Video and Audio "Recording" Police Conduct in Public Now Protected by First Amendment – U.S. Supreme Court Lets Appeal Opinion of 7th U.S. Circuit Stand

Posted by Kevin Earl Wood+Posted on Thursday, November 29th, 2012
Panama City, Bay County, Florida

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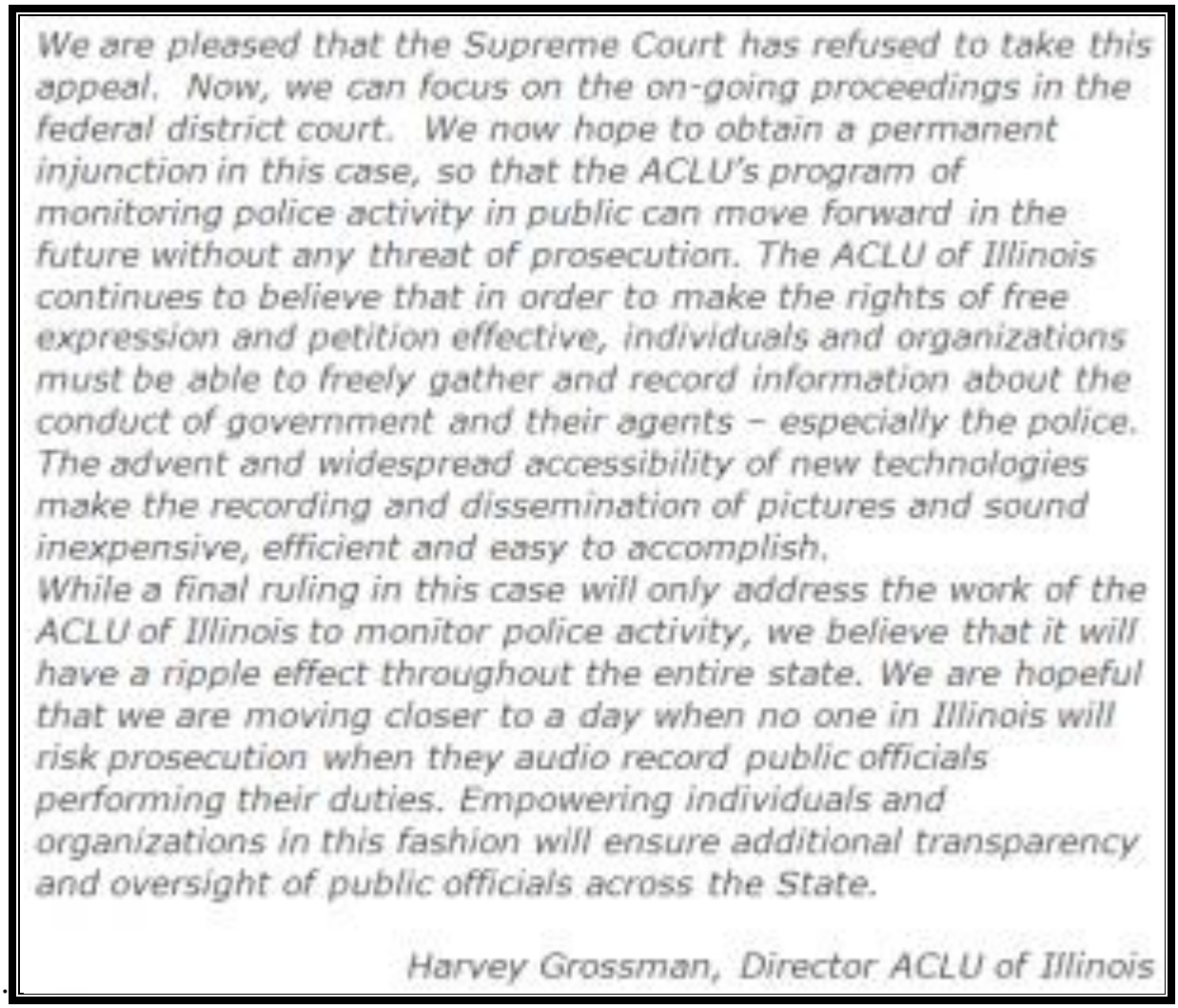
The U.S. Supreme Court has left standing an opinion of the U.S. Seventh Circuit Court of Appeals finding that audio and video recording of police actions in public is protected conduct by the First Amendment to the U.S. Constitution. The Supreme Court denied certiorari review of the Seventh Circuit opinion on November 26, 2012 in Anita Alvarez vs. ACLU of Illinois, case number 12-318.

State's Attorney Anita Alverez

Cook County, Illinois, State Attorney Anita Alvarez has aggressively defended enforcing the Illinois state law that makes recording a conversation without the consent of all parties a felony. If the person recorded without his or her consent is a police officer then the penalty is bumped up to a Class 1 felony and a possible prison sentence of fifteen (15) years.
Ms. Alvarez has not yet taken any action to ensure the public that they will not be prosecuted under the law. Because the threat of criminal prosecution exists, the American Civil Liberties Union (ACLU) of Illinois filed suit in federal court seeking a court declaration that the Illinois law is unconstitutional under the First Amendment. The Seventh Circuit on appeal agreed



The ACLU is also asking the court for an injunction against any prosecution under the state law by Ms. Alverez. The case will now be sent back to the federal trial court for further action consistent with the Seventh Circuit's opinion.

ACLU of Illinois Director Harvey Grossman says that now they will seek a permanent injunction with the federal trial, U.S. District Court.

Bay County and this reporter are no strangers to "recording" cases. In 1993 this reporter recorded a telephone conversation placed to an FBI agent and with a federal witness.

The witness was under investigation by the Panama City Police Department (PCPD) for allegedly committing perjury in state and federal proceedings. She was eventually prosecuted in state proceedings for perjury.

The FBI Agent, Joe Tierney, had provided false information to PCPD that there was no evidence of perjury.

This reporter called Mr. Tierney and recorded the conversation. Mr. Tierney confirmed the information was false and that he had never been in "open court" involving this reporter.

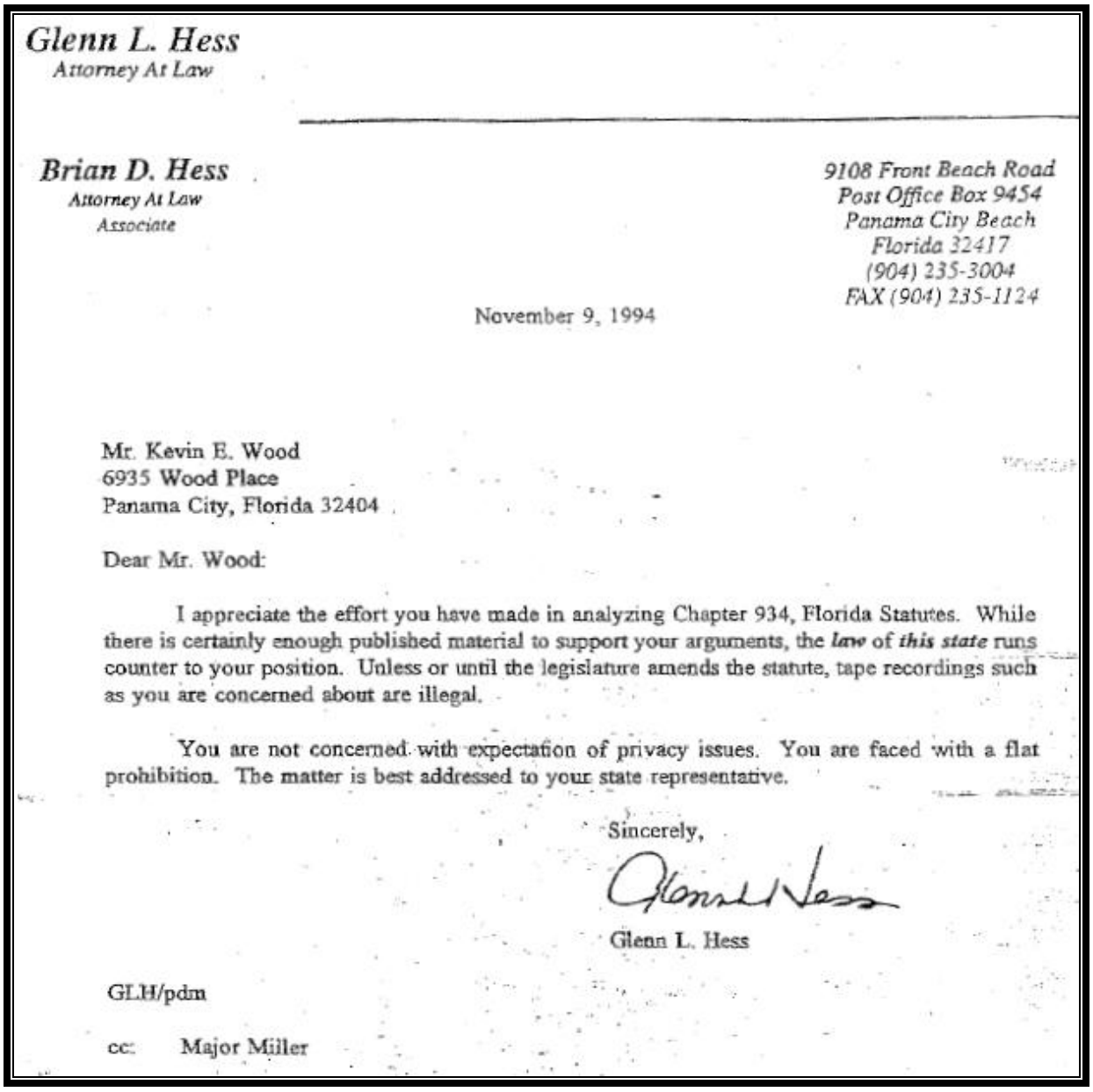
When the two tapes were turned over to PCPD criminal investigator Jimmy Stanford, this reporter was arrested and charged with two counts of felony "interception" of an oral communication.

This reporter was convicted in circuit court in Bay County and sentenced. While serving the sentence the First District Court of Appeals overturned the conviction finding that a good faith determination that federal or Florida law permitted the conduct is a complete defense under Section 934.10 Florida Statutes.

The case was remanded for a new trial and the governor appointed a Special Prosecutor, Harry Shorstein, Jacksonville, to take over the case. Mr. Shorstein then dropped all charges by nolle prossequi.

This reporter was arrested again for recording a conversation with PCPD officers in a public McDonald's restaurant. The state attorney dropped the charges.

Another citizen activist, Randy Fowler, aka Jim Bikeman, was arrested in the lobby of State Attorney Jim Appleman. The court later dismissed the charges finding a public official conducting public business in a public place had no expectation of privacy.



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November 9, 1994

Mr. Kevin E. Wood
6935 Wood Place
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Dear Mr. Wood:

I appreciate the effort you have made in analyzing Chapter 934, Florida Statutes. While there is certainly enough published material to support your arguments, the ***law*** of ***this state*** runs counter to your position. Unless or until the legislature amends the statute, tape recordings such as you are concerned about are illegal.

You are not concerned with expectation of privacy issues. You are faced with a flat prohibition. The matter is best addressed to your state representative.

Sincerely,

Glenn L. Hess

GLH/pdm

cc: Major Miller

Mr. Fowler was again arrested for recording his conversation with PCPD officers outside the Bay County Public Library. Again, the court dismissed the charges.

In 1994 current State Attorney Glenn L. Hess advised then Bay County Sheriff Guy Tunnell that there is a "flat prohibition" against citizens recording conversations to which they are a party.

The above cases that have been dropped or dismissed in Bay County seem to belie Mr. Hess's position.

Under Florida law, like Illinois law, consent of all parties is required to "intercept" an oral communication. However, this is only true where a person is in a circumstance where there is a reasonable belief that his or her communication is not subject to interception.

In the Bay County cases the basic theory relied upon is that a communication uttered in a public place is subject to interception, and recording, by persons who can overhear the conversation with the normal human ear.

In 1984 the Florida Supreme Court heard a case, Inciarrano vs. State of Florida, where a victim of a murder in his own office surreptitiously recorded his own murder with a tape recorder. The Supreme Court held that the recording was lawful and could be used as evidence against the murderer. This case further belies Mr. Hess's claim in 1994 that there is a "flat prohibition."

Mr. Hess was asked for comment and responded, "My position, and the position of this office, is: we will follow the laws of the State of Florida as they are interpreted, dictated and implemented by the Legislature and the appellate courts of the State of Florida." Mr. Hess declined to comment on his 1994 legal advice to the Sheriff.