STATE OF MARYLAND	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiff		
v.	*	**FOR**
ANTHONY JOHN GRABER, III	*	**HARFORD COUNTY**
	*	**Case No. 12-K-10-647**
Defendant		
	*	

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OPINION

On April 27, 2010, a Harford County Grand Jury returned an indictment charging the Defendant with the following offenses:

Count One - unlawful interception of an oral communication in violation of ***Section 10-402(a)(1)*** of the ***Courts and Judicial Proceedings Article*** ("CJ");

Count Two - unlawful disclosure of an intercepted oral communication in violation of ***CJ 10-402(a)(2)***;

Count Three - unlawful possession of a device "primarily useful for the purpose of the surreptitious interception of oral communications" in violation of ***CJ 10-403(a)***;

Count Four - reckless driving in violation of ***Transportation Article 21-901.1(a)***;

Count Five - negligent driving in violation of ***Transportation Article 21-901(b)***;

Count Six - driving in excess of a reasonable and prudent speed in violation of ***Transportation Article 21-801(a)***;

Count Seven - recording illegal activity in violation of ***Transportation Article 21-1126(b).***[1]

Presently pending before the court are nine Motions filed by the Defendant. I held a hearing on the Motions on September 3, 2010, and thereafter held the matter *sub curia* to review the Motions, the responses, the supporting memoranda, the applicable law and the arguments of counsel. At the hearing, after discussion with counsel, several of the issues raised by the Defendant's Motions were resolved by agreement of counsel or were rendered moot. They include the following:

1. The Defendant's request for a transcript of the testimony presented to the Grand Jury in conjunction with its return of the indictment is moot because no transcript exists of the testimony presented to the Grand jury;

2. Defendant's request that the State provide to the Defendant all written and oral statements

of the Defendant pursuant to ***Rule 4-263(d)*** is likewise moot. The State has provided the defense with all such statements. Additionally, statements of the Defendant were addressed by me in my Order of September 1, 2010. The State has in its possession recorded statements given by the Defendant to various news media outlets. The State has agreed to provide those to the Defendant;

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[1]The foregoing is a summary of the essence of the charges. To the extent relevant, the exact language of the various statutory provisions and the wording of the indictment will be discussed *infra*.

3. The Defendant's Motion to suppress any recordings of the incident in question and the interaction between the Defendant and the Troopers that were recorded by the Maryland State Police is also moot as no such recordings exist; and

4. The Defendant's "Notice of Objection" in response to the State's notice that it intended to introduce certain evidence pursuant to ***Rule 5-902*** requires no action by this court. An objection by the defendant to the State's ***Rule 5-902*** notice requires the State to authenticate such evidence in "the old fashioned way." *See* discussion (Hon. Joseph F. Murphy, Jr., ***Maryland Evidence Handbook, 4th Edition, Section 1104***).

At the hearing, Defendant withdrew his Motion to dismiss Counts Four, Five and Six on the ground that these three motor vehicle violations are in the exclusive jurisdiction of the District Court. While it is correct that the District Court has exclusive original jurisdiction pursuant to ***CJ 4-301*** for violations of the motor vehicles laws of the state, there is an exception in ***CJ 4-302(f)*** which gives this court jurisdiction when motor vehicle offenses arise out of the same circumstances as other charged offenses properly within the jurisdiction of this court. *See* ***Privette v. State***, 320 Md. 738 (1990) and ***Harris v. State***, 94 Md.App. 266 (1992).

Before turning to the remaining Motions, a brief summary of the relevant facts is helpful for contextual purposes.

FACTS

On March 5, 2010, the Defendant was stopped for alleged motor vehicle violations by two Troopers of the Maryland State Police. The Defendant was stopped on the exit ramp to Maryland Roue 543 from northbound Interstate 95, both of which are public highways of the State of Maryland. During the course of the Defendant's interaction with the Troopers at the scene of the traffic stop, the Defendant recorded his interaction with the Troopers. The

recording included both video and audio. The Defendant did not tell the Troopers he was recording the encounter nor did he seek their permission to do so. Subsequent to the completion of the traffic stop, the Defendant posted the recordings on the website "YouTube." The charges against the Defendant were initiated in the District Court of Maryland by way of an Application for Statement of Charges filed by Detective Sgt. McGuire of the Maryland State Police. Defendant was arrested pursuant to an Arrest Warrant issued by a District Court Commissioner. Later an indictment was returned by the Grand Jury thus moving the case to this court. On the same day that the charges were filed in the District Court (April 7, 2010) the Maryland State Police obtained a Search Warrant for the Defendant's residence from a District Court Judge in Baltimore County.[2] The Search Warrant was executed on April 15, 2010 at the Defendant's residence. Several items were seized and an inventory returned on April 23, 2010.[3]

THE MOTION TO DISMISS COUNTS ONE AND TWO

The exact wording of ***CJ 10-402(a)(1),*** the violation of which is charged in Count One, is as follows:

> "Except as otherwise specifically provided in this subtitle it is unlawful for any person to wilfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire, oral, or electronic communication."

We are dealing here only with an oral communication. For purposes of the application of ***10-402(a)(1), CJ 10-401(2)(i)*** defines oral communication as:

> "Means any conversation or words spoken to or by any person in private conversation." (Emphasis supplied)

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[2]District Court Judges unlike Circuit Court Judges have authority to issue search warrants for any location in the state.

[3]The foregoing summary of the basic facts comes from three sources: the application for Statement of Charges filed in the District Court; the indictment; and the underlying facts as alleged in the parties' submissions for which there is no dispute. At the outset of the hearing I presented this summary and asked counsel if everyone was in agreement that these were the core facts for purposes of the Motions hearing, to which all agreed.

For purposes of the pending matters before this court, the State does not contend, nor could it, that the video portion of the recording violates any provision of Maryland law. *See* ***Ricks v. State***, 70 Md.App. 287 (1987), aff'd 312 Md. 11, cert. denied 488 US 832 (1988). We are concerned only with the audio portion of the recording.

The Defendant posits several grounds on which I should dismiss Count One. These include: the statute on its face is unconstitutional; that it is unconstitutional and violative of the First Amendment to the United States Constitution and the Maryland Declaration of Rights; that it is unconstitutional as applied to the facts of this case; and that under the facts of this case and the application of the statute, what transpired does not fit the definition of an oral communication as found in ***CJ 10-401,*** and specifically that the exchange between the Defendant and the Troopers was not a private conversation and thus not within the purview of the statute. In a somewhat related matter, the Defendant also seeks dismissal on the grounds that the indictment is defective. Defendant suggests that a "short form" of indictment that was apparently used here was not authorized by the legislature and fails to sufficiently place the Defendant on constitutional notice in the due process sense of what he is alleged to have done so as to allow him to adequately prepare a defense.

When a matter can be decided on alternative grounds without reaching constitutionality, courts should do so. I find that the recorded audio exchange between the Defendant and the Troopers was not a private conversation as intended by the statute. There is, therefore, no need to engage in analysis of the Defendant's other grounds.

To begin this analysis, a few words about the march of time and changes in technology. As discussed in a recent article, the use of hand held and miniature technology has changed rapidly as to cost, size, weight, quality and storage systems. George Holliday was instrumental in changing the landscape of the video taping of police activity when he video taped Los Angeles Police Officers beating Rodney King in 1991. Stationary and portable cameras and other

recording devices are everywhere. The article raises the question: "Is it a violation of an officer's privacy to record or photograph him or her on duty, in uniform, and engaged in an encounter with a citizen?" The article makes reference to ***Tarus v. Borough of Pine Hill***, 189 NJ 497, 916 A.2d 1036 (2007), which involved an arrest of an individual for video taping a municipal council meeting. The New Jersey court said: "The use of modern technology to record and review the activities of public bodies should marshal pride in our open system of government not muster suspicion against citizens who conduct the recording." *See* ***2009 (5)AELE No. L.J. 201 (May 2009)***.[4] I agree.

Maryland's wiretap statute is patterned after its federal counterpart, *see* ***18 USC 2510-2520***, but with some differences. One important difference relevant here is that federal law allows an intercept when one of the two parties consents, whereas Maryland requires the consent of both parties. For a complete history *see* Richard P. Gilbert[5] "***A Diagnosis, Dissection, and Prognosis of Maryland's New Wiretap and Electronic Surveillance Law***, 7 U Balt Law Review 374 and a note "***The 1977 Maryland Wiretapping and Electronic Surveillance Act***" 8 U Balt Law Review 183; ***Miles v. State***, 365 Md. 488 (2001) cert. denied 534 U.S. 1163 (2002).

The definitions in the two laws also differ. The federal law, under ***18 USC 2510*** defines an oral communication as one "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation..." The Maryland definition discussed, *infra*, specifically restricts the interception of an oral communication to words spoken in a private conversation.

My focus is on whether or not the Troopers could reasonably consider their enforcement

[4]See //www:aele.org/libaries/monthlylawjournal

[5]Now deceased former Chief Judge of the Court of Special Appeals.

contact with the Defendant as a private conversation. Obviously the Defendant consented because he did the recording.

The principles of statutory construction have recently been recounted in detail by the Court of Appeals in ***Lockshin v. Semsker***, 412 Md. 257 (2010) and most recently in ***State v. Johnson***, ____ Md.App. _____ (No. 140, September term 2009, slip opinion filed August 23, 2010). The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the legislature. That process begins with giving the words used their ordinary dictionary definitions unless the context in which the words are used indicates a contrary intent. If the plain language of the statute is sufficient and consistent with the statute's apparent purpose, the court's inquiry ends. Needless to say, the plain language used must be viewed within the context of the statutory scheme in which it is found.

Webster's New Collegiate Dictionary defines the word private as: "intended for or restricted to the use of a particular person, group or class... restricted to an individual... not known or intended to be known publically, secret, unsuitable for public use or display."

Albeit in the context of a civil case, in ***Fearnow v. Chesapeake Telephone***, 104 Md.App. 1 (1995), the Court of Special Appeals after comparing the different wording of the definition of oral communication in both the federal and Maryland statutes said, "both acts require that a plaintiff show a reasonable expectation of privacy in the intercepted oral communication." Id. at 33. The Court of Special Appeals observed that only those oral communications which are made under circumstances justifying a reasonable expectation of privacy fit the definition. Id. Importantly, there must not only be a subjective belief that the communication is private, but that such an expectation is one that society is prepared to recognize as reasonable. This principle was discussed recently in ***Williamson v. State***, 413 Md. 521 (2010). In ***Fearnow v. C & P Telephone***, 342 Md. 363 (1996), the court observed, although in the context of a civil claim for damages, that the outcome depends on the determination of whether or not there was a

reasonable expectation of privacy in the conversation, affirming the Court of Special Appeals. In ***Benford v. American Broadcasting Companies***, 554 F. Supp. 145 (1982) in commenting upon the meaning of the term "private conversation" as defined in ***CJ 10-401***, Judge Northrup stated that the rule of reason controls questions concerning expectations of privacy which by their nature are imprecise and that such questions should be decided on a case by case basis. Judge Northrup pointed out, however, that the nature of the expectation of privacy has to be something which society is prepared to accept as reasonable.

What is a "oral communication," keeping in mind that under the Maryland statute it must be a private conversation, was analyzed in an opinion of the Attorney General, ***85 Opinions of the Attorney General 225 (2000).*** In the opinion of the Attorney General, statements that a person knowingly exposes to the public are not made with a reasonable expectation of privacy and are not protected as oral communications. The Attorney General cited both ***Malpas v. State***, 116 Md.App. 69 (1997) and ***Hawes v. Carberry***, 103 Md.App. 214 (1995) as standing for the proposition that "private" means that a participant must have a subjectively and objectively reasonable expectation of privacy. Recently in a letter of advice to Delegate Samuel I. Rosenberg of the Maryland General Assembly, the Chief Counsel for Opinions and Advice of the Attorney General's Office cited a number of cases from other states in which courts have concluded, for example, that a person including the police, who engages in a conversation while sitting in a police car has no reasonable expectation of privacy in his or her statements. The Attorney General also observed that encounters between uniformed police officers and citizens could hardly be characterized as private conversations. In a similar case, ***State v. Flora***, 845 P.2d 1355 (Wash: Court of Appeals, Div 1 1992) the Court of Appeals of Washington found the idea that public officers performing an official function on a public thoroughfare and within sight and hearing of a passerby do not enjoy a privacy interest. Other cases have reached a similar conclusion. *See* ***Commonwealth v. Henlen***, 564 A.2d 905 (Pa. Super.1989) (suspect who

secretly recorded interview with State Trooper in the presence of a third party did not violate the law because the officer could not have a reasonable expectation of privacy); ***Jones v. Gaydula***, 1989 WL 156343 (E.D.PA. 1989) (police officer had no reasonable expectation of privacy when an individual who he arrested recorded his interview with the police despite being asked to stop).

Citing cases from around the country, Defendant suggests in his memorandum that the overwhelming weight of authority from other courts is that a law enforcement officer has no reasonable expectation of privacy in encounters with citizens in public places. I agree. The following is a representative sample.[6]

State v. Clark, 916 P.2d 384 (Wash. 1996): A conversation on a public road in the presence of a third party and within the sight and hearing of a passerby is not private; ***State v. Smith***, 848 So.2nd 650 (LA. App. 2003): There was no violation of a wiretap law to record a conversation between a prosecutor and witness who talked loudly enough to be heard through a closed door; ***In Re John Doe Trader***, 894 F.2d 240 (7th Cir. 1990): There was no reasonable expectation of privacy in the statements made by security traders and recorded by undercover FBI agents posing as traders; ***Kee v. City of Rowlett***, 247 F.3rd 206 (5th Cir. 2001): There could be no reasonable expectation of privacy in conversations that took place in an outdoor publicly available space; ***Lewis v. State***, 139 P.3rd 1078 (Wash. 2006): There can be no reasonable expectation of privacy in traffic stop communications; ***Johnson v. Hawe***, 388 F.3rd 676 (9th Cir. 204): There was no violation of state privacy statues by tape recording a law enforcement officer in the performance of his duties on a public street; ***Alford v. Haner***, 333 F.3rd 972 (9th Cir. 2003); reversed on other grounds 453 US 146 (2004): There is no expectation of privacy concerning a traffic stop on a public street. The law is clearly established that a traffic stop is

[6]Many more cases than these are cited in Defendant's memorandum.

not a private encounter; ***People v. Beardsley***, 503 NE.2nd 346 (Ill. 1986): Conversation that takes place in a police car is not a private conversation; *See* also ***Sprague v. Nally***, 882 A.2d 1164 (Vt. 2005); ***Commonwealth v. Dewar***, 674 A.2d 714 (Pa. Super. 1996); ***Tancredit v. Malfitano***, 567 F.Supp. 2d 506 (S.D.N.Y. 2008); and ***Robinson v. Fetterman***, 378 F.Supp. 2d 534 (E.D.Pa. 2005).

Our appellate courts, at least to my knowledge, have not yet construed the Maryland act as it may apply to a conversation between a police officer and an individual during the course of an official police action involving the individual. In his concurring opinion in ***Katz v. United States***, 389 US 347 (1967), Justice Harlan said, in the context of the Fourth Amendment, that a person must have an actual expectation of privacy and that expectation has to be one that society is prepared to recognize as reasonable. Citing to ***Hester v. United States***, 265 US 57 (1924), Justice Harlan said that conversations conducted in the open are not protected from being heard: "... the expectation of privacy under the circumstances would be unreasonable." In his majority opinion in ***Katz***, Justice Stewart said: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection" (Katz, 389 US at 352). These principles have been the linchpins of Fourth Amendment analysis ever since and provide an appropriate analytical model for this case.

Our appellate courts have, however, decided cases bearing on reasonable expectations of privacy and in the following found no expectation of privacy. *See* ***McCray v. State***, 84 Md.App. 513 (1990) (no expectation of privacy walking on a public street); ***Stone v. State***, 178 Md.App. 428 (2008) (no expectation of privacy in one's location while traveling on a public street); ***Furman v. Sheppard***, 130 Md.App. 67 (2000) (no expectation of privacy on a boat on a public waterway viewable by the public); ***Gibson v. State***, 138 Md.App. 399 (2001) (no expectation of privacy in a person's public movements); ***Fowler v. State***, 79 Md.App. 517 (1989) (no expectation of privacy as to what can be seen on a public street). On the other hand, the court

did find a reasonable expectation of privacy in the following cases: ***Deibler v. State***, 365 Md. 185 (2000) (hidden camera installed in a bathroom); ***Perry v. State***, 357 Md. 37 (1999) (taping by co-conspirator of conversations with another conspirator); ***Petric v. State***, 66 Md.App. 470 (1986) (secret tape recordings made by union official of his conversations with management representatives); and

Standiford v. Standiford, 89 Md.App. 326 (1991) (husband secretly wiretapping of wife's telephone conversations with others).

In this rapid information technology era in which we live, it is hard to imagine that either an offender or an officer would have any reasonable expectation of privacy with regard to what is said between them in a traffic stop on a public highway. One can turn on a television and watch a myriad of high speed police chases and other law enforcement activities, such as the television show "Cops." These involve law enforcement activities recorded as they occur, often with the approval of and sometimes even with the encouragement of law enforcement agencies. Law enforcement agencies have "ride along" programs. Law enforcement agencies issue press releases and have press conferences where they often relate to the media and the public accounts of their law enforcement activities, including information obtained via various kinds of recording.

As the Attorney General noted, in the last several years a number of courts have held that for purposes of electronic surveillance statutes, exchanges even in a police car do not support an expectation of privacy. *See* for example ***State v. Timley***, 975 P.2nd 264 (Kan1998); ***United States v. Clark***, 22 F.3rd 799 (8th Cir 1994); and ***United States v. McKinnon***, 985 F.2d 525 (11th Cir 1993); ***Gilles v. Davis***, 427 F.3rd 197 (3rd Cir 2005).

The Attorney General's letter of July 7, 2010 collected other cases from our sister states. The Attorney General suggested a number of possible outcomes, the last of which was:

> "Finally, a court can hold that a police stop of an individual necessarily is

> not a private conversation and therefore does not involve an oral communication covered by the State Wiretap Act. This conclusion would be consistent with the suggestion made in a 2000 opinion and with the holdings of the courts in most other states construing state eavesdropping statutes. Given the language of the Maryland statute, this seems to be the most likely outcome in the case of a detention or arrest."

The encounter in this case took place on a public highway in full view of the public. Under such circumstances, I cannot, by any stretch, conclude that the Troopers had any reasonable expectation of privacy in their conversation with the Defendant which society would be prepared to recognize as reasonable.

The State suggests that Count 1 may be "saved" by the provisions of ***CJ 10-402(c)(4)(i),*** which allows law enforcement officers in the course of their duties to record an oral communication during a traffic stop. That addition to the wiretap law was the subject of the 2000 Attorney General's opinion. Interestingly, that particular portion of ***10-402*** allows a police officer to record both oral and video of a traffic stop, but does not require the consent of the alleged traffic violator. I disagree. The legislature is free to provide one set of rules for one party and another set of rules for the other. What is good for the goose is not always good for the gander and vise-a-versa.

For the reasons stated herein, the Defendant's Motion to Dismiss Count One will be by separate Order granted.

I suggested at the hearing of September 3, 2010, that if Count One were to be dismissed, Count Two would likewise have to be dismissed for the simple reason that if the Troopers had no expectation of privacy with regard to their conversation with the Defendant, then the Defendant would be free to disclose the recording he made as he chose. Therefore, by separate Order, Count Two will also be dismissed.

COUNT THREE

Count Three of the indictment charges the Defendant with a violation of ***CJ 10-403(a)***. Count Three reads as follows in pertinent part: "...did unlawfully possess any electronic,

mechanical

or other device knowingly and having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious interception of oral communications..." (Emphasis supplied).

The indictment does not identify the device allegedly possessed by the Defendant. In fact, Count Three specifically uses the word any. Count Three also uses language to the effect that the Defendant knew and had reason to know. The statute, on the other hand, uses the phrase "knowing or having reason to know." (Emphasis supplied) The word "or" generally indicates use in the disjunctive. The State, however, substituted the word "and" for the word "or," thereby binding itself to prove both knowing and having reason to know instead of either. *See* recent discussion in ***Jefferson v. State***, ____ Md.App. _____ (No. 1013, September term 2008, slip opinion filed 9/2/10).

By discovery request filed June 25, 2010, the Defendant sought from the State identification of the alleged device (No. 16, No. 21c). This followed the Defendant's request for a Bill of Particulars (***Rule 4-241***) seeking detailed information from the State as to Count Three (No. 16-19). In its July 7, 2010 response to the Defendant's Request for Particulars, the State did not respond to any of the Defendant's requests concerning the Defendant's concerns with Count Three.

In its July 19, 2010 response to the Defendant's Motion to Dismiss Count Three, the State again does not respond to the Defendant's concerns about Count Three. The State suggested that it could rely on the Statement of Charges filed in the District Court (Case 1R00073830). That Statement of Charges is bereft of any information concerning Count Three other than the following: "TFC Uhler observed a strange looking object on the operator's helmet that was later realized to be a video camera."

Unhappy with the State's response to his request for particulars, Defendant filed a Motion

to Compel on July 6, 2010. In response, the State said it had provided the Defendant with "a list of evidence" which the State intended to use at trial. To try to satisfy the concern, the State provided the Defendant with a supplemental investigation report prepared by a member of the State Police dated May 4, 2010. It likewise does not contain any information as to the alleged device used. All it does is list items seized from the Defendant's residence pursuant to the Search Warrant. From the information in the court's file, the State has never provided the Defendant with specifics concerning the alleged device.

The closest our appellate courts have come to the issue of the scope of devices that fall under the statute is ***Derry v. State***, 358 Md. 325 (2000). ***Derry*** illustrates the Defendant's concern about the substance of Count Three. ***Derry*** primarily involved the device registration requirement of the wiretap statute and how it might affect a suppression motion in a criminal case based on the fact that the device involved was not "registered" with the State Police at the time the recording was made. The Court of Appeals said in part "...the applicability to the particular equipment used ... is an important threshold inquiry for Maryland trial courts..." The court noted that the Panasonic recorder at issue in ***Derry*** might not be the type of device envisioned by the statute. "It might fall outside the class of devices circumscribed by the legislature." The court further noted that if the Panasonic recorder was in fact covered by the statute, then "...untold numbers of clerks, secretaries, and officers... would be forbidden to keep at their desks run-of-the-mill ... recorders ..." (***Derry***, 358 Md. at 346-7).[7] Borrowing from the federal wiretap statute, *see* ***Kassap v. Seitz***, 315 Md. 155 (1989), the Court of Appeals cited to ***United States v. Shriver***, 989 F.2d 898 (7th Cir. 1992), which discusses the intent of congress in enacting the almost identical provision of the federal law with regard to the type of devices. In discussing the type of devices ***Shriver*** said: "[it]...pertains to only a small category of

[7]The actual quote is much longer I have truncated it for ease of reference. Although not necessary for a decision on the suppression issue in ***Derry***, we might say that the Court of Appeals asked the rhetorical question just what is an item whose design renders it primarily useful for surreptitious interception.

electronic devices the designs of which render them sufficiently invasive or devious in purpose to warrant criminal prosecution." A similar observation may be found in ***United State v. Schweihs***, 569 F.2d 965 (5th Cir. 1978) to the effect that the intent of the similar provision of Title 3 was to only been a narrow category of devices which by virtue of their design characteristics were primarily useful for eavesdropping and wire tapping. ***Schweihs*** uses as example the James Bond-esque martini olive transmitter,[8] spike mikes, microphones described as wrist watches, fountain pens, etc. "To be prohibited... the device [must] possess attributes that give pre-dominance to the surreptitious character of its use, such as the spike in the case of the spike mike where the disguise shape in the case of the martini olive transmitter..."[9]

[8] Apparently if the drink had been a Gibson it would be different because Gibson onions are translucent and likely would have revealed the device.

[9] Apparently under the State's theory, the small pocket size recorder I use would be illegal!

The Defendant's dilemma is obvious. ***Rule 4-202(a)*** requires that a charging document, including an indictment, "shall contain a concise and definite statement of the essential facts of the offense with which the defendant is charged and, with reasonable particularity, the time and place the offense occurred." With regard to that latter requirement, the indictment does charge in Count Three that the offense occurred on March 5, 2010 in Harford County. The Maryland General Assembly has from time to time authorized what are commonly known as "short form" indictments for certain offenses.[10] The legislature, however, has not authorized a short form indictment for violations of the wiretap law. *See* discussion in ***Brown v. State***, 44 Md.App. 71 (1979). The Defendant asks the question "what is the device I am charged with possessing?" He could not possibly tell that from the indictment.[11] In the absence of short form authorization, an indictment is required to put the accused on notice within reason of what he is called upon to defend by characterizing and describing the crime and conduct. It is basic due process for a defendant to have some idea as to what he is called upon to defend. *See* ***Ayre v. State***, 291 Md. 155 (1981); ***Jones v. State***, 303 Md. 323 (1985). In ***Ayre***, the Court of Appeals said:

> "We have recognized several times in the past that in order to place an accused on adequate notice two different types of information ought to be provided by the charging document. First, it is essential that it characterize the crime, and second, it should furnish the defendant such a description of the particular act alleged to have been committed as to inform him of the specific conduct with which he is charged."

The State might argue that simply using the words of the statute are sufficient. That is not the case. While it may be argued that the modern trend is away from formalistic pleading requirements, it does not relieve the State of its responsibilities. The State likewise cannot rely

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[10] *See* for example ***Criminal Law Article, 3-206, 3-317, 6-11, 6-210, and 7-108***.

[11] An evening spent browsing in an electronic store, shopping on the internet, and perusing magazines would reveal hundreds if not more of electronic devices that are capable of surreptitious recording. It would include likely almost every cell phone, blackberry, and every similar device not to mention dictation equipment and other types of recording devices.

on an assumption that the party charged knows what he is alleged to have done. *See* ***Imbraguglia v. State***, 184 Md. 174, 177-78 (1944).

The Defendant also complains that Count Three of the indictment provides no indication as to why the State believes that he knew and had reason to know that the design of the unnamed device rendered it primarily useful for the purpose of surreptitious interception. Sufficiency of a charging document is primarily governed by ***Rule 4-202(a),*** but the due process requirements of the Fourteenth Amendment to the United States Constitution and Article 21 of the Declaration of Rights apply. The liberalization of pleading does not change the principle "that in all criminal prosecutions every man hath a right to be informed of the accusation against him." *See* ***Article21 of Maryland Declaration of Rights***. Two of the five purposes served by the due process requirements are to put an accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct and enabling him to prepare for trial. It may also provide a basis for a court to consider the legal sufficiency of the charging document. *See* ***Edmund v. State***, 398 Md. 562, 576 (2007).

The Defendant posits "the offense is determined by the facts stated in the indictment." ***Duncan v. State***, 282 Md. 385, 389 (1978). Defendant suggests, however, that there are no such facts in Count Three. All Count Three does is parrot the language of the statute. I agree Count Three is defective and must be dismissed. In light of my decision regarding the sufficiency of Count Three, I do not address the constitutionality of ***Section 10-403(a)***.

COUNT SEVEN

Count Seven of the Indictment charges the Defendant with a violation of ***Section 21-1126, Transportation Article***, which provides as follows:

> "A person may not commit or engage another person to commit a violation for the purpose of filming, video taping, photographing, or otherwise recording the violation unless the person obtains written permission for the commission of the violation from: (1) the Secretary of State Police or the Secretary's designee; or (2) the Chief Executive Officer of the governing body of the county in which the violation is to occur, or the Chief Executive Officer's designee."

For purposes of the statute, the term violation is defined as any violation of the vehicle law which is punishable by imprisonment or a violation of ***Transportation 21-901.1(a)*** - reckless driving. By the very words of the statute, a person could deliberately violate any provision of the motor vehicle law and film it, unless the violation was reckless driving or a "jailable" offense. Jailable motor offenses are set forth primarily in ***Title 27*** of the ***Transportation Article***. The statute was enacted by ***Chapter 335*** of the ***Laws of Maryland 2006*** (HB616). As originally introduced to the General Assembly, HB616 simply made it a misdemeanor to conspire to engage in one of the prohibited activities. The original version of the bill also contained a provision stating it did not apply to a law enforcement officer acting within the scope of the officer's official duties. Apparently, as originally proposed, officers could engage in the prohibited activities and film them, but no one else could. The original version also applied only to conspiracies not to actual violations. Through the legislative process it was completely re-written into the version enacted. Other than to summarize the essence of the statute as enacted, the purpose clause is of no help in defining the intent of the legislature nor is the revised policy note of the Department of Legislative Reference.

Transportation Article 8-101 defines the terms highway, primary highway, secondary highway, etc. for purposes of various provisions of the ***Transportation Article***. All of them, however, are public roads. ***Section 16-101*** provides that an individual must be appropriately licensed to drive a motor vehicle on any highway of this State. ***Transportation 21-101.1*** provides that the "rules of the road" (***Title 21***) apply to the driving of vehicles on highways except with regard to certain exceptions not applicable here. It, therefore, seems only logical that ***21-1126*** applies only on public roads. It would also appear that a person could deliberately violate any provision of the ***Maryland Motor Vehicle Code*** for the purpose of recording the violation so long as the violation is not reckless driving or a jailable motor vehicle offense. A person could, therefore, speed, run a red light, follow too closely, fail to keep to the right of

center, etc. and tape it, so long as he did not engage in reckless driving or a jailable offense. On the other hand, a person driving suspended for failing to pay child support or failing to appear in the District Court for a traffic citation could not film his driving even though he was violating no other provision of the ***Motor Vehicle Code*** without getting the requisite permission. Not every piece of legislation has to be totally logical. Not to mention the very concept of giving the executive branch of state and local government standardless plenary authority to grant permission to commit a criminal misdemeanor.

Defendant has likewise moved to dismiss Count Seven and filed a memorandum in support thereof on August 30, 2010. Defendant's memorandum was a supplement to his Motion to Dismiss Counts One, Two, Three and Seven which was filed on July 1, 2010. Defendant suggests that the statute suffers from a number of constitutional infirmities. Defendant suggests: "***Section 21-1126*** is unconstitutional on its face under the First Amendment of the United States Constitution and ***Articles 2*** and ***40*** of the ***Maryland Declaration of Rights***." He has two fall back positions. They are that ***Section 21-1126*** is unconstitutional as applied to the facts of this case and the statute provides no guidance of how approvals are to be given. He suggests a comparison to ***Transportation 21-1211*** providing for approval of motor vehicle and bicycle racing events on highways, but including a number of conditions that must be satisfied for such approval. The State did not file a responsive memorandum as to Count Seven.

Article 2 of the ***Declaration of Rights of the Maryland Constitution*** recognizes that the Constitution and laws to the United States are the supreme law of the State. ***Article 40*** of the ***Declaration of Rights*** on the other hand is the Maryland equivalent of the First Amendment to the United States Constitution, although the First Amendment to the United States Constitution and ***Article 40*** have some differences. Both of them, however, for purposes of Count Seven, provide for protection of freedom of speech and have historically been treated in *pari materia*. ***Freedman v. State***, 233 Md. 498 (1964) reversed in 380 U.S. 51 (1965)(but principal of *pari*

materia still good); ***Jakanna Woodworks v. Montgomery County***, 344 Md. 584 (1997). *See* discussion in ***Davis v. DiPino***, 121 Md.App. 28, affirmed in part 354 Md. 18 (1999), a case in which an individual was arrested for the crime of "hindering" as a result of revealing publically that an individual was in fact an undercover police officer. ***DiPino*** also involved, although in a civil context, alleged violations of the First Amendment and Article 40. Officer DiPino arrested Mr. Davis for obstructing and hindering based on her belief that Davis having "blown her cover" would negatively affect her job as an undercover officer. There was no question in that case that the words uttered by Mr. Davis were done in a public forum. There is likewise no question in this case that Mr. Graber's actions likewise took place in a public forum. Quoting from ***City of Houston v. Hill***, 482 US 451 (1987) the Court of Appeals said: "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation form a police state."

To be sure, not all forms of speech (including video taping) are absolutely protected. Speech directed to inciting or producing lawless action is not protected. There is no claim by the State in this case that Mr. Graber's actions did so or were intended to do so. Why should Mr. Graber have to seek the permission of governmental authorities to do something otherwise protected, whether he intended to violate any provision of the Motor Vehicle Law or not?

Criminal statutes which implicate the free speech protections of the First Amendment must be narrowly construed. ***Pendergast v. State***, 99 Md.App. 141 (1994). Many courts have held that the video taping of public events is protected under the First Amendment. ***Iacobucci v. Boulter***, 193 F.3rd 14 (CA1 1999) (Plaintiff's videotaping of conversation in a town hallway was protected, and thus his disorderly arrest was unlawful); ***Forydyce v. Seattle***, 55 F.3rd 436 (CA9 1995) (reversing dismissal of claims against police officer who sought to interfere with plaintiff's exercise of his right to film matters of public interest by videotaping a protest march of which he was a part). A state statute which attempted to prevent a convicted felon from "profiting" by

publishing descriptions of his crime did not pass First Amendment scrutiny. ***Simon and Schuster v. New York State Crime Victim's Board***, 502 US 105 (1991). Defendant suggests that the only element that distinguishes ***Transportation 21-1126*** from the underlying traffic offenses enumerated therein is the intent to engage in a constitutionally permitted activity. Relying on ***Simon and Schuster***, *supra*, the Defendant suggests "the State may no more punish making a film that depicts those offenses than it may punish writing a book that depicts them."

Defendant also suggests that ***21-1126*** suffers from another infirmity in that it provides no guidelines or criteria to be applied by a public officer when permission is sought. The Defendant is correct in the abstract that the statute does not contain any guidelines in that regard. I do not, however, have to decide that issue. I have concluded after reviewing the pertinent authorities and the Defendant's legal arguments that the Defendant is correct. With all due respect to the Maryland General Assembly, it cannot criminalize an otherwise protected activity.[12]

A FINAL OBSERVATION

Those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public. When we exercise that power in public fora, we should not expect our actions to be shielded from public observation. "*Sed quis custodiet ipsos cutodes*" (*See* ***State v. McCray***, 267 Md. 111, 1972 at 114).

For the reasons stated herein, a separate Order has been entered of even date herewith dismissing Counts One, Two, Three and Seven. In light of my dismissal of these counts, the

[12]This opinion, of course, deals only with the current version of ***Transportation 21-1126***. This is not to say that a different more narrowly drafted statute would not pass constitutional muster.

Defendant's Motion to suppress evidence and Motion to compel particulars are denied as moot. Only Counts Four, Five, and Six remain, which contain traffic violations.

Dated: September 27, 2010

/s/ Emory A. Plitt, Jr.

EMORY A. PLITT, JR. Judge

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STATE OF MARYLAND	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiff		
v.	*	**FOR**
ANTHONY JOHN GRABER, III	*	**HARFORD COUNTY**
	*	**Case No. 12-K-10-647**
Defendant		
	*	

* * * * * * * * * * * * *

ORDER

For the reasons stated by the court in the opinion of even date herewith, it is ***ORDERED*** this 27th day of September, 2010, as follows:

1. Defendant's Motion to dismiss Counts One, Two, Three and Seven of the indictment is granted;

2. Defendant's Motion to suppress evidence and Motion to compel particulars are denied as moot;

/s/ Emory A. Plitt, Jr.

EMORY A. PLITT, JR.. Judge

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