

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	05-00344-01-CR-W-ODS
)	
GARY EYE,)	
)	
Defendant.)	

**DEFENDANT EYE’S SEPARATE AND INDIVIDUAL
OBJECTIONS TO THE MAGISTRATE’S REPORT AND
RECOMMENDATION TO THE DISTRICT COURT
RECOMMENDING THAT DEFENDANTS’ JOINT MOTION TO
SUPPRESS TAPE RECORDED CONVERSATIONS MADE AT
THE JACKSON COUNTY JAIL OF DEFENDANT EYE BE
DENIED WITH SUGGESTIONS IN SUPPORT**

COMES NOW Defendant Eye and hereby files his separate and individual objections to the Report and Recommendation (R&R) of the United States Magistrate Judge in which the Magistrate recommends to the district court that the motion to suppress be denied.

The Magistrate’s 26 page R&R sets out the facts from the suppression hearing with commendable clarity and accuracy for the most part but then recommends denial of the motion to suppress because:

I find that defendants were repeatedly warned that their calls **could be** monitored, the evidence establishes (and they admitted) they knew the calls **could be** monitored, they used the telephones despite that knowledge, and therefore they impliedly consented to the recording of their calls. Therefore, defendants’ motion to suppress should be denied.

(emphasis added)¹

In his motion to suppress, defendant cited *Deal v. Spears*, 980 F.2d 1153 (8th Cir. 1992) as controlling authority from this Circuit that defendant believes to be squarely on point. The R&R relies on opinions from other Circuits that appear to support the Magistrate's recommendation; however, there is no attempt to distinguish *Deal*. Indeed, there is no discussion of *Deal* or for that matter *U.S. v. Corona-Chavez*, 328 F.3d 974 (8th Cir. 2003), albeit not cited by defendant in his original motion, a more recent criminal case which reaffirms the key holding in *Deal*.² *Deal* hold:

There is no evidence of express consent here. Although constructive consent is inadequate, actual consent may be implied from the circumstances. See *Griggs-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir. 1990). Nevertheless, "[c]onsent under title III is not to be cavalierly implied. . . . [K]nowledge of the capability of monitoring alone cannot be considered implied consent." *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 581 (11th Cir. 1983) (citations omitted).

We do not believe that Deal's consent may be implied from the circumstances relied upon in the Speares' arguments. The Speares did not inform Deal that they were monitoring the phone, but only told her they might do so in order to cut down on personal calls. Moreover, it seems clear that the couple anticipated Deal would not suspect that they were intercepting her calls, since they hoped to catch her making an admission about the burglary, an outcome they would not expect if she knew her calls were being recorded. . . .

Given these circumstances, we hold as a matter of law that the

¹ The Magistrate uses the term "could be" in his summary findings. The actual logo on the phone, as noted in the R&R, contained the admonition "[c]alls are subject to monitoring and recording." There is not a shred of evidence that Mr. Eye was ever told or specifically knew that any particular call was in fact being recorded, much less all of them. Moreover, the latter does not appear to be a disputed fact in the R&R.

² *Deal* is a civil case; however, its entire focus is on what constitutes consent under Title III, the wiretap statute, so the fact that it was not a criminal case is of little significance.

Spearses have failed to show Deal's consent to the interception and recording of her conversations.

In *U.S. v. Corona-Chavez*, 328 F.3d 974 (8th Cir. 2003) the 8th Circuit reaffirmed the basic holding in *Deal* and then cited *United States v. Horr*, 963 F.2d 1124 as an example of what is required for actual consent. *Horr* coincidentally is the only 8th Circuit case cited by the Magistrate in the R&R. In *Horr* the Court found that Horr actually knew he was being recorded as opposed to the possibility he might be which is of course the crucial distinction under the law of this Circuit and the facts in this case:

Horr impliedly consented to the taping of his telephone conversations. Upon entering FMC, all prisoners are given an admission and orientation handbook which indicates that inmate telephone calls are monitored and recorded. Inmates are also told about this policy at orientation. Although Horr claimed at the suppression hearing that it was not his signature - testimony that the magistrate judge did not find credible - Horr signed a form indicating that he was aware of the telephone policy. Moreover, Horr testified that he had seen signs posted near the telephones which state: "The Bureau of Prisons has the authority to monitor conversations on this telephone. Your use of the institutional telephone constitutes consent to this monitoring. A properly placed telephone call to an attorney is not monitored."

At the Circuit level each panel is bound by the opinion of another panel and only an *en banc* panel has authority to alter a prior decision. *Moore v. Kinney*, 278 F.3d 774 (8th Cir. 2002); *Planned parenthood v. Miller*, 63 F.3d 1452 (8th Cir. 1995); *U.S. v. Hale*, 977 F.2d 455 (8th Cir. 1992). This is true no matter to what extent a particular panel might disagree with the result reached in another prior panel decision. *Holloway v. Conger*, 896 F.2d 1131 (8th Cir. 1990). On the other hand, in the absence of controlling authority (something we do not have in this case given the *Deal* decision) in the interest of uniformity, a court of appeals or a district court is not justified in refusing to follow the

decision of another court of appeals unless satisfied that the prior decision is clearly erroneous. *Mitchell v. Hygrade Water & Soda Company*, 285 F.2d 362 (8th Cir. 1960). Obviously, the Magistrate and the district court are therefore bound to follow the same rules imposed on a panel of the Circuit and must follow the law of the Circuit.

Thus, while there appears to be a split of authority between the 8th Circuit and the holdings in the cases cited by the Magistrate in his R&R as to what may be implied or inferred from extraneous circumstantial facts pointing to the clear possibility of monitoring, this Court is bound to follow the ruling in *Deal v. Spears*, 980 F.2d 1153 (8th Cir. 1992) which imposes a far more restrictive test.

There is also the issue of the introductory preamble warning that is automatically played prior to the use of the phone system which again admonishes the user that calls are “subject to” being recording. The R&R points out that in Mr. Eye’s case that only one of 14 calls actually contained the preamble warning because of a computer problem, although the logo was apparently on the face of the phone. The absence of the warning in the majority of instances and its presence in one further clouds the situation.

Finally, the R&R concludes that Mr. Eye engaged in guarded conversation which the FBI agent opined was code, suggesting that Mr. Eye in fact knew he was being recorded in that particular conversation. From this he extrapolates that Mr. Eye in fact knew all calls were recorded and thereby consented. This is simply not supported by the evidence before the Magistrate. Moreover, this again misses the whole point of *Deal*. Mr. Eye did not know in fact he was being recorded and did not consent in fact to such a recording and at best only knew that he was “subject to” at some point in time the

possibility of being recorded. Defendant submits that *Deal* controls and the tapes must be suppressed.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was caused to be emailed to David Ketchmark, Assistant US Attorney, WDMo, Kansas City, Missouri and other counsel in the case via the electronic document filing system on Wednesday, September 06, 2006.

/s/

JOHN R. OSGOOD