacked by the members of Four Corners outside of her home. They left her in a permanent vegetative state . . . and I feel like it's my fault. It's my responsibility to protect these officers, and I failed.

Q: Did you know Monica?

A: Yes. We were very close. I trained her when she first became a member of the force about six years ago.

Q: When you prepared the memorandum, were you concerned about officer safety and privacy?

A: Yes, ma'am. I have been extremely safety conscious since my time in the Army. When I was a platoon leader, I was deployed overseas and we had a reporter embedded with us.

We got into a situation where we were taking fire, and the reporter was just worried about getting a good story. I ended up losing a good man who took a bullet saving that journalist's life. After that, I made it my number one priority to always look out for the safety of my soldiers - and that attitude carried over when I later became Chief of Police.

Q: And you believe that the recording of police officers poses a bona fide risk to officer safety?

A: Absolutely.

Q: Thank you. No further questions, Your Honor.

Cross-Examination of Randall Hogan by Robert Bruce

*[Omitted]*

Q: Is it true between April 11, 2009 and June 8, 2010, only three people were arrested under the eavesdropping statute?

A: Yes, sir.

Q: And your memorandum came out on June 8, 2010, correct?

A: Yes, sir.

Q: And between June 8, 2010, and July 4, 2010, didn't the SSPD arrest eighteen people under the eavesdropping statute?

A: Yes, sir.

Q: No further questions, Your Honor.

**Transcript of Video Recorded by Campbell Scobee**  
July 5, 2010

Scobee: Its, uh, July 5, 2010, I'm, standing on my front porch. This guy just got pulled over. Uh... The cops are searching the car. Don't know what the (inaudible). Oh, oh.

*[Kerekes is seen fleeing across the lawn and into municipal easement alleyway. Officer Blaine is seen pursuing Kerekes.]*

Officer Blaine: Stop! Stop now!

*[The video follows Officer Blaine and Kerekes into the alleyway.]*

Scobee: Oh, wow.

Officer Blaine: Sir, back away now.

*[The video moves back, away from Officer Blaine and Kerekes.]*

Officer Blaine: Get up. Get up.

*[Officer Blaine is seen lifting Kerekes to his feet and pushing him up against a fence.]*

Officer Blaine: Sir back away now -

Scobee: Yes, sir

Officer Blaine: - Turn off the camera and leave.

Scobee: Sir, I have a right to be recording this.

*[Officer Blaine is seen patting down Kerekes and putting him back on the ground, face-down.]*

Officer Blaine: (inaudible) Face down!

Scobee: Man he's roughing him up a little bit.

Officer Blaine: Sir I'm not going to tell you again.... Stay there

*[Officer Blaine is seen pointing at Kerekes]*

Scobee: Sir

Officer Blaine: I'm not going to tell you again. Leave - What's your name?

Scobee: Am I breaking any law?

Officer Blaine: One more chance. You need to put the camera away.

Scobee: I have a right to be recording this right now. What law am I breaking?

*[Officer Blaine is seen returning to Kerekes momentarily and then is seen walking back towards Scobee]*

Scobee: Sir, I'm not interfering. I will, will back away, but I have a right to be recording this right now.

Officer Blaine: *[Into his police radio]* White male, approximately five-foot-six, blue jeans, T-shirt.

Scobee: Sir, have I broken any laws?

Officer Blaine: Put the camera down.

*[Officer Blaine is seen reaching out his hand and grabbing the phone. The phone is dropped to the ground. The parties are no longer visible in the video image]*

Officer Blaine: You're going to jail.

Scobee: What am I being arrested for?

Officer Blaine: You're going to jail.

Scobee: For what?

Officer Blaine: For interfering with my investigation. I don't know what you're doing—

Scobee: I have a right to be (inaudible)

Officer Blaine —standing behind me. I have no idea whether you're gonna—pull a weapon on me. I asked you nicely once. I don't care if you—

Scobee: And I backed up.

Officer Blaine: —recording.

Scobee: Ow!

Officer Blaine: If you would have listened to my orders you wouldn't be going to jail.

Scobee: Ow!

Officer Blaine: Get on the ground.

Scobee: What—what law—

Officer Blaine: Get on the ground. Face down on the ground!

Scobee: Agh!

Officer Blaine: I asked you once kindly, and you didn't so you're gonna go to jail.

*[Officer Blaine is seen picking up the phone from the ground.]*

*[Scobee's shoes are seen]*

## MEMORANDUM

TO: All Members of the Sulfur Springs Police Department

FROM: Randall Hogan, Sulfur Springs Police Chief

DATE: June 8, 2010

RE: Dealing with Video Recordings of Officers in Response to Recent Events

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Members of the Sulfur Springs Police Force,

Due to recent events, it is necessary to address our current policy regarding MAP and similar such organizations. The SSPD has weathered some rough times in the past year or so, but the brutal attack of Officer Monica Santos has left us all in shock. We must come together during this difficult time.

You and I know with certainty that this department is one of the most effective in the state at both investigating crimes committed against our citizenry and keeping our community safe and secure. It is our ability to operate free from interference that allows us to effectively bring criminals to justice and serve the community that we all love.

Like all of you, I find it very disconcerting that a small group of officious intermeddlers are insisting that they know more about how to run a police force than we do. But what I am more concerned about is the substantial likelihood that these individuals will put the safety of our officers in danger. While the department has always supported and encouraged political efficacy and the citizenry's involvement in helping to keep our community safe, I fear that MAP will have the opposite effect—the activities that it support continually endanger our lives and the lives of those we work so hard to protect.

We are not without the ability to remedy this dangerous situation; however, over the past year, at least three of our fellow officers have wisely made use of this state's eavesdropping statute (310 Mars. Stat. §144.11) to protect themselves from being videotaped in their official capacity. This approach is becoming common and generally effective throughout the country.<sup>1</sup> It has become increasingly important that you protect yourself and your ability to serve this great state. Tools such as the eavesdropping statute and our public order statutes<sup>2</sup> are at your disposal and I urge you to use them when you feel that one of these participants has satisfied the elements of the statutes.

I hope that you find these tools useful. Always be mindful of your ultimate duty: to protect the citizens of Sulfur Springs and to bring criminals to justice. I see MAP being a great detriment to the force if all of our actions are put under a microscope; your jobs are stressful

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<sup>1</sup> [http://www.boston.com/news/local/massachusetts/articles/2010/01/12/police\\_fight\\_cellphone\\_recordings/](http://www.boston.com/news/local/massachusetts/articles/2010/01/12/police_fight_cellphone_recordings/)

<sup>2</sup> For example, our Public Order statutes of Chapter 310 of the Marshall Criminal Code, which include: Disorderly Conduct § 122.08, Obstruction of Justice § 122.23, Failure to Disperse Upon A lawful Order § 122.14, and Resisting Law Enforcement § 122.10.

enough as it is, and I am only trying to prevent this additional, unnecessary burden from weighing on the force. We owe it to Monica.

As a final matter, I want to remind you all that it is within your authority, under the Fourth Amendment, to conduct searches incident to arrest. These searches extend to any digital devices such as a recording instruments, digital cameras, portable phones, etc. found on the arrestee's person.

Yours in fraternity,

*Chief Randall Hogan*

# Sulfur Springs Gazette

March 15, 2010

## **Local Organization's Website Causes Stir**

Sandra Dee, Staff Reporter

The Marshall Accountability Project (MAP) has done it again. In MAP's most recent attempt to hold government officials accountable for their actions, MAP uploaded onto their website a twenty-seven minute video which it received from an anonymous source.

The video depicts six members of the Sulfur Springs Police Department on a lunch break at Denny's. The recording captures the officers discussing topics which range from the mundane to the deeply personal.

The video begins with the officers talking about everyday topics, including their NCAA tournament favorites and their recent string of success fishing at Sulfur Lake. The officers also speak at length about the alleged mismanagement of the police department by the Chief of Police and the recent fallout from videos which had been posted by MAP on their website.

The conversation, however, quickly took a turn into topics the officers likely intended to keep private.

One officer is captured talking about his recent divorce with his wife and how much it has affected him personally. He can be heard saying that "sometimes it's just so hard to go about my duties as an officer when everything in my personal life is falling apart." He goes on to confide in the rest of the officers at the table that his doctor had diagnosed him with depression and had written him a prescription to manage the depression.

Officer Dodd Browning, identified by his nametag which is visible in the video, admits that he has stopped attending his Alcoholics Anonymous meetings and has

relapsed back into drinking. He admits he may have an alcoholism problem, but expresses reluctance in restarting the program.

The publishing of this video has caused a divide among Sulfur Springs citizens. Many believe MAP has gone too far, calling for MAP to take down the video and issue a formal apology to the officers and their families. They claim that no purpose could possibly be served by publishing the video on the internet for everyone to see, especially since parts of the conversations focused on very private and potentially embarrassing topics.

MAP's advocates, however, claim that MAP is merely bringing attention to the fact that Sulfur Springs' so-called finest are involved in deeply entrenched corruption that must be addressed. They applaud MAP on its mission to expose any wrongdoing on the part of government officials and urge MAP to continue to promote transparency in government actions.

This video is just the most recent in a string of digital content - photographs, video recordings, and audio recordings - which MAP has published on the internet in an attempt to raise public awareness. MAP has also made available on their website information about health officials taking bribes, the conditions in the Cardozo County jail, and members of the City Council receiving possible kickbacks from local businesses.

# THE SULFUR SPRINGS TIMES

October 17, 2007

## 1 Officer Slain, 2 Injured in Ambush by Gang Members

Terrence Furtado, Staff Reporter

Officer Bert Berkowitz suffered two gunshot wounds during a drug raid on South Rockport Road yesterday afternoon. He was pronounced dead at Mercy Hospital at 6:39 a.m. Officers Melinda Tanenbaum and Skeeter Pimpkin also suffered gunshot wounds. Tanenbaum and Pimpkin are currently in stable condition, and doctors expect them to make full recoveries.

The raid was the culmination of a year-long Sulfur Springs Police Department (“SSPD”) investigation of Petey Dickson, a known Four Corners gang member, and suspected cocaine dealer. In the months leading up to yesterday’s raid, undercover SSPD officers had executed several controlled buys from Dickson in his residence in Sulfur Springs. Based on their investigation, officers obtained a warrant for Dickson’s arrest.

As the SSPD tactical team approached Dickson’s home early yesterday morning, Four Corners gang members opened fire. The gang’s strategic use of armor-piercing bullets resulted in Officer Berkowitz’s death. Officers returned fire and the shooters eventually fled the scene. Officers then gained access to Dickson’s home, but Dickson was nowhere to be found.

Officers later arrested Four Corners street gang member Snoop Peters at a known drug dealing location only two blocks from the scene. During a resulting police interrogation, Peters revealed that Four Corners gang members had intercepted police communications that tipped them off as to the time and place of the raid.

Peters revealed that Four Corners members had utilized high-powered, long-range microphone systems (commonly referred to as “shotgun” or “boom” microphones) to record police conversations concerning the raid. Peters reportedly told police that Four Corners members regularly follow on-duty police officers and record their conversations in an attempt to gather information about ongoing investigations of the gang’s illegal activities.

With regard to the Dickson investigation, Peters disclosed that at approximately 11:00 p.m. on October 15, Four Corners gang members recorded a conversation between two SSPD officers parked in their squad cars at Joe’s Body Shop on Davis Drive. Gang members secretly recorded the conversation from a discreet location about 100 yards from the officers.

When the gang members heard the officers discussing the upcoming raid of the Dickson home, they informed Dickson and made plans to hide in ambush-ready positions on the roofs of surrounding buildings. The gang members that Peters identified have been arrested and charged with murder, attempted murder, and eavesdropping.

As you may recall, this isn’t the first time a Four Corners gang member has been charged with all three of these crimes. Last year, J.C. Crabtree, a high-ranking member of Four Corners, was arrested and charged with these crimes after police learned that Four Corners had been planting eavesdropping devices on gang members

who they believed to be police informants. At least three police informants, all of whom were connected to Four Corners, were killed last year and three others are still missing. Crabtree's trial is scheduled for later this month.

When asked about whether the availability and use of this technology represents a new frontier in the war on crime, SSPD Lieutenant Erin Rodinski stated that although she had never dealt with a situation where a gang member used an eavesdropping device to record another member, she "see[s] this kind of thing all the time. [The SSPD] makes numerous eavesdropping-related arrests each year in a variety of different situations. Last year, for example, we arrested at least twenty private investigators who had resorted to eavesdropping to obtain information for their clients."

She also talked about the twelve eavesdropping arrests made in connection with the 2005 blackmail scandal—the individuals arrested were suspected of tapping into the phone lines of numerous Sulfur Springs doctor's offices and using the confidential information obtained to blackmail patients—as well as the highly publicized controversy over Pamela Baker's eavesdropping-related arrest. Mrs. Baker, who suspected her neighbor of dealing drugs to area kids, used a baby monitor to intercept information related to a drug deal and was later arrested on eavesdropping charges when she presented this information to the authorities. Lieutenant Rodinski explained that "at the end of the day, it doesn't matter whether you're trying to save the world or catch a cheating spouse, eavesdropping is illegal."

For more articles about eavesdropping-related crimes similar to those which have taken place in Sulfur

Springs, as well as information related to the types of eavesdropping technology available on the market today, please see the following:

- "Eavesdropping case in tiny Illinois town makes big waves": [http://articles.chicagotribune.com/2012-01-02/news/ct-met-eavesdropping-law-sidebar-20120102\\_1\\_eavesdropping-case-tiny-illinois-town-big-waves](http://articles.chicagotribune.com/2012-01-02/news/ct-met-eavesdropping-law-sidebar-20120102_1_eavesdropping-case-tiny-illinois-town-big-waves)
- "Judge: Google Can Be Sued for Wiretapping in Street View Debacle": <http://www.wired.com/threatlevel/2011/06/google-wiretap-breach/>
- "Man arrested for eavesdropping": [http://newsdemocratleader.com/view/full\\_story/1810232/article-Man-arrested-for-eavesdropping](http://newsdemocratleader.com/view/full_story/1810232/article-Man-arrested-for-eavesdropping)
- "Eavesdropping Laws Mean That Turning On an Audio Recorder Could Send You to Prison": <http://www.nytimes.com/2011/01/23/us/23cnceavesdropping.html?pagewanted=all>
- "9/11 Relatives Who Suspect Hacking Await Answers": [http://www.nytimes.com/2012/01/03/us/relatives-of-9-11-victims-suspecting-hacking-await-answers.html?\\_r=2](http://www.nytimes.com/2012/01/03/us/relatives-of-9-11-victims-suspecting-hacking-await-answers.html?_r=2)
- "High-tech devices leave users vulnerable to spies": [http://www.therepublic.com/view/story/CPT-SPYING\\_6944001/CPT-SPYING\\_6944001/](http://www.therepublic.com/view/story/CPT-SPYING_6944001/CPT-SPYING_6944001/)
- "Hedge fund insider-trading scandal expands": <http://articles.latimes.com/2009/nov/06/business/fi-hedge-scandal6>

# MRS Report for Marshall State Legislature

## **Categorization & Analysis of Arrests by Sulfur Springs Police Department Under Marshall Eavesdropping Statute: 310 MARSHALL STATUTE § 144.11**

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Committees of the  
Marshall State Legislature

# Categorization & Analysis of Sulfur Springs Police Department Arrests under Marshall Eavesdropping Statute: 310 MARSHALL STATUTE § 144.11

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## Summary

This report provides an overview and analysis of arrests made by the Sulfur Springs Police Department (“SSPD”) under 310 MARSHALL STATUTE § 144.11 (“Marshall Eavesdropping Statute”).<sup>1</sup>

[Redacted]

## III. Statistical Data & Analysis

Statistical data relating to Marshall Eavesdropping Statute arrests made by the SSPD from 2005 to 2010 suggests that anywhere from eleven to thirty-one Marshall citizens were arrested each year for violating the statute. The following chart places these arrests into one of two categories: arrests of individuals suspected of recording a SSPD officer(s) or arrests of individuals suspected of recording a non-SSPD officer(s)—in most cases, a non-governmental employee (i.e. an average Marshall citizen).<sup>2</sup>

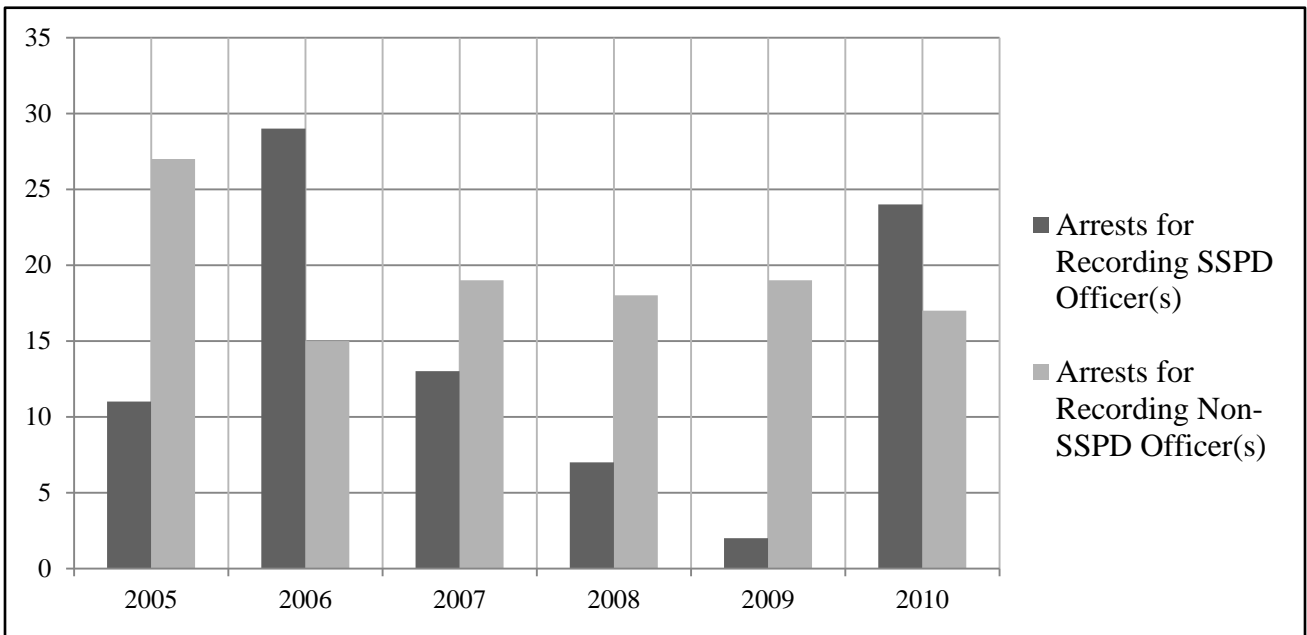
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<sup>1</sup> This report was requested by the House Judiciary Committee of the State of Marshall General Assembly in anticipation of a Committee Hearing discussing proposed amendments to the Marshall Eavesdropping Statute.

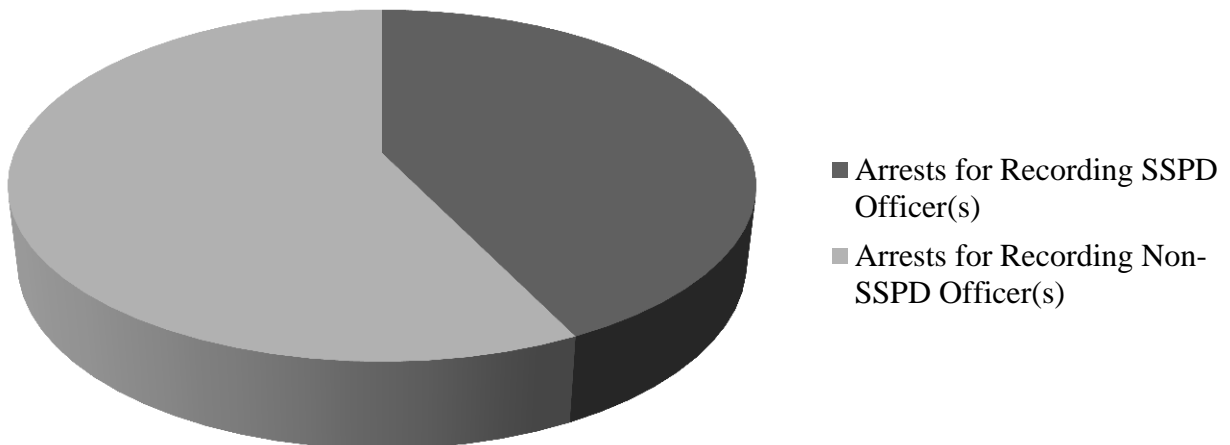
<sup>2</sup> The term “recording a SSPD officer(s)” includes all situations in which one or more of the parties to the recorded communication was an officer of the SSPD. For example, the arrest of an individual suspected of recording a conversation between a SSPD officer and a private citizen would be placed in the category “recording a SSPD officer(s).” The term “recording a non-SSPD officer(s)” refers to conversations in which no SSPD officer participated.

**Categorization of Sulfur Springs Police Department Arrests  
Under Marshall Eavesdropping Statute  
2005 – 2010**

<b>Year</b>	<b>Arrests for Recording SSPD Officer(s)</b>	<b>Arrests for Recording Non-SSPD Officer(s)</b>
2005	11	27
2006	29	15
2007	13	19
2008	7	18
2009	2	19
2010	24	17



**Recording SSPD Officer(s)  
vs.  
Recording Non-SSPD Officer(s)**



**310 MARS. STAT. § 144.11**  
**144.11. Elements of the offense; affirmative defense**

§ 141.11. Elements of the offense; affirmative defense.

(a) A person commits eavesdropping when he:

(1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so with the consent of all of the parties to such conversation or electronic communication;

\* \* \*

(b) It is an affirmative defense to a charge brought under this Article relating to the interception of a privileged communication that the person charged:

1. was a law enforcement officer acting pursuant to an order of interception, entered by the Chief Judge for the circuit pursuant to the relevant statutory procedures; and
2. at the time the communication was intercepted, the officer was unaware that the communication was privileged; and
3. stopped the interception within a reasonable time after discovering that the communication was privileged; and
4. did not disclose the contents of the communication.

**310 MARS. STAT. § 144.09**  
**144.09. Definitions**

(a) Eavesdropping device.

An eavesdropping device is any device capable of being used to hear or record oral conversation or intercept, retain, or transcribe electronic communications whether such conversation or electronic communication is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

\* \* \*

(d) Conversation.

For the purposes of this Article, the term conversation means any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.