

# State's eavesdropping law subject of two high court cases Tuesday

BY DAVE GONG

Law Bulletin correspondent

Two cases set for oral arguments before the Illinois Supreme Court on Tuesday question the constitutionality of the state's long-standing eavesdropping law, which bans the audio recording of conversations without the consent of all parties involved.

"This is a clash between two critical societal values — the public's right to know and the individual's right of privacy," said Donald J. Ramsell, owner of Ramsell & Associates LLC in Wheaton, who represents the defendant in one of those cases.

"The problem we have in society is the law sometimes swings too far one way or the other, and it becomes problematic."

The state Eavesdropping Act, which bans recording a conversation unless all parties consent, has sparked controversy in recent

years. Though federal and state trial court rulings dating back to 2009 have found the statute unconstitutional, it has remained on the books, and 2012 efforts to revise the law in the state legislature proved unsuccessful.

A first offense under the statute constitutes a Class 4 felony, punishable by up to one year in prison. Unauthorized audio recording of a law enforcement officer, prosecutor or judge is a Class 1 felony.

The cases will be argued back-to-back on Tuesday, though they are factually different and deal with different types of audio recording.

The first — *People v. Annabel Melongo*, No. 114852 — involves audio recordings of a series of phone conversations between the defendant and a Cook County court reporter.

The second case — *People v. Deforest Clark*, No. 15776 — relates to criminal charges for recording in-person conversations with an

opposing attorney during a child support hearing in Kane County, as well as related court proceedings.

In the first case, the state charged Annabel K. Melongo with six felony counts under the eavesdropping statute after she recorded conversations between herself and court reporter Pamela Taylor. Melongo later published the recordings, along with corresponding transcripts, to her website, [illinoiscorruption.net](http://illinoiscorruption.net).

At trial, Melongo didn't dispute that she had recorded the conversations, but cited a statutory exemption to the law that allows someone to record a conversation to collect evidence if there is reason to believe the other person "is committing, about to commit or has committed" a crime against them.

In the second case, Deforest Clark was charged with two felony counts after he was accused of secretly recording a child support

EAVESDROP, Page 24

# Eavesdrop

hearing presided over by then-Kane County Circuit Judge Robert Janes.

Clark also allegedly secretly recorded a conversation in a courthouse hallway between him and opposing attorney Colleen Thomas.

Both defendants have challenged the statute on freedom of speech and due process grounds and cite a 2012 7th U.S. Circuit Court of Appeals ruling in *American Civil Liberties Union of Illinois v. Alvarez*, which found that the eavesdropping law's ban on openly recording police officers performing their duties in public is unconstitutional.

Daniel M. Feeney, a partner at Miller, Shakman & Beem LLP who represents Melongo, said the act of recording is a First Amendment activity and "applies to public officials when they are performing their duties with members of the public."

If recording police officers in their official capacity is acceptable, he said, that right should extend to the recording of other public officials as well.

"The purpose (of the statute) the state has espoused is to protect conversational privacy," said Feeney, who is handling the case along with firm partner Gabriel

Bankier Plotkin. "However, the statute has detached itself from its intended purpose and is overbroad."

Nicole R. Sartori, an attorney at Fox Valley Law Center Ltd. in Aurora representing Clark, agreed that the statute is too broad, adding that she believes the law needs to be narrowly tailored if it's going to make an act a felony punishable by time in prison.

"I think it's got to be a higher standard if you're going to criminalize something to that degree," said Sartori, who is teaming with Ramsell in the *Clark* case.

In both disputes, circuit court judges declared the statute unconstitutional on its face — action that sent the cases directly to the high court — and dismissed the charges against the defendants.

Cook County Circuit Judge Steven J. Goebel wrote in his ruling in *Melongo* that he "finds that the statute cannot be constructed in a manner that would preserve its validity, and judgment cannot rest on alternative ground."

Alan J. Spellberg, a Cook County assistant state's attorney, will argue *Melongo* before the high court. Spellberg declined to comment.

The state's brief to the justices argues that the "defendant offers



Nicole R. Sartori

no authority from any jurisdiction holding that the First Amendment includes a right to surreptitiously record telephone conversations."

It also contends the requirement that all parties involved in a conversation give consent prior to audio recording "provides clarity to all as to what is required before a conversation may be recorded."

In *Clark*, Kane County Circuit Judge David R. Akemann ruled that the statute violates substantive due process and freedom of speech rights granted in the state and federal constitutions.

"The purpose of the eavesdrop-

ping statute is to protect the conversational privacy of citizens ... the statute makes no requirement that there be a reasonable expectation of privacy in the conversations at issue in order for a violation of the statute to occur," Akemann's opinion says.

"There is not a sufficient connection between the expansive means adopted by the statute and its purpose in protecting conversational privacy to even overcome a rational basis analysis, much less the rigor of intermediate scrutiny."

Assistant Attorneys General Michael M. Glick and Eric M. Levin, in their brief to the high court, argue the law isn't unconstitutional because when people converse, they "often expect that even the conversations they have in public ... will nevertheless remain private — and certainly that they will not be recorded for posterity and possible worldwide publication."

Glick and Levin declined to comment on the *Clark* dispute.

Arguments begin at 9:30 a.m. Tuesday at the Bilandic Building, 160 N. LaSalle St. Audio and video can be accessed later in the day on the high court's website, [state.il.us/court](http://state.il.us/court).

[dgong@lbpc.com](mailto:dgong@lbpc.com)

FROM PAGE 4

## Cotter

the case was never solved. The students discussed how a man with that experience might as chief justice guide a court to extending criminal rights of the accused.

We discussed how the Marshall/Story court through circuit riding was able to select cases of

note for the Supreme Court to hear.

This spring, we will explore with the students the two Marshalls, Chief Justice John Marshall and Justice Thurgood Marshall. Students will explore John Marshall, the Revolutionary War

hero and his influence in the constitutional convention in Virginia. We will explore Thurgood Marshall's fights against lynchings and segregation and his work as "Mr. Civil Rights."

And we will discuss in depth both of these justices' jurispru-

dence and how their lives before wearing the black robes might have provided perspective to both of these justices.

We hope that the students are as excited as I am to be able to participate in this exciting, rigorous, challenging historical exploration.

FROM PAGE 6

## Abortion

law limits their ability to be on a public sidewalk with a message — though disagreeable to some — they have a right to express.

"The public sidewalk has effectively been made private property," said Bill Cotter of the anti-abortion

of snow had fallen overnight, McCullen and a few other protesters were back, handing out roses.

"Every child deserves a birthday. Save a child today," one man said whenever people entered the clinic.

McCullen said she sometimes

pregnancy.

"I'll go to the hospital and then have the baby christened, if they want," she said.

There is steady foot traffic along Commonwealth Avenue in front of Planned Parenthood, including

minutes before they entered the clinic.

When the women emerged 45 minutes later, they went with McCullen into the nearby market, came out with diapers and groceries and drove off with her in her blue Mercedes-Benz.