

To: New Jersey Law Review Commission
From: Joseph Miller, Legislative Law Clerk
Re: Use of Civilian Monitors Under N.J.S. 2A:156A-12 as discussed in *State v. Burns*, 462 N.J. Super. 235 (App. Div. 2020)
Date: April 05, 2021

MEMORANDUM

Executive Summary

The New Jersey Wiretapping and Electronic Surveillance Control Act (the Act) regulates the process that the state and local law enforcement must follow when intercepting communication for the purposes of a criminal investigation.¹ The Act contains a section intended to reduce the intrusion on individual privacy rights.²

In *State v. Burns*, the Appellate Division considered, as a matter of first impression, whether the State's use of “federally-contracted civilian monitors” to intercept communications was lawful under the Act.³ N.J.S. 2A:156A-12 is known as the “minimization section” of the Act; it concerns the requirements and limitations placed on an order under the Act. The minimization section allows “investigative or law enforcement officers” to participate in wiretap investigations, but it is silent on whether the State may utilize civilian monitors.⁴

The Court determined that because the civilian contractors had been deputized and sworn in as “special county investigators,” they were “investigative or law enforcement officers” under the minimization section.⁵ As a result, the Court declined to review whether the Act permits non-deputized civilian personnel to monitor intercepted communication.⁶ Instead, the Court said that the Legislative and Executive branches of government would be better suited to address whether the minimization section includes non-deputized civilians.⁷

Statute Considered

Subsection e. of N.J.S. 2A:156A-12 provides that the “identity of the **investigative or law enforcement officers or agency** to whom the authority to intercept a wire, electronic or oral communication is given and the identity of whoever authorized the application... (emphasis added)”

¹ N.J. STAT. ANN. § 2A:156A-1. et seq. (West 2021).

² N.J. STAT. ANN. § 2A:156A-12 (West 2021).

³ *State v. Burns*, 462 N.J. Super. 235, 238 (App. Div. 2020), cert. denied, 241 N.J. 477 (2020).

⁴ *Id.* at 245.

⁵ *Id.* at 246.

⁶ *Id.* at 248.

⁷ *Id.*

Background

In *State v. Burns*, the defendants plead guilty to drug distribution after their motion to suppress was denied in the Law Division court.⁸ Following an 18-month investigation conducted by the Burlington County Prosecutor's Office and the Drug Enforcement Agency (DEA), the defendants were indicted on various charges associated with drug trafficking.⁹ The investigation included the interception of communication over four cellular telephone facilities subscribed to by the defendant, which implicated the defendants in cocaine and drug transactions.¹⁰

To obtain the wiretap authorization, the prosecutor's office submitted a sixty-six-page affidavit to support their application.¹¹ The affidavit indicated that individuals conducting the surveillance would include DEA agents "as well as civilian monitors contracted by that agency, all of who[m] have been sworn as Special County Investigators/Detectives."¹²

The County Prosecutor deputized each monitor as a special county investigator.¹³ The Prosecutor witnessed each monitor take an oath as they were sworn in.¹⁴ The County provided each monitor with written and oral minimization instructions consistent with New Jersey Supreme Court precedent.¹⁵ Additionally, a supervisor was present in the wire room at all times, and a supervising assistant prosecutor was made available to address any issue that arose not covered in the instructions.¹⁶

At trial, the defendants moved to suppress evidence obtained through the wiretap investigation, claiming that the use of civilian monitors rendered the warrant application invalid.¹⁷ Additionally, the defendants claimed that the Prosecutor exceeded his authority by appointing special county investigators to monitor intercepted communication.¹⁸

The Act does not include any reference to the use of civilian personnel in wiretap investigations.¹⁹ The Law Division denied the defendant's motion, noting the lack of precedent prohibiting the implementation of civilian monitors, because the monitors, in this case, had been sworn in as special investigators and as such were "law enforcement officers" as defined by the

⁸ *Id.* at 241-2.

⁹ *Id.* at 238.

¹⁰ *Id.* at 239

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 239-40.

¹⁵ *Id.* (citing *State v. Catania*, 85 N.J. 418, 427-29 (1981))

¹⁶ *Id.*

¹⁷ *Id.* at 241.

¹⁸ *Id.*

¹⁹ *Id.*

Act.²⁰

On appeal, the defendants reasserted their claim that the utilization of civilian monitors violated the Act's minimization section.²¹ The State asserted that the Prosecutor acted within his authority to appoint special county investigators when he appointed the civilian monitors.²²

Analysis

The New Jersey Supreme Court previously indicated that the Act is “more restrictive” than Title III, the federal act on which it was modeled, in certain respects.²³ Further, the Supreme Court determined that “the Legislature intended to lay down stricter minimization guidelines than did Congress.”²⁴

After its enactment, the federal minimization section was amended to allow civilian personnel to monitor intercepted communications.²⁵ The New Jersey Legislature amended the State minimization section three times; none of those changes expressly permit civilian personnel to monitor to participate in wiretap investigations.²⁶

In *Burns*, the Court declined to review the Legislature's intent because it viewed the DEA civilian contractors in question as deputized “investigators and, as such, were no longer acting in a civilian capacity.”²⁷

Under the Act, “investigative or law enforcement officers” or the agency that sought the wiretap authorization may intercept communications.²⁸ The Act defines “investigative or law enforcement officers” as “any officer of the State of New Jersey... **who is empowered by law to conduct investigations** of, or to make arrests for, any offense enumerated in [the Act]... [emphasis added].”²⁹ N.J.S. 2A:157-10 outlines the Prosecutor's power to appoint investigators necessary to

²⁰ *Id.* (citing N.J. STAT. ANN. § 2A:156A-2(f) (West 2021) (“Investigative or law enforcement officer” means any officer of the State of New Jersey or of a political subdivision thereof who is empowered by law to conduct investigations of... any offense” under the Act)).

²¹ *Id.* at 242.

²² *Id.* at 243.

²³ *Id.* (citing *State v. Feliciano*, 224 N.J. 351, 367-68 (2016); *State v. Ates*, 217 N.J. 253, 266 (2014); *State v. Catania*, 85 N.J. at 427-29 (1981); *State v. Diaz*, 308 N.J. Super. 504, 510 (App. Div. 1998)).

²⁴ *Id.* at 243-4 citing *Catania*, 85 N.J. at 427-29

²⁵ *Id.* at 245 (citing 18 U.S.C. § 2518(5) (allows “an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer” to conduct an interception”))

²⁶ *Id.* (citing N.J. STAT. ANN. § 2A:156A-12.)

²⁷ *Id.*

²⁸ *Id.* (citing N.J. STAT. ANN. § 2A:156A-9(b) (Application to wiretap “shall state ... [t]he identity and qualifications of the investigative or law enforcement officers or **800 agency for whom the authority to intercept a wire, electronic or oral communication is sought ...”); N.J. STAT. ANN. § 2A:156A-10(e)(Judge must determine if there is probable cause for “[t]he investigative or law enforcement officers or agency to be authorized to intercept the wire, electronic or oral communication are qualified by training and experience to execute the interception sought ..”); N.J. STAT. ANN. § 2A:156A-12.)

²⁹ *Id.*

perform the functions of their office.³⁰

The Court noted that the Prosecutor had the authority to deputize the civilian monitors as special county investigators for the purpose of the wiretap application.³¹ Further, the Court reasoned that when the monitors took their oath, they ceased acting as “civilians” and became “investigative or law enforcement officers[,]” as defined by the Act.³² Thus, the monitors fit within the bounds of N.J.S. 2A:156A-12 when they intercepted communications authorized by the wiretap judge.³³

The State cited a recent amendment to N.J.S. 2A:156A-35(a), which defines a “[m]ember of a New Jersey law enforcement agency” as “any sworn or civilian employee of a law enforcement agency...”³⁴ The Court noted that it is arguable that the section applies broadly to the entire Act.³⁵ The term “member of an NJ law enforcement agency”, however, is not referenced anywhere in the Act.³⁶ The Court did not address the State’s arguments regarding this section because it did not rely on this section in its decision.³⁷

The Court noted that this decision did not require it to determine if the minimization section permits civilian personnel to monitor intercepted communications when they are not deputized as special investigators or other law enforcement officers as defined in the Act.³⁸ Instead, the Court stated that this determination would be best left to the Legislature and Executive branch.³⁹

The New Jersey Supreme Court subsequently denied a petition for certification.⁴⁰

Pending Legislation

There are currently seven bills pending in the Legislature which apply to the Act.⁴¹ These bills do not pertain to section N.J.S. 2A:156A-12, and do not address civilian participation in wiretapping investigations.

³⁰ *Id.* at 246.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 245, n.10.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 248.

³⁹ *Id.*

⁴⁰ *State v. Burns*, 241 N.J. 477 (2020).

⁴¹ A.B. 3308, and S.B. 1619, 219th Leg., 1st Sess. (N.J.2020) (Clarifies crime of unlawful access concerning certain password protected communications in electronic storage.); A.B. 3443, 219th Leg., 1st Sess. (N.J.2020) (Requires law enforcement agencies to obtain search warrant prior to accessing telecommunications subscriber's personal information.); A.B. 3779, 219th Leg., 1st Sess. (N.J.2020) (Authorizes wiretapping to investigate crimes involving human trafficking or certain prostitution activities.); A.B. 1224, 219th Leg., 1st Sess. (N.J.2020) (Authorizes wiretap orders for investigation of luring or enticing a child, identity theft, stalking and cyber-harassment under certain circumstances.); A.B. 3616, 219th Leg., 1st Sess. (N.J.2020) (Requires parties to certain telephone communications

Conclusion

The Court in *Burns* stated that the Legislative and Executive branches of government would be better suited than the Court to address whether non-deputized civilian personnel are permitted to monitor intercepted communications pursuant to the New Jersey Wiretapping and Electronic Surveillance Control Act. Staff seeks authorization to conduct additional research and outreach to ascertain whether the statute would benefit from modification to address the intersection of the Act and civilian monitors in the minimization section.

to give notice of intention to record communications in order for communications to be lawfully recorded; failure to give notice violates "New Jersey Wiretapping and Electronic Surveillance Control Act."); S.B. 2782, 219th Leg., 1st Sess. (N.J.2020) (Makes it unlawful for a private citizen to record a communication unless all parties to the communication have previously consented.)