CHAPTER 29-29.2
WIRETAPPING IN DRUG OFFENSE INVESTIGATIONS

29-29.2-01. Definitions. As used in this chapter, unless the context otherwise requires:

1. "Aggrieved person" means a person who was a party to any intercepted wire, electronic, or oral communication or a person against whom the interception was directed.

2. "Common carrier" is defined in section 8-07-01.

3. "Contents", when used with respect to any wire, electronic, or oral communication, includes any information concerning the identity of the parties to the communication or the existence, substance, purport, or meaning of that communication.

4. "Electronic communication" means transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system, but does not include:

   a. The radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;

   b. A wire or oral communication;

   c. A communication made through a tone-only paging device; or

   d. A communication from a tracking device, defined as an electronic or mechanical device that permits the tracing of the movement of a person or object.

5. "Electronic, mechanical, or other device" means any device or apparatus that can be used to intercept a wire, electronic, or oral communication, other than:

   a. Any telephone or telegraph instrument, equipment, or facility, or any component thereof, either:

      (1) Furnished to the subscriber or user in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by a subscriber or user for connection to the facilities of service and used in the ordinary course of its business; or

      (2) Being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of the officer's duties.

   b. A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

   c. A device or apparatus specifically designed to only record conversations to which the operator of the device is a party;

   d. A device or apparatus used in the normal course of broadcasting by radio or television; or

   e. A device or apparatus that is otherwise commonly used for a purpose other than overhearing or recording conversations.

In determining whether a device that is alleged to be an electronic, mechanical, or other device is, in fact, such a device, there must be taken into account, among other things, the size, appearance, directivity, range, sensitivity, frequency, power, or intensity, and the representation of the maker or manufacturer as to its performance and use.

6. "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

7. "Judge of competent jurisdiction" means justice of the supreme court of this state or judge of any district court of this state.

8. "Law enforcement officer" means a public servant authorized by law or by a government agency or branch to enforce the law and to conduct or engage in investigations or prosecutions for violations of law.

9. "Oral communication" means a communication uttered by a person believing that the communication is not subject to interception, under circumstances justifying that belief, but does not include any electronic communication.

10. "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, including any electronic storage of the communication, but does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.

29-29.2-02. Ex parte order for wiretapping and eavesdropping.

1. An ex parte order for wiretapping or eavesdropping, or both, may be issued by any judge of competent jurisdiction. The order may be issued upon application of the attorney general, or an assistant attorney general, or a state's attorney, or an assistant state's attorney, showing by affidavit that there is probable cause to believe that evidence will be obtained of the commission or attempted commission of a felony violation of chapter 19-03.1, or a criminal conspiracy to commit a felony violation of chapter 19-03.1.

2. Unless otherwise provided by law, an ex parte order for wiretapping or eavesdropping may be issued only for a crime specified in subsection 1 for which a felony penalty is authorized upon conviction.

3. Each application for wiretapping or eavesdropping, or both, must be made in writing upon oath or affirmation to a judge of competent jurisdiction and must state the applicant's authority to make the application. Each application must include:

   a. The identity of the law enforcement officer making the application, and the officer authorizing the application.

   b. A complete statement of the facts and circumstances relied upon by the applicant, to justify the belief that an order should be issued, including details as to the particular offense that has been, is being, or is about to be committed; a particular description of the nature and location of the facilities from which, or the place where, the communication is to be intercepted; a particular description of the type of communication sought to be intercepted; and the identity of the person, if known, committing the offense and whose communications are to be intercepted.

c. A complete statement as to whether other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried, or to be too dangerous.

d. A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, there must be a particular description of the facts establishing probable cause to believe that additional communications of the same type will occur thereafter.

e. A complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, electronic, or oral communications involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each such application.

f. If the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain those results.

4. The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

5. Upon an application, the judge may enter an ex parte order, as requested or as modified, authorizing or approving wiretapping or eavesdropping within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that:

   a. There is probable cause for belief that a person is committing, has committed, or is about to commit a felony violation of chapter 19-03.1 or a criminal conspiracy to commit a felony violation of chapter 19-03.1;

   b. There is probable cause for belief that particular communications concerning that offense will be obtained through the interception;

   c. Normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous; and

   d. There is probable cause for belief that the facilities from which or the place where the wire, electronic, or oral communications are to be intercepted are being used, or about to be used, in connection with the commission of an offense, or are leased to, listed in the name of, or commonly used by the person alleged to be involved in the commission of the offense.

6. Each order authorizing or approving wiretapping or eavesdropping must specify:

   a. The identity of the person, if known, whose communications are to be intercepted.

   b. The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted.

   c. A particular description of the type of communications sought to be intercepted, and a statement of the particular offense to which it relates.

   d. The identity of the agency authorized to intercept the communications, and of the person authorizing the application.

e. The period of time during which an interception is authorized, including a statement as to whether the interception automatically terminates when the subscribed communication is first obtained.

7. No order entered under this chapter may authorize or approve the interception of any wire, electronic, or oral communication for any period longer than is necessary to achieve the objective of the authorization. In no event may the period exceed thirty days. The thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. An extension of an order may be granted, but only upon application for an extension made in accordance with subsection 3, and to the court making the findings required by subsection 5. The period of the extension may be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted, and in no event for longer than thirty days. Every order and extension of an order must contain provisions that the authorization to intercept must be executed as soon as practicable, must be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this section, and must terminate upon attainment of the authorized objective, or in any event in thirty days. No more than one extension may be granted for any order entered under this section.

8. If an order authorizing interception is entered pursuant to this section, the order may require reports to be made to the judge who issued the order, showing what progress has been made toward achievement of the authorized objective and the need for continued interception. A report must be made at any time the judge requires.

9. a. The contents of any wire, electronic, or oral communication intercepted by any means authorized by this section must, if possible, be recorded on tape, wire, or other comparable device. The recording of the contents of any wire, electronic, or oral communication under this subsection must be done in such a way as will protect the recording from editing or other alterations. Immediately upon expiration of the period of the order, or extension of the order, the recording must be made available to the judge issuing the order and sealed under the judge's directions. The judge shall direct where the recording must be maintained. A recording may not be destroyed except upon an order of the judge, and in any event must be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to this section. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, is a prerequisite for the use or disclosure of the contents of any wire, electronic, or oral communication or evidence derived under this section.

   b. Applications made and orders granted under this section must be sealed by the judge. The judge shall direct where applications and orders must be maintained. The applications and orders may be disclosed only upon a showing of good cause before a judge of competent jurisdiction, and may not be destroyed except on order of the judge to whom presented. In any event applications and orders must be kept for ten years. Information obtained pursuant to a court order authorizing interception of wire, electronic, or oral communications may not be used, published, or divulged except in accordance with this chapter.

   c. The court may punish violation of this subsection as contempt of court.

10. Within a reasonable time, but not later than ninety days after the termination of the period of an order or extension thereof, the judge to whom the application was presented shall cause to be served, on the persons named in the order or the

application, and any other party to intercepted communications as the judge may determine is in the interest of justice, notice of the following:

a. The fact of the entry of the order.

b. The date of the entry and the period of authorized interception.

c. The fact that during the period wire, electronic, or oral communications were intercepted.

The judge, upon the filing of a motion, may make available to any person or counsel for inspection such portions of the intercepted communications, applications, and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction, the serving of the matter required by this subsection may be postponed.

11. The contents of any intercepted wire, electronic, or oral communication or evidence derived therefrom may not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a court, unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the court if the court finds that it was not possible to furnish the party with the information ten days before the trial, hearing, or proceeding, and that the party will not be prejudiced by the delay in receiving this information.

12. An aggrieved person in any trial, hearing, or proceeding in or before any court, officer, agency, or other authority of this state, or a political subdivision of this state, may move to suppress the contents of any intercepted wire, electronic, or oral communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted, the order of authorization or approval under which it was intercepted is insufficient on its face, or the interception was not made in conformity with the order of authorization or approval. This motion must be made before the trial, hearing, or proceeding unless there was no opportunity to make the motion, or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire, electronic, or oral communication, or evidence derived from the communication may not be received as evidence. The court, upon the filing of the motion by the aggrieved person, may make available to the aggrieved person or the person's counsel for inspection any portion of the intercepted communication or evidence derived from the communication as the court determines to be in the interests of justice.

13. In addition to any other right to appeal, the state has the right to appeal from an order granting a motion to suppress made under subsection 12, or the denial of an application for an order of approval, if the person making or authorizing the application certifies to the judge granting the motion or denying an application that the appeal is not taken for purposes of delay. The appeal must be taken within thirty days after the date the order was entered and must be diligently prosecuted.

14. A law enforcement officer who, by any means authorized by this section, has obtained knowledge of the contents of a wire, electronic, or oral communication, or evidence derived from the communication, may disclose the contents to another law enforcement officer to the extent that this disclosure is appropriate in the proper performance of the official duties of the officer making or receiving the disclosure.

15. A law enforcement officer who, by means authorized by this section, has obtained knowledge of the contents of any wire, electronic, or oral communication, or evidence derived therefrom, may use those contents to the extent the use is appropriate in the official performance of official duties.

16. A person who has received, by means authorized by this section, information concerning a wire, electronic, or oral communication, or evidence derived from the communication, intercepted in accordance with this section, may disclose the contents of that communication or derivative evidence while giving testimony in any proceeding held under the authority of the United States or this state.

17. No otherwise privileged wire, electronic, or oral communication intercepted in accordance with, or in violation of, this section loses its privileged character.

18. When a law enforcement officer, while engaged in intercepting wire, electronic, or oral communications in the manner authorized in this section, intercepts wire, electronic, or oral communications relating to an offense other than one specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections 14 and 15 only if an offense other than one specified in the order is an offense that constitutes a felony under the laws of this state. The contents, and evidence derived from the contents, as authorized by this section, may be used under subsection 16 only when authorized or approved by a judge of competent jurisdiction, when the judge finds on subsequent application that the contents were otherwise intercepted in accordance with this section. This application must be made as soon as practicable.

19. The requirements of subdivision b of subsection 3 and subdivision d of subsection 5 relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if:

    a. In the case of an application with respect to the interception of an oral communication, the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted and the judge finds that such specification is not practical; or

    b. In the case of an application with respect to a wire or electronic communication, the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing of a purpose, on the part of that person, to thwart interception by changing facilities and the judge finds that such purpose has been adequately shown.

20. An interception of a communication under an order with respect to which the requirements of subdivision b of subsection 3 and subdivision d of subsection 5 do not apply by reason of subsection 19 may not begin until the facilities from which, or the place where, the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communication service which has received an order as provided for in subdivision b of subsection 19 may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court, upon notice to the government, shall rule on such a motion expeditiously.

29-29.2-03. Order may direct others to furnish assistance. An order authorizing the interception of a wire, electronic, or oral communication must, upon request of the applicant, direct that a communication common carrier shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that the carrier is according the person whose communications are to be intercepted. A communication common carrier furnishing these facilities or technical assistance must be compensated by the applicant for reasonable expenses incurred in providing the facilities or assistance.

29-29.2-04. Reports to attorney general. A state's attorney shall report annually to the attorney general information as to the number of applications made for orders permitting the interception of wire, electronic, or oral communications; the offense specified in the order or application; the nature of the facilities from which or the place where communications were to be intercepted; the number of persons whose communications were intercepted, the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made; the number of motions to suppress made with respect to such interceptions and the number granted or denied; the number of convictions resulting from the interceptions and the offenses for which the convictions were obtained; and a general assessment of the importance of the interceptions. The state's attorney shall submit the report to the attorney general by January first of each year. The report must include all orders and applications made, but not in effect, during the preceding year.

29-29.2-05. Inapplicability. This chapter does not apply to the interception, disclosure, or use of a wire, electronic, or oral communication if the person intercepting, disclosing, or using the wire, electronic, or oral communication:

1. Was a person acting under color of law to intercept a wire, electronic, or oral communication and was a party to the communication or one of the parties to the communication had given prior consent to such interception; or

2. Was a party to the communication or one of the parties to the communication had given prior consent to such interception and such communication was not intercepted for the purpose of committing a crime or other unlawful harm.