SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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Re: State of Delaware v. Tywaan Johnson a/k/a John Nurse
C.A. No. 1007020056

Submitted	:	September 12, 2011
Bench Ruling	:	September 13, 2011
Written Decision	:	October 5, 2011

On Defendant's Motion to Suppress.
DENIED.

Dear Counsel:

INTRODUCTION

Defendant was convicted on September 22, 2011 of Murder First Degree, Robbery First Degree, Conspiracy Second Degree, Possession of a Deadly Weapon By Person Prohibited and Possession of a Deadly Weapon During The Commission of a Felony. Prior to trial, Defendant sought to suppress certain evidence gathered from recorded outgoing telephone calls made while Defendant was incarcerated.

Defendant claims that the recordings constitute an unreasonable search and seizure contrary to his constitutionally guaranteed reasonable expectation of privacy. Defendant also argues the State's efforts to gain access to that evidence, through the use of an Attorney General subpoena, was invalid because the subpoena was unreasonable in specificity, scope and duration, and additionally, that the recording itself is an unlawful eavesdropping.

I. FACTS

This case arises from the fatal shooting of Anthony Bing ("Bing") of Newark, Delaware, who was shot in the City of Wilmington in an area known as Allen's Alley on the evening of June 12, 2010. Bing was shot in the course of a drug related transaction during which a robbery and shooting ensued. While incarcerated pending trial for that shooting, Defendant made several telephone calls which the State considers to be evidence of witness tampering. The State sought to introduce those recorded outgoing telephone conversations at trial against Defendant's Motion to Suppress.

The three recorded telephone conversations that the State sought to introduce include calls to the defendant's associates ranging from immediately after Defendant's initial incarceration, until almost a year later.[1] All of the three calls were made while Defendant was incarcerated within the Howard R. Young Correctional Institute.[2] The first telephone recording includes Defendant's efforts to explain how the police "killed [Defendant's] alibi" by pressuring his alleged alibi witness into changing her story.[3] The other two conversations include Defendant's recorded attempts to explain to different call recipients that the Defendant's role in the robbery was not as alleged by the police.[4]

Defendant's Motion to Suppress addresses the admissibility of Defendant Tywaan Johnson's outgoing prison telephone calls, which were recorded by the Department of Correction and subpoenaed by the Attorney General. Defendant is challenging the admissibility of the State's intended use of recorded telephone calls under the Fourth and Sixth Amendments.

Incident to the investigation into Bing's death, the Wilmington Police Department focused upon three individuals: Luis Sierra, Gregory Napier, and

[1] State Ex. 68; State Ex. 69; State Ex. 70.
[2] State Ex. 68; State Ex. 69; State Ex. 70.
[3] State Ex. 68.
[4] State Ex. 69; State Ex. 70.

Tywaan Johnson, a/k/a John Nurse. ("Defendant") Johnson was interviewed regarding this investigation on June 16. Johnson offered an alibi that on the night of the shooting he was at a "strip party…at a girl named Jackie's house."[5]

In following that lead, the Wilmington Police Department contacted one Jackie Eatmon, who advised police that Johnson had contacted her shortly after June 12, 2010 and told Eatmon that if the police questioned her, she should tell the police that Johnson was at Eatmon's party. However, Eatmon told the police that while she intended to have a party, the party did not happen; Eatmon asserted that Defendant was not with her at the time of the shooting.

Defendant and the other two identified suspects were ultimately arrested and charged with the murder of Bing, as well as other charges arising out of the robbery.[6] Defendant was taken into custody on August 3, 2010. While being formally processed at the Wilmington Police Department, Defendant made several spontaneous statements to Detectives. Johnson stated, "I know you talked to Jackie and you scared the truth out of her."[7]

After his arrest, Defendant was then incarcerated with the Delaware Department of Correction, first at the Howard R. Young Correctional Center and then the James T. Vaughn Correctional Center. The Attorney General subpoenaed the Defendant's prison telephone records because Eatmon had told police that Defendant had attempted to contact her from prison and urged her to alter her statement. These factors led the Attorney General to suspect that Johnson was using the prison telephones to engage in witness tampering.

The first Attorney General subpoena was dated August 23, 2010 and the second August 1, 2011. Both Attorney General subpoenas were served upon the Department of Correction. The August 23, 2010 subpoena was served upon the Howard R. Young Correctional Institution and the August 1, 2011 subpoena was served upon the James T. Vaughn Correctional Center for the periods when the Defendant was incarcerated within those facilities. The record is unclear regarding the precise time periods for which Defendant was incarcerated at each facility, but the subpoenas presumably were requested for dates during which Defendant was in that particular facility.

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[5] State's Reply Br. 1.
[6] Defendant's co-defendant Gregory Napier pled guilty to Manslaughter and related charges arising from the robbery and co-defendant Luis Sierra's Capital Murder trial is scheduled for January 9, 2012.
[7] *Id.* at 2.

In pertinent part, both the Attorney General subpoenas commanded the Department of Correction to produce and deliver:

> "[A]ll records regarding telephone contact for inmate, **TYWAAN JOHNSON AKA JOHN NURSE, [ ],** including, but not limited to any and all available approved phone number lists, outgoing call log entries and conversations…."[8]

The subpoenas sought the Defendant's telephone records at the Howard R. Young Correctional Institution beginning "August 3, 2010 to the present" and sought Defendant's telephone records while incarcerated at the James T. Vaughn Correctional Center beginning "January 1, 2011 to the present."[9] Every outgoing inmate prison telephone call at these two correctional facilities was recorded at the time; the prisons utilized recorded prompts notifying both the inmate and the call recipient that each particular call was recorded.[10] Specifically, at the Howard R. Young Correctional Institute, an audio header immediately warned both the call recipient and the inmate that "this call may be recorded or monitored."[11] A very similar warning was also played for both the call recipient and the inmate from outgoing telephone calls made from the James T. Vaughn Correctional Center.[12]

In support of its opposition to Defendant's Motion to Suppress, the State submitted affidavits from Kim Pfaff, a detective with the Wilmington Police Department and from Kristen Fluharty-Emory, a social-worker employed by the Department of Justice. Both affidavits addressed a prior investigation and subsequent trial held in April of 2010, where Tywaan Johnson was the defendant.[13] In that unrelated prior instance, Defendant had been charged with Assault Second Degree and related charges.[14]

Both affidavits generally aver that during Defendant's trial on those charges, a State witness's testimony did not conclude by the end of the day. The witness called the police to report that in the intervening evening, associates of Defendant came to the witness's home and threatened the witness not to complete his

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[8] Attorney General Subpoena Aug. 23, 2010; Attorney General Subpoena August 1, 2011.
[9] *Id.*
[10] State's Reply Br. 3.
[11] State's Ex. 69. While the terms "monitoring" and "recording" are not perfectly synonymous, the jurisprudence interchangeably uses those two terms in the context of substantively similar cases. In this case, other than when quoting from references which use the term "monitor," this Court will hereinafter, solely use the term "recording."
[12] State's Reply Br. 3.
[13] Pfaff Aff. ; Fluharty-Emory Aff.
[14] Fluharty-Emory Aff. ¶ 1.

testimony the following day. The witness apparently believed that the threats were made by friends of the Defendant.[15] As a result of the threats, the witness did not show the next day to continue his testimony, causing a mistrial.

In describing the event, Ms. Fluharty-Emory's affidavit averred that:

> "[T]he police were called about an act of intimidation the previous night, which prompted [the witness] to leave his home and go to an undisclosed location. As such, [the witness] was not present for trial. After argument [the] Judge [ ] dismissed the case without prejudice and granted a mistrial. Subsequently, a material witness warrant was issued for [the witness] and a wanted flyer was distributed for [the witness]."[16]

Ms. Emory further explained that "it was then learned that other members of [the witness's] family had been threatened about [the witness's] testifying."[17] The witness's family was told that the witness would be killed if he testified.[18]

Once the witness was apprehended, he was placed in protective custody with the Department of Correction.[19] The witness remained in protective custody until the second trial, during which the witness's testimony concluded and the witness was "driven to an out-of-state location for his safety."[20] At the retrial, Defendant was found guilty of Assault 3rd Degree and related charges.[21]

II. PROCEDURAL POSTURE

Defendant moved to suppress the State's use at trial of tape-recorded outgoing telephone conversations intercepted while the Defendant was a pretrial detainee at the Howard R. Young Correctional Institution. In support of his Motion, Defendant argues that the State's subpoenas and the interception of his prison phone calls were in violation of the Defendant's Constitutional rights under the Fourth and Sixth

[15] Pfaff Aff. at ¶ 6.
[16] *Id.* at ¶ 2.
[17] *Id.* at ¶ 3.
[18] Pfaff Aff. at ¶ 5.
[19] Fluharty-Emory Aff. at ¶ 4.
[20] *Id.* at ¶ 12.
[21] *State v. Tywaan Johnson*, ID #0909001526

Amendments.[22] Additionally, Defendant argues that the interception of his prison telephone calls violated the Delaware Wiretap statute, 11 Del C. §2402.

DISCUSSION

I. PRISON INMATES HAVE A SUBSTANTIALLY REDUCED EXPECTATION OF PRIVACY IN PRISON TELEPHONE CALLS

A. The Fourth Amendment

Defendant contends that his constitutional rights have been abridged by the State's interception of his telephone calls, while Defendant was incarcerated as a pretrial detainee. The Fourth Amendment and Article I, §6 of the Delaware Constitution protect individuals from "unreasonable searches and seizures."[23] The issue in search and seizure analysis of this nature is whether a person's constitutionally protected reasonable expectation of privacy has been violated.[24]

Defendant points to the recognition in other jurisdictions that incarcerated citizens are not devoid of constitutional rights.[25] The Defendant asserts that because he maintained his constitutional rights despite his incarcerated status, he therefore also maintains, under the circumstances of this case, a reasonable expectation of privacy with respect to the outgoing prison telephone calls at issue. Defendant asserts that his telephone conversations were unreasonably searched and seized by the prison's efforts to record his outgoing telephone conversations, as well as by the State's subsequent subpoena of those recordings.

However, the great majority of courts that have considered this issue have determined that prison inmates have a significantly diminished expectation of privacy.[26] An inmate's use of a prison telephone has been said to be "a privilege, not a right, and a prisoner's choice – even a Hobson's choice – to use a monitored

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[22] Defendant subsequently withdrew a First Amendment claim, and because the Sixth Amendment was not asserted in the Motion and only minimally argued at oral argument, the Court deems any Sixth Amendment claim waived. *See Murphy v. State*, 632 A.2d 1150, 1152-53 (Del. 1993)

[23] U.S. Const. amend. IV and Del. C. Ann. Const. art.1§ 6.

[24] *See Katz v. U.S.*, 338 U.S. 347 (1967); *See also State v. Ashley*, 1998 WL 110140 (Del. Super.).

[25] *Rivera v. Smith*, 472 N.E. 2nd 1015 (NY 1984).

[26] *Johnson v. State of Delaware*, 983 A.2d 904 (2009); *See also Hudson v. Plamer*, 468 U.S. 517 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Pell v. Procunier*, 417 U.S. 817 (1974).

telephone implies his/her consent to be monitored."[27] Such implied consent is all the more strongly inferred when evidence is established that the inmate was previously notified that the telephone conversations are recorded.[28]

In *State of Delaware v. Curtis*, C.A. No. 1003018968, at 5-8 (Del. Super. Dec. 13, 2010) (TRANSCRIPT), this Court issued a bench ruling that held that an inmate has a substantially reduced expectation of privacy for Fourth Amendment purposes when placing outgoing calls, because of the notice inmates are given that the calls are recorded. *Curtis* adopted the majority view that a prison's practice of recording inmate telephone calls is not in violation of the Fourth Amendment.[29]

Given Defendant's status as a prison inmate at the time of the subject outgoing telephone calls, Johnson had a reduced expectation of privacy than that of non-incarcerated persons under the Federal and State of Delaware Constitutions. Moreover, Defendant's telephone calls were a privilege of his incarceration, not a right, and as such, the expectation of privacy in the communication is reduced to a greater extent.

Additionally, every inmate prison telephone call that is recorded is preceded by a pre-recorded prompt notifying both the inmate and the call recipient that the call may be recorded. On balance, taken along with the State's ongoing investigation into criminal activity and Ms. Eatmon's statement that Defendant had contacted her to persuade her to change her statement, the interception of Defendant's prison telephone calls did not constitute an unreasonable search and seizure by violating Defendant's reasonable expectation of privacy under either the Federal or Delaware Constitutions.

II. THE INTERCEPTION OF OUTGOING INMATE TELEPHONE CALLS WAS LAWFUL AND THE ATTORNEY GENERAL'S SUBPOENA WAS MOTIVATED BY A REASONABLE INVESTIGATION INTO WITNESS TAMPERING

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[27] *United States v. Verdin-Garcia*, 516 F.3d 884, 894 (10th Cir. 2008) ("Agree with the other circuits having considered the question that where the warnings given and other circumstances establish the prisoner's awareness of the possibility of monitoring or recording, his decision to take advantage of that privilege implies consent to the conditions placed upon it.")

[28] *U.S. v. Korbe*, 2010 WL 2776337 (W.D. Pa).

[29] *See e.g., U.S. v. Freeman*, 2010 WL 989227 (S.D. Fla.); *U.S. v. Van Poyck*, 77 F.3d 285 (9th Cir. 1996); *U.S. v. Amen*, 831 F. 2d 373 (2nd Cir. 1987).

A. Admissibility

Defendant separately argues that the State's intended usage of recorded telephone calls is unlawful under the Fourth Amendment and that the subpoena of the Defendant's recorded telephone conversations is contrary to the Delaware Supreme Court's ruling in *Johnson v. State*, 983 A. 2nd 904 (Del. 2009). *Johnson* first analyzed the admissibility of intercepted prisoner mail under the First and Fourth Amendments. Although Defendant has waived the First Amendment claims, the analysis of the Defendant's claims require an overlapping analysis that touches upon elements of both the First and Fourth Amendments.

The *Johnson* court addressed the constitutionality of admitting letters sent by an inmate, that were seized because the State believed the inmate was engaged in witness tampering.[30] The Court adopted a two-pronged analysis regarding the constitutional propriety of seizing an inmate's mail and subsequent use of that mail at trial.[31] To survive the scrutiny required under this adopted test, a trial court must analyze: (1) whether the seizure furthered an important or substantial government interest unrelated to the suppression of expression; and (2) whether the seizure was no greater than necessary for the protection of that interest.[32]

The *Johnson* Court found that both factors were satisfied since the State had established a reasonable concern that the Defendant may have been tampering with witnesses and that he may have been utilizing the mail for that purpose.[33] In *State v. Curtis*, the Supreme Court's tests as explained in *Johnson v. State,* were analogized to also encompass outgoing inmate telephone calls.[34] This Court also concludes that an analogy between outgoing inmate mail and outgoing inmate telephone calls is apt.

In applying the first prong to the instant facts, the Court is sufficiently persuaded that the State had an important governmental interest at stake in their efforts to prevent witness tampering. Such a concern is validated by the affidavits regarding the Defendant's prior allegations of witness tampering, as well as by Ms. Eatmon's statement that Defendant contacted her about being untruthful in her statements to the police. Here, the Attorney General not only suspected witness

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[30] *Id*. at 917-18.
[31] *Id.*
[32] *Id.*
[33] *Id*. at 921-22.
[34] *State of Delaware v. Curtis*, C.A. No. 1003018968, at 5-8 (Del. Super. Dec. 13, 2010) (TRANSCRIPT)

tampering, but evidence suggested that witness tampering was afoot and Defendant's history reinforced that belief.

The second prong of the Fourth Amendment analysis in *Johnson v. State* requires that the interception of the Defendant's telephone calls be no greater than necessary. Satisfaction of this prong is also satisfied, because the investigation was ongoing and continued to yield evidentiary material. Additionally, by its very nature, this investigation was of limited duration and would conclude at the time of trial.

In *Johnson*, the prison officials were reading and photocopying the Defendant's outgoing mail.[35] That is analogous to the prison's recording of Tywaan Johnson's telephone conversations in the instant case. Additionally, as in *Johnson*, here, there are no restrictions or censorship upon the Defendant's telephone privileges that raise any First Amendment issues.[36] Additionally, as in *Johnson*, the Defendant was on notice that his telephone calls would be recorded. Therefore, the seizure of Defendant's telephone recordings was no greater than necessary to prevent witness tampering.

In sum, the Court concludes that the State sufficiently articulated witness tampering concerns as an important government interest and because the act of intercepting Defendant's prison telephone calls prior to his murder trial was reasonable in scope, there was no State or Federal violation of Defendant's reasonable expectation of privacy.

B. Reasonableness of the Attorney General Subpoena

The Fourth Amendment of the United States Constitution requires that a subpoena for the seizure of documents be "reasonable."[37] In order to meet this test of reasonableness, the Delaware Superior Court adopted a test for a subpoena's reasonableness in *In re Blue Hen Network*, 314 A.2d 197, 201 (Del. Super. 1973). *Johnson v. State* adapted this test and applied it to an Attorney General subpoena that sought an inmate's outgoing mail. *Curtis* analogized the test for an Attorney General subpoena of an inmate's mail to the context of inmate outgoing telephone recordings.[38]

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[35] *Id.* at 915.
[36] *Id.* at 918.
[37] *In re Blue Hen Country Network*, 314 A.2d 197, 201 (Del. Super. 1973) (citing *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614 (1946)); *Hale v. Henkel*, 201 U.S
[38] *State of Delaware v. Curtis*, C.A. No. 1003018968, at 5-8 (Del. Super. Dec. 13, 2010) (TRANSCRIPT)

The Attorney General subpoena power arises under two statutory provisions of the Delaware Code.[39] First, the Attorney General has the power, duty, and authority "[t]o investigate matters involving the public peace, safety and justice and subpoena witnesses and evidence in connection therewith. . . ."[40] Second, "[t]he Attorney General or any assistant may …issue process to compel the attendance of persons, witnesses and evidence at the office of the Attorney General or at such other place as designated."[41]

"The purpose of this statutory grant of power [is] to 'confer upon the Attorney General, in the investigation of crime and other matters of public concern, powers similar to those inherent in grand juries,' including the grand jury's power to 'compel the appearance of witnesses and the production of documents.' "[42] "Although this subpoena power is similar to that of a grand jury, the Attorney General's power to investigate is not terminated by an arrest or indictment, and continues throughout the prosecution of an alleged crime.[43]

Various Delaware court decisions have interpreted the Attorney General's statutory subpoena power as pertaining to document requests, rather than telephone recordings.[44] Apparently until *Curtis*, the statutory subpoena power had been construed to include many non-documentary forms of evidence, but it had not yet been expanded to include inmate prison telephone recordings. The instant subpoenas requested records "including but not limited to any and all available approved phone number lists, outgoing call log entries, and conversations" for the time periods identified.[45] This Court holds, as did *Curtis*, that the Attorney General subpoena power fairly extends to a request for telephone recordings because of the broad grant of power associated with the Attorney General's investigatory function.[46]

The three-pronged test adapted in *Johnson* requires that: (1) the State specify materials to be produced with reasonable particularity; (2) the subpoena must

[39] *See In re McGowen*, 303 A.2d 645, 647 (Del. 1973).
[40] 29 Del. C. § 2504(4).
[41] 29 Del. C. § 2508 (a).
[42] *In re McGowen*, 303 A.2d at 647 (quoting *In re Hawkins,* 123 A.2d 113, 115 (Del. 1956).
[43] *Johnson*, 983 A.2d 904 at 920.
[44] *Id.* at 921.
[45] Attorney General Subpoena Aug. 23, 2010; Attorney General Subpoena August 1, 2011.
[46] 29 Del. C. § 2504(4).

require only the production of materials relevant to the investigation; and (3) the materials must not cover an unreasonable period of time. [47]

The three factors are all fulfilled in the instant case. First, the Court is satisfied that the subpoena stated the materials sought with reasonable particularity. Similarly, the second prong was fulfilled, as all the telephone conversations were subpoenaed with the intention that they might provide evidence relevant to the investigation. Thirdly, the requirement that the subpoena not cover an unreasonable amount of time was also fulfilled. Although the subpoenas were of an indefinite and continuing nature, the Court believes that the ongoing time period was reasonable. Despite the open-ended time period of the subpoena, a definite ending period existed because of the September 7, 2011 trial date. Finally, it is a reasonably foreseeable presumption that one intercepted telephone call may lead directly to additional intercepted conversations of evidentiary value. For that reason, the open-ended nature of the subpoena was reasonable.

The touchstone of the analysis of this three-pronged test is reasonableness. In *Curtis*, the Court determined that the subpoena was unreasonable because in that case, the State was only "hop[ing]" that it might obtain potential evidence.[48] The *Curtis* Court held:

> "It appears the State's sole purpose in seeking these recordings was its hope, without any bases, that they might contain some incriminating statements, admissions or otherwise, that would corroborate the charges that it had brought against the Defendant. Consequently, as noted in *Johnson* [*v. State*], the State cannot sustain its burden to establish the reasonableness of its subpoena."[49]

In contrast to *Curtis*, no such circumstances are present in this case. Conversely, the Attorney General's subpoena here was as noted, based upon evidence of witness tampering both from Ms. Eatmon's statement and the Defendant's alleged prior tampering.

Defendant objected to consideration of the affidavits' assertions of the Defendant's past witness tampering, both on hearsay grounds and because Defendant argued that the most probative evidence would be testimony from the prior witness. However, the usage of the affidavits within the record is not to

[47] *Johnson*, 983 A.2d 904 at 921-23.
[48] *State of Delaware v. Curtis*, C.A. No. 1003018968, at 5-8 (Del. Super. Dec. 13, 2010) (TRANSCRIPT)
[49] *Id.*

establish the truth of the assertions therein, but rather for the purpose of examining whether the State's concern for witness tampering was reasonable. When the affidavits are understood within that context, and combined with the statements of Ms. Eatmon, the evidence demonstrating the State's concern for witness tampering is compelling.

As the *Johnson* Court said:

> "Cumulatively, this information presents a ***reasonable basis for the State to suspect that Johnson might attempt to contact*** [witness] Truitt indirectly, and that [conspirator] Stewart, in particular, might be involved in or aware of this communication. Moreover, after the information, revealed by the informants in January 2008, about a potential plot between Johnson and [conspirator] Stewart to kill [witness] Truitt, the State had even more reason to inspect all of Johnson's mail, and in particular to [conspirator] Stewart." (emphasis added)[50]

The Supreme Court used the phrases "might attempt to contact" and "reasonable basis for the police to suspect," as the appropriate standard for the reasonability of an Attorney General subpoena.[51] In other words, there is no requirement of a greater degree of proof placed upon the Attorney General in lieu of the basic standard of reasonableness. Such a burden was sufficiently fulfilled, and the instant case merits a ruling commensurate with *Johnson v. State*, rather than *State v. Curtis*, the latter case being distinguishable on its facts.

The Attorney General's subpoena was reasonable and fulfilled the three-pronged analysis provided. While the breadth of the subpoenas' coverage is broad, the Court is satisfied that the subpoena's scope was reasonable, appropriate and limited to the extent possible.

III. THE INTERECEPTION OF INMATE TELEPHONE CALLS WAS NOT PROHIBITED BY THE DELAWARE WIRETAP STATUTE

Finally, Defendant argues that the interception of Defendant's prison telephone calls is prohibited by the Delaware Wiretap statute, 11 Del C. § 2402. That statute generally prohibits the intentional interception of telephone conversations without the

[50] *Johnson*, 983 A.2d 904 at 921.
[51] *Id.*

consent of either the caller or the call recipient.[52] However, the statute additionally provides exceptions whereby interception is lawful.[53]

In pertinent part, 11 Del C. § 2402(c)(4) states that it is lawful "for a person to intercept a wire, oral, or electronic communication where the party is a person to the communication or where one of the parties to the communication has given prior consent to the interception…"[54] This statutory provision governs except where the communication "is intercepted for the purpose of committing any criminal or tortious act in violation of the constitutions or the laws of the United States, this State or any other political subdivision."[55]

Perhaps more relevantly, the statute goes on to provide an additional exception for

> "A person acting under color of law and employed for such purpose by the Department of Correction to intercept an electronic or oral communication of any individual confined to a State correctional facility. At the direction of the Commissioner of Correction or the Commissioner's designee, a person performing an official investigation into suspected criminal activity may monitor and intercept the incoming and outgoing electronic communication of any individual incarcerated in a State correctional facility."[56]

The majority rule among jurisdictions that have addressed this issue is that an inmate "implicitly consents" to the recording of that inmate's outgoing prison telephone conversations when the inmate chooses to make a telephone call after receiving adequate prior warning that the telephone may be recorded.[57] Here, as in *Curtis*, the Defendant implicitly consented to the recording of his telephone conversations. The Defendant continued the telephone conversations despite hearing the audio header warning him that his call was potentially recorded.

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[52] 11 Del. C. § 2402 (a).
[53] 11 Del. C. § 2402 (c).
[54] 11 Del C. §2402 (c)(4).
[55] *Id*.
[56] 11 Del C. §2402 (c) (11).
[57] *U.S. v. Footman*, 215 F.3d 145, 154-55 (1st Cir. 2000); *U.S. v. Workman*, 80 F.3d 688 (2d Cir. 1996); *U.S. v. Horr*, 963 F.2d 1124 (8th Cir. 1992); *U.S. v. Faulkner*, 439 F.3d 1221, 1223 (10th Cir. 2006).

On the other hand, a few courts have criticized this "implicit consent" reasoning.[58] The 7th Circuit Court of Appeal has established an alternative test which holds that, absent abundantly clear manifestations of consent or notice, an inmate cannot implicitly demonstrate consent to have their telephone conversations recorded.[59] The Court sees no basis to depart from the majority rule under these circumstances where the Defendant's implicit consent is present.

However, even assuming, *arguendo,* that the Court were to employ the 7th Circuit's reasoning and find that Defendant did not personally manifest implicit consent, the call recipient's implicit consent governs. Each call recipient also hears the prompt informing them that the telephone conversation might be recorded. When the call recipient chooses to continue the telephone conversation, despite that warning, the call recipient sufficiently manifests his or her implicit consent. As the statute indicates, only one person's consent is generally required under the Delaware Wiretap statute.[60] To the further satisfaction of this Court, this reasoning has also been followed in other jurisdictions interpreting the very similar Federal Wiretap statute.[61] Therefore, the Court finds that the interception of Defendant's telephone conversations was not in violation of the Delaware Wiretap statute, 11 Del C. §2402.

CONCLUSION

For the foregoing reasons, Defendant's motion to suppress is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary

[58] *U.S. v. Daniels*, 902 F.2d 1238, 1245 (7th Cir. 1990); *Campiti v. Walonis*, 611 F.2d 387, 393-94 (1st Cir. 1979) (Upholding the trial judge's rejection of the implied consent theory. But where notice is sufficiently explicit, the First Circuit later held, implied consent suffices to legalize this monitoring. Circuit decisions to this effect are collected in the first note of this section.); *Crooker v. U.S. Dept. of Justice*, 497 F. Supp. 500, 502-03 (D. Conn. 1980).
[59] *U.S. v. Daniels*, 902 F.2d 1238, 1245 (7th Cir. 1990).
[60] 11 Del C. §2402 (c)(4).
[61] *U.S. v. Footman*, 33 F. Supp.2d 60 (U.S.D.C. Mass.).