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Police surveillance privilege

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In criminal trials in which some of the evidence against the defendant is obtained by undercover surveillance, the defense often seeks to obtain information about the location of the surveilling officer or equipment and about surveillance techniques and technology. In many of these cases, courts have faced the issue of whether a "police surveillance privilege" exists that prohibits the disclosure of such information because disclosure would frustrate future surveillance, would educate criminals about how to avoid surveillance or would endanger the individuals who allowed or conducted it. In [Weaver v. Com.](#), 955 S.W.2d 722, 67 A.L.R.5th 691 (Ky. 1997), for example, the defendant sought to cross-examine a police witness about the nature of the tape-recording device that a paid informant was wearing during a drug sting of the defendant. The defendant intended to argue that the informant could, and did, intentionally muffle the recording to fake a successful sale and receive his informant's fee. Diverging from the majority rule nationwide, the Kentucky Supreme Court refused to recognize the police surveillance privilege in Kentucky because new rules of evidence in Kentucky can only come about through certain procedures established in the Kentucky Rules of Evidence and because the court concluded that disclosing the type of tape-recording device used would not allow criminals to educate themselves about how to avoid tape-recorded surveillance in the future. This annotation collects and analyzes all cases addressing the existence, scope, and applicability of the police surveillance privilege in particular situations.

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I. PRELIMINARY MATTERS

§ 1[a] Introduction— Scope

This annotation collects and analyzes all cases addressing the existence, scope, and applicability of the police surveillance privilege.

Readers are cautioned that any constitutional provisions, legislative enactments, court rules, rules of evidence or regulations bearing directly upon this subject are discussed herein, and included in the Jurisdictional Table of Cited Statutes and Cases, only to the extent that they are reflected in the reported cases within the scope of this annotation. To ascertain the current state of these provisions, it is necessary to consult the appropriate constitutional, statutory, court rule, rules of evidence, or regulatory compilation.

Some opinions discussed in this annotation may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions.

§ 1[b] Introduction— Related annotations

Related Annotations are located under the [Research References](#) heading of this Annotation.

§ 2[a] Summary and comment— Generally

The majority of jurisdictions that have addressed a police surveillance privilege have recognized a qualified privilege prohibiting disclosure of the location, equipment, and techniques used during police surveillance. The reasons given for the privilege are that disclosure of the location of, manner of, and equipment used in surveillance would educate criminals about how to avoid future surveillance, would educate third parties about how to conduct illegal surveillance, would frustrate future similar surveillance activities and would pose a risk to individuals conducting surveillance or allowing it to occur on their premises.

When applied, the privilege is a qualified one. Some courts have held that the interests of the government in maintaining the secrecy of surveillance techniques must be balanced against the interest of the defendant in challenging the worthiness of the information obtained by the surveillance (§ 3[a], *infra*). Because the circumstances differ from case to case, trial courts have the discretion to apply this balancing test on a case-by-case basis.

Some of the interests that weigh on the side of nondisclosure are the safety of the officers involved, the safety of private individuals who allow their homes or businesses to be used by surveillance officers, and the likelihood that criminals will be able to avoid surveillance if a disclosure of the location or techniques of the surveillance in a particular case is allowed.

Some of the considerations that weigh in favor of disclosure are the unavailability of the information sought from other sources, the existence of evidence tending to cast doubt on the accuracy of the information gained by surveillance, and physical conditions at the surveillance site that bring into question the ability of the surveillance team to actually observe what they claim to have observed.

In certain jurisdictions, courts have required merely that the information be somehow relevant to the defendant's case in order to defeat the privilege (§ 3[b], *infra*). In other jurisdictions, the courts require a showing that the information is material and that the defendant has no other practical means of obtaining the information (§ 3[c], *infra*).

While the majority of jurisdictions support a qualified police surveillance privilege, some courts have rejected the application of the privilege in cases of first impression, often for procedural or technical reasons not closely tied to the substantive merit of a police surveillance privilege (§ 4, *infra*).

Courts, in applying the various tests in particular circumstances, have upheld the use of the privilege where alternative methods were available for proving the point for which the privileged evidence was sought (§ 5[a], *infra*), the defendant offered no proof of fabrication or mistake on the part of the officer (§ 5[b], *infra*), the defendant could not offer any proof of obstructions or poor visibility (§ 5[c], *infra*), or for other miscellaneous reasons (§ 5[d], *infra*). The use of the privilege has also been rejected under the particular facts presented (§ 6, *infra*), and courts have designated the procedures to follow when the privilege is asserted (§ 7, *infra*).

§ 2[b] Summary and comment— Practice pointers

Like any privilege, the police surveillance privilege must be asserted by the party seeking to rely on it and can be waived. Likewise, opposition to the privilege can also be waived. Thus, counsel asserting and opposing the privilege must make a contemporaneous objection either for or against the assertion of privilege.

Appellate courts in many cases have also exhorted lower courts to conduct an in camera hearing regarding the governmental and defense interests to be balanced before ruling on the applicability of the privilege. The hearings should be ex parte, or the court should require counsel to not relate the exact location to anyone. Additionally, in some cases, the court itself has traveled to the surveillance site or has reviewed videotape taken from the site to determine whether the exact location of the surveillance site could be material or helpful to the defense.

Even in cases in which the court applies the privilege, counsel will normally be allowed to ask questions regarding the ability of the surveillance team to actually make the observations testified to as long as the questions do not become so specific that they identify the location or techniques by implication. Thus, counsel may be permitted to ask whether officers used binoculars or special sound amplifiers or whether the view was obstructed in any way, but counsel will probably not be able to inquire into the particular side of the street, number of floors, style of windows, or other features of a building used for surveillance, for example.

II. PROPRIETY OF POLICE SURVEILLANCE PRIVILEGE IN GENERAL

§ 3[a] Cases recognizing qualified police surveillance privilege and applying varying tests for determining whether privilege applies in particular case— Privilege subject to balancing of interests

[Cumulative Supplement]

Courts in the following cases examined the need for a police surveillance privilege and found that the privilege is justified as long as the government's interest in confidentiality outweighs the individual defendant's need for disclosure.

The court in *U.S. v. Porter*, 701 F.2d 1158 (6th Cir. 1983), held that United States Customs Officials have a qualified privilege to refuse to allow inspection of classified surveillance equipment aboard special designed Customs aircraft under § 4 of the Classified Information Procedures Act, 18 U.S.C.A. Appx. 3 § 4. Additionally, the court found that, although the statute requires the court to dismiss the indictment or information in some instances when classified information is not disclosed, the court is not required to do so if the court determines that the interests of justice would not be served by dismissal of the indictment or information, and in such a case the court shall order such other action, in lieu of dismissal, as the court decides is appropriate.

The government has a qualified privilege to withhold the location or nature of surveillance, but the government's interest in confidentiality must be weighed against the defendant's right to a fair trial, the court held in *U.S. v. Gazie*, 786 F.2d 1166 (6th Cir. 1986). The court held that this balancing test must be done on a case-by-case basis, and thus, in some instances, information sought by a defendant may be so critical that the Sixth Amendment right to confrontation would outweigh the government's asserted needs for the privilege. When the defendant's interest is paramount, the court held that the government must make the decision whether to reveal the location and nature of surveillance or to proceed without the surveillance evidence.

The surveillance-post privilege, which is part of the official information privilege in *Cal. Evid. Code § 1040*, is analogous to the qualified informant privilege, which requires a trial court to balance the defendant's interests for disclosure against the prosecution's competing interests for non-disclosure, the court held in *Haider v.*

[Director of Corrections](#), 992 F. Supp. 1192 (C.D. Cal. 1998).

The court in [In re Sergio M.](#), 13 Cal. App. 4th 809, 16 Cal. Rptr. 2d 701 (6th Dist. 1993), reh'g denied, (Feb. 22, 1993), held that the government has a police surveillance privilege to refuse to disclose information acquired in confidence by a public employee in the course of duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made, and a public entity has a privilege to refuse to disclose this official information if disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.

The court in [Hicks v. U. S.](#), 431 A.2d 18 (D.C. 1981), held that applying the same qualified testimonial privilege to surveillance positions as to police informants is appropriate because if a location for observation becomes known to the public at large its value to law enforcement probably will be lost, and the revelation may jeopardize the lives of police officers and of cooperative occupants of the building.

In determining whether the defendant has demonstrated a "substantial need" to be entitled to disclosure of a police surveillance location that would otherwise be privileged, the court in [State v. Zenquis](#), 131 N.J. 84, 618 A.2d 335 (1993), held that the trial court should balance the defendant's need for that information with the public's interest in nondisclosure; a court must consider the crime charged, possible defenses, the potential significance of the privileged information, and other relevant factors, and the trial court's determination should be overturned only if the record discloses a mistaken exercise of discretion in its application of the relevant factors.

In determining whether the police surveillance privilege should be recognized in a particular case, the court in [Matter of Chris C.](#), 172 Misc. 2d 416, 658 N.Y.S.2d 929 (City Fam. Ct. 1997), examined whether the state provided compelling reasons for nondisclosure, such as fear of reprisals and frustration of future surveillance, and balanced those concerns against the defendant's need for disclosure.

When the commonwealth asserts that the surveillance location used by testifying officers is confidential, the Supreme Court of Pennsylvania held, in [Com. v. Rodriquez](#), 543 Pa. 651, 674 A.2d 225 (1996), cert. denied, 117 S. Ct. 207, 136 L. Ed. 2d 142 (U.S. 1996), that the trial court must balance relevant factors to determine whether the commonwealth's interest in protecting the confidentiality of the surveillance location outweighs the defendant's need for the information.

The court in [Com. v. Jennings](#), 428 Pa. Super. 297, 630 A.2d 1257 (1993), held that, while the location of a secret surveillance post is protected by a qualified privilege, and although in seeking disclosure of such location the defendant cannot be expected to predict that such information would actually be helpful, the record must at least suggest a reasonable probability that the information would be helpful, and that it is necessary.

CUMULATIVE SUPPLEMENT

Cases:

Once the party asserting the privilege makes a threshold showing that law enforcement privilege attaches, court must then balance the public interest in nondisclosure against the need of the particular litigant for access to the privileged information. [Schiller v. City of New York](#), 252 F.R.D. 204 (S.D. N.Y. 2008).

State enjoys qualified privilege regarding disclosure of secret surveillance locations; need for disclosure is decided on case-by-case basis, balancing public interest with defendant's need to prepare defense. [People v. Quinn](#), 265 Ill. Dec. 501, 772 N.E.2d 872 (App. Ct. 1st Dist. 2002), appeal pending, (Sept. 1, 2002).

The State has the benefit of a qualified privilege regarding disclosure of secret surveillance locations; the need for disclosure is decided on a case-by-case basis, balancing the public interest in preserving and holding secret the surveillance location with the defendant's need of disclosure of the surveillance location to prepare a defense. [People v. Bell](#), 869 N.E.2d 807 (Ill. App. Ct. 1st Dist. 2007).

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[END OF SUPPLEMENT]

§ 3[b] Cases recognizing qualified police surveillance privilege and applying varying tests for determining whether privilege applies in particular case— Privilege subject to materiality analysis

The courts in the following cases, while recognizing the police surveillance privilege, held that the privilege is subject to a materiality analysis.

The court in [Association for Reduction of Violence v. Hall](#), 734 F.2d 63, 39 Fed. R. Serv. 2d (LCP) 181 (1st Cir. 1984), held that documents tending to reveal a correctional facility's investigative and surveillance techniques are protected by a qualified privilege, and when particular documents have been determined to be covered by that qualified privilege, a party seeking discovery of those documents must make a threshold showing of need amounting to more than mere speculation.

The court in [U.S. v. Chimurenga](#), 609 F. Supp. 1066 (S.D.N.Y. 1985), held that, while a qualified privilege exists to allow the government to withhold surveillance photographs that would reveal the location of the private dwelling from which they were taken, such a privilege must yield when the photographs are relevant to the defendant's guilt or innocence. Thus, the court held that even though the government promised the owners of the dwelling that their identity would not be revealed the right of the accused to try to prove that the meetings at his own residence were political in nature using the photographs outweighed the government's interest in preserving anonymity.

The court in [U. S. v. Green](#), 670 F.2d 1148, 9 Fed. R. Evid. Serv. (LCP) 801 (D.C. Cir. 1981), found that policy justifications analogous to those underlying the well-established informer's privilege supported a qualified privilege protecting police surveillance locations from disclosure. Like confidential informants, hidden observation posts may often prove to be useful law enforcement tools, as long as they remain secret. Just as the disclosure of an informer's identity may destroy the informer's future usefulness in criminal investigations, the identification of a hidden observation post will likely destroy the future value of that location for police surveillance. The revelation of a surveillance location may also threaten the safety of police officers using the observation post, or lead to adversity for cooperative owners or occupants of the building. Finally, the assurance of nondisclosure of a surveillance location may be necessary to encourage property owners or occupants to allow the police to make such use of their property. The court held, however, that, because the location of the observation post may well be relevant to the defendant's ability to dispute whether the observing officer's view was open or obstructed, whether the angle of the officer's view made the observations easy or difficult, and whether the distance from the criminal activity enhanced or detracted from an officer's claimed observation of detail, the trial court must attempt to balance the interests of the public and the police in nondisclosure and the interest of the defendant in accurate fact-finding.

Although the covert surveillance location that the officer used to investigate narcotics sales was information that could be protected from disclosure by the statutory privilege for information acquired in confidence by a public employee in the course of duty ([Cal. Evid. Code § 1040](#)), the court in [Hines v. Superior Court](#), 203 Cal. App. 3d 1231, 251 Cal. Rptr. 28 (1st Dist. 1988), held that when invoking this privilege deprives the defendant of his fundamental right to cross-examine on a material issue, an adverse finding to the government is mandated by [Cal. Evid. Code § 1042](#). Thus, the court held that, once the statutory privilege was invoked with respect to the covert surveillance location and the location was material to the issue of guilt, the magistrate should have stricken the testimony regarding the officer's observations.

Because the identification of a hidden observation post will likely destroy the future value of the location for police surveillance, might threaten the safety of police officers using the observation post, or might lead to

adversity for cooperative owners or occupants of the building, the court in *People v. Walker*, 230 Cal. App. 3d 230, 282 Cal. Rptr. 12 (2d Dist. 1991), opinion modified, (June 10, 1991) and opinion modified, (June 13, 1991), held that a surveillance officer could testify about his observations without revealing the precise location of his observation post as long as such information was not material to the guilt or innocence of the accused. The court rejected the argument that the location of a surveillance post is always material to guilt or innocence; instead, the materiality of the location depends on the particular facts of each case.

The court in *People v. Haider*, 34 Cal. App. 4th 661, 40 Cal. Rptr. 2d 369 (2d Dist. 1995), reh'g denied, (May 12, 1995) and habeas corpus denied, 992 F. Supp. 1192 (C.D. Cal. 1998), held that while, under Cal. Evid. Code § 1040, the government has a privilege to refuse to disclose the exact location of a surveillance site if the public interest in preserving the confidentiality of that information outweighs the need for disclosure, under Cal. Evid. Code § 1042, if this privilege is asserted, the court must strike all evidence obtained by surveillance if the exact location of a surveillance site is "material" to the guilt or innocence of the accused.

The court in *Hicks v. U. S.*, 431 A.2d 18 (D.C. 1981), held that the defendant is entitled to disclosure of the government's surveillance location if the location is material to the defendant's guilt or innocence, and the trial court should hold an in camera hearing with both counsel present to determine materiality. In showing materiality, the court held that the defendant is not required to predict exactly what disclosure of the location will prove or the extent to which the defendant would be prejudiced by nondisclosure, but the defendant must show that disclosure of the location is essential to an overall fair presentation of the issues to the jury; when the case hinges on the observations and credibility of the surveillance officer, the exact location of the surveillance officer is likely to be deemed material to the issue of guilt.

The court in *State v. Moss*, 648 So. 2d 206 (Fla. Dist. Ct. App. 3d Dist. 1994), held that, because the disclosure of the location of surveillance, a private citizen's home opened to the police in reliance on their promise that the owner's identity would not be revealed, would be tantamount to disclosure of the identity of a confidential informant, the rules and procedures established for determining whether the identity of a confidential informant should be ordered disclosed were applicable in determining the applicability of the police surveillance privilege, and consequently the defendant had to allege facts and generally make an evidentiary showing in support thereof, which, if true, would support the possibility of a specific asserted defense to the crime charged; mere speculation as to the usefulness of the information regarding the location of surveillance to the defendant was insufficient to justify disclosure.

While recognizing in *People v. Criss*, 294 Ill. App. 3d 276, 228 Ill. Dec. 586, 689 N.E.2d 645 (4th Dist. 1998), that the accused traditionally enjoys a right to full and unfettered cross-examination, the court likened the police surveillance location privilege to the privilege regarding identity of informants and concluded that a qualified privilege exists for the disclosure of secret surveillance locations. To hold otherwise, the court found, would seriously cripple legitimate criminal surveillance and endanger the lives of police officers and those who allow their property to be used for criminal surveillance, since if secret surveillance positions are revealed building owners who might have previously consented to the use of their property for surveillance purposes might withdraw their consent. The court recognized, however, the importance of the accused's right to test the credibility of identification witnesses and concluded that the standard used for determining whether the identity of an informant should be disclosed is an appropriate standard for determining whether a secret surveillance location should be revealed. Disclosure should be decided on a case-by-case basis, balancing the public interest in keeping the location secret with the defendant's interest in preparing a defense, and the defendant must demonstrate a need for disclosure, not mere speculation that the information may possibly prove useful. The court also held that even if the defendant cannot overcome the surveillance location privilege defense counsel should be permitted to cross-examine the police officers' observations with respect to distance, weather, and any possible obstructions.

The court in *Com. v. Hernandez*, 421 Mass. 272, 656 N.E.2d 1237 (1995), held that the surveillance location privilege is analogous to the informer's privilege and a similar standard exists for evaluating claims of privilege under both categories; thus, disclosure of the location is required at trial when the material is relevant and helpful to the defense of the accused or is essential to a fair determination of the cause.

While the court in *Com. v. Grace*, 43 Mass. App. Ct. 905, 681 N.E.2d 1265 (1997), review denied, 425 Mass. 1108, 691 N.E.2d 580 (1997), held that under certain circumstances the government possesses a surveillance location privilege that protects the precise location of a secret surveillance post from disclosure, the privilege is qualified, and the location of a purportedly secret surveillance post must generally be disclosed if it is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause. While defendants seeking such information need not make a specific showing of just what the evidence would have proved and how far they would be prejudiced by the withholding, the court held that it was not enough for a defendant seeking to overcome the privilege simply to claim a need to know the location of the surveillance post; rather, the defendant is under an affirmative obligation to show an exception to the privilege, and must therefore make a preliminary showing that disclosure of the information would provide material evidence needed to present the defense case to the jury.

The court in *State v. Garcia*, 131 N.J. 67, 618 A.2d 326 (1993), held that under New Jersey Rule of Evidence 34 the government is entitled to a privilege not to reveal the exact location of a surveillance site if the state can demonstrate a realistic possibility that revealing the location would compromise present and future prosecutions or would endanger lives or property, and the trial court should hold an evidentiary hearing at which the state may attempt to justify application of the privilege; if the state meets this preliminary burden for application of the privilege, the court should permit disclosure if the information sought is relevant and helpful to the defense or essential to a fair determination of the case.

The court in *State v. Laws*, 262 N.J. Super. 551, 621 A.2d 526 (App. Div. 1993), certification denied, 134 N.J. 475, 634 A.2d 523 (1993), held that, while a trial court, before applying or rejecting the police surveillance privilege, should hold an in camera hearing without defense counsel present to determine the need for the confidentiality of the location of the surveillance post and the defendant's need for information regarding the exact location, if the testimony of the observing officer is the sole evidence in the case, it is very likely that disclosure of the location will be necessary to the defendant's case; the court should, however, apply the balancing test on a case-by-case basis.

The court in *State v. Ribalta*, 277 N.J. Super. 277, 649 A.2d 862 (App. Div. 1994), certification denied, 139 N.J. 442, 655 A.2d 444 (1995), held that to establish the surveillance location privilege the state must demonstrate a realistic possibility that revealing the surveillance location would compromise present and future prosecutions or would endanger lives or property, and the defendant must make a substantial showing of need to defeat the state's proper assertion of the surveillance location privilege. In determining whether the defendant has made the substantial showing of need required to defeat the state's surveillance location privilege, the trial court must consider the crime charged, the possible defenses, the possible significance of the privileged information, and other relevant factors.

§ 3[c] Cases recognizing qualified police surveillance privilege and applying varying tests for determining whether privilege applies in particular case— Privilege subject to materiality and necessity analysis

The courts in the following cases held that a defendant seeking to learn the location of a police surveillance post should ordinarily show that the evidence is needed to conduct the defense and that there are no adequate alternative means of getting at the same point.

Recognizing that, under *Fed.R.Evid. 501*, federal courts retain the power to develop common-law witness

privileges in criminal trials on a case-by-case basis, the court in [U.S. v. Cintolo](#), 818 F.2d 980 (1st Cir. 1987), found that the policy of a qualified privilege was entirely appropriate in the context of criminal trials in which a defendant seeks disclosure of confidential government surveillance information. The First Circuit was concerned that discoverability of this kind of information would enable criminals to frustrate future government surveillance and perhaps unduly jeopardize the security of ongoing investigations. The court recognized, however, that this privilege is qualified and must give way if a defendant can show sufficient need for the disclosure. Regarding the level of need required, the court held that a defendant seeking to learn the location of a police surveillance post should ordinarily show that the evidence is needed to conduct the defense and that there are no adequate alternative means of getting at the same point.

Comparing the interests of the government in refusing to disclose the location and nature of secret surveillance equipment to the privilege to refuse to disclose the identity of confidential informants, the court in [U.S. v. Van Horn](#), 789 F.2d 1492, 20 Fed. R. Evid. Serv. (LCP) 431 (11th Cir. 1986), applied a qualified privilege to the location and nature of surveillance equipment. The Eleventh Circuit was concerned that disclosing the precise locations where surveillance devices are hidden or their precise specifications will educate criminals regarding how to protect themselves against police surveillance. Furthermore, the court found that electronic surveillance is an important tool of law enforcement, and its effectiveness should not be unnecessarily compromised. Disclosure of such information will also educate persons on how to employ such techniques themselves, in violation of other federal laws. The court immediately pointed out, however, that the privilege will give way if the defendant can show a requisite need and necessity for the information.

Extending the rule of [U. S. v. Green](#), 670 F.2d 1148, 9 Fed. R. Evid. Serv. (LCP) 801 (D.C. Cir. 1981), discussed supra § 3[b], the court in [U. S. v. Harley](#), 682 F.2d 1018, 11 Fed. R. Evid. Serv. (LCP) 64 (D.C. Cir. 1982), held that the surveillance location privilege, like the informer's privilege, applied at trials and that it, too, is to be applied through a balancing test controlled by the fundamental requirements of fairness. The court held that a defendant seeking to learn the location of a police surveillance post should ordinarily show that the evidence is needed to conduct the defense and that there are no adequate alternative means of getting at the same point, and the degree of the handicap that the defendant establishes must then be weighed by the trial judge against the policies underlying the privilege.

To defeat societal interests in protecting people at a surveillance location and the governmental privilege regarding the confidentiality of a surveillance location, the court held in [Com. v. Santiago](#), 429 Pa. Super. 135, 631 A.2d 1323 (1993), the defendant must make a specific showing that the information available to the defendant is insufficient to mount an effective defense.

The Virginia Court of Appeals in [Hollins v. Com.](#), 19 Va. App. 223, 450 S.E.2d 397 (1994), recognized the police surveillance privilege and established a two-step test to determine when the privilege is properly applied. First, to compel disclosure of the exact location of a surveillance post, the defendant must show that evidence is needed to conduct the defense and that there are no other adequate alternative means of getting at the same point, and only then must the court balance the public interest in effective law enforcement and citizens' safety against the defendant's constitutional right to confront government witnesses.

§ 4. Cases rejecting police surveillance privilege

[Cumulative Supplement]

While the majority of jurisdictions support a qualified police surveillance privilege, the courts in the following cases rejected the application of the privilege in cases of first impression, often for procedural or technical reasons not closely tied to the substantive merit of a police surveillance privilege.

Diverging from the majority rule nationwide and overruling an earlier decision,[1] the Kentucky Supreme

Court in [Weaver v. Com.](#), 955 S.W.2d 722, 67 A.L.R.5th 691 (Ky. 1997), refused to recognize the police surveillance privilege in Kentucky because new rules of evidence in Kentucky can only come about through certain procedures established in the Kentucky Rules of Evidence and because the court concluded that disclosing the type of tape-recording device used in that case would not allow criminals to educate themselves about how to avoid tape-recorded surveillance in the future. The defendant sought to cross-examine a police witness about the nature of the tape-recording device that a paid informant was wearing during a drug sting of the defendant. The defendant intended to argue that the informant could, and did, intentionally muffle the recording in order to fake a successful sale and receive his informer's fee. While the court found that the application of the privilege was error in that case, the court found the error to be harmless because the government witness admitted on cross-examination that such intentional muffling was possible.

Although significant police interests in [Com. v. Rios](#), 412 Mass. 208, 588 N.E.2d 6 (1992), justified application of the police protection privilege, the court held that it was a violation of the defendants' right to confront witnesses for the trial court in a bench trial to proceed with testimony regarding a surveillance location while removing the defendants from the courtroom. If a privilege is justified in a particular case, the court should simply uphold the nondisclosure and allow defense counsel alternative means to raise arguments attacking the ability of the officers to see what they claim to have seen.

CUMULATIVE SUPPLEMENT

Cases:

Washington does not recognize a privilege that protects the prosecution from disclosing the location of a secret surveillance post. [State v. Darden](#), 41 P.3d 1189 (Wash. 2002).

[\[Top of Section\]](#)

[END OF SUPPLEMENT]

III. APPLICATION OF TESTS IN PARTICULAR CIRCUMSTANCES

§ 5[a] Reasons under which use of privilege upheld— Alternative methods available for proving point for which privileged evidence was sought

Courts in the following cases upheld the police surveillance privilege because the defense was able to rely on other proof, or was allowed thorough and searching cross-examination, to make the point for which the evidence regarding the police surveillance location, equipment, or techniques was sought.

The court in [U.S. v. Cintolo](#), 818 F.2d 980 (1st Cir. 1987), properly rejected the accused's argument that he needed disclosure of the exact location and techniques used to record conversations in a certain apartment to prove that not everyone in the apartment could have heard all of the conversations, as alternative methods of proving that point were available to the defense, such as by displaying a layout of the room to the jury, and, in any event, the sound technician admitted that defendant's point was correct in front of the jury and was not contradicted.

The defendant in [U.S. v. Van Horn](#), 789 F.2d 1492, 20 Fed. R. Evid. Serv. (LCP) 431 (11th Cir. 1986), failed to show the requisite need for disclosure of the location of microphones used to tape conversations in the office of the leader of a drug importation scheme. Several of the members of the drug conspiracy contended that the information was necessary to demonstrate that the voices on the tapes could have been distorted, resulting in improper voice identifications. They insisted that testimony of the undercover agent involved and their own ex-

pert witness indicated that the location of the microphone could have resulted in distortion. The Eleventh Circuit upheld the application of the privilege because the district court conducted an in camera hearing to review the government's assertion of privilege and held a hearing on the appellants' claim of necessity. At the hearing, there was testimony that the voices could have been distorted by the way the microphone was hidden. The district court, however, listened to the agent who was monitored from the office during the course of the investigation and was able to compare the agent's voice on the tapes with his actual voice and determine that the voice had been accurately recorded. The appellants were allowed to examine the tapes and were informed that the transmission was by air rather than wire. The ultimate question whether the voice identifications of the appellants were correct was given to the jury, and the appellants were allowed to explore and argue the possibility of misidentification in front of the jury.

In a prosecution in which the only issue at trial was identification, the district court in [U. S. v. Harley](#), 682 F.2d 1018, 11 Fed. R. Evid. Serv. (LCP) 64 (D.C. Cir. 1982), properly sustained the government's objection, which was based on the surveillance location privilege, to cross-examination of an investigator in which the defendant asked the location of an apartment used as a police surveillance post. The court found that the defendant had failed to demonstrate a need for the evidence to prove the difficulties the officers using the post would have had in accurately identifying the seller from their vantage point. The court relied on the fact that the jury was shown a videotape of the transaction that showed the view the officers in the surveillance post had. The District of Columbia Circuit found it difficult to believe that the accused could have gained anything more by learning the number of the apartment from which the police observed him.

The court in [State v. Williams](#), 239 N.J. Super. 620, 571 A.2d 1358 (App. Div. 1990), held that the defendant was not entitled to question a police officer about the precise location of the surveillance site from which the officer made observations that led to the drug offense prosecution; trial cross-examination brought out the distance from which the police officer observed the defendant, the weather, the time of day, and the fact that the officer used binoculars in making his observations, disclosure of the surveillance site would be of only peripheral assistance to the defendant, and disclosure of the surveillance site would destroy a significant tool of the police department for fighting narcotics activity.

In [Matter of Chris C.](#), 172 Misc. 2d 416, 658 N.Y.S.2d 929 (City Fam. Ct. 1997), the court found that the state's interest in preserving the confidentiality of its surveillance location in a private dwelling outweighed the defendant's interest in knowing the exact location as long as the defendant was allowed to cross-examine the surveillance officer regarding the distance from which the observation was made; whether the officer used additional vision-enhancing articles besides the binoculars; whether the officer observed the alleged crime from an elevated position; the officer's angle of sight and field of vision; whether there were other people in the immediate area; whether there were any other buildings in the area of comparable size; the position of the sun at the time of the observation; and whether he saw the activity across a crowded roadway or a vacant lot.

The defendant failed to show that disclosure of the exact surveillance location was necessary in [Com. v. Rodriguez](#), 543 Pa. 651, 674 A.2d 225 (1996), cert. denied, 117 S. Ct. 207, 136 L. Ed. 2d 142 (U.S. 1996), where the court found that the defendant made no specific claim of necessity for disclosure, the defendant was aware that the surveillance location was 100 feet north of where the defendant was observed, that the surveillance location was 10 to 20 feet above street level, and that people were playing basketball on a court in between the surveillance location and the drug buyer's car, and, using this information, defense counsel thoroughly cross-examined the officer's ability to view the drug transaction despite the alleged glare on the drug buyer's car windows.

Any prejudice to the defendant in [Hollins v. Com.](#), 19 Va. App. 223, 450 S.E.2d 397 (1994), by the failure of the police to disclose the location of the surveillance post from which he was observed selling drugs was outweighed, according to the court, by the commonwealth's significant interest in protecting the cooperative apart-

ment owner from reprisals in the neighborhood where drugs were sold repeatedly, because the defendant was able to cross-examine the officer as to weather conditions, lighting, use of binoculars, distance, elevation, angle, and the specific block on which the surveillance site was located.

§ 5[b] Reasons under which use of privilege upheld— Defendant offered no proof of fabrication or mistake on part of officer

In the following cases, the courts refused to allow the defendant to embark on a fishing expedition into the surveillance techniques used absent some indication that the officers were fabricating their testimony or mistaken in some way.

The court in [Haider v. Director of Corrections](#), 992 F. Supp. 1192 (C.D. Cal. 1998), held that, where the defendant's identity is not in issue and the defendant also fails to proffer a need for the exact location by showing it may result in exoneration, no constitutional violation of the Confrontation Clause occurs by sustaining the surveillance-post privilege.

During a suppression hearing, the court in [Hicks v. U. S.](#), 431 A.2d 18 (D.C. 1981), properly refused to allow cross-examination of the surveillance officer concerning the exact location of the site from which he witnessed several drug transactions. His testimony on cross-examination established that there was at least one building in the immediate area, and perhaps others, that was tall enough to provide a clear view of the drug transactions at issue. Moreover, the court noted that the detective's candid testimony about the obstruction of his view between the time the appellant handed over money to an individual and the time soon thereafter when he received a white object later found to be heroin did not detract from the sufficiency or credibility of his testimony for probable cause purposes. Defense counsel also had ample opportunity to question the officer about the details of the drug buy, with the exception of the exact location of the surveillance post.

In a case in which the surveillance officer claimed not only to have observed the defendants "casing" several automobiles, but from his vantage point at the window of the undisclosed residence also claimed to have overheard certain incriminating conversations between the defendants, the court in [State v. Moss](#), 648 So. 2d 206 (Fla. Dist. Ct. App. 3d Dist. 1994), upheld the use of the police surveillance privilege, finding that the defendants had failed to show that there was some reason to believe the police officer was fabricating, misrepresenting, or obfuscating testimony, a necessary step in order to pierce the government's privilege of nondisclosure.

Where the defendant was allowed to cross-examine the surveillance officer about his observation from one surveillance location but not about the exact location of a second site from which the officer testified he witnessed the same activity, the court in [Montford v. State](#), 168 Ga. App. 394, 309 S.E.2d 650 (1983), held that no prejudice resulted from refusing to allow cross-examination and that revealing the location of the second site would identify the confidential informant who tipped off the police in the case.

In [People v. Criss](#), 294 Ill. App. 3d 276, 228 Ill. Dec. 586, 689 N.E.2d 645 (4th Dist. 1998), the court held that the defendant, observed selling drugs on his front porch, did not make an adequate showing that the exact location of the surveillance posts was essential to his defense. First, he was arrested immediately after his last sale and before he left the view of the surveillance officer, which refuted his claim of mistaken identity. Second, defense counsel was given sufficient latitude to test the officers' credibility by eliciting from the officers information about the distance, lighting, and any possible obstructions of the officers' view. There was no evidence or reason to believe the officers' testimony was not credible.

Because the state in [State v. Garcia](#), 131 N.J. 67, 618 A.2d 326 (1993), presented a substantial amount of evidence to corroborate the observations of the surveillance officers, including an informer's tip and the recovery of heroin from the freezer to which the observing officers saw the defendant go, and because the defendant failed to show how the concealment of the surveillance location deprived him of effective cross-examination,

the state was entitled to the police surveillance location privilege. The court noted that the defendant was able to demonstrate several inconsistencies in the officers' testimony, and that the defendant learned the distance and direction from which the officers had conducted the surveillance, that the officers had used binoculars, and that the officers had viewed the transaction from an elevated position.

§ 5[c] Reasons under which use of privilege upheld— Defendant could not offer any proof of obstructions or poor visibility

[Cumulative Supplement]

In the following cases, the courts upheld the use of the privilege because the defendant offered no evidence that the police officers' abilities to observe the crimes in question were obstructed, where —

—one officer admitted not seeing the small object, which later turned out to be heroin, exchanged between two defendants and an unidentified man; both officers conceded not seeing the paper bag containing heroin packets transferred from the defendant's left pocket to his right hand; the defense had already learned, on direct and cross-examination, the officer's distance from the transaction (75 to 80 feet), his approximate height (40 feet), the weather (sunny and clear), and that he was using binoculars; and the defendant never suggested that the officer's view was obstructed in any fashion. [U. S. v. Green, 670 F.2d 1148, 9 Fed. R. Evid. Serv. \(LCP\) 801 \(D.C. Cir. 1981\)](#).

—the surveillance officer testified that he was standing behind a building, at eye level, 15 feet away from the drug transaction, the drug transaction took place about 5:45 p.m. under good lighting conditions; the officer had an unobstructed view and did not use binoculars to observe the transaction from his position, and he observed the defendant receive cash in exchange for a small object later identified as rock cocaine; and the officer was standing close enough to observe the defendant give the rock cocaine to his customer, who placed the cocaine in his right shirt pocket; although the defendant was allowed extensive cross-examination, the defendant did not offer evidence to indicate that there was some point within the 15 feet to the rear of the building from which the officer could not have observed him due to an obstruction. [People v. Walker, 230 Cal. App. 3d 230, 282 Cal. Rptr. 12 \(2d Dist. 1991\)](#), opinion modified, (June 10, 1991) and opinion modified, (June 13, 1991).

—the officer testified that he was within 100 yards of the minor, that he was using 35-power binoculars, that he had an unobstructed view of the minor both while at the fence where a supposed transaction took place and while at the car used in the transaction, that it was clear and sunny the afternoon of the observation, and that nobody else in the vicinity was dressed like the minor; the officer was able to see the minor pull a small item from within a plastic bag that had been within a paper bag behind a fence, the minor gave the small item to a passenger in a Chevy Blazer and received currency in exchange, which he placed in his pocket, the Blazer passenger was found to have a baggie of marijuana shortly thereafter, a brown bag containing a plastic bag of marijuana was found at the location where the officer saw the minor place a bag, and the money found on the minor was consistent with him having sold at least one package of marijuana; although the court stated that there was no question that there were locations within 100 yards from which the officer could not have observed the minor due to an obstruction, the court also found at least two locations where one could have seen what the officer said he saw. [In re Sergio M., 13 Cal. App. 4th 809, 16 Cal. Rptr. 2d 701 \(6th Dist. 1993\)](#), reh'g denied, (Feb. 22, 1993).

—defense counsel was permitted to question the officer about the existence of any obstructions, his distance from a possibly obstructing fence, his angle of vision in observing the appellant at the time of the transaction,

and whether he saw the appellant from the front, back, left side, or right side; additionally, the defendant made no showing that there was any observation site on a rooftop of a two-story building, at a distance of 100 to 120 feet from the place where the defendant and his customer stood when the exchanges occurred, from which the officer would have been unable to see the transactions if the officer's angle of vision was approximately 30 degrees and the appellant's left side was closest to the officer. [People v. Haider](#), 34 Cal. App. 4th 661, 40 Cal. Rptr. 2d 369 (2d Dist. 1995), reh'g denied, (May 12, 1995) and habeas corpus denied, 992 F. Supp. 1192 (C.D. Cal. 1998).

—the officer's testimony was clear and positive in identifying the defendant as the person involved in the criminal activities, and the officer further testified that the light and weather were good. [Jett v. Com.](#), 862 S.W.2d 908 (Ky. Ct. App. 1993) (overruled on other grounds by, [Weaver v. Com.](#), 955 S.W.2d 722, 67 A.L.R.5th 691 (Ky. 1997)).

—in a prosecution for open air heroin sales, the officer testified that he observed a drug transaction from a distance of approximately 100 feet, that he had a clear, unobstructed view, and that he used binoculars to enhance his vision. [Com. v. Grace](#), 43 Mass. App. Ct. 905, 681 N.E.2d 1265 (1997), review denied, 425 Mass. 1108, 691 N.E.2d 580 (1997).

—testimony at an in camera hearing revealed that there were no obstructions to the officer's view and no problems with the angle of sight that would impugn the officer's observations, and the judge further stated that he would view the site himself, alone, to verify this conclusion, which he did and made a record of his findings; on cross-examination, the officer, without revealing the location of the surveillance point, revealed the distance from the transaction site, the time of day, lighting, absence of obstructions, presence of trees and a telephone pole, and the fact that the cars that stopped in the street did not obstruct his view of the transactions; and the officer's descriptions of the defendant's clothing to other police officers at the time of the observation was later corroborated by the arresting officers. [State v. Laws](#), 262 N.J. Super. 551, 621 A.2d 526 (App. Div. 1993), certification denied, 134 N.J. 475, 634 A.2d 523 (1993).

—the defendant was allowed to question the detective on cross-examination about the distance, angle, elevation, whether the detective's view was obstructed, and whether he used binoculars, glasses, or other devices, and the detective testified that the surveillance was made from an occupied structure at a 60-degree elevated angle from the corner, at a distance of 75 feet, and binoculars were used at certain times to corroborate the detective's observations. [State v. Ribalta](#), 277 N.J. Super. 277, 649 A.2d 862 (App. Div. 1994), certification denied, 139 N.J. 442, 655 A.2d 444 (1995).

—the officer testified at trial that he observed the defendant delivering cocaine from a distance of about five to seven feet and that his view was unobstructed, and the commonwealth revealed the exact location of the surveillance location at an ex parte hearing. [Com. v. Jennings](#), 428 Pa. Super. 297, 630 A.2d 1257 (1993).

—the defendant was permitted to bring out on cross-examination that the officer's surveillance position was approximately 125 feet from the southeast corner of the particular intersection involved, that he was approximately 25 feet above sidewalk level, that ample overhead lighting was provided by a nearby baseball field, that his sight was enhanced through use of binoculars, and that a cyclone fence did not obstruct his view. [Com. v. Santiago](#), 429 Pa. Super. 135, 631 A.2d 1323 (1993).

CUMULATIVE SUPPLEMENT

Cases:

State was entitled to qualified privilege regarding disclosure of officer's exact surveillance location in drug prosecution, thus there was no violation of defendant's right to confront witnesses; defendant was allowed to cross-examine officer extensively with respect to surveillance area, without pinpointing exact surveillance location, defendant was permitted to establish officer's position sufficiently enough to allow trial court to assess officer's credibility and reliability, and defense presented no evidence that would illustrate that roof of auto would have blocked officer's view. [U.S.C.A. Const.Amend. 6. People v. Bell, 869 N.E.2d 807 \(Ill. App. Ct. 1st Dist. 2007\)](#).

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[END OF SUPPLEMENT]

§ 5[d] Reasons under which use of privilege upheld— Miscellaneous reasons

[\[Cumulative Supplement\]](#)

The courts in the following cases upheld the use of the police surveillance privilege for miscellaneous reasons.

Viewing the record as a whole, the court in [U.S. v. Porter, 701 F.2d 1158 \(6th Cir. 1983\)](#), concluded that even if the defendants who were charged with flying marijuana into the country may have been hampered to some degree by their inability to inspect the surveillance equipment used to track them, they were not deprived of a fair trial. United States Customs officials testified that they detected the defendants' plane just as it entered United States airspace and tracked it continuously until the capture of the defendants. The defendants sought to board and inspect the equipment on the customs jet that tracked them, and the government refused, citing its privilege to withhold access to how its sensitive tracking equipment worked. The court found that the defendants lacked the requisite need for the evidence because, first, the defendants were allowed extensive cross examination of the pilot and the Customs surveillance operator who were aboard the specially equipped Customs plane. Testimony revealed that the air-to-air radar was the same system used in the F-16 fighter. The infrared system was also described in detail, including testimony concerning its operation, its range, and its ability to distinguish between various objects observed. The defendants offered no expert testimony challenging the capabilities of the surveillance systems relied on in this case. Second, there was substantial independent evidence verifying and corroborating the information obtained by the surveillance equipment, such as flight logs, eyewitness descriptions, and the flight of the suspects after the plane was stopped.

In a case in which co-defendants, members of a large drug conspiracy, sought to obtain the location and nature of hidden microphones used to record conversations among the conspirators, the court in [U.S. v. Gazie, 786 F.2d 1166 \(6th Cir. 1986\)](#), applied the police surveillance privilege, concluding that the defendants did not make an adequate showing of need for the information sought. The defendants sought to prove that the microphones had been placed in containers and thus that the recordings were distorted and voice identification of the co-conspirators was flawed. The Sixth Circuit upheld the rejection of the defendants' request because, first, the defendants themselves were not identified based on voice identification from the recordings. Second, the co-conspirators who were identified based on their voices on the recordings also testified at the trial against the defendants and confirmed their voices on the recordings. The court thus found that the requested information concerning the location of the microphones was not particularly helpful to the defendants' case.

CUMULATIVE SUPPLEMENT

Cases:

Police officer had qualified privilege not to disclose in drug prosecution the exact location from which officer observed defendant; nondisclosure protected owner of location, and officer was extensively cross-examined about possible obstructions, angle and clarity of view, distance between surveillance location and drug transaction, and other details of surveillance. [Johnson v. State, 148 Md. App. 364, 811 A.2d 898 \(2002\)](#).

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[END OF SUPPLEMENT]

§ 6. Use of privilege rejected

The courts in the following cases held that the police surveillance privilege was not applicable under the particular facts presented.

The court in [U.S. v. Chimurenga, 609 F. Supp. 1066 \(S.D.N.Y. 1985\)](#), refused to extend the police surveillance privilege to allow the government to withhold certain photographs taken from a private dwelling, although the government had promised anonymity to the owners of the private dwelling and the photographs tended to reveal the identity of the location from which they were taken. The photographs recorded the defendants and others coming and going from an address where two of them lived, and the defendants wanted to argue that the meetings at that address were political gatherings rather than meetings of a weapons conspiracy. The court noted that the photographs were relevant and not otherwise available, and that failure to obtain the photographs could have delayed and impeded the defendants' preparation for trial. The court also relied on the fact that the defendants did not seek to obtain the identity of the persons who occupied the dwelling when the pictures were taken or even the precise location of the dwelling itself. All the defendants sought were the pictures, to prove who had come and gone from their own house.

Although the surveillance officer in [Hines v. Superior Court, 203 Cal. App. 3d 1231, 251 Cal. Rptr. 28 \(1st Dist. 1988\)](#), testified that his view from 50 yards away was unobstructed and that weather conditions were favorable to his alleged observations of drug sales by the accused, the court held that none of his testimony should have been allowed after he refused to reveal the exact location of his surveillance site. The court held that the exact location was material to whether the officer had a clear and unobstructed view of the transactions.

The court in [Com. v. Lugo, 406 Mass. 565, 548 N.E.2d 1263 \(1990\)](#), held that the defendant was entitled to disclosure of the surveillance location from which the police officer allegedly observed the defendant selling drugs in a parking lot, where the entire prosecution rested on the police officer's credibility and his ability to observe what he said he had seen from his hidden location; the police officer's testimony was not corroborated in any respect, and the in-camera hearing by the trial court established several inconsistencies as to the location of the police officer's vantage point and whether it permitted him to have a clear view of what he claimed to have seen.

Because the testimony of the observing police officers was crucial to the commonwealth's case in [Com. v. Hernandez, 421 Mass. 272, 656 N.E.2d 1237 \(1995\)](#), the court held that the lower court correctly held that disclosure of the surveillance location from which the police observed the defendant's activities would have been relevant and helpful to the defense; to properly cross-examine the officers on observations from that location, the defendant would need to know the distance from the observation post to the site of the alleged crime as well as the existence of any obstructions or other impediments to a clear view of the site.

Since the case against the defendant for heroin distribution turned almost exclusively on the testimony of

the observing officer, the defendant's need for the location information in [State v. Zenquis](#), 131 N.J. 84, 618 A.2d 335 (1993), was substantial and outweighed the interest of the government in keeping the location secret. The court found that the police found no drugs on the defendant or his accomplice. Thus, without access to the surveillance site, the defendant's sole defense necessarily was simply a denial of the charges. The case depended on the jury's appraisal of the credibility of the observing officer and the defendant, but the protective order impeded the jury's opportunity fairly to assess the officer's credibility.

The state failed to prove that its interests in the confidentiality of the location of a surveillance post outweighed the defendant's interest in using the exact location to cross-examine the observing officer in [Matter of James B.](#), 146 Misc. 2d 532, 551 N.Y.S.2d 439 (Fam. Ct. 1990), because the officer's testimony was the only evidence against the defendant and the officer failed to provide compelling reasons why disclosure would pose a risk to any specific individuals.

§ 7. Procedures to follow with regard to putatively privileged information

Courts in the following cases commented on the procedures to follow when the question of the privilege arises. Some courts suggest in camera review of the evidence, and others suggest ways to allow the defense to prove its point without revealing all details of a particular surveillance operation.

The court in [Association for Reduction of Violence v. Hall](#), 734 F.2d 63, 39 Fed. R. Serv. 2d (LCP) 181 (1st Cir. 1984), a civil case brought by prisoners against their prison, held that the lower court erred in considering on summary judgment evidence, to which the prison asserted the qualified privilege for police surveillance should have applied, without the trial court specifically ruling on whether the privilege would apply. In its remand order, the First Circuit held that the district court should begin by making a fresh determination of privilege based on an in camera examination of the documents as to which privilege was claimed. The court was to take the competing interests into account in its initial determination of privilege and then consider whether the court could edit or sanitize the documents in question so that they could be disclosed without undue harm to the underlying interests of the party claiming privilege or, if this were not feasible, the court might develop its own summary of the privileged material and release the summary to the parties for use in lieu of the original. The First Circuit noted, however, that the district court's actions in editing, sanitizing, or summarizing material would, of course, be reviewable along with its ruling on privilege.

The court in [People v. Montgomery](#), 205 Cal. App. 3d 1011, 252 Cal. Rptr. 779 (1st Dist. 1988), reh'g denied and opinion modified, (Dec. 7, 1988), set out the procedures to be followed in determining whether all surveillance testimony must be stricken because the location is material to the defense. The correct procedure in these cases is for the court first to ask the defendant to make a prima facie showing for disclosure. If the defendant does so, the court should then hold an in-camera hearing attended by the party claiming the privilege (the surveillance officer and/or the prosecutor). The defendant should be given an opportunity to propose questions to be asked at this hearing. The in-camera hearing is a preliminary inquiry into whether the claim of privilege should be upheld. If the People succeed in camera, the adversary process should be used, probing the information's relevance to the defense, exploring with counsel the availability of other alternatives, and, if necessary, hearing testimony voir dire. The court found that the surveillance officer was improperly allowed to testify without disclosing the exact location of the surveillance site because the trial court failed to conduct a full hearing on whether the location of the site was material to the defendant's guilt or innocence. The trial judge incorrectly held that a risk of injury to others by revealing the surveillance site was, in itself, sufficient to justify the application of the privilege. The appellate court disagreed, holding that the trial court should have conducted a hearing to determine whether alternatives to full disclosure were possible, such as revealing the location only to defense counsel and requiring secrecy or playing a videotape taken from the surveillance location to show that

no amount of distance or obstructions prevented the officer from seeing what the officer claimed to have seen. Additionally, because the alleged purchaser of drugs from the defendant was not detained and because no photograph of the sale had been taken, the testimony about the observation was the only evidence of the sale. Thus, the location of the surveillance was material to the issue of guilt.

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Section 4 Footnotes:

[FN1] The court expressly overruled *Jett v. Com.*, 862 S.W.2d 908 (Ky. Ct. App. 1993), in which the appellate court applied a qualified privilege to the location of secret police surveillance sites and required the trial court to balance the defendant's need for the disclosure of the evidence against the government's interest in confidentiality.

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