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THE ADMISSIBILITY OF TAPE RECORDED EVIDENCE PRODUCED BY PRIVATE INDIVIDUALS UNDER TITLE III OF THE OMNIBUS CRIME CONTROL ACT OF 1968

To control the growth of organized crime, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968 (the Crime Control Act).¹ In enacting the Crime Control Act, Congress determined that one method to limit the growth of organized crime was to authorize law enforcement officials and private individuals to record conversations between organized crime members.² Congress thought that tape recordings of organized crime members' conversations would produce valuable evidence that would allow law enforcement officials effectively to identify and prosecute organized crime members.³ Accordingly, Congress enacted Title III of the Crime

1. Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C §§ 2510-2520 (1982)(Crime Control Act); see S. REP. No. 1097, 90th Cong., 2d Sess. 66, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2157 [hereinafter Senate Report](discussing Congress' rationale for controlling growth of crime by allowing individuals to tape record conversations under limited circumstances). By analyzing statistics, Congress concluded that organized crime posed a threat to society and recognized the need to control the growth of organized crime. Senate Report, *supra*, at 2157-58. In 1967 organized crime received \$7 billion from supporting professional gambling organizations. *Id.* at 2157. In addition, organized crime received a substantial portion of the \$350 million spent on narcotics each year. *Id.* Organized crime also received as much as \$350 million each year from illegal lending activities. *Id.* at 2158. Currently, organized crime affects the operation of many legitimate businesses including night clubs, food wholesaling, and record manufacturing. *Id.*

In considering the need to legislate a method for detecting organized criminal activities, Congress also discussed the history of organized crime in the United States. *Id.* at 2157. Congress noted that law enforcement officials in the nation's early years were able to identify and prosecute people who committed crimes because law enforcement officials personally knew the members of the community as a result of the nation's small size. *Id.* Law enforcement officials, therefore, did not consider the existence of organized crime members in developing methods to apprehend and prosecute criminals. *Id.* As the nation grew in size, the need for new methods for apprehending criminals increased because law enforcement officials no longer knew each member of the community. *Id.* Congress concluded that law enforcement officials in the 1960's could not detect and control organized crime because of the nation's increasing population. *Id.*

2. See Senate Report, *supra* note 1, at 2159-61 (recognizing use of electronic surveillance as means to aid law enforcement in combatting organized crime). Congress recognized that law enforcement officials could not detect organized crime in the late 1960's because organized crime was less visible, more secretive, and, therefore, more difficult to detect than other types of crime. *Id.* at 2158. Congress also recognized that law enforcement officials had difficulty detecting organized criminal activities because witnesses and victims of organized crime would not testify out of fear that organized crime members might seek vengeance. *Id.* at 2159, 2160. The problem of identifying organized crime members was compounded because many people at lower levels in the organized crime hierarchy protected top figures of organized crime, and top figures frequently did not participate in the direct activities of organized crime. *Id.* at 2159.

3. See *supra* note 2 and accompanying text (discussing Congress' opinion that allowing law enforcement officials to record conversations of organized crime members is effective in

Control Act (Title III) to authorize law enforcement officials and private individuals to record conversations between organized crime members.⁴

In enacting Title III, however, Congress recognized that permitting law enforcement officials and private individuals to record conversations substantially could invade a person's privacy.⁵ In balancing Congress' interests in protecting privacy against Congress' desire to control the growth of organized crime, Congress decided to permit law enforcement officials and private individuals to record organized crime members' conversations only within certain limitations.⁶ Under Title III law enforcement officials may record a conversation only after a federal judge has reviewed and authorized an application for taping conversations made by a law enforcement official.⁷

detecting activities of organized crime members). Because many organized crime members live in every part of the country, the telephone is often the easiest and most secret manner to plan criminal activities. See M. Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. OF CRIM. LAW & CRIMINOLOGY 36 (1983) (discussing organized crime members' use of telephones to conduct and plan criminal activities). As a result of organized crime members' use of the telephone to plan criminal activities, Congress reasoned that giving law enforcement officials the ability to record organized crime members' telephone conversations would help courts identify and prosecute organized crime members. See Senate Report, *supra* note 1, at 2159-61 (discussing congressional rationale for allowing individuals to record organized crime members' conversations).

4. See Senate Report, *supra* note 1, at 2157 (discussing Congress' rationale for enacting Title III).

5. See *id.*, at 2154-56 (discussing Congress' concern for protecting individuals' privacy from indiscriminate electronic surveillance). Congress recognized that technological developments have enabled individuals to violate other persons' privacy by abuse and vast usage of tape recorded surveillance. *Id.*

6. See *id.*, at 2156-57 (Congress reconciled protecting privacy with combatting organized crime in enacting Title III by establishing strict guidelines for individuals who tape record conversations). Congress reasoned that only minimal violations of privacy would exist if Congress established uniform guidelines for individuals to follow in taping conversations. *Id.* at 2156.

7. Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2516-19 (1982) (hereinafter Title III). To obtain an authorization to record conversations, law enforcement officials must follow procedural guidelines. *Id.* at § 2518. A law enforcement official first must complete and submit an application for recording conversations to the attorney general. *Id.* at § 2516. The attorney general then may authorize the law enforcement official to give the application for recording conversations to a federal judge. *Id.* The federal judge may authorize a surveillance only if the tape recorded conversations may produce evidence of a felony or of certain other crimes. *Id.*; see Griffin-Landrum Labor Reform Act, 29 U.S.C. § 501(c) (1954) (listing crimes that federal judge will consider in issuing authorization). A judge may issue the order only if the judge determines from the application that probable cause of criminal activity exists, and that the subject of the taping has committed or is committing an offense listed in Title III. Title III, *supra*, at § 2518; see Title III, *supra*, at § 2516 (listing crimes judge considers in issuing authorization).

When a law enforcement official applies for a judicial authorization, the application must include the identity of the law enforcement officer, as well as a complete statement of the facts and circumstances of the suspected crime. See Title III, *supra*, at § 2518. The application for a judicial order also must show whether the law enforcement official has considered other types of investigation to uncover evidence of the suspected crime. *Id.* If law enforcement officials have considered other types of investigation, the application must explain why the

Similarly, under Title III a private individual may record conversations only if the individual is a party to the conversation or if the individual has received consent from a party to the conversation to make the recording.⁸

Congress further limited a private individual's right to record conversations by enacting the criminal purpose exception to Title III [hereinafter referred to as the criminal purpose exception].⁹ In creating the criminal purpose exception, Congress prohibited the introduction of tape recorded evidence in any court if an individual made the tape recording for a criminal purpose.¹⁰ Although little legislative history exists to reveal Congress' intent in enacting the criminal purpose exception, Congress stated that a private individual acts with a criminal purpose if the individual intends to injure or offend a party to the conversation who has not consented to the recording [hereinafter referred to as the non-consenting party].¹¹ Congress noted that without the criminal purpose exception to Title III, private individuals legally could record a conversation intending to injure the non-consenting party through means like blackmailing or stealing business secrets.¹² Al-

other investigations have not succeeded. *Id.* After reviewing the application, the judge may enter an order accepting or modifying the application. *Id.* In addition to issuing an order, a federal judge may also request law enforcement officials to file progress reports concerning the taping of conversations. *Id.*

8. See Title III, *supra* note 7, at § 2511 (stating that private individual may record conversations if individual is party to taped conversation or if one party to conversation consents to recording).

9. *Id.* at § 2511(2)(d) (stating that private individuals may not tape conversations for criminal purposes). As originally proposed, Title III would permit private individuals to record conversations for any illicit purpose, including blackmailing a party to the conversation who did not consent to the recording [hereinafter non-consenting party], threatening the non-consenting party, or publicly embarrassing the non-consenting party. See 114 CONG. REC. 14,694-95 (1968) (reporting congressional debate concerning originally proposed Title III). By enacting the criminal purpose exception, Congress sought to deter individuals from recording conversations for the purpose of injuring the non-consenting party. *Id.* The language of the criminal purpose exception provision is as follows: tape recorded evidence is admissible. . . unless such communication is intercepted for the purpose of committing any criminal or tortious act. . . ." Title III, *supra* note 7, at § 2511(2)(d).

10. See Title III, *supra* note 7, at § 2511(2)(d) (stating that making tapes for criminal purpose violates Title III); *id.* at § 2515 (stating that tape recordings that violate Title III are inadmissible as evidence in any court).

11. 114 CONG. REC. 14,694-95 (1968) (discussing rationale for enacting criminal purpose exception). Congress recognized that unrestricted electronic surveillance would allow private individuals to tape conversations to injure persons not consenting to the recordings. *Id.* In enacting the criminal purpose exception, Congress reasoned that a person intending to injure a non-consenting individual with tape recorded evidence acts with a criminal purpose. *Id.*; see *supra* note 9 and accompanying text (discussing Congress' purpose in amending Title III to deter private individuals from recording conversations intending to injure non-consenting parties with tape recorded evidence).

12. See *supra* note 9 and accompanying text (discussing Congress' purpose in enacting criminal purpose exception). Crimes falling under the criminal purpose exception include any crime if an element of intent for the crime is to injure a non-consenting party to the conversation. See 114 CONG. REC. 14,694-95 (1968) (discussing Congress' rationale for enacting criminal purpose exception).

though Congress did not attempt to define thoroughly the criminal purpose exception, Congress nonetheless concluded that Title III should not permit a person to make recordings for a criminal purpose because the recordings seriously could invade a non-consenting party's privacy.¹³ As a result of Congress' failure to define the criminal purpose exception thoroughly, the criminal purpose exception has created confusion for federal circuit courts attempting to interpret and apply the exception.¹⁴ In recent decisions, circuit courts have raised three questions about the criminal purpose exception.¹⁵ First, circuit courts have attempted to ascertain what type of injury a private individual must intend to inflict upon the non-consenting party to constitute a criminal purpose.¹⁶ Second, circuit courts have attempted to determine whether the criminal purpose exception applies to a private individual who makes recordings as well as to non-consenting parties.¹⁷ Finally, circuit courts have considered whether the criminal purpose exception applies to a private individual who has recorded conversations for many different purposes.¹⁸ In attempting to eliminate the confusion and ambiguity of the criminal purpose exception, courts have attempted to answer these questions.¹⁹

13. 114 CONG. REC. 14,694-95 (1968) (discussing violations of privacy by person recording conversations intending to injure non-consenting party with recorded evidence); *see* Title III, *supra* note 7, at § 2511(2)(d) (establishing criminal purpose exception); *supra* notes 9-12 and accompanying text (discussing Congress' rationale for amending Title III to include criminal purpose exception).

14. *See* United States v. Underhill, 813 F.2d 105, 107-111 (6th Cir. 1987) (discussing Congress' intended meaning and application of criminal purpose exception), *cert. denied*, 107 S. Ct. 2484 (1987); United States v. Vest, 639 F. Supp. 899, 903-05 (discussing application of criminal purpose exception to situations involving persons who tape record conversations for many purposes), *aff'd*, 813 F.2d 477 (1st Cir. 1987); *infra* notes 39-41 and accompanying text (discussing Sixth Circuit's difficulty in interpreting and applying criminal purpose exception); *infra* notes 83-117 and accompanying text (discussing *Vest* court's difficulty in applying criminal purpose exception to circumstances involving person recording conversations for many different purposes).

15. *See infra* notes 16-18 and accompanying text (discussing three questions about criminal purpose exception circuit courts recently have raised).

16. *See* United States v. Underhill, 813 F. 2d 105, 110-11 (6th Cir. 1987) (discussing difficulty with interpreting criminal purpose exception), *cert. denied*, 107 S. Ct. 2484 (1987); United States v. Vest, 639 F. Supp. 899, 902-905 (D. Mass 1986) (court discusses meaning of criminal purpose), *aff'd*, 813 F.2d 477 (1st Cir. 1987); *infra* notes 53-66 and accompanying text (discussing Sixth Circuit's difficulty in interpreting criminal purpose exception and Congress' intent in enacting criminal purpose exception).

17. *See* United States v. Underhill, 813 F.2d 105, 112 (6th Cir. 1987) (discussing whether to apply criminal purpose exception to persons who tape record conversations for criminal purposes), *cert. denied*, 107 S. Ct. 2484 (1987); *infra* notes 67-80 and accompanying text (discussing *Underhill* court's difficulty in applying exception to both private individuals who record conversations for criminal purposes and non-consenting parties).

18. *See* United States v. Vest, 639 F. Supp. 899, 904-05 (D. Mass. 1986) (discussing methods for determining criminal purpose when individuals record conversations for many different purposes), *aff'd*, 813 F.2d 477 (1st Cir. 1987); *infra* notes 84-117 and accompanying text (discussing *Vest* court's difficulty in applying criminal purpose exception when individuals record conversations for many different purposes).

19. *See supra* notes 16-18 (discussing circuit courts that address questions attempting to apply criminal purpose exception properly).

Recently, the United States Court of Appeals for the Sixth Circuit interpreted and applied the criminal purpose exception in *United States v. Underhill*.²⁰ In *Underhill* federal agents searched an apartment leased by Daniel Rokitka for evidence of illegal gambling.²¹ The agents discovered gambling paraphernalia and saw two telephones attached to tape recorders.²² The agents found and seized fifteen audio cassettes.²³ The cassettes contained conversations concerning exchanges of gambling information and the placing of bets on sporting events.²⁴ At an evidentiary hearing, the government attempted to introduce the tapes as evidence against Rokitka and Howard Underhill, the persons who had recorded the conversations.²⁵ The government also tried to use the recordings against Walter Person, Pat Tata, Tony Rayburn, and Eddie and Joe Osborne, the defendants that Underhill and Rokitka had recorded secretly.²⁶ A federal grand jury in the Western District of Tennessee indicted all of the defendants for conspiracy and other offenses relating to the ownership and operation of an illegal gambling operation.²⁷

In the United States District Court for the Western District of Tennessee, Underhill and Rokitka testified that they had recorded conversations to retain a record to settle disputes over gambling wagers.²⁸ Recognizing that making gambling records is a misdemeanor in Tennessee,²⁹ the defendants argued that the court should exclude the tape recordings under the criminal purpose exception.³⁰ In response to the defendants' contention that the district court should not admit the tapes as evidence, the government argued that in enacting Title III, Congress never intended to prevent courts from

20. 813 F.2d 105 (6th Cir. 1987), *cert. denied*, 107 S. Ct. 2484 (1987).

21. *United States v. Underhill*, 813 F.2d 105, 107 (6th Cir. 1987), *cert. denied*, 107 S. Ct. 2484 (1987).

22. *Id.* at 107.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 110.

29. *Id.* at 111; see TENN. CODE ANN. §§ 39-6-601(7), 39-6-602(e) (1980) (prohibiting production and possession of gambling records). To knowingly make, possess or store gambling records is a misdemeanor in Tennessee. See TENN. CODE ANN. at §§ 39-6-601(7), 39-6-602(e).

30. *Underhill*, 813 F.2d at 108-09. In *Underhill* the defendants that did not consent to the taping of the conversations argued that criminal purpose is equivalent to the intent to commit any criminal act. *Id.* The non-consenting defendants showed that defendants Underhill and Rokitka had committed a crime under Tennessee law. *Id.* Accordingly, the defendants argued that Rokitka and Underhill recorded conversations for a criminal purpose. *Id.* In contending that defendants Underhill and Rokitka recorded the conversations for a criminal purpose, the remaining defendants argued that the court should exclude the tape recordings under the criminal purpose exception of Title III. *Id.*; see Title III, *supra* note 7, at §2511(2)(d) (stating that tapes made for criminal purpose violate provisions of Title III); *supra* note 10 and accompanying text (stating that evidence produced by violating Title III is inadmissible as evidence in court); *supra* note 29 and accompanying text (discussing that person who makes gambling records violates Tennessee law).

using evidence against organized crime members.³¹ The government reasoned that excluding recordings under the criminal purpose exception would circumvent Congress' purpose of combatting organized crime.³² The government also argued that Underhill and Rokitka had not made the recordings with a criminal purpose.³³ The government reasoned that the defendants had made the tapes intending to maintain records of gambling bets but not intending to injure the non-consenting defendants.³⁴ Furthermore, the government reasoned that Congress did not intend for the criminal purpose exception to encompass all crime, but only certain crimes, such as blackmail, that involve a private individual who intends to injure a non-consenting party.³⁵ Consequently, the government argued that the tapes were admissible as evidence against the defendants.³⁶ The district court disagreed with the government's arguments and excluded the tape recordings as evidence against the defendants.³⁷ The government appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit.³⁸

The Sixth Circuit in *Underhill* first considered whether defendants Underhill and Rokitka had made the tapes for a criminal purpose.³⁹ In considering whether to exclude the recordings under the criminal purpose exception of Title III, the Sixth Circuit recognized that to make or possess gambling records is a crime in Tennessee.⁴⁰ Relying on the defendants' testimony that the tapes were records of gambling transactions, the Sixth Circuit held that Underhill and Rokitka had made the tapes for a criminal purpose.⁴¹

31. *Underhill*, 813 F.2d at 109. In arguing that the court should admit the tapes into evidence against the defendants, the government in *Underhill* stated that Congress' primary purpose in enacting Title III was to control the growth of organized crime. *Id.*; see *supra* note 1 and accompanying text (discussing Congress' intent to combat organized crime in enacting Crime Control Act). The government argued, therefore, that Congress did not intend to protect organized crime members with the criminal purpose exception. *Underhill*, 813 F.2d at 109.

32. *Underhill*, 813 F.2d at 109-10; see *supra* note 31 and accompanying text (discussing government's argument that excluding tapes as evidence would circumvent purpose of Crime Control Act).

33. See *Underhill*, 813 F.2d at 109-10.

34. *Id.* (discussing defendants' testimony that purpose of recordings was to make gambling records).

35. *Id.*; see *supra* notes 11-13 and accompanying text (discussing Congress' intent in enacting criminal purpose exception); see also *supra* notes 9, 12 and accompanying text (discussing crimes falling under criminal purpose exception).

36. *Underhill*, 813 F.2d at 110; see Title III, *supra* note 7, at § 2511(2)(d) (stating that tape recordings made for criminal purpose are inadmissible as evidence). Under Title III courts may admit a tape recording against any defendant if the individual made the recording without a criminal purpose. See Title III, *supra* note 7, at § 2511(2)(d) (criminal purpose exception).

37. *Underhill*, 813 F.2d at 108 (discussing district court excluding evidence because court held intent to commit criminal act equivalent to criminal purpose under criminal purpose exception).

38. *Id.* at 107.

39. *Id.* at 110-11.

40. *Id.* at 111; see *supra* notes 29-30 and accompanying text (discussing Tennessee statutory prohibition against making and possessing gambling records).

41. *Underhill*, 813 F.2d at 111. The Sixth Circuit in *Underhill* reasoned that intent to

After determining that Underhill and Rokitka had made tapes for a criminal purpose, the Sixth Circuit next considered whether to apply the criminal purpose exception to the tape recordings as evidence against Underhill and Rokitka, the defendants who recorded the conversations.⁴² In considering whether the criminal purpose exception applied to Underhill and Rokitka, the Sixth Circuit examined the legislative history of Title III.⁴³ The *Underhill* court recognized that although Congress had intended to permit private individuals to tape conversations, Congress also intended to protect the privacy of individuals by restricting the use of tape recorded conversations.⁴⁴ In concluding that Congress had enacted the criminal purpose exception only to protect the privacy of persons who did not record conversations, the Sixth Circuit reasoned that Congress did not enact the exception to protect the privacy of private individuals who made recordings.⁴⁵ The Sixth Circuit determined, therefore, that the government could admit the recordings against Underhill and Rokitka, even if Underhill and Rokitka made the tapes with the criminal purpose of recording gambling transactions.⁴⁶

Finally, the Sixth Circuit considered whether to exclude the tape recordings as evidence against the defendants who did not consent to the tape recordings.⁴⁷ In determining the admissibility of the tapes against Person, Tata, Rayburn, and Eddie and Joe Osborne, the Sixth Circuit examined the relationship between Underhill and Rokitka and the remaining defendants.⁴⁸ The court determined that even though the remaining defendants did not consent to the recordings, the remaining defendants were co-

commit a crime constitutes a criminal purpose under Title III. *Id.* at 110-11; *cf.* Title III, *supra* note 7, at § 2511(2)(d) (criminal purpose exception).

42. *Underhill*, 813 F.2d at 111-12.

43. *Id.*; see Senate Report, *supra* note 1, at 2153-97 (legislative history of Title III).

44. *Underhill*, 813 F.2d at 112; see *supra* note 5 and accompanying text (discussing Congress' concern for protecting non-consenting parties from invasions of privacy); *supra* notes 9-13 and accompanying text (discussing Congress' intent to protect non-consenting parties' privacy by enacting criminal purpose exception).

45. *Underhill*, 813 F.2d at 112. In *Underhill* the Sixth Circuit concluded that in enacting Title III, Congress intended to prohibit a perpetrator from benefiting from the perpetrator's unlawful acts. *Id.*; see Senate Report, *supra* note 1, at 2156 (reporting legislative history stating that perpetrators must not benefit from illegal acts). The Sixth Circuit contended that a perpetrator is an individual who records conversations for a criminal purpose. *Underhill*, 813 F.2d at 112. The Sixth Circuit reasoned, therefore, that the criminal purpose exception does not apply to persons who violate Title III by recording conversations with a criminal purpose. *Id.*

46. *Underhill*, 813 F.2d at 112; see *supra* note 45 and accompanying text (discussing Sixth Circuit's conclusion that Congress did not intend for criminal purpose exception to protect persons who record conversations for criminal purposes).

47. *Underhill*, 813 F.2d at 112; see *infra* notes 48-52 and accompanying text (discussing court's rationale for admitting tapes as evidence against non-consenting parties).

48. *Underhill*, 813 F.2d at 112. The Sixth Circuit in *Underhill* held that defendants Person, Tata, Rayburn and Eddie and Joe Osborne conspired with Underhill and Rokitka to maintain an illegal gambling operation. *Id.*

conspirators of Underhill and Rokitka.⁴⁹ The Sixth Circuit reasoned that, as co-conspirators, the remaining defendants had waived any claim to invasion of privacy and were bound by the acts of the conspirators who had recorded the conversations.⁵⁰ The Sixth Circuit reasoned that the remaining defendants were as responsible as Underhill and Rokitka for the existence of the tape recordings.⁵¹ Consequently, the Sixth Circuit admitted the tapes as evidence against the remaining defendants, holding that the criminal purpose exception did not apply to co-conspirators.⁵²

The Sixth Circuit in *Underhill* raised the question of what type of intent demonstrates that a person recorded a conversation for a criminal purpose.⁵³ The *Underhill* court answered the question by concluding that Congress intended for any criminal intent to constitute a criminal purpose.⁵⁴ The Sixth Circuit reasoned that intending to commit a criminal act is equivalent to acting with a criminal purpose under Title III.⁵⁵ In determining whether Underhill and Rokitka had recorded the conversations with a criminal purpose, however, the Sixth Circuit mistakenly focused on the fact that Underhill and Rokitka committed a crime by making gambling records rather than focusing on whether Underhill and Rokitka made the gambling records for a criminal purpose under Title III.⁵⁶

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 111-12 (Sixth Circuit's interpretation of meaning of criminal purpose); see *supra* notes 39-52 and accompanying text (discussing Sixth Circuit's analysis of criminal purpose exception).

54. *Underhill*, 813 F.2d at 110-111 (court reasons that criminal purpose is equivalent to any criminal intent); see *infra* notes 56-63 and accompanying text (discussing correct interpretation of criminal purpose).

55. *Underhill*, 813 F.2d at 111; see *infra* note 56 and accompanying text (discussing Sixth Circuit's incorrect interpretation of criminal purpose).

56. See *Underhill*, 813 F.2d at 110-11 (discussing Sixth Circuit's rationale for holding that defendants made tapes for criminal purpose). In *Underhill* the Sixth Circuit equated the intent to commit a criminal act with criminal purpose. *Id.* The Sixth Circuit held that Underhill and Rokitka taped with a criminal purpose because Rokitka and Underhill violated Tennessee law by making gambling records. *Id.*; see *United States v. Vest*, 813 F.2d 477, 480 (1st Cir. 1987) (district court held that criminal purpose is intent to injure non-consenting party to conversation, including crimes such as blackmail); *Meredith v. Gavin*, 446 F.2d 794, 798 (8th Cir. 1971) (holding that criminal purpose exception does not apply to all crimes because criminal purpose is intent to injure taped subject); 114 CONG. REC. 14,694-95 (1968) (stating that criminal purpose exception applies to crime if person commits crime by intending to injure non-consenting party). In *Meredith* plaintiff allegedly suffered a hip injury. 446 F.2d at 796. Plaintiff claimed that the injury occurred during employment. *Id.* The defendant, Gavin, was the claims manager for the insurance carrier for plaintiff's employer. *Id.* The insurance carrier did not pay for the injury, arguing that the plaintiff's alleged injury did not occur during a work-related activity. *Id.* The insurance carrier based the refusal to pay on a written statement by the plaintiff. *Id.* The statement suggested that the injury occurred from ordinary lifting strain, and the insurance carrier concluded that the plaintiff's injury was not compensable. *Id.* On one occasion plaintiff telephoned Gavin to ask why the carrier had not paid the injury

The Sixth Circuit incorrectly interpreted and applied the criminal purpose exception perhaps because of the paucity of legislative history and congressional guidance concerning the criminal purpose exception.⁵⁷ The criminal purpose exception has little legislative history because Congress did not include the exception within the originally proposed version of Title III.⁵⁸ Under the originally proposed version of Title III, Congress permitted private individuals to record conversations without restriction.⁵⁹ Congress, however, thought that the original provisions of Title III would permit private individuals to make recordings to injure non-consenting parties.⁶⁰ Therefore, Congress amended the originally proposed version of Title III by enacting the criminal purpose exception.⁶¹ Congress designed the criminal

claim. *Id.* Gavin recorded the conversation without the plaintiff's consent. *Id.* During the conversation, Gavin read the written statement to the plaintiff. *Id.* Gavin claimed he routinely recorded conversations to keep accurate records of any conversations he made with claimants. *Id.* The plaintiff filed a worker's compensation claim alleging that the plaintiff slipped on a floor littered with debris at his place of employment. *Id.* During the hearing, the plaintiff denied having the taped conversation with Gavin. *Id.* Gavin testified at the hearing that after Gavin read a transcript of the taped conversation to the plaintiff, the plaintiff responded that the plaintiff did make the written statement. *Id.* Plaintiff brought suit against the defendant alleging that the use of the recording at the worker's compensation hearing violated Title III. *Id.* at 797.

In addressing the plaintiff's contention, the United States Court of Appeals for the Eighth Circuit recognized that Congress enacted the criminal purpose exception after Congress initially considered Title III. *Id.* at 798. The Eighth Circuit noted that the criminal purpose exception prohibited a person from making any recordings of conversations with the intent to injure a non-consenting party. *Id.*; see 114 CONG. REC. 14,694-95 (1968) (discussing criminal purpose exception applying if person commits crime intending to injure non-consenting party). In the context of the statute, the Eighth Circuit determined that, in enacting the criminal purpose exception, Congress contemplated conduct in which a person records conversations with the intent to use the recordings against the non-consenting party in an offensive manner. *Meredith*, 446 F.2d at 799. The Eighth Circuit reasoned that the criminal purpose exception does not apply to all criminal acts because a criminal purpose under Title III is the intent to injure a non-consenting party. *Id.* Accordingly, the Eighth Circuit held that Gavin did not make the tape recording for a criminal purpose because Gavin did not intend to injure or offend anyone with the tape recording. *Id.*

57. See *Meredith*, 446 F.2d at 798 (recognizing lack of legislative history about meaning of criminal purpose exception); Senate Report, *supra* note 1, at 2182 (demonstrating that Congress did not mention criminal purpose exception in early legislative history of Title III).

58. See *Meredith*, 813 F.2d at 797-798 (discussing legislative history of criminal purpose exception); Senate Report, *supra* note 1, at 2182 (legislative history of originally proposed Title III does not contain criminal purpose exception); Title III, *supra* note 7, at § 2511(2)(d) (criminal purpose exception as enacted by Congress).

59. See Senate Report, *supra* note 1, at 12 (discussing proposed provision including criminal purpose exception); 2 U.S. CODE CONG. & ADMIN. NEWS, 90th Cong., 2d Sess. 2236 (1968) (discussing provision as originally proposed). The sponsors of the criminal purpose exception objected to Title III as originally proposed because the act would permit persons to tape record conversations for any injurious purpose. *Id.*

60. See *supra* notes 9-13 and accompanying text (discussing Congress' fear that proposed version of Title III would authorize persons to injure taped subjects).

61. See *Meredith*, 813 F.2d at 798 (discussing Congress' rationale for enacting criminal purpose exception); *supra* note 56 and accompanying text (discussing Eighth Circuit's analysis of Congress' intent in enacting criminal purpose exception); *supra* note 9 and accompanying text (discussing Congress' intent in enacting criminal purpose exception).

purpose exception to protect non-consenting parties from private individuals who record conversations intending to injure non-consenting parties with the evidence produced by the recordings.⁶² Congress intended the criminal purpose exception to apply to a crime if the private individual secretly intended to injure a party to the conversation by committing a crime such as blackmail.⁶³ If a private individual secretly records a conversation while intending to commit a crime by injuring a non-consenting party with the recorded evidence, then the crime falls under the criminal purpose exception.⁶⁴ If the private individual records the conversations intending to commit a crime but not intending to injure a party with the recorded evidence, then the crime does not fall under the criminal purpose exception.⁶⁵ Therefore, in amending Title III to include the criminal purpose exception, Congress intended for courts to exclude tape recordings as evidence against non-consenting parties only if a private individual made the recordings with the intent to injure a non-consenting party.⁶⁶

After considering Congress' intent in enacting the criminal purpose exception, the Sixth Circuit in *Underhill* raised the issue of whether the criminal purpose exception applies to tape recorded evidence used against a private individual who made the recordings.⁶⁷ The Sixth Circuit properly admitted the tapes against the defendants who recorded the conversations because Congress never intended to protect persons who make tape record-

62. See *Meredith*, 446 F.2d at 799 (court discusses Congress' intent in enacting criminal purpose exception); *United States v. Vest*, 639 F. Supp. 899, 905-907 (D. Mass. 1986) (crime with intent to injure non-consenting parties falls under criminal purpose exception which include crimes like blackmail), *aff'd*, 813 F.2d 477 (1st Cir. 1987); 114 CONG. REC. 14,694-95 (1968) (discussing meaning of criminal purpose).

63. See *Meredith*, 446 F.2d at 799 (discussing crimes falling under criminal purpose exception); *Vest*, 639 F. Supp. at 907 (discussing blackmail as crime falling under criminal purpose exception); 114 CONG. REC. 14,694-95 (1968) (stating that crimes falling under criminal purpose exception have elements of intent to injure non-consenting parties); *supra* note 12 and accompanying text (discussing crimes Congress intended to fall under criminal purpose exception).

64. See *supra* note 63 and accompanying text (discussing criminal acts falling under criminal purpose exception).

65. *Id.*

66. Title III, *supra* note 7, at § 2511(2)(d) (criminal purpose provision); see *Meredith*, 446 F.2d at 799 (discussing Congress' intent in enacting criminal purpose exception); *Vest*, 639 F. Supp. at 907 (stating that person acts with criminal purpose when intending to injure a non-consenting party); *supra* note 9 and accompanying text (discussing Congress' intent to protect non-consenting parties by enacting criminal purpose exception); *supra* note 56 and accompanying text (discussing Congress' purpose in enacting criminal purpose exception); *supra* note 63 and accompanying text (discussing Congress' intent to protect non-consenting parties rather than persons who record conversations for criminal purposes).

67. *United States v. Underhill*, 813 F.2d 105, 112 (6th Cir. 1987) (discussing difficulty in determining whether to admit tapes against person who recorded conversations under criminal purpose exception), *cert. denied*, 107 S. Ct. 2484 (1987); *supra* notes 40-46 and accompanying text (discussing court's difficulty in determining whether to admit tapes as evidence against persons making tapes).

ings.⁶⁸ A careful analysis of the legislative history of the criminal purpose exception under Title III reveals that Congress did not intend for the criminal purpose exception to apply to private individuals who have recorded conversations.⁶⁹ According to the legislative history of Title III, Congress intended to authorize courts to permit the government to admit tape recorded evidence against the maker of the tape.⁷⁰ Congress reasoned that allowing the government to use and disclose tape recorded evidence is necessary to investigate and prosecute persons who record conversations for criminal purposes.⁷¹

Courts would support Congress' purpose in combatting organized crime by admitting the tape recordings against a private individual who records conversations to produce evidence of the individual's organized crime activities.⁷² By admitting tape recorded evidence against an individual who records a conversation for a criminal purpose, courts would not interfere with Congress' desire to prevent invasions of a person's privacy.⁷³ In addition to admitting tape recordings against the persons who record conversations

68. See *infra* notes 69-72 and accompanying text (discussing Congress' intent not to protect persons making tapes with criminal purpose exception).

69. See Senate Report, *supra* note 1, at 2156 (discussing Congress' intent not to apply criminal purpose exception to persons making recordings for criminal purposes); *infra* note 74 and accompanying text (legislative history reveals that Congress intended to admit tapes against person who makes tapes).

70. See *Underhill*, 813 F.2d at 112 (analyzing legislative history regarding decision to admit tapes against persons making tapes); Senate Report, *supra* note 1, at 2156 (discussing Congress' intent to deny protection to persons recording conversations under criminal purpose exception). The legislative history of Title III reveals that Congress intended to deny individuals who record conversations for criminal purposes to benefit from the fruits of the individuals' illegal activities. See Senate Report, *supra* note 1, at 2156. Congress, therefore, did not intend for courts to shield persons making illegal tape recordings by excluding tape recorded evidence under the criminal purpose exception. *Id.* Congress allowed the government to use and disclose the tape recordings against a person making the tape recordings in order to investigate and prosecute the person making the tapes. *Id.* at 2188.

71. See Senate Report, *supra* note 1, at 2188 (discussing Congress' determination that admitting tape recorded evidence is crucial to prosecution of persons who record conversations for criminal purposes).

72. See *Underhill*, 813 F.2d at 112 (court admitted tape recordings against persons making tapes which produced evidence of involvement with illegal gambling operation); *supra* note 1 and accompanying text (discussing Congress' intent to control growth of organized crime by enacting Title III); Senate Report, *supra* note 1, at 2188 (stating that admitting tape recorded evidence against persons who record for criminal purposes is necessary to investigate and decrease organized criminal activity).

73. See *Meredith v. Gavin*, 446 F.2d 794, 798 (8th Cir. 1971) (discussing enactment of criminal purpose exception to protect taped subjects from injurious invasions of privacy); CONG. REC., *supra* note 9, at 14,694-95 (discussing Congress' intent to protect non-consenting parties by enacting criminal purpose exception); *supra* note 5 and accompanying text (discussing Congress' desire to protect non-consenting parties from invasions of privacy); *supra* note 9 and accompanying text (discussing Congress' intent to protect persons from invasions of privacy by enacting criminal purpose exception); Senate Report, *supra* note 1, at 2154-2156 (discussing Congress' desire to protect individuals' privacy from persons who record conversations for criminal purposes).

for a criminal purpose, a court's threat of prosecuting the individuals for organized criminal activities would deter individuals from making recordings to injure or offend a non-consenting party.⁷⁴

Finally, courts should admit recordings as evidence against private individuals who record conversations according to Congress' intended meaning of the criminal purpose exception.⁷⁵ Congress designed the criminal purpose exception to protect a non-consenting party from a private individual who tape records conversations intending to injure the non-consenting party with the tape recorded evidence.⁷⁶ The criminal purpose exception, however, does not apply to a tape recording if a party to the conversation consents to the recording.⁷⁷ A private individual who is also a party to the conversation arguably consents to the recording of the conversation by recording the conversation.⁷⁸ As a result of Congress' intent to protect only a non-consenting party to a conversation, Congress did not intend for the criminal purpose exception to protect the interests of a private individual who recorded the conversation for a criminal purpose.⁷⁹ Therefore, under

74. See CONG. REC., *supra* note 9, at 14694-95 (discussing Congress' intent in enacting criminal purpose exception to exclude evidence used against non-consenting parties); Senate Report, *supra* note 1, at 2156 (discussing Congress' intent to admit tapes against maker of tapes because criminal purpose exception gives no protection to persons recording conversations in violation of Title III). A person who makes tapes for a criminal purpose violates Title III. See Title III, *supra* note 7, at § 2511(2)(d) (discussing criminal purpose exception as violation of Title III). Courts must deny protection under the criminal purpose exception to a person who violates Title III by recording conversations for a criminal purpose. See Senate Report, *supra* note 1, at 2156.

75. See *Meredith*, 446 F.2d at 798 (discussing enactment of criminal purpose exception to protect non-consenting parties from injurious invasions of privacy); CONG. REC., *supra* note 9, at 14,694-95 (stating that criminal purpose is intent to injure or offend non-consenting parties with tape recorded evidence); *supra* note 9 and accompanying text (discussing Congress' intent in enacting criminal purpose exception).

76. See CONG. REC., *supra* note 9, at 14,694-95 (discussing criminal purpose exception as protection for non-consenting parties). In enacting the criminal purpose exception, Congress intended to protect the privacy of non-consenting parties. *Id.*

77. Title III, *supra* note 7, at § 2511(2)(d) (Congress specified under criminal purpose exception provision that exception does not apply to tape recorded evidence when party to conversation consents to recording).

78. See Title III, *supra* note 7, at § 2511(2)(d) (criminal purpose exception provision). The criminal purpose exception does not apply to tape recorded evidence if persons give consent to individuals to record conversations or know that an individual is recording a conversation. *Id.* An individual who is a party to the conversation, while recording the conversation, knows that someone is recording the conversation. See *id.* Therefore, an individual who records a conversation arguably consents to the recording. See *id.*

79. See CONG. REC., *supra* note 9, at 14,694-95 (discussing purpose in enacting criminal purpose exception). Congress enacted the criminal purpose exception to protect non-consenting parties from potential injury. *Id.* In *Underhill* the Sixth Circuit determined that the persons making the tapes waived claims to violations of privacy because the persons making the tapes produced the tapes. See *United States v. Underhill*, 813 F.2d 105, 112 (6th Cir. 1987), *cert. denied*, 107 S. Ct. 2484 (1987). The court determined that in making the tapes, the persons had no expectation of privacy. *Id.*

the criminal purpose exception, courts should admit tapes as evidence against the person who records conversations for a criminal purpose.⁸⁰

Although the criminal purpose exception does not apply to tape recordings used as evidence against persons who have recorded conversations for a criminal purpose, the exception does apply to tape recorded evidence used against non-consenting parties.⁸¹ In enacting Title III, Congress reasoned that a private individual records a conversation for a criminal purpose if the individual intends to injure a non-consenting party to the recording.⁸² Although Congress specified that Congress enacted the criminal purpose exception to protect non-consenting parties from private individuals who record for a criminal purpose, Congress did not indicate how courts should determine criminal purpose when individuals record conversations for many different purposes.⁸³ Recently, the United States Court of Appeals for the First Circuit in *United States v. Vest*⁸⁴ addressed the problem of determining criminal purpose when an individual made tape recordings for many purposes.⁸⁵

In *Vest* police officers arrested and charged Jesse James Waters with shooting detective Francis J. Tarantino.⁸⁶ While on bail, Waters met with Tarantino and Vest, another detective.⁸⁷ Waters agreed to pay \$300,000 to Tarantino, and Vest agreed to collect the payments for Tarantino from Waters.⁸⁸ In return for Waters' payments, Tarantino promised that the Superior Court for Suffolk County, Massachusetts, would not sentence Waters to imprisonment if Waters pled guilty to the shooting of Tarantino.⁸⁹ When Vest visited Waters to receive the first payment, Waters tape recorded the entire conversation without Vest's knowledge.⁹⁰

80. See *supra* notes 77-79 and accompanying text (discussing rationale for admitting tapes against persons who record conversations under criminal purpose exception).

81. See CONG. REC., *supra* note 9, at 14694-95 (discussing intent to protect non-consenting parties from invasions of privacy by enacting criminal purpose exception).

82. See *Meredith v. Gavin*, 446 F.2d 794, 798 (8th Cir. 1971) (discussing Congress' purpose in protecting non-consenting parties by enacting criminal purpose exception); CONG. REC., *supra* note 9, at 14694-95 (discussing congressional meaning of criminal purpose); *supra* note 9 and accompanying text (discussing Congress' purpose for enacting criminal purpose exception).

83. See *United States v. Vest*, 639 F. Supp. 899, 902 (D. Mass. 1986) (discussing lack of congressional guidance and legal precedent in applying criminal purpose exception), *aff'd*, 813 F.2d 477 (1st Cir. 1987); Title III, *supra* note 7, at §§ 2510-20 (suggesting lack of congressional guidance for applying criminal purpose exception when persons record conversations for many purposes); Senate Report, *supra* note 1, at 2112-97 (suggesting lack of legislative history to reveal Congress' intended application of criminal purpose exception to persons recording conversations for many purposes).

84. 813 F.2d 477 (1st Cir. 1987).

85. See *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987).

86. *Id.* at 479.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

Two months after the Superior Court convicted and sentenced Waters to imprisonment for the shooting of Tarantino, Waters turned the tape recording of the transaction with Vest over to law enforcement officials.⁹¹ After law enforcement officials investigated the payoff agreement between Tarantino, Vest and Waters, a grand jury indicted Vest.⁹² Vest moved to suppress the tape recording, arguing that the evidence was inadmissible under the criminal purpose exception because Waters had recorded the conversation intending to blackmail Vest.⁹³

In considering whether to exclude the tape recording under the criminal purpose exception of Title III, the United States Court of Appeals for the First Circuit adopted without comment the reasoning of the United States District Court for the District of Massachusetts.⁹⁴ The district court recognized that a tape recording is inadmissible as evidence against non-consenting parties to the taped conversation if a person recorded the conversations for a criminal purpose.⁹⁵ The district court noted, however, that the criminal purpose exception was difficult to apply to situations involving private individuals who record conversations for a criminal purpose because individuals seldom act for a singular purpose.⁹⁶ The district court reasoned that persons tape conversations for many different purposes.⁹⁷ The district court acknowledged that without congressional guidance or legal precedent, the district court needed to construct a method for determining whether an individual has recorded a conversation for a criminal purpose when the individual made the recording for many different purposes.⁹⁸

In developing the method, the district court examined two approaches for determining whether a person recorded a conversation for a criminal purpose.⁹⁹ The first approach the court considered required a non-consenting party to show that the person recording the conversation had some intent, no matter how little, to injure the non-consenting party.¹⁰⁰ However, the

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 480 (First Circuit affirmed district court's holding that tape recorded evidence was inadmissible under criminal purpose exception).

95. *United States v. Vest*, 639 F. Supp. 899, 902 (D. Mass. 1986), *aff'd*, 813 F.2d 477 (1st Cir. 1987); *see supra* note 9 and accompanying text (discussing language of criminal purpose exception).

96. *Vest*, 639 F. Supp. at 902 (discussing difficulty in applying criminal purpose exception if person records conversations for many different purposes); *supra* note 9 and accompanying text (stating that criminal purpose provision refers to single purpose).

97. *Vest*, 639 F. Supp. at 902 (stating that persons usually tape record conversations for many purposes).

98. *Id.*; *see supra* note 83 and accompanying text (discussing lack of congressional guidance in applying criminal purpose exception when individuals record conversations for many purposes).

99. *Vest*, 639 F. Supp. at 904 (discussing court's analysis of two methods for determining criminal purpose); *infra* notes 100-09 and accompanying text (discussing district court's analysis of two methods court considered for determining criminal purpose).

100. *Vest*, 639 F. Supp. at 904 (discussing district court's analysis of first method for

district court rejected the first approach, reasoning that the first approach unfairly would require the government to prove that the person recording the conversations had no intent whatsoever to injure the non-consenting party.¹⁰¹ The second approach the court considered required the non-consenting party to show that the person recording the conversation intended only to injure the non-consenting party.¹⁰² However, the district court rejected the second approach, reasoning that the second approach would unfairly require the non-consenting party to prove that the person recorded the conversation solely to injure the non-consenting party.¹⁰³

In rejecting the two approaches, the district court in *Vest* adopted a third method as a compromise between the two examined approaches.¹⁰⁴ The district court determined that a person records a conversation for a criminal purpose if the person primarily intends to injure a non-consenting party with the recording (hereinafter referred to as the primary motivation method).¹⁰⁵ The district court stated that by applying the primary motivation method, courts could take into account the complexity of human motivation.¹⁰⁶ The district court reasoned that the primary motivation method weighs the purposes for which the individual made the tapes in order to

determining whether individuals record conversations for criminal purposes). The first method analyzed by the district court would require that the government prove that the individual recorded the conversation with no criminal purpose in order to admit the tape recordings into evidence. *Id.*

101. *Vest*, 639 F. Supp. at 904 (discussing court's rationale for rejecting first method in determining whether individuals record conversations for criminal purposes). The district court determined that the first method would place an unreasonable burden of proof upon the government. *Id.*

102. *Id.* (discussing court's analysis of second method for determining criminal purpose). The district court in *Vest* stated that to render tape recordings inadmissible under the second method, the non-consenting party must prove that the individual made the recordings only for a criminal purpose. *Id.*

103. *Id.*

104. *Id.* at 904; see *infra* note 105 and accompanying text (discussing method court adopts in determining whether person tape recorded conversations for criminal purposes).

105. *Vest*, 639 F. Supp. at 904 (discussing court's adoption of method to determine whether person tape recorded conversations for criminal purpose). In *Vest* the district court determined that a person records a conversation for a criminal purpose if the person primarily intends to injure the non-consenting party with the recording (hereinafter referred to as the primary motivation method). *Id.* The district court noted that courts usually use the primary motivation method in determining whether a person has acted with the requisite intent of a particular crime when the person has acted for many different motives. *Id.* at 905. Courts often apply the primary motivation method in employment discrimination cases concerning age, sex or race. *Id.*; see *Monteiro v. Poole Silver Co.*, 615 F.2d 4, 9 (1st Cir. 1980) (applying primary motivation test to determine whether firing of employee was based on racial discrimination); *United States v. Phillips*, 564 F.2d 32, 34 (8th Cir. 1977) (applying primary motivation test to circumstances involving public embarrassment with tape recordings); *infra* notes 106-109 and accompanying text (discussing court's rationale for adopting primary motivation method for determining criminal purpose).

106. *Vest*, 639 F. Supp. at 904 (discussing court's statement that primary motivation method would enable other courts to account for all of individual's purposes in recording conversations).

determine if the criminal purpose was primary.¹⁰⁷ The district court also stated that the primary motivation method places a reasonable burden of proof upon the government and the non-consenting party to show whether the individual recorded a conversation with a criminal purpose.¹⁰⁸ The district court thought the burden of proof was reasonable because both the government and the non-consenting party would need only to show that the primary purpose for the recording was or was not criminal under Title III.¹⁰⁹

In applying the primary motivation method to determine whether Waters recorded the conversation for a criminal purpose, the *Vest* district court stated that Waters wanted to make a record of the transaction between himself and Vest.¹¹⁰ The district court also stated, however, that while Waters might have made the recording to protect himself, Waters intended primarily to use the tape to blackmail Vest.¹¹¹ The district court concluded that because Congress designated blackmail as a crime under the criminal purpose exception, the exception prevented the government from presenting the tape recording as evidence against Vest.¹¹²

The district court in *Vest* raised the problem of applying the criminal purpose exception when an individual records conversations for many different purposes.¹¹³ As a result of Congress' failure to consider the complexity of human motivation in enacting the criminal purpose exception, the *Vest* court had difficulty in applying the criminal purpose exception.¹¹⁴ The

107. *Id.*

108. *Id.* at 904-905; see *supra* notes 100-103 and accompanying text (discussing court's rejection of two methods for determining criminal purpose that impose unreasonable burdens of proof upon government and non-consenting party).

109. *Vest*, 639 F. Supp. at 904-905. The district court applied the primary motivation test to the facts in *Vest* and determined that Waters' primary motivation for making the tape recordings of the transaction between Waters and Vest was to use the recording to blackmail Vest. *Id.* at 905-908; see *supra* note 111 and accompanying text (discussing district court's determination that Waters primarily intended to use tape recording for blackmail).

110. *Vest*, 639 F. Supp. at 907.

111. *Id.* In *Vest* the district court found that Waters tried on many occasions to threaten detectives in order to receive a light sentence for the crime of shooting a detective. *Id.* at 906.

112. *Id.* at 907-08 (stating that Congress intended blackmail to fall under criminal purpose exception); see CONG. REC., *supra* note 9, at 14,694-95 (discussing crimes falling under the criminal purpose exception); Title III, *supra* note 7, at § 2511(2)(d) (provision stating tapes made for criminal purpose are made in violation of Title III); *id.* at § 2515 (provision stating that evidence produced in violation of Title III is inadmissible in any court); *supra* note 12 and accompanying text (discussing crimes Congress intended to fall under criminal purpose exception).

113. See *Vest*, 639 F. Supp. at 902 (discussing lack of congressional guidance in applying criminal purpose exception when individuals record conversations for many different purposes); see *supra* note 83 and accompanying text (discussing lack of legal precedent and congressional guidance in applying criminal purpose when individuals record conversations for many purposes).

114. *Vest*, 639 F. Supp. at 902-904 (discussing district court's difficulty in applying criminal purpose exception); see *supra* note 83 and accompanying text (discussing Congress' lack of guidance for applying criminal purpose exception when individuals record conversations for many purposes).

language of the criminal purpose exception refers to a single criminal purpose.¹¹⁵ Although people act for many reasons and motivations,¹¹⁶ Congress did not provide adequate guidance for courts to apply the criminal purpose exception consistently when a recording is made for many purposes.¹¹⁷

Courts can reduce the difficulty of applying the criminal purpose exception by adopting the *Vest* court's primary motivation method to determine whether a person recorded a conversation for a criminal purpose.¹¹⁸ The primary motivation method, which accounts for the complexity of human motivation, allows a court to analyze all factors that comprise a person's motivation in recording a conversation.¹¹⁹ The primary motivation method also places a reasonable burden of proof upon the government to show whether a person recorded a conversation for a criminal purpose.¹²⁰ Finally, courts will encounter little difficulty in applying the primary motivation method because courts are familiar with the method and have applied the primary motivation method to different types of circumstances.¹²¹

115. Title III, *supra* note 7, at § 2511(2)(d) (criminal purpose exception provision); *see supra* note 9 and accompanying text (stating language and purpose of criminal purpose exception).

116. *See Vest*, 639 F. Supp. at 904 (discussing that humans usually act with many different purposes); *id.* at 907-913 (presenting difficulty in applying criminal purpose exception to situation involving tape recording made for many different purposes).

117. *See id.* at 902-04 (discussing difficulty in applying criminal purpose exception resulting from lack of congressional guidance); *supra* note 9 and accompanying text (discussing Congressional enactment of criminal purpose exception provision referring to single criminal purpose); *supra* note 83 and accompanying text (discussing Congress' failure to provide courts with guidance in applying criminal purpose exception when individuals record conversations for many different purposes).

118. *See Vest*, 639 F. Supp. at 904-05 (discussing court's rationale in adopting primary motivation method for determining criminal purpose); *infra* notes 119-121 and accompanying text (discussing primary motivation method as useful method for determining criminal purpose when individuals record conversations for many different purposes).

119. *See Vest*, 639 F. Supp. at 904-05 (discussing court's contention that primary motivation method accounts for an individual's mixed motives in recording conversations); *see also* *Monteiro v. Poole Silver Co.*, 615 F.2d 4, 9 (1st Cir. 1980) (discussing court's adoption of primary motivation method to determine whether employer fired employee for racially discriminatory reasons although employer had many reasons for firing employee).

120. *See Vest*, 639 F. Supp. at 904-05 (discussing court's adoption of primary motivation method for determining criminal purpose). To admit a recording under the primary motivation method, the government need only show that an individual did not intend primarily to injure a non-consenting party to the conversation. *See id.* at 904 (discussing court's reasoning that primary motivation method places reasonable burden of proof upon government). To argue that a recording is inadmissible under the primary motivation method, a non-consenting party need only prove that a private individual intended primarily to injure the non-consenting party. *Id.* (discussing *Vest* court's conclusion that primary motivation method places reasonable burden of proof upon non-consenting party to demonstrate that individual recorded conversation for criminal purpose); *see supra* notes 100-103 and accompanying text (discussing court's rejection of two methods for determining criminal purpose that impose unreasonable burdens of proof upon government and non-consenting party).

121. *See Vest*, 639 F. Supp. at 905-907 (*Vest* court applies primary motivation test to

Courts have had difficulty interpreting and applying the criminal purpose exception.¹²² By carefully analyzing the legislative history of the criminal purpose exception, courts will apply the criminal purpose exception to tape recorded evidence when an individual records conversations with the criminal purpose of intending to injure or offend a non-consenting party.¹²³ In determining whether a person recorded conversations for a criminal purpose, courts should adopt the primary motivation method to apply properly the exception to persons who record conversations for many purposes.¹²⁴ After determining whether an individual recorded conversations for a criminal purpose, courts only should exclude tape recorded evidence against non-consenting parties under the criminal purpose exception.¹²⁵ By applying the criminal purpose exception when a person records conversations intending to injure or offend another individual, courts will apply the criminal purpose exception properly, and will support Congress' purpose in enacting Title III to protect non-consenting parties from invasions of privacy while combatting organized crime.¹²⁶

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determine criminal purpose); *Monteiro*, 615 F.2d at 9 (First Circuit applies primary motivation test to racial discrimination case); *United States v. Phillips*, 564 F.2d 32, 34 (8th Cir. 1977) (Eighth Circuit applies primary motivation test to case concerning public embarrassment); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 958-59 (Del. 1985) (Supreme Court of Delaware applies primary motivation test to determine whether directors of corporation breached fiduciary duty of care).

122. See *supra* notes 20-52 and accompanying text (discussing *Underhill* court's difficulty in applying criminal purpose exception); *supra* notes 84-109 and accompanying text (discussing *Vest* court's difficulty in applying criminal purpose exception when individuals record conversations for many different purposes).

123. See *supra* notes 53-66 and accompanying text (discussing Congress' definition of criminal purpose as individual's intent to injure non-consenting party with tape recorded evidence).

124. See *supra* notes 113-121 and accompanying text (discussing benefits of court adopting primary motivation method in determining whether individual recorded conversation for criminal purpose when individuals make recordings for many different purposes).

125. See *supra* notes 67-80 and accompanying text (discussing rationale for admitting tape recorded evidence against individual who records conversation and not admitting tape recorded evidence against non-consenting party).

126. See *supra* notes 72-74 and accompanying text (discussing court's support of Congress' purposes for enacting Title III by admitting tape recorded evidence against individual who records conversations for criminal purpose); *supra* notes 5-6 and accompanying text (discussing Congress' purpose of protecting non-consenting parties' privacy by enacting criminal purpose exception); *supra* note 1 and accompanying text (discussing Congress' purpose of combatting organized crime by enacting Title III to authorize law enforcement officials and individuals to tape record organized crime members' conversations).