



HENRY McMASTER
ATTORNEY GENERAL

March 6, 2006

Robert E. Saverance, Investigator
Office of the Solicitor, Twelfth Judicial Circuit
City-County Complex, Room 1101
180 North Irby Street, MSC-Q
Florence, South Carolina 29501

Dear Mr. Saverance:

In a letter to this office you questioned the admissibility in court of surveillance or undercover evidence obtained using a STING miniature digital recorder. According to your letter, video imagery is initially captured on a micro-drive card which is then downloaded to a DVD for court presentation. The micro-drive is then erased for reuse.

Generally, the admission of a tape recording rests in the sound discretion of the trial judge. State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). In State v. Worthy, 239 S.C. 449, 123 S.E.2d 835, 841 (1962), *overruled on other grounds*, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the State Supreme Court indicated that "(i)t has almost uniformly been held that evidence offered in the form of a sound recording is not inadmissible because of that form if properly authenticated.

The South Carolina Rules of Evidence in Rule 1002, SCRE, the "best evidence rule", states that

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

Rule 1003, SCRE, allows, however, for the admissibility of a duplicate stating that

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A duplicate¹ is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.²

Also, Rule 1004, SCRE does not require the introduction of an original where the originals are lost or destroyed, the original is not obtainable, the original is in the possession of an opponent, or where the copy is not closely related to a controlling issue. Therefore, Rules 1003 and 1004 provide exceptions to the general rule of Rule 1002 which requires an original. If a proponent of a duplicate recording can establish that proffered evidence falls within either of the exceptions, a duplicate can be admitted regardless of the general rule. Ballard v. State of Texas, 23 S.W.3d 178 (Tx. Ct. App. 2000).

In the circumstances described by you, the original recording on the miniature digital recorder is not preserved but instead is downloaded to a DVD for use at trial and then erased. Consistent with Rule 1003, SCRE, the duplicate recording on DVD would be admissible to the same extent as the original unless "a genuine question is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the duplicate in lieu of the original." A party seeking to exclude a duplicate recording pursuant to Rule 1003 would have the burden of showing that the duplicate should not be introduced. National City Bank v. Fleming, 440 N.E.2d 590 (Ohio, 1981); United States v. Georgalis, 631 F.2d 1199 (5th Cir. 1980).

In United States v. Stewart, 420 F.3d 1007 (9th Cir. 2005) there was alleged error in the trial court's admitting a recording between the defendant and another individual and permitting the Government to play the recording for the jury. The recording resulted from the use of a digital recording device such as suggested by you where the data was then downloaded to a disk and offered as a duplicate recording at trial. In its decision the Ninth Circuit Court of Appeals determined that the lower court did not abuse its discretion in admitting the recording inasmuch as "...the record shows no evidence presenting a 'genuine question' the duplicate recording was altered or otherwise tainted, and...(the defendant)...did not show any resulting unfairness from admission of the duplicate." 420 F.3d 1021 fn.13. See also: United States v. Capanelli, 257 F.Supp.2d 678, 681 (S.D.N.Y., 2003) (as to the use of a recording made from a digital recording device where the

¹The term "duplicate" is defined by Rule 1001(4), SCRE, as "...a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

²As explained in the notes to such Rule, This rule is identical to the federal rule. There is no case law in this State on the admissibility of a duplicate in this context, only on the admissibility of a duplicate as secondary evidence.

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contents are transferred to another form the Court stated that "(n)otwithstanding the conceded destruction of the digital chip originals, the recordings produced from them are duplicates and admissible under the protocol established by Rules 1001-1003. Any potential problems inherent in the software-assisted reproduction of the recordings may be fully explored by a defense expert witness, with the jury then asked to reject the recordings as technically unreliable.").

The issue of whether the conditions for admissibility are met is determined by the trial court on a case-by-case basis. 6 Weinstein's Federal Evidence 2nd Ed. § 1003.02[1]. It is generally stated that

(o)nce authenticity and fairness issues are resolved...duplicates and originals are generally interchangeable for evidentiary purposes. For example, a duplicate is admissible when the opposing party concedes its accuracy. Even when accuracy is not conceded, courts routinely accept duplicates as a convenience to the court and the parties unless there are persuasive reasons for rejecting the evidence. Thus, if there is no reason to believe that the duplicate is inaccurate or that a party is attempting to commit a fraud on the court, for example, by altering the proffered evidence, the duplicate will be admitted.

Ibid.

Consistent with the above, in my opinion, a recording resulting from the use of a STING miniature digital recorder in the manner described by you could be admissible in court assuming the requirements of Rule 1003, SCRE are met. As referenced, the duplicate recording on DVD would be admissible to the same extent as the original except in circumstances where "a genuine question is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the duplicate in lieu of the original."

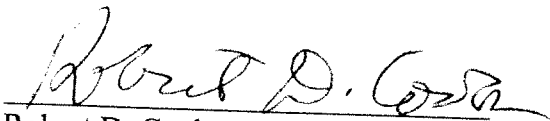
With kind regards, I am,

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General