

## **WIRETAPPING**

G.L. c. 272, § 99C.1

**The defendant is charged with unlawful wiretapping. To prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:**

***First:* That the defendant used a device to hear, record or aid another person in hearing or recording an oral or wire communication;**

***Second:* That the defendant did so secretly; and**

***Third:* That the defendant did so willfully.**

**To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant used a device to hear, record or aid another person in hearing or recording the contents of an oral or wire communication. The contents of a communication means any information concerning the identity of the parties to such communication or the existence, contents, substance, or meaning of that communication. A device is any device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or**

**oral communication. [Oral communications are defined as human speech and any words spoken by a human.] [Wire communications are defined as any communication made in whole or in part by the aid of wire, cable, or other like connection between the point of origin and the point of reception.]**

SUPPLEMENTAL INSTRUCTIONS

1. **Device exception.**

**A device does not include a hearing aid or similar device which is being used to correct subnormal hearing to normal. A device also does not include any telephone or telegraph instrument, equipment, facility, or a component thereof, being used by the subscriber, user or communications common carrier in the ordinary course of its business.**

See *Commonwealth v. Todisco*, 363 Mass. 445, 452 (1973) (“The clear and obvious legislative intent was to prevent the illegal use of devices external and extraneous to the regular telephone equipment” and “not to prevent the repair of a telephone or the replacement of a missing component part of the telephone in order to make it operable.”)

2. **“Record” definition.** **To “record” something means to set words down in writing or to cause sounds or visual images to be transferred to and registered on something by**

**electronic means in such a way that the words, sounds or visual images can be subsequently reproduced.**

*Commonwealth v. Moody*, 466 Mass. 196, 209 (2013) (defining the term “record”).

**To prove the second element, the Commonwealth must prove beyond a reasonable doubt is that the defendant did so secretly. A person hears or records secretly if the person(s) recorded or heard is (are) unaware or otherwise not on notice that the defendant is hearing or recording them.**

See *Commonwealth v. Morris*, 492 Mass. 498, 517-518 (2023) (the term secretly “apparently contemplates circumstances in which one openly hears a conversation and secretly records it through the use of an intercepting device”); *Commonwealth v. Du*, 103 Mass. App. Ct. 469, 478 (2023), quoting *Commonwealth v. Jackson*, 370 Mass. 502, 507 (1976) (the term “secretly” does not “encompass[] only those situations where an individual has a reasonable expectation of privacy; a recording is made “secretly” when it is made without the actual knowledge of the person being recorded; the Commonwealth may prove actual knowledge “where there are clear and unequivocal objective manifestations of knowledge [on the part of the person being recorded]. “A recording that is made with the actual knowledge of all parties is not an interception, even if they have not affirmatively authorized or consented to it.” *Jackson, supra*. See notes 1-3 for other exemptions)

**To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant acted willfully. An act is “willful” if it is done intentionally and by design, in contrast to an act which is done thoughtlessly or accidentally. A person acts willfully if they intend the conduct and its consequences.**

See, e.g., Instruction 8.280 Willful and malicious destruction of property.

**If the Commonwealth has proven all three of the elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.**

NOTES:

**1. Exemptions in § 99 D.** “An interception... is unlawful unless it comes within one of the exemptions set forth in § 99 D, such as the exemption for those authorized persons who are acting pursuant to a warrant issued in accordance with the statute.” *Commonwealth v. Jackson*, 370 Mass. 502, 503 n.1 (1976). Section 99 D 1 (a) – (f) lists several other exemptions, including for “investigative and law enforcement officers of the United States of America... if acting pursuant to [and within the scope of the] authority of the laws of the United States” and for “investigative or law enforcement officers [when acting] for the purposes of ensuring the safety of any law enforcement officer or agent thereof who is acting in an undercover capacity, or as a witness for the commonwealth... .” The statute also exempts recordings made by employees or agents of communications companies and of financial institutions in the ordinary course of business, with some caveats. See D 1 (a) and (f). Finally, the statute delineates permissible disclosure or use of intercepted wire or oral communications under certain circumstances. See G.L. c. 272, § 99 D. 2. (a) - (e).

**2 One-party consent exception.** The one-party consent exception is "a narrow exception to the broad statutory prohibition against warrantless surveillance." *Commonwealth v. Thorpe*, 384 Mass. 271, 279 (1981), cert. denied, 454 U.S. 1147 (1982). It applies where a law enforcement officer is either 1) a party to a communication or 2) has been given prior authorization to record or transmit the communication by the other party. See G.L. c. 272, § 99 B 4. In addition, in either circumstance, the exemption only applies if the communication is recorded or transmitted in the course of an investigation of a “designated offense” committed in connection with organized crime. See G. L. c. 272, § 99 B 4, 7. See *Commonwealth v. Tavares*, 459 Mass. 289, 297-298 (2011); *Commonwealth v. Du*, 103 Mass. App. Ct. 469, 476 (2023). The term “designated offense” is defined in § 99 B 7, which enumerates several specific offenses. The preamble to the wiretap statute specifically defines "organized crime" to mean "a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services." G. L. c. 272, § 99 A, first par. See *Commonwealth v. Du*, 103 Mass. App. Ct. at 476-477 and cases cited (“Our cases have found this standard to be met where there was evidence of an ongoing coordinated effort among multiple people to engage in one of the statute’s designated offenses for the group’s financial gain or goals.”)

**3. Other offenses prohibited by Section 99.** In addition to 1) the unlawful interception of wire or oral communications, section 99 also prohibits 2) the editing or altering of recordings with the intent to present those in any judicial proceeding or proceeding under oath without indicating the nature

of the changes made; 3) the willful use or disclosure of wire or oral communications, knowing that the information was obtained through an “interception”, 4) the disclosure of information contained in a wiretap warrant and the contents of any recordings obtained pursuant to such a warrant and 5) possessing an interception device. This instruction may be tailored to fit those fact patterns if alleged.

**4 Other recognized exceptions.** An audio-visual recording “made openly, or for a non-investigative purpose untargeted to a particular suspect, or while knowing one is voluntarily speaking with police who are taking the statement down” is not an interception for purposes of the wiretap statute. *Commonwealth v. Du*, 103 Mass. App. Ct. 469, 479 (2023) (interception means to secretly hear, record or aid another person in hearing or recording the contents of a communication through the use of an intercepting device without authority). See e.g., *Commonwealth v. Morris*, 492 Mass. 498, 506 (2023) (police department recording of interrogation where defendant knew his voluntary statement was being preserved by police); *Commonwealth v. Rainey*, 491 Mass. 632, 643-644 (2023) (voluntary victim statement to police officer wearing body worn camera); *Commonwealth v. Rivera*, 445 Mass. 119, 123-125 (2005) (in-store surveillance camera); *Commonwealth v. Gordon*, 422 Mass. 816, 833 (1996) (administrative booking video).