94-0123

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 94-0123-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KEVIN GILMORE,

Defendant-Respondent-Petitioner.

On Review Of A Decision Of The Court Of Appeals, District I, Reversing The Order Entered In The Circuit Court For Milwaukee County, The Honorable John A. Franke, Circuit Judge, Presiding

---

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER

ROBERT R. HENAK
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

Attorney for Defendant-
Respondent-Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Rules and Statutes

Other Authorities

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 94-0123-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KEVIN GILMORE,

Defendant-Respondent-Petitioner.

BRIEF OF
DEFENDANT-RESPONDENT-PETITIONER

ISSUE PRESENTED FOR REVIEW

Whether the state's unilateral public disclosure in a criminal complaint of the contents of wire communications intercepted pursuant to a wiretap violates the strict limits on disclosures set forth in the Wisconsin Electronic Surveillance Control Law and Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

The circuit court held that such public disclosure violated Wis. Stat. §968.29 and Title III, struck the unlawful disclosures from the complaint, and dismissed the redacted

complaint for failure to state probable cause. The Court of Appeals reversed, holding that §968.29 does not bar the prosecutor from including intercepted wire communications in a criminal complaint, at least so long as the state provides the defendant notice and an opportunity to object before a court prior to the public filing of such a complaint. The Court did not explain, however, why the state's unilateral public disclosure of the criminal complaint in this case without such notice and opportunity to object did not violate §968.29 and Title III.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that both oral argument and publication are warranted.

STATEMENT OF THE CASE

On September 29, 1992, the state filed a criminal complaint which, in Count I, charged Gilmore and several others with conspiracy to deliver cocaine (R2).[1] On November 20, 1992, Gilmore moved to strike contents of intercepted wire communications from the criminal complaint and to dismiss

---

[1] Throughout this brief references to the record will take the following form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page number of the document. Where the referenced material is contained in the Appendix, it will be further identified by Appendix page number as App. __.

(R10). The parties briefed the issue, along with other issues raised by the defendant (R15:6-8; R16:14-17).

On February 1 and February 15, 1993, the Milwaukee County Circuit Court, Judge John A. Franke presiding, heard argument from the parties concerning Gilmore's motion (R22; R23). The February 1, 1993 hearing addressed the legality of the state's public disclosure of the contents of intercepted wire communications in the criminal complaint. Following argument, Judge Franke concluded that the relevant statutes are clear on their faces and that "there is no authorization anywhere in the statute--the Wisconsin or the federal law to disclose this material in a Criminal Complaint, and as a consequence, it may not be disclosed in a Criminal Complaint." (R22:17, 21-22; App. 16, 20-21).

Judge Franke then determined that the only reasonable remedy was to strike the unlawful disclosures from the complaint:

> Now, that leads me to the question of what the remedy ought to be. That is, simply because this stuff shouldn't have been disclosed doesn't mean that I have to strike it or should strike it.
>
> I'm not sure there's any clear guidance on this, but I've thought about it. I'm satisfied that the only reasonable remedy is to strike it. That is somewhat analogous to the exclusionary rule, in that to use it now, to consider it now, to talk about it now would essentially put the Court in the position of promoting a violation of the statute.
>
> It would essentially put the Court in the position of using material that should

> not have been disclosed, and ... even though there's no particular guidance as to what to do, I think the only reasonable course is to find that since this material should not have been disclosed, the Court cannot participate any further in its disclosure, and that it cannot consider it in assessing the probable cause in the sense I never should have read it to begin with, so I am going to grant the motion to strike any material in the Criminal Complaint which discloses the contents of any electronic surveillance.

(R22:22-23; App. 21-22).

At the motions hearing on February 15, 1993, Judge Franke heard argument concerning whether the redacted complaint[2] stated probable cause and concluded that "the complaint is insufficient as to Defendant Gilmore on Count 1" (R23:33; App. 34; *see also* R23:35; App. 36 ("as to Defendant Gilmore, the complaint is dismissed -- it's Count 1")). Following that order, Judge Franke stated that "Defendant Gilmore is released from any and all pre-trial orders" (R23:36).

The judgment roll bears the following notation regarding the court's actions at the February 15, 1993 hearing:

> Court finds Ct. 1 to be insufficient as to defendant (Gilmore) and dismisses the complaint as to Gilmore.

(R1:14).

---

[2] No redacted complaint was filed in the trial court as a separate document. The state did submit a redacted version as an attachment to its State's Response (R15).

The state took no action concerning the dismissal of Gilmore's case until October 26, 1993, over eight months later, at which time the prosecutor sent a letter to Gilmore's former defense counsel requesting him to review the proposed order regarding dismissal that the state intended to submit to Judge Franke. In a letter dated November 3, 1993, Gilmore's counsel objected to the proposed order and requested a hearing on the matter (R27).

On November 8, 1993, the state submitted its proposed order to Judge Franke, who signed the order on November 23, 1993, without affording Gilmore a hearing on the matter (R19; App. 10). The state filed a notice of appeal from the written order on January 6, 1994 (R20).

On April 11, 1995, the Court of Appeals reversed the dismissal order, reinstated the original complaint, and remanded for further proceedings (App. 1-9). *State v. Gilmore*, 193 Wis.2d 403, 535 N.W.2d 21 (Ct. App. 1995). The court held as an initial matter "that §968.29(2) provides prosecutors the authority to include intercepted communication in a criminal complaint" (App. 6).

The court then addressed whether such a complaint can be filed publicly. It recognized the need to prevent unilateral public disclosure of intercepted communications by the state. It also quoted at length the decision in *United States v. Gerena*, 869 F.2d 82 (2d Cir. 1989), with its holding that such communications may be disclosed publicly only upon

court order after notice to the defendant and opportunity to object, *id.* at 86-87. (App. 6-8 & n.3). The court nonetheless reversed the dismissal order and reinstated the original complaint, despite the state's total disregard for these requirements and without explaining the discrepancy between the court's language and its ultimate decision (*see* App. 8-9).

By Order dated September 26, 1995, this Court granted Mr. Gilmore's Petition for Review of that decision.

ARGUMENT

I.

BECAUSE FEDERAL AND WISCONSIN WIRETAP STATUTES BAR EXACTLY THE TYPE OF DISCLOSURES COMMITTED BY THE STATE HERE, THE TRIAL COURT DID NOT ERR IN STRIKING THOSE DISCLOSURES FROM THE CRIMINAL COMPLAINT

The state intercepted Gilmore's private telephone conversations and then unilaterally disclosed them publicly in a criminal complaint for the whole world to see (*see* R2). It claimed that it has a right to do just that, apparently whenever it wants to. After full briefing and argument on the issue, the trial court held to the contrary in a thoughtful oral decision (R22:13-22; App. 11-22). The Court of Appeals nonetheless reversed, without even addressing whether the state's disclosure here of the intercepted communications by publicly filing the criminal complaint violated Wis. Stat. §968.29 and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (App. 1-9).

The trial court was right and the state and the Court of Appeals are wrong. Not only was the state's disclosure a blatant violation of the Wisconsin Electronic Surveillance Control Law ("WESCL"), Wis. Stat. §§968.27 - 968.37, but it violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510 *et seq.*, as well.

A. Standard of Review

Whether WESCL and Title III permit the state's unilateral public disclosure of intercepted wire communications presents a question of statutory interpretation. Statutory construction is a question of law reviewed *de novo*. *See Voss v. City of Middleton*, 162 Wis.2d 737, 470 N.W.2d 625, 629 (1991).

In construing a statute, first recourse is to the language used. *Id.* The purpose of statutory interpretation is to give effect to the intent of the legislature. *Id.* Only if the language does not clearly or unambiguously set forth the legislative intent may the court look beyond the language and resort to judicial construction to ascertain and carry out that intent. *Id.*

B. The Applicable Statutes

WESCL is modeled after Title III. *State ex rel. Arnold v. County Court of Rock County*, 51 Wis.2d 434, 187 N.W.2d 354, 359 (1971). Like Title III, WESCL imposes strict

limitations upon the interception of wire and oral communications, as well as upon the use and disclosure of the contents of such intercepted communications. Because the statutes as relevant to this case are virtually identical, the following discussion will focus primarily upon the Wisconsin statutes with citation to the parallel federal provisions.[3]

The Third Circuit aptly summarized the purposes underlying Title III (and thus WESCL as well):

> Title III is a comprehensive statute designed to regulate strictly the interception and disclosure of wire and oral communications. It "has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of [such communications] may be authorized." *S. Rep. No.* 1097, 90th Cong., 2d Sess., *reprinted in* [1968] *U.S. Code Cong. & Admin. News*, pp. 2112, 2153. The legislative history of Title III makes it clear, as do the elaborate authorization and disclosure provisions of the statute itself, that "the protection of privacy was an overriding congressional concern" of the act. *Gelbard v. United States*, 408 U.S. 41, 48 ... (1972) (footnote omitted)... .

United States v. Cianfrani, 573 F.2d 835, 855 (3rd Cir. 1978).

The provisions most at issue here are those mandating that the contents of intercepted communications be sealed and barring disclosure or use of such contents except in very

---

[3] While a state can provide more protection than required under a federal law such as Title III, the Supremacy Clause, U.S. Const. Art. VI, ¶2, mandates that the defendant is entitled at a minimum to those federal protections.

limited circumstances. Pursuant to Wis. Stat. §968.30(7)(b), all applications for wiretap orders and all such orders "shall be ordered sealed by the court" and may be disclosed only upon a showing of "good cause." *See also* 18 U.S.C. §2518(8)(b). Any records or recordings of the contents of any communication intercepted pursuant to such an order likewise must be filed with the court and sealed. Wis. Stat. §968.30(7)(a); *see* 18 U.S.C. §2518(8)(a). Duplicates may be made, however, for use or disclosure as authorized under Wis. Stat. §968.29(1), (2) & (3). *See* Wis. Stat. §968.30(7)(a); *see also* 18 U.S.C. §2518(8)(a).

Section 968.29 provides those limited situations in which the contents of an intercepted wire or oral communication lawfully may be used or disclosed:

> **968.29 Authorization for disclosure and use of intercepted wire, electronic or oral communications.** (1) Any investigative or law enforcement officer who, by any means authorized by ss. 968.29 to 968.37 or 18 U.S.C. 2510 to 2520, has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may disclose the contents to another investigative or law enforcement officer only to the extent that the disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by ss. 968.28 to 968.37 or 18 U.S.C. 2510 to 2520, has obtained knowledge of the contents of any wire, electronic or oral communication or evidence derived there-

> from may use the contents only to the extent the use is appropriate to the proper performance of the officer's official duties.
>
> (3)(a) Any person who has received by any means authorized by ss. 968.28 to 968.37 or 18 U.S.C. 2510 to 2520 or by a like statute of any other state, any information concerning a wire, electronic or oral communication or evidence derived therefrom intercepted in accordance with ss. 968.28 to 968.37, may disclose the contents of that communication or that derivative evidence only while giving testimony under oath or affirmation in any proceeding in any court or before any magistrate or grand jury in this state, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

Wis. Stat. §968.29(1) - (3)(a); *see* 18 U.S.C. §2517(1) - (3).[4] Moreover, disclosure of such communications or derivative evidence at a hearing in open court requires at least 10 days prior notice unless waived by the court. Wis. Stat. §968.30(8); *see* 18 U.S.C. §2518(9). Any aggrieved party is entitled, prior to disclosure of the contents of their intercepted communications in any court proceeding, to move to suppress those contents on the grounds that the interception was not legally authorized. 18 U.S.C. §2518(10)(a); Wis. Stat. §968.30(9)(a).

Disclosure of the results of an illegal or

---

[4] Title III and WESCL provide for limited disclosure in other circumstances not relevant to this appeal. *See, e.g.*, 18 U.S.C. §§2511(2)(a)(i), (b) & 2511(3); Wis. Stat. §968.31(2)(a).

unauthorized wiretap is a felony, as is the intentional disclosure of the contents of oral or wire communications intercepted pursuant to even a legal wiretap except as authorized under Wis. Stat. §§968.28 - 968.30. Wis. Stat. §968.31(1)(c) & (e); *see* 18 U.S.C. §2511(1)(c).

C. Neither WESCL Nor Title III Authorizes Public Disclosure in a Criminal Complaint of Intercepted Private Telephone Conversations

The publicly filed criminal complaint in this action contained numerous references to the contents of intercepted wire communications, along with 27 pages of verbatim transcripts of those communications (R2). As the trial court properly held, this public disclosure of the contents of Gilmore's privileged wire communications was not authorized by §968.29 (R22:14-22; App. 13-21).

The Court of Appeals nonetheless justified the state's unilateral public disclosure of the intercepted communications under the statutory authorization for "use" under §968.29(2). That construction of the statute, however, both overlooks the statute's plain language and purpose and is unsupported by any authority or legitimate rationale. The clear language of the statute bars disclosures other than those specifically authorized in Wis. Stat. §§968.29(1) & (3); *see* 18 U.S.C. §2517(1) & (3). But, even if some additional

disclosures may be considered "authorized" under WESCL and Title III, the state's unilateral public disclosure here certainly was not.

1. WESCL and Title III Bar Any Disclosures Not Specifically Authorized

In construing a statute, the language at issue must be construed in light of the entire section and all related sections. *State v. Barnes*, 127 Wis.2d 34, 377 N.W.2d 624, 625 (Ct. App. 1985). Section 968.29(1) specifically addresses disclosure and authorizes such disclosure only to fellow law enforcement officers and only when such disclosure "is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure." Wis. Stat. §968.29(1); *see* 18 U.S.C. §2517(1). Using almost identical language, Section 968.29(2) authorizes the "use" of the contents of an intercepted communication. Wis. Stat. §968.29(2); *see* 18 U.S.C. §2517(2). Section 968.29(3) authorizes public disclosure by "[a]ny person," but "only while giving testimony under oath or affirmation" in a court or grand jury proceeding. Wis. Stat. §968.29(3) (emphasis added); 18 U.S.C. §2517(3).

The Court of Appeals' conclusion that the term "use" in §968.29(2) incorporates "disclosure," renders §968.29(1) utterly meaningless. Why would Congress and the Wisconsin

Legislature go to the trouble of authorizing a particular type of disclosure in §968.29(1) if it already authorized such disclosures in §968.29(2)? *See also* 18 U.S.C. §§2511(1)(c) & (d) (distinguishing between unlawful "use" and unlawful "disclosure" of wiretap information); Wis. Stat. §§968.31(1)(e) & (d) (same).

"[C]onstruction of a statute that would result in any portion of the statute being superfluous should be avoided wherever possible." *Matter of Sueann A.M.*, 176 Wis.2d 673, 500 N.W.2d 649, 652 (1993). The only reasonable interpretation of the statute, and the only one which gives meaning to §968.29(1), is that relied upon by the trial court. Specifically, disclosures are controlled by §§968.29(1) & (3), while uses not involving disclosure are controlled by §968.29(2). (R22:14-22; App. 13-21). *See Scott v. United States*, 573 F. Supp. 622, 625 (M.D. Tenn. 1983), *rev'd on other grounds sub nom. Resha v. United States*, 767 F.2d 285 (6th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986).

Falling into the latter category are those uses recognized in the legislative history of Title III,[5] none of which require disclosure beyond that authorized in §968.29(1), such as to establish probable cause to search or arrest, *e.g.*,

---

[5] *See* S. Rep. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. & Admin. News p. 2188.

United States v. Hall, 543 F.2d 1229, 1232-33 (9th Cir. 1976) (federal agents provided state agents with information gained from wiretap, which information state agents used as basis for approaching and questioning defendant), *cert. denied*, 429 U.S. 1075 (1977); *State v. Lee*, 307 A.2d 827, 829 (N.H. 1973) (agents used wiretap evidence to develop probable cause for warrantless arrest), or to develop witnesses by refreshing their recollections with the contents of their own telephone conversations, *see United States v. Ricco*, 566 F.2d 433, 435 (2d Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).[6]

Those few rogue decisions which permit certain disclosures under the equivalent of §968.29(2) not otherwise authorized under the equivalents of §968.29(1) & (3) fail to resolve, or even mention, the fact that their position effectively writes the equivalent of §968.29(1) out of the statute. *See Application of Newsday, Inc.*, 895 F.2d 74, 76-78 (2d Cir.) (disclosure in search warrant affidavit), *cert.*

---

[6] Permitting someone to listen to a tape of his or her own telephone conversation is not a "disclosure." To disclose means "to make known or public (something previously held close or secret)." *Webster's New Collegiate Dictionary* (1973) at 325. A person already knows his or her own prior communications, so they are not "secret" in relation to that person. *See also Birdseye v. Driscoll*, 534 A.2d 548, 551-52 (Pa. Commw. 1987) (public affidavit referring to wiretap not an unlawful "disclosure" where existence of wiretap previously was made public by court order, as well as by party to conversation); S. Rep. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. & Admin. News p. 2181 ("The disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowledge' would not be prohibited").

denied, 496 U.S. 931 (1990);[7] *Certain Interested Individuals v. Pulitzer Pub.*, 895 F.2d 460, 463-64 (8th Cir.) (same), *cert. denied*, 498 U.S. 880 (1990); *United States v. Johnson*, 696 F.2d 115, 118 n.21 (D.C. Cir. 1982) (same); *United States v. Rabstein*, 554 F.2d 190, 193 (5th Cir. 1977) (disclosure for voice identification); *Orkin v. State*, 223 S.E.2d 61, 72 (Ga. 1976) (same).

Those cases are not binding upon this Court and may be accepted or rejected based upon the persuasive power of their reasoning. *E.g.*, *State v. Fettig*, 172 Wis.2d 428, 493 N.W.2d 254, 261 (Ct. App. 1992). This Court can and should reject such authority, as it "neither expresses any convincing reasons [nor] contains a discussion of the problem." *Widell v. Holy Trinity Catholic Church*, 19 Wis.2d 648, 121 N.W.2d 249, 254 (1963). Indeed, the only decision Gilmore has found which recognizes and discusses the problem supports him. *See Scott*, 573 F. Supp. at 625.

While this Court addressed a related issue in *State v. Waste Management of Wisconsin, Inc.*, 81 Wis.2d 555, 261 N.W.2d 147, *cert. denied*, 439 U.S. 865 (1978), that case does not suggest that §968.29(2) permits disclosures not authorized under §§968.29(1) or (3). Rather, that case only addresses

---

[7] The court in *Application of Newsday* did explain the different statutory language between "use" in §2517(2) and "disclosure" in §2517(3) as based upon the fact subsection (2) is directed to law enforcement officers while subsection (3) applies to anyone. 895 F.2d at 78. The court did not address the effect of its decision on subsection (1), however.

the effect of §968.29(3) on disclosure of one party consent tapes. *See* 261 N.W.2d at 154-55. Although lawful, one party intercept tapes are not "authorized by ss. 968.28 to 968.33." 261 N.W.2d at 154. Accordingly, §968.29(3) bars their admission in court proceedings. *Id.* at 154-55; *see Arnold, supra*.

Waste Management does nothing to limit §968.29's additional restrictions on public disclosure of non-consensual wiretap information, however. Indeed, that decision helps Gilmore here, recognizing as it does that it is not simply testimonial disclosures, but rather the general "use of the contents at evidence" which is controlled by §968.29(3). 261 N.W.2d at 154-55. It is exactly such an evidentiary disclosure which is at issue here and the state plainly failed to comply with the requirements of §968.29(3) which *Waste Management* says must be met.

The circuit court thus was correct and the Court of Appeals was not. In light of the plain language of §968.29 and 18 U.S.C. §2517, lawful disclosures are limited to those appropriate disclosures between law enforcement personnel and in-court testimony of witnesses. Any other interpretation would render §968.29(1) and §2517(1) meaningless. *Scott*, 573 F. Supp. at 625.

2. Even if some disclosures are authorized by §968.29(2) and §2517(2), the state's unilateral public disclosures here were not

Even if this Court could simply write §968.29(1) out of the statute books, as did the Court of Appeals, the state's unilateral public disclosures here still were not legally authorized. Even if the statutes could be read to permit some limited, private disclosures of intercepted wire communication beyond those expressly stated, they do not authorize public disclosures, at least in the absence of prior judicial approval. *See, e.g., United States v. Dorfman*, 690 F.2d 1230 (7th Cir. 1982) (distinguishing between public and private disclosures of the contents of intercepted communications and holding that "[t]he only lawful way they can be made public over the defendants' objection is by being admitted into evidence in the criminal trial or in some other public proceeding within the scope of section 2517(3)"); *Cianfrani*, 573 F.2d at 855 & n.7 (distinguishing between "public disclosure," which is authorized only in accordance with §2517(3), and "non-public disclosure" under §2517(1) & (2)).

The Court of Appeals appears to have recognized this added aspect of the problem (App. 6-8), but totally failed to address it in light of the facts of this case.

Even the cases most helpful to the state recognize that "Title III limits disclosure of intercepted communica-

tions to '"professionally interested strangers' in the context of their official duties.'" *United States v. Shenberg*, 791 F. Supp. 292, 293 (S.D. Fla. 1991), quoting *Pulitzer Pub.*, 895 F.2d at 465.

"Title III's restrictions cannot be avoided by including the intercepted information in search warrant affidavits" or, as in this case, in a criminal complaint. *Shenberg*, 791 F. Supp. at 293. As the Eighth Circuit has recognized, such use "cannot transform the wiretap information into non-wiretap information unprotected by Title III." *Pulitzer Pub.*, 895 F.2d at 465:

> [D]isclosure to a limited audience of "professionally interested strangers" in the context of their official duties is not the equivalent to disclosure to the public. "Title III does not allow public disclosure of all lawfully obtained wiretap evidence just because a few officers are privy to its contents; if it were construed to do so, much of the statute would be superfluous, for example, 18 U.S.C. §§ 2517(1)-(3)." . . . We do not agree that once wiretap information is used in search warrant affidavits, it is no longer subject to Title III's restrictions upon its use and disclosure. We do not think that Title III's restrictions can be so easily avoided.

Id. (citing *Dorfman*, 690 F.2d at 1234-35).

The only cases which suggest that public disclosure of wiretap information may be permissible other than during testimony do not base that suggestion upon a perceived authorization under Title III to make public disclosures. Rather they rely upon a case-by-case judicial determination,

prior to the disclosure, as to whether the public's non-statutory right to know outweighs the individual's right to privacy under Title III and the Fourth Amendment. *See Pulitzer Pub.*, 895 F.2d at 465-67 (balance of interests bars pre-indictment disclosure); *Application of Newsday, supra* (balance of interests permitted disclosure after guilty plea of redacted search warrant application containing wiretap information); *Shenberg*, 791 F. Supp. at 293-94 (balance required search warrant affidavits to remain sealed at least until suppression hearing and admissibility determination by court).[8] *See also Cianfrani*, 573 F.2d at 857 (court should bar public disclosure even of testimony at suppression hearing prior to decision whether interception was lawful).

These cases recognize that the "court must assume responsibility for the balancing" of interests. *E.g., United*

---

[8] Of course, some courts have rejected this *ad hoc* approach as insufficient to protect the constitutional privacy right at stake and inappropriate in light of Congress' determination of the proper balance in Title III:

> Congress in Title III struck a balance between these interests that seems reasonable to us. It put no limits on the public disclosure of lawfully obtained wiretap evidence through public testimony in legal proceedings; but neither did it authorize wiretap evidence not made public in this manner to be made public another way without the consent of the people whose phone conversations were intercepted.

Dorfman, 690 F.2d at 1234. The decision as to which approach is most appropriate is irrelevant here as the state simply disclosed the wiretap information unilaterally, without any prior judicial action.

States v. Gerena, 869 F.2d 82, 86 (2d Cir. 1986). Prior judicial involvement is necessary because, to hold otherwise "makes the government the sole arbiter of what should be disclosed, since once a paper is publicly filed, the damage is done." *Id.* "[I]t would clearly defeat the purpose of protection of the private citizen to allow the issue of what is necessary and essential to be determined solely by the subjective beliefs of the prosecuting attorneys." *Orkin*, 223 S.E.2d at 73.

Even if not otherwise obvious from the statutes, the prohibition of public disclosures beyond those made while testifying is inherent in the limitation on authorized "use" of intercepted communications to that "appropriate to the proper performance of the officer's official duties." Wis. Stat. §968.29(2); *see* 18 U.S.C. §2517(2). As explained by the Ninth Circuit, that phrase in part was "designed to protect the public from unnecessarily widespread dissemination of the contents of interceptions...." *Hall*, 543 F.2d at 1233. Accordingly, it bars exactly the type of unnecessary public disclosure inherent in the public filing of a criminal complaint containing 27 pages of wiretap transcripts, which complaint could and should have been filed under seal, at least pending a determination of the legality of the wiretap. *See, e.g., Shenberg, supra*.

Neither the Court of Appeals nor the state below identified a single case in which the court found a unilateral

government disclosure of intercepted wire or oral communications to the public at large to be authorized under Title III or its equivalent. Rather, the cases cited by the state below uniformly involve extremely limited releases of privileged information, either (1) disclosures solely to other law enforcement officers as authorized under 18 U.S.C. §2517(1) or Wis. Stat. §968.29(1), *see Lee, supra*; (2) use of recordings to refresh the recollection of a participant in the communication (and thus not a "disclosure," *see* Note 6, *supra*), *see Ricco, supra;* (3) inclusion of previously unsealed information (which thus is not a "disclosure"), *Birdseye, supra*; (4) limited disclosure to a few civilian witness as necessary for purposes of voice identification, see *Rabstein, supra*; *Orkin, supra*; (5) inclusion of wiretap information in a sealed affidavit for a search warrant, *see Application of Newsday, supra*; *Pulitzer Pub., supra*;[9] or (6) inclusion of wiretap information in some other sealed submission to the court, *see Gerena, supra* (trial briefs).

United States v. Woods, 544 F.2d 242, 253 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977), also relied upon by the state below, did involve public disclosure in a search

---

[9] Or, alternatively, suggesting that the actual contents of intercepted communications be included in search warrant applications, *Johnson*, 696 F.2d at 118 n.21; *People v. Mastrodonato*, 75 N.Y.2d 18, 549 N.E.2d 1151 (1989), a suggestion not inconsistent with a requirement that such affidavits be sealed to preserve the privacy of the parties to the intercepted communications.

warrant affidavit, but did not characterize such disclosure as an appropriate "use" under §2517(2). Rather, the court there simply held that straight dismissal was not a proper sanction for improper public disclosure of search warrant affidavits. 544 F.2d at 253.[10] Indeed, the court noted that

> in view of the congressional intention to protect individual privacy, it would be better practice for the government to request, as a matter of course, that the district court restrict access to documents filed with the court that contain intercepted communications.

Id.

In short, no case, prior to the Court of Appeals decision here even remotely supports the state's position that it has a right unilaterally to disclose the contents of intercepted wire or oral communications to the public at large.

The absence of such authority is not surprising. "[T]he strict prohibition in Title III against disclosure of unlawfully obtained wiretap evidence would be undermined by public disclosure of wiretap evidence ... before the judge ruled on the lawfulness of the wiretaps." *Dorfman*, 690 F.2d at 1233; *see Cianfrani*, 573 F.2d at 857. This is why the statutes require notice and an opportunity to challenge the

---

[10] Dismissal was sought in *Woods* as a direct sanction for the government's unlawful disclosures in an unsealed search warrant affidavit, a remedy which the Court understandably deemed unjustified. Unlike the present case, the defendant apparently did not seek the more limited remedy to strike the improper disclosures from the affidavit.

legality of the wiretap before intercepted communications may be disclosed in a court hearing. S. Rep. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. & Admin. News p. 2195; *see* 18 U.S.C. §§2518(9) & (10)(a); Wis. Stat. §§968.30(8) & (9)(a). *See also Gerena*, 869 F.2d at 88 (government must give notice and opportunity to object, with decision by court, before it includes unsuppressed Title III materials in a publicly filed memorandum or brief).

If the state were correct that its unilateral public disclosure here was proper, nothing in Title III or WESCL would bar the state from simply holding a press conference and disclosing the contents of intercepted communications whenever some prosecutor thought it appropriate. The statutes clearly bar such disclosure, however. *See Dorfman*, 690 F.2d at 1233.

What was required under Title III and WESCL was for the state to refrain from disclosing the wiretap information except pursuant to §§968.29(1) & (3), *i.e.*, to other officers or in testimony before a judge. *See also* 18 U.S.C. §§2517(1) & (3). Even if some limited additional disclosure is deemed permissible under §2517(2) and §968.29(2), however, the most that could have been found lawful would have been submission of the criminal complaint under seal pending a judicial determination of whether the interests in disclosure outweigh the privacy interests protected by Title III and WESCL.

At least prior to a determination that the underly-

ing wiretaps were legal, that balance necessarily bars public disclosure. *Pulitzer Pub, supra*; *Cianfrani, supra*; *Shenberg, supra*. The type of wholesale, unilateral public disclosure accomplished by the state here clearly is not authorized. This Court should say so.

D. The Trial Court Did Not Err in Depriving the State of the Benefit of Its WESCL and Title III Violation

The trial court concluded that the only proper remedy for the state's unlawful disclosure was to strike the disclosures from the criminal complaint because to use those disclosures "would essentially put the Court in the position of promoting a violation of the statute" (R22:22-23; App. 21-22). In the Court of Appeals, the state asserted for the first time that it was improper for the court to deny the state the benefit of its violation of WESCL and Title III. Although the Court of Appeals did not address this argument, Mr. Gilmore anticipates that the state may attempt to raise it again in this Court. If it does, it once again will be wrong.

First, however, this Court should not even reach this issue because the state waived any objection to the particular remedy chosen by the trial court. The state has the burden to establish by reference to the record that it objected before the trial court on the same grounds raised on appeal. *State v. Krysheski*, 119 Wis.2d 84, 349 N.W.2d 729, 731 n.3 (Ct. App. 1984), *overruled on other grounds, State v.*

McDonald, 144 Wis.2d 531, 424 N.W.2d 411 (1988). It cannot do so here for the simply reason that it never made such an objection, despite ample opportunity. Neither the state's written response to Gilmore's motion, nor its oral arguments in the trial court object on this ground. Instead, the state's objections in the trial court consisted merely of the allegation that the disclosures were authorized and that the complaint was sufficient even with the disclosures stricken. (R15:6-8; R22:10-13; R23:14-16). "Failure to make a timely objection constitutes a waiver of the objection." *Krysheski*, 349 N.W.2d at 731 n.3 (citation omitted).

Even if the state had not waived its objection, it plainly is without merit. The trial court's decision to strike the illegal disclosures was the only effective remedy for the state's unlawful conduct.

There has been no finding yet that the interceptions themselves were illegal. Accordingly, the state was correct below that suppression is unjustified at this time. Where, as here, the violation is an unlawful disclosure rather than an unlawful interception, the remedy of suppression is overkill. Suppression would ban not simply the current illegal disclosure, but also any future use or disclosure of the same information, even if such future conduct were otherwise authorized by §968.29 and §2517. In short, the remedy of wholesale suppression is not commensurate with the disclosure violation.

The state was incorrect below, however, in jumping from that unremarkable position to the conclusion that it is entitled to the benefit of its unlawful disclosure. The trial court did not suppress the wiretap information. The state can continue to use or disclose that information non-publicly, as long as it complies with §968.29 and §2517. It may also disclose the information publicly under §968.29(3) and §2517(3), assuming, of course, that it provides the requisite notice and the interception itself is found to have been legal.

The trial court simply addressed the state's particular violation and fashioned an appropriately limited remedy, fully in line with what Congress intended:

> Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. *The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings.* Each of these objectives is sought by the proposed legislation.

S. Rep. No. 1097, *supra*, at 69, quoted in *Gelbard v. United States*, 408 U.S. 41, 50 (1972).

Only by striking the state's unlawful disclosures could the trial court put an end to that violation and deny the state the fruits of its unlawful conduct. At the same time, that remedy does not go beyond the scope of the illegal-

ity. It simply places the parties in the exact same position they would have been in had the state complied with the law by not disclosing the wiretap information in the first place.

As the trial court recognized, this limited remedy also is necessary to ensure that the court did not become a partner in the state's illegal conduct (R22:22-23; App. 21-22). In enacting Title III, Congress found that the restrictions on the use and disclosure were necessary not simply "to prevent the obstruction of interstate commerce" and "to protect effectively the privacy of wire and oral communications," but "to protect the integrity of court and administrative proceedings" as well. Pub. Law 90-351, §801(b); *see also Gelbard*, 408 U.S. at 51. Had the trial court not stricken the unlawful disclosures, it would have improperly "entangle[d] the courts in the illegal acts of Government agents." *Id.* The unlawful disclosure would have continued unabated and to the state's ill-gotten benefit.

Finally, given the state's conduct, its proposed "remedy" in the Court of Appeals of simply sealing the complaint now is nothing more than closing the barn door after the cows are out. It accomplishes nothing. *See, e.g., Dorfman*, 690 F.2d at 1232 (once disclosure takes place "the privacy that the defendants claim to be entitled to under Title III would be gone forever"). At the same time, it leaves the state to benefit from its own wrongdoing. That, in short, is no remedy at all.

II.

THE TRIAL COURT PROPERLY DISMISSED THE REDACTED CRIMINAL COMPLAINT FOR FAILURE TO STATE PROBABLE CAUSE

The state also claimed below that the trial court erred when, after striking the unlawful disclosures from the criminal complaint, it concluded that the remaining allegations failed to state probable cause against Gilmore. Mr. Gilmore anticipates that the state will attempt to drag out this argument again as well. Once again, the state would be wrong.

A. Standard of Review

A criminal complaint "must set forth facts within its four corners that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and the defendant is probably culpable." *State v. Adams*, 152 Wis. 2d 68, 447 N.W.2d 90, 92 (Ct. App. 1989). That document must answer five questions: (1) What is the charge?; (2) Who is charged?; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so? or How reliable is the information? *Id.; State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 161 N.W.2d 369, 372 (1968). If it does not, the action must be dismissed. *See State v. White*, 97 Wis.2d 193,

295 N.W.2d 346, 350 (1980).

Along with the actual facts in the complaint, the court may consider inferences reasonably drawn from the facts alleged. *State ex rel. Cornellier v. Black*, 144 Wis.2d 745, 425 N.W.2d 21, 27 (Ct. App. 1988). A reasonable inference is a rational and logical deduction from established facts rather than a mere guess or conjecture. *See, e.g.*, 1 Sand, et al., *Modern Federal Jury Instructions (Criminal)* ¶6.01 (1995) and cases cited therein. *See also Leary v. United States*, 395 U.S. 6, 36 (1969) (inference is "irrational" unless presumed fact more likely than not given proven fact); *State v. Haugen*, 52 Wis.2d 791, 191 N.W.2d 12, 15 (1971) (inference of guilt from criminal complaint unreasonable if conclusion of innocence equally reasonable).

Evidence required for probable cause thus must support more than a mere possibility or suspicion. *See, e.g., Cornellier*, 425 N.W.2d at 27. Wisconsin does not permit criminal complaints "on possible cause." Rather, the state is obligated to present sufficient evidence in that document to support a reasonable inference, not hunch, not guess, not possibility, that the defendant charged committed the particular offense alleged.

The exact standard of review on appeal is not entirely clear. While the Court of Appeals has stated that the sufficiency of a criminal complaint is a matter of law reviewed *de novo*, *Adams*, 447 N.W.2d at 92, it also has applied

a more deferential standard of review to trial court determinations regarding the value of information provided by an informant. *See State v. Wolske*, 143 Wis.2d 175, 420 N.W.2d 60, 66 (Ct. App.), *rev. denied*, 143 Wis.2d 912, 422 N.W.2d 861 (1988), *cert. denied*, 488 U.S. 1010 (1989). In the latter case, the court held that "[a] reviewing court must ensure only that the magistrate had a substantial basis for his or her determination." *Id.*, citing *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). Cases applying the *Gates* standard have also noted the uncertainty concerning the appropriate standard for reviewing a magistrate's determination regarding probable cause. *See United States v. Leake*, 998 F.2d 1359, 1362-63 (6th Cir. 1993). The correct standard of review is irrelevant here, however, as the redacted complaint was insufficient under either standard.

B. The Trial Court Properly Discredited Unreliable Evidence in the Redacted Complaint

The state complained in the court of appeals that the trial court made an impermissible credibility determination when it dismissed the redacted criminal complaint. Specifically, the trial court found that "the statements of a participant in the hours shortly after the execution of a search warrant by themselves blaming somebody else are not enough to establish probable cause" (R23:31; App. 32). The court was referring to statements of Edna Mae Armon, one of

the targets of the wiretap along with Steven Campbell, to the effect that "KG" was one of Steve's workers and that "him and Steve transact business together." Ms. Armon later identified a photograph of Kevin Gilmore as "KG." (R2:11). Because Ms. Armon's conclusory allegations, the only allegations purporting to tie Gilmore to the charged conspiracy, were unreliable and uncorroborated, the trial court held that the complaint failed to state probable cause against Gilmore (R23:33; App. 34).

The state's argument below ignored settled Wisconsin and federal law *requiring* courts to determine whether information in a criminal complaint is reliable when assessing sufficiency. While a criminal complaint may be based upon hearsay, *see* Wis. Stat. §968.01, "there must be something in the complaint, considered in its entirety and given a common sense reading, which shows why the information on which belief is based should be believed." *Ruff v. State*, 65 Wis.2d 713, 223 N.W.2d 446, 449 (1974) (fn. omitted). Reliability is one of the five questions a valid complaint must answer. *See Adams*, 447 N.W.2d at 92. The required determination of reliability must take into account the entirety of the circumstances, including the informant's demonstrated veracity and basis for knowledge. *Wolske*, 420 N.W.2d at 66, citing *Gates*, 462 U.S. at 238-39.

While a citizen informant who is a victim or mere witness to a crime and aids the police without expectation of

gain normally may be deemed reliable, *e.g.*, *State v. Paszek*, 50 Wis.2d 619, 184 N.W.2d 836, 843 (1971), the same cannot be said of an alleged co-participant. As this Court observed in *Paszek*:

> Information supplied to officers by the traditional police informer is not given in the spirit of a concerned citizen, but often is given in exchange for some concession, payment, or simply out of revenge against the subject. The nature of these persons and the information which they supply convey a certain impression of unreliability, and it is proper to demand that some evidence of their credibility and reliability be shown.

Paszek, 184 N.W.2d at 842.

The Ninth Circuit, for instance, has taken judicial notice that "[t]he use of informants to investigate and prosecute persons engaged in clandestine activity is fraught with peril." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993). By definition, the court said, such

> [c]riminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom.

Id. The court further noted that "[o]ur judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating a risk of sending innocent persons to prison." *Id.* at 334.

There are limited circumstances in which the word of an alleged accomplice may be deemed reliable, such as where

the accomplice admits her own criminal culpability without promise of benefit while also implicating the defendant. *See Ruff*, 223 N.W.2d at 449-50. The Court must keep in mind, however, that "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Williamson v. United States*, ___ U.S. ___, 114 S.Ct. 2431, 2435 (1994). Accordingly, the statement of an alleged co-participant is "presumptively unreliable as to the passages detailing the defendants' conduct or culpability...." *Lee v. Illinois*, 476 U.S. 530, 545 (1986).

The mere inculpatory allegation of an alleged co-participant thus is not sufficient for probable cause. There must be facts as well to show "why credence should be placed in [the informant's] assertion." *State ex rel. Cullen v. Ceci*, 45 Wis.2d 432, 173 N.W.2d 175, 181 (1970). The fact that the trial court required such a showing in this case thus was not error. *See Paszek*, 184 N.W.2d at 842.

C. The Redacted Complaint Failed to State Probable Cause

The state conceded below, as it must, that it's case against Gilmore rests upon Armon's statement to the police on July 12, 1991. In marked contrast to Armon's detailed

allegations against the other defendants (*see* R2:10, 30 (¶s 19 & 30)), her claims about Gilmore were aptly described by the trial court as "cryptic" (R23:28; App. 29). She merely identified a photograph of Gilmore as a person known to her as "KG" and stated in conclusory form that "KG" was "one of Steve's workers" and that "him and Steve transact business together." She also believed that "KG" lived on First Street. (R2:11 (¶23)).

The trial court properly held that these allegations were unreliable (R23:33; App. 34). *See* Section II, B, *supra*. Indeed, Armon's attempts to blame others "are exactly the [type of statements] which people are most likely to make even when they are false; and mere proximity to other, self-incriminatory, statements does not increase the plausibility of the self-exculpatory statements," *Williamson*, 114 S.Ct. at 2435; *see Lee v. Illinois*, 476 U.S. at 545, and exactly the type of statements for which corroboration is required. There must be something showing why Armon nevertheless should be believed. *See Ceci, supra; Ruff, supra*. This is especially true given that Armon falsely accused Gilmore in her same July 12, 1991 statement of responsibility for drugs seized pursuant to a search warrant, which drugs in fact belonged to someone else (R2:11 (¶ 23); *see* R23:32; App. 33).

Finally, Armon's detailed allegations concerning the involvement of others in the conspiracy renders her cryptic assertions against Gilmore, if anything, even more suspect.

The detail with which one is able to support one's allegations is highly relevant to the issue of probable cause. *E.g.*, *Gates*, 462 U.S. at 245 (noting "range of details" in informant's statement). Yet, while Armon amply detailed her allegations against others, she could not, or at least did not, do so with regard to her claims against Gilmore.

Given the totality of the circumstances presented in the redacted criminal complaint, the trial court thus plainly was correct in holding that the complaint failed to state probable cause against Gilmore.

CONCLUSION

The Court of Appeals' decision is wrong. WESCL and Title III simply do not permit the disclosure of intercepted wire communications in a criminal complaint and certainly do not permit the state to publicly file such a complaint. The trial court, moreover, was correct in denying the state the benefit of its unlawful conduct and dismissing the redacted criminal complaint for failure to state probable cause.

Mr. Gilmore, therefore, respectfully asks that this Court reverse the Court of Appeals and reinstate the trial court's order dismissing the criminal complaint.

Dated at Milwaukee, Wisconsin, October 24, 1995.

Respectfully submitted,

KEVIN GILMORE,
Defendant-Appellant-Petitioner

SHELLOW, SHELLOW & GLYNN, S.C.

Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

F:\DATA\WP60\G-I\GILMORE\KG102395.BRZ

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief and appendix produced with a mono-spaced font. The length of this brief is 36 pages.

Robert R. Henak

Robert R. Henak

STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 94-0123-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KEVIN GILMORE,

Defendant-Respondent-Petitioner.

APPENDIX

F:\DATA\WP60\G-I\GILMORE\XG102395.BRW

COURT OF APPEALS
DECISION
DATED AND RELEASED

April 11, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0123-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KEVIN GILMORE,

Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

SCHUDSON, J. The State of Wisconsin appeals from the trial court order granting Kevin Gilmore's motion to strike the references to intercepted communications in a criminal complaint, and dismissing the redacted complaint

against him for lack of probable cause.[1] We conclude that § 968.29(2), STATS., provides a prosecutor the authority to use the contents of intercepted communications in a criminal complaint. Therefore, we reverse.

Between June 24 and July 15, 1991, in the course of an investigation that included electronic monitoring of telephone conversations, the Milwaukee police intercepted communications allegedly connecting Gilmore to drug transactions. The police provided that information to a Milwaukee County Assistant District Attorney who, on September 29, 1992, filed a criminal complaint charging Gilmore and several other defendants with conspiracy to deliver cocaine. The complaint contained numerous references to the intercepted communications and included twenty-seven pages of verbatim transcripts of those communications.

Gilmore moved to strike the contents of the intercepted wire communications from the complaint, and to dismiss the redacted complaint for lack of probable cause. The trial court concluded that the complaint's incorporation of

---

[1] As a preliminary matter, we also have considered Gilmore's argument that this court lacks jurisdiction to hear the State's appeal due to the ten and one-half month delay between the trial court's oral decision dismissing the complaint against him and the State's filing of a notice of appeal. In this case, however, the trial court order of dismissal was filed on November 29, 1993, and the notice of appeal was filed on January 6, 1994. Thus, the State's appeal was timely and this court has jurisdiction. *See State v. Malone*, 136 Wis.2d 250, 256-257, 401 N.W.2d 563, 566 (1987) (appeals court lacks jurisdiction where there is no final written judgment or order). To the extent Gilmore makes a laches/due process argument regarding the State's delay in initiating this appeal, Gilmore has failed to support his argument that reinstatement of the complaint will prejudice his defense.

intercepted communications constituted an unauthorized disclosure under § 968.29, STATS. The trial court struck those references and then, concluding that the remaining information was insufficient to establish probable cause as to Gilmore, dismissed the redacted complaint against him.

This case presents an issue of first impression: whether § 968.29, STATS., allows a prosecutor to include intercepted communication in a criminal complaint. Section 968.29 sets forth the situations in which intercepted communications may be used and/or disclosed. As relevant to this appeal, the statute provides:

> **968.29 Authorization for disclosure and use of intercepted wire, electronic or oral communications.** (1) Any investigative or law enforcement officer who, by any means authorized by ss. 968.28 to 968.37 or 18 USC 2510 to 2520, has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may disclose the contents to another investigative or law enforcement officer only to the extent that the disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by ss. 968.28 to 968.37 or 18 U.S.C. 2510 to 2520, has obtained knowledge of the contents of any wire, electronic or oral communication or evidence derived therefrom may use the contents only to the extent the use is appropriate to the proper performance of the officer's official duties.

> (3) (a) Any person who has received, by any means authorized by ss. 968.28 to 968.37 or 18 U.S.C. 2510 to 2520 or by a like statute of any other state, any information concerning a wire, electronic or oral communication or evidence derived therefrom intercepted in accordance with ss. 968.28 to 968.37, may disclose the contents of that communication or that derivative evidence only while giving testimony under oath or affirmation in any proceeding in any court or before any magistrate or grand jury in this state, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

Whether § 968.29, STATS., precludes the State from including intercepted communication in a criminal complaint presents a question of statutory interpretation, which is subject to our *de novo* review. *See State v. Wittrock*, 119 Wis.2d 664, 669, 350 N.W.2d 647, 650 (1984). The primary source of construction is the language of the statute itself. *State v. Guck*, 176 Wis.2d 845, 853, 500 N.W.2d 910, 913 (1993). We conclude that, under the unambiguous language of § 968.29(2), a prosecutor is permitted to include intercepted communication in a criminal complaint.

The parties agree that disclosure is only allowed as provided in the statute. They argue at length about what they consider to be the intricate interrelationships among subsections (1), (2), and (3)(a). In this case, however, we think it analytically more helpful to first clarify the three distinct areas covered by these three subsections. As relevant to the issue in this case:

— § 968.29(1), STATS., relates to disclosure of intercepted communication from one law enforcement officer to another.

— § 968.29(2), STATS., relates to use of intercepted communication by a law enforcement officer.

— § 968.29(3)(a), STATS., relates to disclosure through court testimony concerning intercepted communication, by any person.

The parties and the trial court focused most closely on the "use" of the contents *by the police*. The trial court concluded that while a police officer may "use" the intercepted communication under § 968.29(2), the officer may not "disclose" the communication in a complaint. Although the trial court's examination of the issue was thoughtful in this regard, we think it was incomplete by failing to consider the *prosecutor's* "use."

According to § 968.27(10), STATS., a prosecutor is a law enforcement officer for purposes of § 968.29, STATS. Therefore, when, as in this case, a police officer "discloses" the contents of intercepted communication to a prosecutor, he or she does so under § 968.29(1). When, however, the prosecutor "uses" the contents of the intercepted communication in a criminal complaint, the prosecutor does so under § 968.29(2). Under § 968.29(2), the prosecutor "may use the contents only to the extent the use is appropriate to the proper performance of the officer's official

duties." A prosecutor's official duties include the preparation of criminal complaints. *See* § 968.02(1), STATS. ("Except as otherwise provided in this section, a complaint charging a person with an offense shall be issued only by a district attorney .... A complaint is issued when it is approved for filing by the district attorney."). A prosecutor's proper performance of official duties necessarily includes the preparation of complaints that provide references to information and/or quotations from sources necessary to establish probable cause. *See* § 968.01(2), STATS. ("The complaint is a written statement of the essential facts constituting the offense charged."). Thus, we conclude that § 968.29(2) provides prosecutors the authority to include intercepted communication in a criminal complaint.

The Second Circuit Court of Appeals encountered a similar circumstance in *United States v. Gerena*, 869 F.2d 82 (2nd Cir. 1989). The government claimed that 18 U.S.C. § 2517(2)[2] "permits a prosecutor to use the contents of intercepted communications in briefs and memoranda in a criminal case and in various other ways in preparation for trial." *Id.* at 85. The court agreed,

---

[2] The words of 18 U.S.C. § 2517(2) are virtually identical to those of § 968.29(2), STATS. The federal statute provides:

> Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

rejecting "the argument that the statute always forbids public disclosure of unsuppressed, intercepted communications in briefs and memoranda." *Id.*

We acknowledge Gilmore's concern that a prosecutor, unilaterally, would be able to publicly disclose intercepted communications by including them in a complaint. Indeed, the State expresses the same concern and agrees that the best practice may be to file a complaint that submits under seal those portions that are based on intercepted communications. This would allow a court the opportunity, upon request of either party, to consider maintaining the confidentiality of the communications so that the filing of a complaint would not automatically result in their public disclosure. *See id.* at 84-87; *see also* ***Certain Interested Individuals v. Pulitzer Pub.*** 895 F.2d. 460, 465-466 (8th Cir.), *cert. denied*, 498 U.S. 880 (1990); ***United States v. Woods***, 544 F.2d 242, 253 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977).

We recognize that "disclosure to a limited audience of 'professionally interested strangers' in the context of their official duties is not the equivalent to disclosure to the public." ***Pulitzer Pub.***, 895 F.2d at 465 (lawful "use and disclosure of wiretap information in search warrant affidavits ... cannot transform the wiretap information into non-wiretap information unprotected by Title III"). Thus, we appreciate the parties' apparent agreement that the best approach would afford the trial court the opportunity to consider either party's request to seal portions of a

criminal complaint when it is filed.[3]

Therefore, we reverse the trial court's order dismissing the redacted complaint against Gilmore. We remand for further proceedings consistent with this

---

[3] In this regard also, we consider the federal court decision in ***United States v. Gerena***, 869 F.2d 82 (2nd Cir. 1989), valuable and instructive. Considering a prosecutor's "use" of intercepted communications in briefs and memoranda, the court guarded against the prosecutor's unilateral public disclosure:

> [W]hen the government wants to use unsuppressed Title III materials in a publicly filed memorandum or brief, the government must give defendants notice and the opportunity to object. This ... will enable the district court, upon a defendant's objection, to perform the balancing test mandated by such cases as [***Press-Enterprise Co. v. Superior Court***, 478 U.S. 1, 13-14 (1986), *cert. denied*, 485 U.S. 977 (1988), and ***In re the New York Times Co.***, 834 F.2d 1152, 1154 (2nd Cir. 1987)]. If the district court finds that privacy or fair trial interests cannot otherwise be protected and that these interests outweigh the public's interest in access, it should order redaction or sealing. In doing so, the district court must make findings specific enough so that a reviewing court can determine whether the sealing or redaction order was properly entered.
>
> In recognition of the presumption of openness created by the qualified First Amendment right of access to papers filed in court, this ... will properly place the burden on defendants of both objecting to the proposed briefs and memoranda and persuading the court that the Title III material contained in them should be continued under seal. This ... will insure that the district court, not the prosecutor, makes the decision as to what Title III material should be publicly disclosed. We believe that [this] ... will also give appellants and others necessary protection, while not hampering unduly the government's ability to prosecute its case efficiently and the public's right to know what goes on in a federal court.

Id. at 86-87 (citations omitted).

opinion on the original complaint.[4]

By the Court.—Order reversed and cause remanded.

Recommended for publication in the official reports.

[4] We note that trial court has not yet determined whether the unredacted complaint states probable cause as to Gilmore.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. F-923711

KEVIN GILMORE,

Defendant.

ORDER

For reasons stated on record on February 1 and February 15, 1993, the Court granted defendant Gilmore's motion to strike from the criminal complaint all allegations disclosing the content of conversations obtained through court-ordered wire interceptions. Without these allegations, the Court then found that the complaint failed to state probable cause with respect to defendant Gilmore and dismissed the complaint. In a letter dated November 8, 1993, the state has requested a written order of dismissal.

THEREFORE, IT IS HEREBY ORDERED THAT the criminal complaint filed against the defendant is dismissed without prejudice.

Dated: November 23, 1993

By the Court:

/s/

John A. Franke
Circuit Judge
Branch 25

ORAL DECISION (2/1/93),
FINDING VIOLATION OF WESCL
AND TITLE III
(R22:13-23)

wouldn't talk about it at the corner bar; that they wouldn't disclose it improperly.

I think clearly the Wisconsin legislature wanted to prevent people whose conversations were intercepted from having those conversations used improperly and disclosed to people who are not authorized by the statute.

And as I indicated in my brief, I think that disclosing those conversations to the Court in a Criminal Complaint is a proper use of those conversations and not--because under the--if omitting the word "only" authorizes law enforcement to disclose the contents to other law enforcement officers or to a Court while giving testimony, but it does not prohibit them from disclosing them to anybody else, and I think that's clearly what the--it would seem from the amendment that the Wisconsin legislature wanted to make it clear to law enforcement that those are the only appropriate purposes.

THE COURT: All right. I'm going to rule on this issue, and then we'll see where we are. I initially when I started looking at this last week, thought that I take this under advisement and consider it more carefully but I believe that I've had the chance to consider it wit sufficient care to be able to rule from the bench at this time, and I'm doing that in the interest of moving this case along.

I had considerable occasion in my work as a lawyer for the federal government to stare at these three subsections in their federal form about 11 or 12 years ago and wonder what they meant.

I struggled because I had to decide whether it was proper to disclose things or not under certain circumstance--under certain circumstances and who could disclose them, and these three sections provided the primary guidance for that, and I could not figure out what they meant.

I could not figure out what the intended interaction between those three sections was, and the first mystery had to do with the difference between "use" and "disclose"; what the distinction is intended to be.

Any intentional disclosure, to me, is a use. It's a type of use, and certainly most of the uses that one can conceive of--at least a law enforcement person could conceive of--involves some type of disclosure, so why the distinction?

The other mystery had to do with the reason why there were two different disclosure sections; one and three. Why was there a disclosure section for investigative and law enforcement officers in sub. 1 and then another section in sub. 3 that authorized disclosure in one particular setting by any person?

I--I would have thought that in the intervening 11 or 12 years, that there would have emerged a clear explanation for this or a clear answer, and I--it came to me last week, and I realized that I was going to have to wrestle with this again.

I opened the briefs assuming that there was going to be a clear answer there, and as is so often the case in this business, I was disappointed to find out that no Court had ruled on either this precise question in the context of a Complaint, or even some closely analogous questions.

In trying to decide what this means now, which is what I believe I have to do, I start with the premise that this is a statute which was intended and designed to provide very tight controls over both the initial interception of any conversation like this, and also the subsequent disclosure.

The statutes--and I'm referring to both the State and the Federal statutes together here--clearly have as a priority not just controls over the ability of someone and the way in which these things are intercepted, but also tight controls over disclosure of any information that's gleaned from an electronic surveillance interception.

Disclosure is permitted only as authorized in

the chapter. Interception is permitted only as authorized, and there has to be some clear authorization for someone to do either of those two things. That's my understanding of both the specific and general intent of this statute.

The State wants me to read sub. 2 to include disclosures. They want to include within the ability to use the contents the ability to disclose it. If all we had was sub. 2 that might make sense, but it clearly doesn't make any sense in light of the structure of the statute here.

It would essentially make sub. 1 unnecessary and probably makes--well, it wouldn't really apply to sub. 3, but it would make sub. 1 totally unnecessary. Use means something other than disclose, as far as I can discern in reading these statutes.

The State also wants me to read sub. 1 to allow law enforcement officers not only to disclose the content of these things to each other, but to disclose it publicl as long as it's appropriate; as long as it's kind of in-house.

If someone else, like the Milwaukee Sentinel, happens to find out about it, well, that's just--that's just a sideshow from the fact that this is just law enforcement disclosing it to the D.A. and then to the

Court.

I can't read sub. 1 in that fashion either. While this statute certainly could have been better drafted, I believe there is a way to read these three sections so that each has its own meaning and that the meaning is consistent with each of the others, and I believe that the general principles of statutory construction require that I read it that way.

I'm supposed to read the statute so that each of the sections have meaning, as long as there's a logical way to read it in that fashion, and while I've asked questions about legislative history, I'm not sure that I could defer to any legislative history here, since I don't find on reflection that these statutes are particularly confusing or ambiguous, such that we need to consult further evidence of what the legislature meant. I think they're clear on their face.

Subsection 1 refers to private disclosures among law enforcement officers. It simply sets a broad requirement that any of these in-house disclosures be appropriate, and there's certainly been litigation, as is logical when you use words like "appropriate," about what that means and litigation about whether that can extend to search warrants and other types of applications.

But while there are certainly difficult

questions that may have to be answered, this case doesn't present one. This was not some in-house law enforcement-to-law enforcement disclosure.

And I--I will not read this to mean that as long as law enforcement is disclosing it to law enforcement--which is what your have here--if someone else happens to be sitting at the table and overhears it, that that's okay. That's not what the statute had in mind. This is just--sub. 1 is just what I would call private law enforcement disclosure.

With respect to sub. 2, I assume that it occurred to someone drafting this statute that law enforcement officers can use this material without disclosing it. While I used to have trouble wondering what that might be, I really don't any more.

Paragraph 23 of the Complaint provides a perfect example. If you do a wiretap, you can then take the benefit of that information, target a particular house, and go out and do an undercover buy. I suppose one could argue about whether that's appropriate or not, but that's a separate issue to be litigated.

I believe that's what sub. 2 is concerned with; uses that don't involve disclosure. The undercover officer who went to--allegedly went to Ms. Gilmore's house and attempted to do a buy didn't have to say anything;

didn't have to disclose anything about the wiretap in order to do that, but clearly he, or he in connection with other law enforcement officers, was using the--the electronic surveillance.

There are many other ways in which law enforcement officers do use this material without disclosing it, and certainly one could imagine law enforcement going to a person, telling them that they've been the subject of a wiretap and that they're going to disclose it to the D.A., or maybe a choice conversation to the target's wife, unless the--the potential subject cooperates and becomes an informant.

Now, is that appropriate or not? I don't know, but that's not the issue. It's simply an example of--of the use of this material without disclosing it, and that, I believe, is what sub. 2 has to do in the whole picture here, and neither sub. 1 or sub. 2, in my view, applied to the disclosure of this material in a Criminal Complaint.

Sub. 3 covers any person, so it certainly covers a District Attorney filing a Complaint, but it also does not provide authorization for any disclosure. It, in the federal sense, allows disclosure--it specifically addresses the issue of disclosure while giving testimony and allows for it, but it provides no authorization for disclosure in any other setting.

The State of Wisconsin has included the word "only" twice, and what I believe the intent was--although my belief about it isn't particularly important--but what I suspect the intent was, was to clarify at least part of the ambiguity in the federal statute.

By including the word "only" in both sub. 1 and sub. 3, I think the State of Wisconsin was trying to make more clear the reading of this statute that I have given it. I think that's what the federal statute probably meant, and Wisconsin has made it more clear--although not perfectly clear--by including the word "only".

The only circumstance in which someone is given authorization to disclose this material, other than in sub. 1, is while giving testimony under oath or affirmation in any proceeding.

I have to assume that the Wisconsin legislature meant what it said, and that there is no authorization to do anything other than these three things just because it makes sense to law enforcement people; just because it might be appropriate, but for the law.

It's not really pertinent to speculate about the reasons for this, but there are some reasons why the legislature may have done this. Disclosure in a Criminal Complaint is very different than disclosure in--in a public trial setting.

The main difference is in a public trial or hearing setting the defendant, at least arguably, has the right to challenge the use and seek suppression of it before it's disclosed. The defendant has no such right in a Complaint setting.

In a trial setting, there is a third party there. There's a referee; a judge there who has some control over the proceedings and can provide the relief that the statute wants to have here to make sure that someone's privacy isn't needlessly interfered with.

That situation just doesn't exist with a Complaint. And so the legislature, while it certainly raises questions as to what law enforcement is supposed to be doing with this stuff after it gets it, might very well have wanted to have this kind of limitation that nothing be disclosed simply by filing papers in the court file, which is a public file, and have all of this stuff become a part of the public arena, only to later find out that it was not appropriate; that it was not right; that it was improperly taken; and that there is no probable cause and this material never should have come out in the first place.

For those reasons, I believe there is no authorization anywhere in the statute--the Wisconsin or the federal law to disclose this material in a Criminal

Complaint, and as a consequence, it may not be disclosed in a Criminal Complaint.

Now, that leads me to the question of what the remedy ought to be. That is, simply because this stuff shouldn't have been disclosed doesn't mean that I have to strike it or should strike it.

I'm not sure there's any clear guidance on this, but I've thought about it. I'm satisfied that the only reasonable remedy is to strike it. That is somewhat analogous to the exclusionary rule, in that to use it now, to consider it now, to talk about it now would essentially put the Court in the position of promoting a violation of the statute.

It would essentially put the Court in the position of using material that should not have been disclosed, and while I don't believe there is any specific directive here as to what to do--other than the criminal sanctions, which I think are clearly inappropriate here but aren't up to me--even though there's no particular guidance as to what to do, I think the only reasonable course is to find that since this material should not have been disclosed, the Court cannot participate any further in its disclosure, and that it cannot consider it in assessing the probable cause in the sense I never should have read it to begin with, so I am going to grant the

motion to strike any material in the Criminal Complaint which discloses the contents of any electronic surveillance.

Now, I notice that the State argued that there is enough in the Complaint without this. I'm going to need some time to consider that. I don't know if the State wants some time to consider whether they want to go with this or not. Ms. Vinopal?

MS. VINOPAL: That--I would request a little time to do that, your Honor. I would just ask--there is one issue that, in light of the Court's ruling--the State took the position that disclosure was appropriate in the Criminal Complaint under the statute, but would the Court address the issue as to whether a police officer swearing before a John Doe judge as to the contents of the Criminal Complaint, such as when Judge Wagner swore Detective Byers to this Complaint--

Is the Court holding that that is not giving testimony under oath or affirmation as contemplated by the statute?

THE COURT: I meant to ask you about that and I--I didn't.

MS. VINOPAL: That was, at one point, raised before Judge Geske--a position that the State abandoned in this case--but I think if the Court is relying on that

ORAL DECISION (2/15/93),
DISMISSING REDACTED COMPLAINT
(R23:23-35)

THE COURT: You're not bound by your normal charging practice? Don't you normally charge them as attempts to deliver?

MS. VINOPAL: No. Under Chapter 939, no.

THE COURT: I meant with that charging language.

MS. VINOPAL: I guess I haven't done or seen enough to know if there's a general practice in that respect. And based on other information that the State has, namely the statement of Renee Tubbs and the conversations, that it is the State's position that a delivery occurred.

THE COURT: All right. I thought I was prepared to rule on this, but I'm going to take a minute to go through the complaint again, and then rule on the sufficiency of the complaint as to Counts 1, 2, and 4. And then we'll proceed. We'll take about a ten-minute recess.

(Recess was had at 9:53 A.M.)

THE COURT: We're back on the record in this case. The appearances are the same.

For the benefit of the student visitors, this is a case in which the defendants are charged with conspiracy to deliver cocaine, and I have been considering a number of pre-trial motions related to a number of

different things, including whether or not the complaint is sufficient.

Counsel, I'm a little surprised that the State wants to proceed on this particular complaint, and I suspect the defendant has some reasonably strong interest in not winning this particular motion, but I've looked back at the complaint again, and I will give you each the benefit of my best ruling on this subject.

Deciding what is or is not probable cause in a complaint isn't always the clearest or easiest call to make, but I'm going to review what is in the complaint after taking out what I have excised in an earlier ruling, and decide whether or not there's probable cause for each of the charges against each of the defendants.

With respect to the conspiracy charge, what we have as an allegation here is primarily based on the assertions of Ms. Armon, and her basic outline of the conspiracy is set forth in Paragraph 9 in statements that she apparently made subsequent to July 15, 1991, which appears to have become an increasingly important date here. Not the 15th, but the fact that these statements were made subsequent to July 15th. She describes being involved in what appears to be a classic cocaine type conspiracy where Steve Campbell is in effect at the top, and a number of other people were working

for him in distributing--distributing cocaine.

The essential allegations as to Mr. Perry's involvement in the conspiracy also come from Ms. Armon, and those are in Paragraph 19. She states that Roger would work for Steve; if Steve and Roger were going to make a delivery, Roger would carry the cocaine in his pocket. She further stated that Steve used to buy Roger clothes and would give him a few dollars on the side. She stated that Roger was trying to get off dope. Further, that he would make runs and deliver whatever somebody wanted, an eight-ball, a half, a quarter, and she apparently identified a photograph of Roger Perry, presumably by saying that is the Roger Perry about whom I am speaking.

The essential allegations as to Gilmore's involvement in the complaint are contained in Paragraph 23, in which, on July 12, 1991, Ms. Armon apparently stated that someone named K.G. was one of Steve's workers, that she and--that he and Steve--that is K.G. and Steve--transacted business together. She identified a photograph of Kevin Gilmore as the person that she called K.G.

The allegations involving Mr. Richards' involvement in the conspiracy are found in Paragraph 30. On January 29, 1992, apparently Ms. Armon told the complaining officer witness that Kevin was one of Steve's

alternative suppliers. She stated that if he wanted-- if Steve wanted an ounce but couldn't get it from Kevin Richards, he would get it from Tony. She stated that the cocaine that was taken out of Steve's father's house, which apparently refers to the search on July 11, 1991, was Kevin's, and that Kevin fronted it to Steve. I don't remember the exact amount, but there was a considerable quantity of cocaine taken out of Steve's father's house, as described in Paragraph 17.

She refers to one specific night when-- when Kevin Richards--and I'm--I'm using the full name of Richards here, although the paragraph refers to Kevin-- that Kevin Richards came to the house and picked up Steve, they went to Steve's father's house and mixed it up. She states that on some occasion, apparently the same one, Steve had told her that he had to pick up four more ounces from Kevin. She told the police that Steve didn't pay Kevin for the dope which was taken out of his father's house.

Now, all of those allegations come from Ms. Armon. Certainly the existence of some kind of dope dealing conspiracy is also established by what was found at the search warrant execution, and detailed in Paragraph 17.

Furthermore, the existence of some

conspiracy along the lines described by Ms. Armon is significantly corroborated in statements from Willie Campbell, who's apparently Steve Campbell's father, on the night or day of the search, and his statements are in Paragraph 17, and there are also statements from at least three other persons who were arguably Steve--Steve Campbell's workers in some respect, and that's a Mr. Boyd, whose confession about this is in Paragraph 11; Mr. Henry, whose confession is in Paragraph 12; and a Mr. Morris, whose admissions are in Paragraph 14. I don't believe any of those admissions implicate any of the current defendants, but they certainly tend to corroborate what Ms. Armon has said about the existence of a conspiracy.

There's also statements from a Mr. Gerald Campbell detailed in Page 15. If his relationship to Steven Campbell is indicated, I have missed it. I assumed that he's related, but I don't recall finding just--finding any indication of just what the relationship is. But Mr. Campbell apparently made admissions at his sentencing hearing that he was involved with Steve Campbell in a cocaine distribution conspiracy. He was not implicated by any of the other co-defendants directly.

Further corroboration is found in the fact that there was an undercover buy from Gerald Campbell, but that's a relatively minor corroboration here.

What we have left here is certainly not a world class complaint, but as to the essential elements of a conspiracy, and as to the involvement of Defendants Perry and Richards in the conspiracy, I think that it's sufficient. Paragraphs 19 and 30 provide a fairly detailed account of what Ms. Armon says those two were doing. Both of those interviews--or rather the statements about each of those defendants were allegedly made on January 29, 1992, which was significantly after Ms. Armon had confessed her involvement in the enterprise, and presumably believed to be facing some possible sanctions for it, and not want to falsely accuse people or not want to lie about what she observed and what in fact happened.

The allegations with respect to Mr. Gilmore raise a different question in a couple of respects. First of all, they're much less--they're of much less detail, and they're somewhat more cryptic. Now, part of this may simply be that the electronic surveillance allegations have been excised, so this doesn't read as well as it might if the State had redrafted this complaint. But even putting that aside, what we've got is an allegation that Kevin Gilmore was one of Steve's workers, and that the two of them transacted business together.

Reading the complaint in its entirety, I have no problem concluding that what Ms. Armon was talking about there was the drug conspiracy, and the defendant's objection on the ground that it doesn't say what kind of work he was doing is--is not one that I'm willing to sustain based on a reading of the whole complaint. I'm a little troubled by the identification here, but this is fairly standard practice in complaints, and I've sustained it before and will continue to do so, noting only that this photographic identification business can be dangerous, in my view.

The evidence here is that Ms. Armon knew all of these people and saw them regularly. I have less trouble with this kind of identification here than if a witness saw an alleged perpetrator once and then uses a photograph to say that's--that's who did it. Maybe it's my own uncertainty about ever wanting to identify someone from a photograph that causes me to be concerned about this, but in the context of this complaint, I'm going to find that the identification is sufficient.

The problem is just now brief and unadorned the description of his role is, and more importantly, the problem is the timing of Ms. Armon's statements. The Gilmore statements in Paragraph 23 were allegedly made on July 12, 1991. This is the day after--

perhaps the early morning hours after the search. Based on the complaint, at this point Ms. Armon has not implicated herself in this enterprise, and I don't--I'm not sure the extent to which that argument is available to the State in finding some corroboration for what she says.

I want to start with the proposition that complaints which--a complaint based solely on the accusation of a co-defendant or suspect has to be viewed very critically. Anything else would be a very dangerous practice. At least in the brief time I've had here, there doesn't appear to be a lot of support directly for this proposition that I've been able to find.

Defendant Gilmore cited a 1970 case, Cullen v. Ceci or something like that, which seems to stand for the proposition that hearsay is okay, but there needs to be some corroboration. More-- A little more recently, 1974, in Ruff v. State, 65 Wis. 2d 713, the Supreme Court indicated that reliance on accusations by a co-defendant were okay if the co-defendant has implicated him or herself. I think in that case, there were two accomplices who implicated the defendant. On Page 720, the Court says we have specifically held that when a participant in a crime admits his own participation and implicates another, an inference may be reasonably drawn that he

is telling the truth.

There may be something directly on the issue that I am trying to focus on here, which is Ms. Armon's status as of July 12, 1991, but certainly the implication of that ruling in Ruff is that without admission of participation, it's not enough--at least it may not be enough.

I'm supposed to use my common sense, and after a search warrant goes down, there's an awful lot of scrambling that goes on, an awful lot of false statements get made. Sometimes people tell the truth, sometimes they lie about what happened. But I believe that the statements of a participant in the hours shortly after the execution of a search warrant by themselves blaming somebody else are not enough to establish probable cause, and I'll indicate once again that any other ruling would be extremely dangerous. Anything that someone starts saying after the execution of a search warrant could be put in a complaint, and people could be rounded up, and then someone would sort out whether the defendant--the other defendant, the Armon person, the person in Ms. Armon's situation--was telling the truth or not.

There's one other reason to be suspicious here, and that has to do with just what it is Ms. Armon means when she says, "I don't know if he on First Street

or what, but if he, if you all raided a house, that was his stuff." And until Mr. Shellow indicated it, I didn't make the connection between the raid referred to in Paragraph 23 and the search warrant referred to in Paragraph 27. But given the dates, it certainly seems logical that she was aware of the raid. She was being asked about it, and that she may have been referring to it, and the fact that she blamed Gilmore for that on the 12th, then later--much later said oh, that was Richards' stuff, is a factor which simply raises a question about her credibility. A significant question.

Now, I have found in ruling on Defendants Perry and Richards that Ms. Armon's statements are sufficient because they are corroborated by a lot of other evidence, including the search, and because they were made after--long after a time when she had admitted her own participation in the offense. Certainly one can say, well, she told the truth later, at least she appears to be credible later, therefore she was credible on July 12th. And that's the argument that I've spent some time here wrestling with, and it's essentially an argument that I--I reject.

The fact that any criminal defendant at some point admits his or her involvement and appears to tell the truth might in some very small way enhance the

credibility of their earlier statements, but only in a very minor way, because case after case comes through court where defendants have, prior to admitting their participation in what we think is an honest fashion, told one, two, three, or many other different stories. So I can find no corroboration for Ms. Armon's July 12th statements in her later apparently truthful and corroborated statements. The participant-- The admissions of your own participation have to come at or before the time when you accuse other people. Paragraph 23 is not enough to link Mr. Gilmore to the conspiracy, and I'm going to find that the complaint is insufficient as to Defendant Gilmore on Count 1.

Now, Mr. Shellow raised a number of other issues that I haven't had to rule on, but other defendants have joined in, that I don't think save the other defendants here. I don't believe that any--that as to Defendants Perry and Richards, the State has just shown some kind of mere buyer or seller relationship which would require me to dismiss this complaint. There was clearly-- There's clearly alleged more than that as to both of these defendants.

Mr. Shellow complained about not knowing what cocaine it was that the defendant was charged with. I-- I don't know that there's any obligation in a

conspiracy charge to hold up any unique package of cocaine and say that this is it. I think it's enough to prove the elements of a conspiracy or to allege the elements of a conspiracy. But as to these two defendants, and as to this complaint, I think it's clear that they're being charged with a conspiracy to distribute a lot of cocaine, including the cocaine that was found on July 11th. And the complaint is sufficient to notify them of what they are charged with in that respect.

Count 4 as to Defendant Richards relies on the same package of evidence as the conspiracy, and I find that it's sufficient as to Defendant Richards.

Count 2 as to Defendant Perry now relies only on some admissions by Mr. Perry made on December 2, 1991. Defendant Perry in Paragraph--this is in Paragraph 18--stated that he did in fact take dope to Renee's home, but that Renee made him take it back because the people that ordered the dope were not there. I think this is all we've got left, and it doesn't say when this occurred, it doesn't say where this occurred.

I considered on my own trying to make an effort to adopt the complaint to identify Renee as Michelle Johnson who lived at 1411 North Sixth Street, but that sentence is all tied up with I believe disclosures of the contents of an intercepted conversation,

and it doesn't solve the problem of when, even if it does solve the problem of where.

But the problems go on and on. The defendant-- The defendant's statement is just too thin. It just doesn't say enough that--that can draw on any other material in this complaint to establish that at any point close to the time charged, at any place in the City of Milwaukee, the defendant delivered cocaine. I can stretch and find that dope means cocaine, I can-- I can do all sorts of gymnastics, but I shouldn't have to. A complaint's supposed to give someone reasonable notice, and this just doesn't.

Count-- I find that the complaint as to Count 2 isn't sufficient. So as to Defendant Gilmore, the complaint is dismissed--it's Count 1. As to Defendant Perry, Count 2 is dismissed. As to Defendants Perry and Richards, their motions to dismiss Count 1 are denied. And any motions to dismiss Count 4 as to Richards, the motion is denied.

MR. VINOPAL: Your Honor, before Mr. Shellow and Mr. Gilmore leave, I would just enter the State's objection. I think the appropriate remedy would have been for this Court to grant a stay for the State to appeal the Court's decision with respect to the wire tap decisions of the criminal complaint, and in case this does

(b) Is placed in or transferred to a secured correctional facility.

(c) Is committed, transferred or admitted under ch. 51, 971 or 975.

History: 1979 c. 240; 1981 c. 297; 1987 a. 332; 1991 a. 17.

Intrusive searches of the mouth, nose or ears are not covered by (3). However, searches of those body orifices should be conducted by medical personnel to comply with 4th and 5th amendments. 71 Atty. Gen. 12.

968.256 Search of physically disabled person. (1) In this section, "physically disabled person" means a person who requires an assistive device for mobility, including, but not limited to, a wheelchair, brace, crutch or artificial limb.

(2) A search of a physically disabled person shall be conducted in a careful manner. If a search of a physically disabled person requires the removal of an assistive device or involves a person lacking sensation in some portion of his or her body, the search shall be conducted with extreme care by a person who has had training in handling physically disabled persons.

History: 1979 c. 240.

968.26 John Doe proceeding. If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him or her and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the judge may proceed in the examination is within the judge's discretion. The examination may be adjourned and may be secret. Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge. If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint may be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused. Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used. A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08 (1). The person is immune from prosecution as provided in s. 972.08 (1), subject to the restrictions under s. 972.085.

History: 1989 a. 122, 199; s. 88, 223, 315.

A defendant must be allowed to use testimony of witnesses at a secret John Doe proceeding to impeach the same witnesses at the trial, even if the prosecution does not use the John Doe testimony. Myers v. State, 60 W (2d) 248, 208 NW (2d) 311.

Immunity hearing must be in open court. State ex rel. Newspapers, Inc. v. Circuit Court, 65 W (2d) 66, 221 NW (2d) 894.

Person charged as result of John Doe proceeding has no recognized interest in the maintenance of secrecy in that proceeding. John Doe discussed. State v. O'Connor, 77 W (2d) 261, 252 NW (2d) 671.

No restrictions of the 4th and 5th amendments preclude enforcement of an order for handwriting exemplars directed by presiding judge in John Doe proceeding. State v. Doe, 78 W (2d) 161, 254 NW (2d) 210.

See note to Art. I, sec. 8, citing Ryan v. State, 79 W (2d) 83, 255 NW (2d) 910.

This section does not violate constitutional separation of powers doctrine. John Doe discussed. State v. Washington, 83 W (2d) 808, 266 NW (2d) 597 (1978).

Balance between public's right to know and need for secrecy in John Doe proceedings discussed. In re Wis. Family Counseling Services v. State, 95 W (2d) 670, 291 NW (2d) 631 (Ct. App. 1980).

John Doe judge may not issue material witness warrant under 969.01 (3). State v. Brady, 118 W (2d) 154, 345 NW (2d) 533 (Ct. App. 1984).

When John Doe proceeding is not joint executive and judicial undertaking, procedure does not violate separation of powers doctrine and is constitutional. State v. Unnamed Defendant, 150 W (2d) 352, 441 NW (2d) 696 (1989).

Limits of judge's authority in presiding over or conducting John Doe proceeding discussed. 76 Atty. Gen. 217.

968.27 Definitions. In ss. 968.28 to 968.37:

(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) "Aural transfer" means a transfer containing the human voice at any point from the point of origin to the point of reception.

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

(4) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature wholly or partially transmitted by a wire, radio, electromagnetic, photoelectronic or photooptical system. "Electronic communication" does not include any of the following:

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

(b) Any wire or oral communication.

(c) Any communication made through a tone-only paging device.

(d) Any communication from a tracking device.

(5) "Electronic communication service" means any service that provides its users with the ability to send or receive wire or electronic communications.

(6) "Electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of those communications.

(7) "Electronic, mechanical or other device" means any device or apparatus which can be used to intercept a wire, electronic or oral communication other than:

(a) Any telephone or telegraph instrument, equipment or facilities, or any component thereof, which is:

1. Furnished to the subscriber or user by a provider of electronic or wire communication service 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 the subscriber or user for connection to the facilities of the service and used in the ordinary course of its business; or

2. Being used by a provider of electronic or wire communication service in the ordinary course of its business, or by a law enforcement officer in the ordinary course of his or her duties.

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

(8) "Electronic storage" means any of the following:

(a) Any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof.

(b) Any storage of a wire or electronic communication by an electronic communication service for purposes of backup protection of the communication.

(9) "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.

(10) "Investigative or law enforcement officer" means any officer of this state or political subdivision thereof, who is empowered by the laws of this state to conduct investigations of or to make arrests for offenses enumerated in ss. 968.28 to 968.37, and any attorney authorized by law to prosecute or participate in the prosecution of those offenses.

(11) "Judge" means the judge sitting at the time an application is made under s. 968.30 or his or her successor

(12) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation. "Oral communication" does not include any electronic communication.

(13) "Pen register" means a device that records or decodes electronic or other impulses that identify the numbers dialed or otherwise transmitted on the telephone line to which the device is attached. "Pen register" does not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by the provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

(14) "Readily accessible to the general public" means, with respect to a radio communication, that the communication is not any of the following:

(a) Scrambled or encrypted.

(b) Transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of the communication.

(c) Carried on a subcarrier or other signal subsidiary to a radio transmission.

(d) Transmitted over a communication system provided by a common carrier, including a cellular mobile radio telecommunications utility, as defined in s. 196.202 (1), unless the communication is a tone-only paging system communication.

(e) Transmitted on frequencies allocated under 47 CFR part 25, subpart D, E or F of part 74, or part 94, unless in the case of a communication transmitted on a frequency allocated under 47 CFR part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a 2-way voice communication by radio.

(15) "Trap and trace device" means a device that captures the incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

(16) "User" means any person who or entity that:

(a) Uses an electronic communication service; and

(b) Is duly authorized by the provider of the service to engage in that use.

(17) "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, microwave or other like connection between the point of origin and the point of reception, including the use of the connection in any switching station, furnished or operated by any person engaged as a public utility in providing or operating the facilities for the transmission of intrastate, interstate or foreign communications. "Wire communication" includes the electronic storage of any such aural transfer, but does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.

History: 1971 c. 40 s. 93; 1987 a. 399; 1991 a. 39.

Constitutionality of 968.27 to 968.30 upheld. State ex rel. Hussong v. Froelich, 62 W (2d) 577, 215 NW (2d) 390.

Informant who is party to tape recorded telephone conversation also acquired conversation in his mind, regardless of use of tape recorder; it is not an "intercept." Informant may testify to conversation without use of recording. State v. Maloney, 161 W (2d) 127, 467 NW (2d) 215 (Ct. App. 1991).

968.28 Application for court order to intercept communications. The attorney general together with the district attorney of any county may approve a request of an investigative or law enforcement officer to apply to the chief judge of the judicial administrative district for the county where the interception is to take place for an order authorizing or approving the interception of wire, electronic or oral communications. The chief judge may under s. 968.30 grant an order authorizing or approving the interception of wire, electronic or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense for which the application is made. The authorization shall be permitted only if the interception may provide or has provided evidence of the commission of the offense of homicide, felony murder, kidnapping, commercial gambling, bribery, extortion or dealing in controlled substances or a computer crime that is a felony under s. 943.70 or any conspiracy to commit any of the foregoing offenses.

History: 1971 c. 219; 1977 c. 449; 1983 a. 438; 1987 a. 399.

968.29 Authorization for disclosure and use of intercepted wire, electronic or oral communications. (1) Any investigative or law enforcement officer who, by any means authorized by ss. 968.28 to 968.37 or 18 USC 2510 to 2520, has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may disclose the contents to another investigative or law enforcement officer only to the extent that the disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by ss. 968.28 to 968.37 or 18 USC 2510 to 2520, has obtained knowledge of the contents of any wire, electronic or oral communication or evidence derived therefrom may use the contents only to the extent the use is appropriate to the proper performance of the officer's official duties.

(3) (a) Any person who has received, by any means authorized by ss. 968.28 to 968.37 or 18 USC 2510 to 2520 or by a like statute of any other state, any information concerning a wire, electronic or oral communication or evidence derived therefrom intercepted in accordance with ss. 968.28 to 968.37, may disclose the contents of that communication or that derivative evidence only while giving testimony under oath or affirmation in any proceeding in any court or before any magistrate or grand jury in this state, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

(b) In addition to the disclosure provisions of par. (a), any person who has received, in the manner described under s. 968.31 (2) (b), any information concerning a wire, electronic or oral communication or evidence derived therefrom, may disclose the contents of that communication or that derivative evidence while giving testimony under oath or affirmation in any proceeding described in par. (a) in which a person is accused of any act constituting a felony under ch. 161, and only if the party who consented to the interception is available to testify at the proceeding or if another witness is available to authenticate the recording.

(4) No otherwise privileged wire, electronic or oral communication intercepted in accordance with, or in violation of, ss. 968.28 to 968.37 or 18 USC 2510 to 2520, may lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, electronic or oral communications in the manner authorized, intercepts wire, electronic or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subs. (1) and (2). The contents and any evidence derived therefrom may be used under sub. (3) when authorized or approved by the judge who acted on the original application where the judge finds on

subsequent application, made as soon as practicable but no later than 48 hours, that the contents were otherwise intercepted in accordance with ss. 968.28 to 968.37 or 18 USC 2510 to 2520 or by a like statute.

History: 1971 c. 40 ss. 91, 93; 1987 a. 399; 1989 a. 121, 359.

Evidence of intercepted oral or wire communications can be introduced only if the interception was authorized under 968.30; consent by one party to the communication is not sufficient. State ex rel. Arnold v. County Court, 51 W (2d) 434, 187 NW (2d) 354.

Although one-party consent tapes are lawful, they are not "authorized by 968.28 to 968.33 [, 1985 stats.] and therefore the contents cannot be admitted as evidence in chief, but 968.29 (3) does not prohibit giving such tapes to the state. State v. Waste Management of Wisconsin, Inc. 81 W (2d) 555, 261 NW (2d) 147.

Since interception by government agents of informant's telephone call was exclusively done by federal agents and was lawful under federal law, Wisconsin law did not govern its admissibility into evidence in a federal prosecution notwithstanding that the telephone call may have been a privileged communication under Wisconsin law. United States v. Bem, 397 F Supp. 1086.

968.30 Procedure for interception of wire, electronic or oral communications. (1) Each application for an order authorizing or approving the interception of a wire, electronic or oral communication shall be made in writing upon oath or affirmation to the court and shall state the applicant's authority to make the application and may be upon personal knowledge or information and belief. Each application shall include the following information:

(a) The identity of the investigative or law enforcement officer making the application, and the officers authorizing the application.

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including:

1. Details of the particular offense that has been, is being, or is about to be committed;

2. A particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;

3. A particular description of the type of communications sought to be intercepted; and

4. The identity of the person, if known, committing the offense and whose communications are to be intercepted.

(c) A full and complete statement whether or not 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 obtained, a particular description of facts establishing probable cause to believe that additional communications for the same type will occur thereafter.

(e) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any court 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 court on each such application; and

(f) Where 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 such results.

(2) The court may require the applicant to furnish additional testimony or documentary evidence under oath or affirmation in support of the application. Oral testimony shall be reduced to writing.

(3) Upon the application the court may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, electronic or oral communications, if the court determines on the basis of the facts submitted by the applicant that all of the following exist:

(a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in s. 968.28.

(b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception.

(c) Other investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

(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 are about to be used, in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by the person.

(4) Each order authorizing or approving the interception of any wire, electronic or oral communication shall specify:

(a) The identity of the person, if known, whose communications are to be intercepted;

(b) The nature and location of the communications facilities which, or the place where authority to intercept is granted, and the means by which such interceptions shall be made;

(c) A particular description of the type of communication 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; and

(e) The period of time during which such interception is authorized, including a statement whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section 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, nor in any event longer than 30 days. The 30-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 10 days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with sub. (1) and the court making the findings required by sub. (3). The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event be for longer than 30 days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in 30 days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after the interception.

(6) Whenever an order authorizing interception is entered pursuant to ss. 968.28 to 968.33, the order may require reports to be made to the court which issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the court requires.

(7) (a) The contents of any wire, electronic or oral communication intercepted by any means authorized by ss. 968.28 to

968.37 shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, electronic or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order or extensions thereof all such recordings and records of an intercepted wire, electronic or oral communication shall be filed with the court issuing the order and the court shall order the same to be sealed. Custody of the recordings and records shall be wherever the judge handling the application shall order. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be properly kept and preserved for 10 years. Duplicate recordings and other records may be made for use or disclosure pursuant to the provisions for investigations under s. 968.29 (1) and (2). The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, electronic or oral communication or evidence derived therefrom under s. 968.29 (3).

(b) Applications made and orders granted under ss. 968.28 to 968.33 together with all other papers and records in connection therewith shall be ordered sealed by the court. Custody of the applications, orders and other papers and records shall be wherever the judge shall order. Such applications and orders shall be disclosed only upon a showing of good cause before the judge and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for 10 years.

(c) Any violation of this subsection may be punished as contempt of court.

(d) Within a reasonable time but not later than 90 days after the filing of an application for an order of approval under par. (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served on the persons named in the order or the application and such other parties to intercepted communications as the judge determines is in the interest of justice, an inventory which shall include notice of:

1. The fact of the entry of the order or the application.

2. The date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application.

3. The fact that during the period wire, electronic or oral communications were or were not intercepted.

(e) The judge may, upon the filing of a motion, make available to such person or his counsel for inspection in the manner provided in ss. 19.35 and 19.36 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 the issuing judge the serving of the inventory required by this subsection may be postponed. The judge shall review such postponement at the end of 60 days and good cause shall be shown prior to further postponement.

(8) The contents of any intercepted wire, electronic or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in any court of this state unless each party, not less than 10 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 10-day period may be waived by the judge if he or she finds that it was not possible to furnish the party with the above information 10 days before the trial, hearing or proceeding and that the party will not be prejudiced by the delay in receiving the information.

(9) (a) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of this state, or a political subdivision thereof, may move before the trial court or the court granting the original warrant 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. The motion shall 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 therefrom, shall be treated as having been obtained in violation of ss. 968.28 to 968.37. The judge may, upon the filing of the motion by the aggrieved person, make available to the aggrieved person or his or her counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interest of justice.

(b) In addition to any other right to appeal, the state shall have the right to appeal:

1. From an order granting a motion to suppress made under par. (a) if the attorney general or district attorney certifies to the judge or other official granting such motion that the appeal is not entered for purposes of delay and shall be diligently prosecuted as in the case of other interlocutory appeals or under such rules as the supreme court adopts; or

2. From an order denying an application for an order of authorization or approval, and such an appeal shall be ex parte and shall be in camera in preference to all other pending appeals in accordance with rules promulgated by the supreme court.

(10) Nothing in ss. 968.28 to 968.37 shall be construed to allow the interception of any wire, electronic or oral communication between an attorney and a client.

History: 1971 c. 40 s. 93; 1981 c. 335 s. 26; 1987 a. 399

Communications privacy: A legislative perspective. Kastenmeier, Leavy & Beier. 1989 WLR 715 (1989)

968.31 Interception and disclosure of wire, electronic or oral communications prohibited. (1) Except as otherwise specifically provided in ss. 196.63 or 968.28 to 968.30, whoever commits any of the acts enumerated in this section may be fined not more than $10,000 or imprisoned for not more than 5 years or both:

(a) Intentionally intercepts, attempts to intercept or procures any other person to intercept or attempt to intercept, any wire, electronic or oral communication.

(b) Intentionally uses, attempts to use or procures any other person to use or attempt to use any electronic, mechanical or other device to intercept any oral communication.

(c) Discloses, or attempts to disclose, to any other person the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication in violation of this section or under circumstances constituting violation of this section.

(d) Uses, or attempts to use, the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication in violation of this section or under circumstances constituting violation of this section.

(e) Intentionally discloses the contents of any oral, electronic or wire communication obtained by authority of ss. 968.28, 968.29 and 968.30, except as therein provided.

(f) Intentionally alters any wire, electronic or oral communication intercepted on tape, wire or other device.

(2) It is not unlawful under ss. 968.28 to 968.37:

(a) For an operator of a switchboard, or an officer, employe or agent of any provider of a wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication to intercept, disclose or use that communication in the normal course of his or her employment while engaged in any activity which is a necessary incident to the rendition of his or her service or to the protection of the rights or property of the provider of that service, except that a provider of a wire or electronic communication service shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) For a person acting under color of law to intercept a wire, electronic or oral communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.

(c) For a person not acting under color of law to intercept a wire, electronic or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

(d) For any person to intercept or access an electronic communication made through an electronic communication system that is configured so that the electronic communication is readily accessible to the general public.

(e) For any person to intercept any radio communication that is transmitted:

1. By any station for the use of the general public, or that relates to ships, aircraft, vehicles or persons in distress;

2. By any governmental, law enforcement, civil defense, private land mobile or public safety communications system, including police and fire, readily accessible to the general public;

3. By a station operating on an authorized frequency within the bands allocated to the amateur, citizens band or general mobile radio services; or

4. By any marine or aeronautical communications system.

(f) For any person to engage in any conduct that:

1. Is prohibited by section 633 of the communications act of 1934; or

2. Is excepted from the application of section 705 (a) of the communications act of 1934 by section 705 (b) of that act.

(g) For any person to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of the interference.

(h) For users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of the system, if the communication is not scrambled or encrypted.

(i) To use a pen register or a trap and trace device as authorized under ss. 968.34 to 968.37; or

(j) For a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of the service.

(2m) Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of ss. 968.28 to 968.37 shall have a civil cause of action against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose, or use, the communication, and shall be entitled to recover from any such person:

(a) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) Punitive damages; and

(c) A reasonable attorney's fee and other litigation costs reasonably incurred.

(3) Good faith reliance on a court order or on s. 968.30 (7) shall constitute a complete defense to any civil or criminal action brought under ss. 968.28 to 968.37.

History: 1971 c. 40 ss. 92, 93; 1977 c. 272; 1985 a. 297; 1987 a. 399; 1989 a. 56; 1991 a. 294.

Testimony of undercover police officer carrying a concealed eavesdropping device under (2) is not the product of such eavesdropping and is admissible even assuming the eavesdropping was unconstitutional. State v. Smith, 72 W (2d) 711, 242 NW (2d) 184.

The use of the "called party control device" by the communications common carrier to trace bomb scares and other harassing telephone calls would not violate any law if used with the consent of the receiving party. 60 Atty. Gen. 90.

968.32 Forfeiture of contraband devices. Any electronic, mechanical, or other intercepting device used in violation of s. 968.31 (1) may be seized as contraband by any peace officer and forfeited to this state in an action by the department of justice under ch. 778.

History: 1979 c. 32 s. 92 (8).

968.33 Reports concerning intercepted wire or oral communications. In January of each year, the department of justice shall report to the administrative office of the United States courts such information as is required to be filed by 18 USC 2519. A duplicate copy of the reports shall be filed, at the same time, with the office of the director of state courts.

History: 1973 c. 12 s. 37; 1977 c. 187 s. 135; Sup. Ct. Order, 88 W (2d) xii.

968.34 Use of pen register or trap and trace device restricted. (1) Except as provided in this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order under s. 968.36 or 18 USC 3123 or 50 USC 1801 to 1811.

(2) The prohibition of sub. (1) does not apply with respect to the use of a pen register or a trap and trace device by a provider of electronic or wire communication service:

(a) Relating to the operation, maintenance and testing of a wire or electronic communication service or to the protection of the rights or property of the provider, or to the protection of users of that service from abuse of service or unlawful use of service;

(b) To record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful or abusive use of service; or

(c) Where the consent of the user of that service has been obtained.

(2m) The prohibition of sub. (1) does not apply to a telephone caller identification service authorized under s. 196.207 (2).

(9) Whoever knowingly violates sub. (1) shall be fined not more than $10,000 or imprisoned not more than one year or both.

History: 1987 a. 399; 1991 a. 268, 269.

968.36 Application for an order for a pen register or a trap and trace device. (1) The attorney general or a district attorney may make application for an order or an extension of an order under s. 968.36 authorizing or approving the installation and use of a pen register or a trap and trace device, in writing under oath or equivalent affirmation, to a circuit court for the county where the device is to be located.

(2) An application under sub. (1) shall include all of the following:

(a) The identity of the person making the application and the identity of the law enforcement agency conducting the investigation.

(b) A certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency.

History: 1987 a. 399.

968.36 Issuance of an order for a pen register or a trap and trace device. (1) Upon an application made under s. 968.35, the court shall enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device within the jurisdiction of the court if the court finds that the applicant has certified to the court that the information likely to be obtained by the installation and use is relevant to an ongoing criminal investigation.

(2) An order issued under this section shall do all of the following:

(a) Specify the identity, if known, of the person to whom is leased or in whose name is listed the telephone line to which the pen register or trap and trace device is to be attached.

(b) Specify the identity, if known, of the person who is the subject of the criminal investigation.

(c) Specify the number and, if known, the physical location of the telephone line to which the pen register or trap and trace device is to be attached and, in the case of a trap and trace device, the geographic limits of the trap and trace order.

(d) Provide a statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates.

(e) Direct, upon the request of the applicant, the furnishing of information, facilities and technical assistance necessary to accomplish the installation of the pen register or trap and trace device under s. 968.37.

(3) An order issued under this section shall authorize the installation and use of a pen register or a trap and trace device for a period not to exceed 60 days.

(4) Extensions of the order may be granted, but only upon an application for an order under s. 968.35 and upon the judicial finding required by sub. (1). The period of extension shall be for a period not to exceed 60 days.

(5) An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that:

(a) The order be sealed until otherwise ordered by the court; and

(b) The person owning or leasing the line to which the pen register or a trap and trace device is attached, or who has been ordered by the court to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

History: 1987 a. 399.

968.37 Assistance in the installation and use of a pen register or trap and trace device. (1) Upon the request of the attorney general, a district attorney or an officer of a law enforcement agency authorized to install and use a pen register under ss. 968.28 to 968.37, a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the investigative or law enforcement officer forthwith all information, facilities and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if the assistance is directed by a court order under s. 968.36 (5) (b).

(2) Upon the request of the attorney general, a district attorney or an officer of a law enforcement agency authorized to receive the results of a trap and trace device under ss. 968.28 to 968.37, a provider of a wire or electronic communication service, landlord, custodian or other person shall install the device forthwith on the appropriate line and shall furnish the investigative or law enforcement officer all additional information, facilities and technical assistance including installation and operation of the device unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if the installation and assistance is directed by a court order under s. 968.36 (5) (b). Unless otherwise ordered by the court, the results of the trap and trace device shall be furnished to the officer of a law enforcement agency, designated by the court, at reasonable intervals during regular business hours for the duration of the order.

(3) A provider of a wire or electronic communication service, landlord, custodian or other person who furnishes facilities or technical assistance under this section shall be reasonably compensated for the reasonable expenses incurred in providing the facilities and assistance.

(4) No cause of action may lie in any court against any provider of a wire or electronic communication service, its officers, employes or agents or other specified persons for providing information, facilities or assistance in accordance with the terms of a court order under s. 968.36.

(5) A good faith reliance on a court order, a legislative authorization or a statutory authorization is a complete defense against any civil or criminal action brought under ss. 968.28 to 968.37.

History: 1987 a. 399.

968.38 Testing for HIV infection and certain diseases. (1) In this section:

(a) "Health care professional" means a physician or a registered nurse or licensed practical nurse who is licensed under ch. 441.

(b) "HIV" means any strain of human immunodeficiency virus, which causes acquired immunodeficiency syndrome.

(bm) "Physician" has the meaning given in s. 448.01 (5).

(c) "Sexually transmitted disease" has the meaning given in s. 143.07 (1).

(d) "Significantly exposed" has the meaning given in s. 146.025 (1) (em).

(2) In a criminal action under s. 940.225, 948.02, 948.05 or 948.06, if all of the following apply, the district attorney shall apply to the circuit court for his or her county to order the defendant to submit to a test or a series of tests administered by a health care professional to detect the presence of HIV, antigen or nonantigenic products of HIV, an antibody to

person or subject
ture, but no infor
or any evidence w
from such informa
son making such
except a prosecu
ment or otherwise

(As amended Oct. 1
84 Stat. 930; Nov
3511, 3512.)

Based on title 18, [illegible]
1910, ch. 395, § 6, 36

First paragraph of [illegible] was omitted from this [illegible] to Title 8, Aliens and

Words "shall be deem[illegible] omitted as unnecessary [illegible] meanor in section 1 of [illegible] section 212 of this title.

Minor changes were [illegible]

CHAPTER 119—WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

EDITORIAL NOTES

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, as amended, set out as a note under section 3551 of this title.

§ 2510. Definitions

As used in this chapter—

[illegible] communication" means any aural transmission 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 the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication, but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "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;

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service 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 such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code;

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

(12) "electronic communication" means any 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 photooptical system that affects interstate or foreign commerce, 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) any wire or oral communication;

(C) any communication made through a tone-only paging device; or

(D) any communication from a tracking device (as defined in section 3117 of this title);

(13) "user" means any person or entity who—

(A) uses an electronic communication service; and

(B) is duly authorized by the provider of such service to engage in such use;

(14) "electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;

(16) "readily accessible to the general public" means, with respect to a radio communication, that such communication is not—

(A) scrambled or encrypted;

(B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(C) carried on a subcarrier or other signal subsidiary to a radio transmission;

(D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

(E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

(17) "electronic storage" means—

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; and

(18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 212, and amended Pub.L. 99-508, Title I, § 101(a), (c)(1)(A), (4), Oct. 21, 1986, 100 Stat. 1848, 1851.)

Editorial Notes

Effective Date of 1986 Amendment. Section 111 of Pub.L. 99-508 provided that:

"**(a) In General.**—Except as provided in subsection (b) or (c), this title and the amendments made by this title [enacting sections 2521 and 3117 of this title, amending this section and sections 2232, 2511 to 2513, 2516(1)(a), (1)(c), (1)(g) to (*l*), (2), (3), and 2517 to 2520 of this title, and enacting provisions set out as notes under this section] shall take effect 90 days after the date of the enactment of this Act [Oct. 21, 1986] and shall, in the case of conduct pursuant to a court order or extension, apply only with respect to court orders or extensions made after this title takes effect.

"**(b) Special Rule for State Authorizations of Interceptions.**—Any interception pursuant to section 2516(2) of title 18 of the United States Code which would be valid and lawful without regard to the amendments made by this title [enacting sections 2521 and 3117 of this title, amending this section and sections 2232, 2511 to 2513, 2516(1)(a), (1)(c), (1)(g) to (*l*), (2), (3), and 2517 to 2520 of this title, and enacting provisions set out as notes under this section] shall

be valid and lawful notwithstanding such amendment if such interception occurs during the period beginning on the date such amendment [illegible] of—

"(1) the day before the date of the taking effect of State law conforming a provision of a State statute with chapter 119 of title 18, United States Code, as so amended, or

"(2) the date two years after the date of the enactment of this Act [Oct. 21, 1986]

"(c) **Effective Date for Certain Approvals by Justice Department Officials.**—Section 104 of this Act [amending section 2516(1) of this title] shall take effect on the date of enactment of this Act [Oct. 21, 1986]."

Intelligence Activities.—Section 107 of Pub.L. 99-508 provided that:

"(a) **In General.**—Nothing in this Act [Pub.L. 99-508, Oct. 21, 1986, 100 Stat. 1858] or the amendments made by this Act constitutes authority for the conduct of any intelligence activity.

"(b) **Certain Activities Under Procedures Approved by the Attorney General.**—Nothing in chapter 119 or chapter 121 of title 18, United States Code, shall affect the conduct, by officers or employees of the United States Government in accordance with other applicable Federal law, under procedures approved by the Attorney General of activities intended to—

"(1) intercept encrypted or other official communications of United States executive branch entities or United States Government contractors for communications security purposes;

"(2) intercept radio communications transmitted between or among foreign powers or agents of a foreign power as defined by the Foreign Intelligence Surveillance Act of 1978 [50 U.S.C.A. § 1801 et seq.]; or

"(3) access an electronic communication system used exclusively by a foreign power or agent of a foreign power as defined by the Foreign Intelligence Surveillance Act of 1978 [50 U.S.C.A. § 1801 et seq.]."

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

[illegible] transmits communications by [illegible] interferes with the transmission of such [illegible]

[illegible] knows, or has reason to know, [illegible] or any component thereof has [illegible] the mail or transported in [illegible] foreign commerce, or

[illegible] or endeavor to use (A) takes [illegible] the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce, or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence

Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order or certification under this chapter.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter or chapter 121, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person—

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted—

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which—

(I) is prohibited by section 633 of the Communications Act of 1934; or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter—.

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or

(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication—

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled or encrypted, then—

(i) if the communication is not the radio portion of a cellular telephone communication, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

(ii) if the communication is the radio portion of a cellular telephone communication, a public land mobile radio service communication or a paging service communication, the offender shall be fined not more than $500.

(c) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted—

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5)(a)(i) If the communication is—

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection—

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of

subsection (4) an[illegible] liable in a civil [illegible] title, the Federa[illegible] appropriate injun[illegible]

(B) if the viola[illegible] subsequent offe[illegible] tion (4) or such [illegible] prior civil actio[illegible] shall be subject to a [illegible] $500 [illegible]

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

(Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 213, and amended Pub.L. 91–358, Title II, § 211(a), July 29, 1970, 84 Stat. 654; Pub.L. 95–511, Title I, § 201(a)–(c), Oct. 25, 1978, 92 Stat. 1796, 1797; Pub.L. 98–549, § 6(b)(2), Oct. 30, 1984, 98 Stat. 2804; Pub.L. 99–508, Title I, §§ 101(b), (c)(1), (6), (f), 102, Oct. 21, 1986, 100 Stat. 1849–1853.)

EDITORIAL NOTES

References in Text. The Foreign Intelligence Surveillance Act of 1978, referred to in par. (2)(e) and (f), is classified to section 1801 et seq. of Title 50, U.S.C.A. War and National Defense, and section 101 of such Act is classified to section 1801 of Title 50.

Sections 705 and 706 of the Communications Act of 1934, referred to in par. (2)(e), (f), and (g), are classified to sections 605 and 606 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, respectively.

Section 633 of the Communications Act of 1934, referred to in par. (2)(g), classified to section 553 of Title 47, Telegraphs, Telephones, and Radiotelegraphs.

Effective Date of 1986 Amendment. Except as otherwise provided in section 111 of Pub.L. 99–508, amendment by Pub.L. 99–508 effective 90 days after Oct. 21, 1986, see section 111 of Pub.L. 99–508 set out as a note under section 2510 of this title.

§ 2512. Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who intentionally—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, electronic communications, and that such [illegible] any component thereof has been or will [illegible] through the mail or transported in inter- [illegible] foreign commerce; or

[illegible]aces in any newspaper, magazine, handbill, [illegible] publication any advertisement of—

[illegible] electronic, mechanical, or other device [illegible]owing or having reason to know that the de- [illegible]gn of such device renders it primarily useful for [illegible]e purpose of the surreptitious interception of [illegible]re, oral, or electronic communications; or

[illegible] any other electronic, mechanical, or other [illegible]evice, where such advertisement promotes the [illegible]e of such device for the purpose of the surrep- [illegible]itious interception of wire, oral, or electronic [illegible]mmunications,

[illegible]nowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

[illegible] be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a provider of wire or electronic communication service or an officer, agent, or employee of, or a person under contract with, such a provider, in the normal course of the business of providing that wire or electronic communication service, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications.

(Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 214, and amended Pub.L. 99–508, Title I, § 101(c)(1)(A), (7), (f)(2), Oct. 21, 1986, 100 Stat. 1851, 1853.)

EDITORIAL NOTES

Effective Date of 1986 Amendment. Except as otherwise provided in section 111 of Pub.L. 99–508, amendment by Pub.L. 99–508 effective 90 days after Oct. 21, 1986, see section 111 of Pub.L. 99–508 set out as a note under section 2510 of this title.

Effect of Regulations Prohibiting Cellular Telecommunications Interception on Other Laws. For provision relating to the effect of regulations prohibiting manufacture of scanning receivers capable of receiving cellular telecommunications on other laws, see section 403(c) of Pub.L. 102–556, Oct. 28, 1992, 106 Stat. 4195, set out as a note under section 302a of Title 47, Telegraphs, Telephones, and Radiotelegraphs.

§ 2513. Confiscation of wire, oral, or electronic communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section, except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 215, and amended Pub.L. 99-508, Title I, § 101(c)(1)(A), Oct. 21, 1986, 100 Stat. 1851.)

Editorial Notes

Effective Date of 1986 Amendment. Except as otherwise provided in section 111 of Pub.L. 99-508, amendment by Pub.L. 99-508 effective 90 days after Oct. 21, 1986, see section 111 of Pub.L. 99-508 set out as a note under section 2510 of this title.

[§ 2514. Repealed. Pub.L. 91-452, Title II, § 227(a), Oct. 15, 1970, 84 Stat. 930]

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the

Part I

nformation would be in violation

t. Title III, § 802, June 19, 1968

ization for interception of wir
or electronic communicatio
General, Deputy Attorney Gene
ney General, or any Assistant A
y acting Assistant Attorney Gene
Assistant Attorney General in th
specially designated by the Atto
uthorize an application to a Fede
ent jurisdiction for, and such judg
formity with section 2518 of thi
uthorizing or approving the inte
ral communications by the Fede
tigation, or a Federal agency ha
or the investigation of the offen
blication is made, when such inte
le or has provided evidence of-

e punishable by death or by in
nore than one year under section
7 of title 42 of the United State
the enforcement of the Atomi
54), section 2284 of title 42 of th
de (relating to sabotage of nuclea
or under the following chapters
r 37 (relating to espionage), chap
to sabotage), chapter 115 (relatin
ter 102 (relating to riots), chapte
malicious mischief), chapter 11
uction of vessels), or chapter 8
y);

of section 186 or section 501(c)
States Code (dealing with restri
ts and loans to labor organiza
ense which involves murder, kid
, or extortion, and which is pun
s title;

which is punishable under th
of this title: section 201 (briber
and witnesses), section 215 (relat
bank officials), section 224 (brib
ntests), subsection (d), (e), (f), (g
n 844 (unlawful use of explosives
ating to concealment of assets
nsmission of wagering informa
(relating to escape), section 101
and credit applications generally
counts), sections 1503, 1512, an
or injuring an officer, juror, o
), section 1510 (obstruction o
tions), section 1511 (obstructio
law enforcement), section 175
Presidential staff assassinatio

kidnaping, and assault), section 1[illegible] interference with commerce by threats or violence), section 1[illegible] interstate and foreign travel or transportation aid of racketeering enterprises), section 1[illegible] ing to use of interstate commerce facilities in commission of murder for hire), section 1[illegible] ing to violent crimes in aid of racketeering act), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plans), section 1955 (prohibition of business enterprises of gambling), section 1956 (laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 1343 (fraud by wire, radio, or television), section 1344 (relating to bank fraud), sections 2251 and 2252 (sexual exploitation of children), sections 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 1203 (relating to hostage taking), section 1029 (relating to fraud and related activity in connection with access devices), section 3146 (relating to penalty for failure to appear), section 3521(b)(3) (relating to witness relocation and assistance), section 32 (relating to destruction of aircraft or aircraft facilities), section 1963 (violations with respect to racketeer influenced and corrupt organizations), section 115 (relating to threatening or retaliating against a Federal official), and section 1341 (relating to mail fraud), section 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, and assault), section 831 (relating to prohibited transactions involving nuclear materials), section 33 (relating to destruction of motor vehicles or motor vehicle facilities), section 175 (relating to biological weapons), or section 1992 (relating to wrecking trains);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title;

(g) a violation of section 5322 of title 31, United States Code (dealing with the reporting of currency transactions);

(h) any felony violation of sections 2511 and 2512 (relating to interception and disclosure of certain

[illegible] intercepting de-

[illegible] violation of chapter 71 (relating to

[illegible] section [illegible] of the Natural [illegible] Pipeline Safety Act of 1968 (relating to destruction of a natural gas pipeline), or section 902(i) of title 49, Federal Aviation Act of 1958 (relating to aircraft [illegible]);

(k) any criminal violation of section 2778 of title 22 (relating to the Arms Export Control Act);

(l) the location of any fugitive from justice from an offense described in this section; or

(m) any felony violation of sections 922 and 924 of title 18, United States Code (relating to firearms);

(n) any violation of section 5861 of the Internal Revenue Code of 1986 (relating to firearms); and

(o) any conspiracy to commit any offense described in any subparagraph of this paragraph.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

(3) Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, an order authorizing or approving the interception of electronic communications by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made, when such interception

may provide or has pr... ...ce of any Federal felony.

(Added Pub.L. 90-351, ... 82, June 19, 1968, 82 Stat. 216, and amended ... 52; Title VIII, § 810, Title IX, § 902(a), Title ... ct. 15, 1970, 84 Stat. 940, 947, 959; Pub.L. 91-... 16, Jan. 2, 1971, 84 Stat. 1891; Pub.L. 95-... 314(b), Nov. 6, 1978, 92 Stat. 2677; Pub.L. ... 4(e), Oct. 6, 1982, 96 Stat. 1220, 1221; Pub.L. ... May 21, 1984, 98 Stat. 206; Pub.L. 98-473, Tit... 3(c), Oct. 12, 1984, 98 Stat. 2152; Pub.L. 99-50... § 101(c)(1)(A), 104, 105, Oct. 21, 1986, 100 Stat. ... Pub.L. 99-570, Title I, § 1365(c), Oct. 27, 1986, ... 207-35; Pub.L. 100-690, Title VI, § 6461, Title V... 7053(d), 7525, Nov. 18, 1988, 102 Stat. 4374, ... 4502; Pub.L. 101-298, § 3(b), May 22, 1990, ... 3, Pub.L. 101-647, Title XXV, § 2531(2)(D), Title ... 3568, Nov. 29, 1990, 104 Stat. 4879, 4928.)

EDITORIAL NOTES

References in Text. ... mic Energy Act of 1954, referred to in par. (1)(... ...ssified generally to section 2011 et seq. of Title 42, ... A., The Public Health and Welfare.

The Arms Export Contr... Act, referred to in par. (1)(j), is Pub.L. 90-629, Oct. 22, ... 82 Stat. 1320, as amended, which is classified genera... to chapter 39 (section 2751 et seq.) of Title 22, Foreign Relations and Intercourse. For complete classification of this Act to the Code, see Short Title note set out under section 2751 of Title 22 and Tables volume.

Codification. Amendment by section 3(b) of Pub.L. 101-298, which directed insertion of "section 175 (relating to biological weapons)," following "section 33 (relating to destruction of motor vehicle facilities)," was executed to par. (1)(c) of this section as the probable intent of Congress notwithstanding directory language calling for the amendment of section "2516(c) of title 18".

Pub.L. 101-647, §§ 2531(3) and 3568 made identical amendments to subsec. (1)(j) of this section.

Amendment to par. (1)(c) by section 1365(c) of Pub.L. 99-570 was executed by inserting "section 1956 (laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity)," after "section 1955 (prohibition of business enterprises of gambling)," as the probable intent of Congress.

Effective Date of 1986 Amendment. Except as otherwise provided in section 111 of Pub.L. 99-508, amendment by Pub.L. 99-508 effective 90 days after Oct. 21, 1986, see section 111 of Pub.L. 99-508 set out as a note under section 2510 of this title.

Savings Provisions of Pub.L. 95-598. Amendment by section 314 of Pub.L. 95-598 not to affect the application of chapter 9 [§ 151 et seq.], chapter 96 [§ 1961 et seq.], or section 2516, 3057, or 3284 of this title to any act of any person (1) committed before Oct. 1, 1979, or (2) committed after Oct. ..., 1979, in connection with a case commenced before such date, see section 403(d) of Pub.L. 95-598, set out preceding section 151 of this title.

§ 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 217 and amended Pub.L. 91-452, Title IX, § 902(b), Oct. 15, 1970, 84 Stat. 947; Pub.L. 99-508, Title I, § 101(c)(1)(A), Oct. 21, 1986, 100 Stat. 1851.)

EDITORIAL NOTES

Effective Date of 1986 Amendment. Except as otherwise provided in section [illegible] of Pub.L. 99-508, Amendment by Pub.L. 99-508 effective 90 days after Oct. 21, 1986, see section 111 of Pub.L. [illegible] 2510 of this title.

§ 2518. Procedure for interception of wire, oral, or electronic communications

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not 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, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and 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, oral, or electronic 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; and

[illegible]ation is for the extension of [illegible] setting forth the results thus [illegible] interception, or a reasonable [illegible]lure to obtain such results.

[illegible]uire the applicant to furnish [illegible]ocumentary evidence in sup-

(3) [illegible]ation the judge may enter an ex parte [illegible]ested or as modified, authorizing or ap[illegible]eption of wire, oral, or electronic co[illegible]within the territorial jurisdiction of th[illegible]ich the judge is sitting (and outside t[illegible] but within the United States in the ca[illegible]interception device authorized by a Fed[illegible]thin such jurisdiction), if the judge de[illegible] basis of the facts submitted by the ap[illegible]

[illegible]robable cause for belief that an individu[illegible]mitting, has committed, or is about to comm[illegible]particular offense enumerated in section 251[illegible] of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such 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;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall 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 communication 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; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

§ 2518

An order authorizing
electronic communic
(or request of the
wire or electronic
custodian or other
(whereby all informa
assistance necessary
unobtrusively and with
the services that such
(odian, or person is
communications are to be
of wire or electronic
custodian or other person
technical assistance shall be
the applicant for reasonable
providing such facilities or

(5) No order entered under
rize or approve the
electronic communication for
is necessary to achieve the
tion, nor in any event longer
thirty-day period begins on
which the investigative or
first begins to conduct an
order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall 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 thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, 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. Such reports

...als as the judge may

...other provision of this
...aw enforcement officer,
... Attorney General, the
...the Associate Attorney
... prosecuting attorney of
...reof acting pursuant to a
...reasonably determines

...situation exists that involves—
...danger of death or serious phys-
...person,
...rial activities threatening the na-
...terest, or
...activities characteristic of

that requires that wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to

the provisions of [illegible] 2517 of this chapter [illegible] of the seal provided for in this subsection or a satisfactory explanation for the absence thereof may be a prerequisite [illegible] contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, under paragraph (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his 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 inventory required by this subsection may be postponed.

(9) The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State 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 [illegible] that it was not possible to furnish [illegible] the above information ten days before [illegible] or proceeding and that the party [illegible] by the delay in receiving such [illegible]

[illegible] aggrieved person in any trial, hearing, [illegible] or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(c) The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section 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—

(i) the [illegible]
or law [illegible]
the Attor[illegible]
eral, the A[illegible]
tant Attorney [illegible]
Attorney [illegible]
(ii) the application [illegible]
statement [illegible]
practical and [illegible]
the offense [illegible]
intercepted, and
(iii) the judge finds that such [illegible] is not practical and
(b) in the case of [illegible] wire or electronic communications—
(i) the application is made by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any acting Assistant Attorney General;
(ii) 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
(iii) the judge finds that such purpose has been adequately shown.

(12) An interception of a communication under an order with respect to which the requirements of subsections (1)(b)(ii) and (3)(d) of this section do not apply by reason of subsection (11) shall 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 communications service that has received an order as provided for in subsection (11)(b) 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 decide such a motion expeditiously.

(Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 216, and amended Pub.L. 91–358, Title II, § 211(b), July 29, 1970, 84 Stat. 654; Pub.L. 95–511, Title II, § 201(d)–(g), Oct. 25, 1978, 92 Stat. 1797, 1798; Pub.L. 98–473, Title II, § 1203(a), (b), Oct. 12, 1984, 98 Stat. 2152; Pub.L. 99–508, Title I, §§ 101(c)(1)(A), (8), (e), 106(a)–(d)(3), Oct. 21, 1986, 100 Stat. 1851–1853, 1856, 1857.)

Editorial Notes

Effective Date of 1986 Amendment. Except as otherwise provided in section 111 of Pub.L. 99–508, amendment by Pub.L. 99–508 effective 90 days after Oct. 21, 1986, see section 111 of Pub.L. 99–508 set out as a note under section 2510 of this title.

§ 2519. Reports concerning intercepted wire, oral, or electronic communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for (including whether or not the order was an order with respect to which the requirements of sections 2518(1)(b)(ii) and 2518(3)(d) of this title did not apply by reason of section 2518(11) of this title);

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of [illegible] interceptions;

(e) the number of motions to suppress made with respect to such [illegible] granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the interceptions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire, oral, or electronic communications pursuant to this chapter and the number of orders and extensions granted or denied pursuant to this chapter during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 222, and amended Pub.L. 95-511, Title II, § 201(b), Oct. 25, 1978, 92 Stat. 1798; Pub.L. 99-508, Title I, §§ 101(c)(1)(A), 106(d)(4), Oct. 21, 1986, 100 Stat. 1851, 1857.)

EDITORIAL NOTES

Effective Date of 1986 Amendment. Except as otherwise provided in section 111 of Pub.L. 99-508, amendment by Pub.L. 99-508 effective 90 days after Oct. 21, 1986, see section 111 of Pub.L. 99-508 set out as a note under section 2510 of this title.

§ 2520. Recovery of civil damages authorized

(a) In general.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief.—In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages.—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted and if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) Defense.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation.—A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 223, and amended Pub.L. 91-358, Title II, § 211(c), July 29, 1970, 84 Stat. 654; Pub.L. 99-508, Title I, § 103, Oct. 21, 1986, 100 Stat. 1853.)

EDITORIAL NOTES

Effective Date of 1986 Amendment. Except as otherwise provided in section 111 of Pub.L. 99-508, amendment by Pub.L. 99-508 effective 90 days after Oct. 21, 1986, see section 111 of Pub.L. 99-508 set out as a note under section 2510 of this title.

§ 2521. Injunction against illegal interception

Whenever it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a felony violation of this chapter, the Attorney General may initiate a civil action in a district court of the United States to enjoin such violation. The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

(Added Pub.L. 99-508, Title I, § 110(a), Oct. 21, 1986, 100 Stat. 1859.)

EDITORIAL NOTES

Effective Date. Section effective 90 days after Oct. 21, 1986 except as otherwise provided in section 111 of Pub.L. 99-508 with respect to conduct pursuant to court order or extension, see section 111 of Pub.L. 99-508, set out as a note under section 2510 of this title.

CHAPTER 121—STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

Sec.
2701. Unlawful access to stored communications.
2702. Disclosure of contents.
2703. Requirements for governmental access.
2704. Backup preservation.
2705. Delayed notice.
2706. Cost reimbursement.
2707. Civil action.
2708. Exclusivity of remedies.
2709. Counterintelligence access to telephone toll and transactional records.
2710. Wrongful disclosure of video tape rental or sale records.
2711. Definitions for chapter.

EDITORIAL NOTES

Codification. Section 7067 of Pub.L. 100-690 which amended item 2710 by adding "for chapter" following "Definitions" was executed to item 2711 in view of prior redesignation by section 2(b) of Pub.L. 100-618 of such item 2710 as 2711.

§ 2701. Unlawful access to stored communications

(a) Offense.—Except as provided in subsection (c) of this section whoever—

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility;

and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

(b) Punishment.—The punishment for an offense under subsection (a) of this section is—

(1) if the offense is committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain—

(A) a fine of not more than $250,000 or imprisonment for not more than one year, or both, in the case of a first offense under this subparagraph; and

(B) a fine under this title or imprisonment for not more than two years, or both, for any subsequent offense under this subparagraph; and

(2) a fine of not more than $5,000 or imprisonment for not more than six months, or both, in any other case.

(c) Exceptions.—Subsection (a) of this section does not apply with respect to conduct authorized—

(1) by the person or entity providing a wire or electronic communications service;

(2) by a user of that service with respect to a communication of or intended for that user; or

(3) in section 2703, 2704 or 2518 of this title.

(Added Pub.L. 99-508, Title I, § 201, Oct. 21, 1986, 100 Stat. 1860.)

EDITORIAL NOTES

Effective Date. Pub.L. 99-508, Title II, § 202, Oct. 21, 1986, 100 Stat. 1868, provided that: "This title and the amendments made by this title [enacting this chapter] shall take effect ninety days after the date of the enactment of this Act [Oct. 21, 1986] and shall, in the case of conduct pursuant to a court order or extension, apply only with respect to court orders or extensions made after this title takes effect."

§ 2702. Disclosure of contents

(a) Prohibitions.—Except as provided in subsection (b)—