No. 20210470-SC

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,
Plaintiff/Appellee

v.

EUGENE VINCENT WOOD,
Defendant/Appellant.

BRIEF OF APPELLANT

An appeal from an order denying Defendant's motion to suppress jail phone calls, in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable James Blanch, presiding.

Appellant is incarcerated

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BRIEF OF APPELLANT

INTRODUCTION

This Court granted Eugene Wood's petition to appeal an interlocutory order — the denial of his motion to suppress jail phone calls. The State planned to use the calls in two cases, both of which are consolidated in this appeal. Unless otherwise specified, this brief cites to the record in Case No. 20210470-SC.

This Court should reverse. Utah's Interception of Communications Act prohibits intercepting phone calls and states that courts should suppress evidence obtained in violation of the Act. The district court erred when it ruled that all calls from a jail fall within the Act's narrow exception for law enforcement communications. The district court also erred when it ruled that Wood consented to disclosing the calls to the DA's office and using them to prosecute him.

STATEMENT OF THE ISSUE

Issue: Whether the district court erred when it denied a motion to suppress Wood's jail phone calls under Utah's Interception of Communications Act.

Standard of Review/Preservation: This Court reviews the district court's interpretation of the statute for correctness, according "the trial court's legal conclusion no particular deference." *State v. Mitchell*, 779 P.2d 1116, 1123 (Utah 1989). This issue was preserved. R:379; 457; 639; 690-99.

STATEMENT OF THE CASE AND THE FACTS

The State charged Wood with kidnapping, a first-degree felony, and aggravated assault, a second-degree felony. R:1-2. The alleged victim in the case was SH, Wood's wife. R:2-3. SH invoked the spousal privilege. R:340.

The State argued that SH's previous statements should be admitted under the doctrine of forfeiture by wrongdoing. R:792. The State alleged that, in phone calls made from jail, Wood "berate[d SH] for cooperating with the prosecution." R:211. The State also filed new charges based on the jail phone calls. R:213.

In Case No. 20210475, the State charged Wood with tampering with a witness (domestic violence), a third-degree felony, retaliation against a witness, a third-degree felony, and five counts of violation of a protective order, third-degree felonies. R:1-3 (20210475). The probable cause statement explained that the charges were based on Wood's jail phone calls to SH. R:4-5 (20210475).

Wood filed a motion to suppress the jail phone calls under the Utah's Interception of Communications Act. R:379. At an evidentiary hearing, testimony

explained that the jail contracts with a private company, IC Solutions, to provide jail phone services. R:878. The system records all non-legal inmate calls. R:879. Calls from jail begin with a disclaimer that the call is being recorded. R:889. The State also introduced a jail handbook that says the "jail may monitor and/or record telephone calls," R:499, and a photograph of a plaque at the jail that says, "ALL CALLS MAY BE MONITORED AND/OR RECORDED AT ANY TIME." R:514. To request a recording of the calls, a party would submit a form to the records supervisor at the jail. R:884. IC Solutions stores recorded calls on a server. R:691. In Wood's case, an employee at the DA's Office requested Wood's jail calls through this method. R:588.

Under Utah's Interception of Communications Act, it is a violation to "intentionally or knowingly intercept[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept any wire, electronic, or oral communication." Utah Code § 77-23a-4(1)(b)(i). The Act further specifies that when any "wire, electronic, or oral communication has been intercepted, no part of the contents of the communication and no evidence derived from it may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . if the disclosure of that information would be in violation of this chapter." *Id.* § 77-23a-7. And in the following Chapter of the Utah Code, Chapter 23B, "Access to Electronic Communications," a "government entity may only require the disclosure by a provider of electronic communication services of the contents of an electronic communication that is in electronic storage in an

electronic communication system pursuant to a warrant issued under the Utah Rules of Criminal Procedure or an equivalent federal warrant." *Id.* § 77-23b-4(1).

The State argued that the jail phone calls were not "intercepted" under the Act. R:388. The Act defines "intercept" as "the acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." *Id.* § 77-23a-3(10). "'Electronic, mechanical, or other device' means any device or apparatus that may be used to intercept a wire, electronic, or oral communication other than: (a) any telephone or telegraph instrument, equipment or facility, or a component of any of them: . . . (ii) being used . . . by an investigative or law enforcement officer in the ordinary course of his duties." *Id.* § 77-23a-3(8).

Second, the State argued that, due to the disclaimers about the calls being recorded, both Wood and SH consented to the recording, disclosure, and use of the calls. R:390; 482; Utah Code § 77-23a-4(7)(a) ("A person acting under color of law may intercept a wire, electronic, or oral communication if that person is a party to the communication or one of the parties to the communication has given prior consent to the interception.").

The district court denied the motion to suppress the jail calls. R:690-99. The order is attached as Addendum A. The district court ruled that Wood and SH both "impliedly consented to the interception of the phone calls by engaging in the calls despite knowledge they could be intercepted." R:694. It further reasoned that when Wood "consented to the recording of his calls, he implicitly

consented to the disclosure and use of the content of those calls." R:699. And it ruled that, in any event, "the law enforcement section exempts the DA's Office from the procedures required under the Act." R:697.

Wood filed a petition for interlocutory review of the district court's order, which this Court granted. R:711; 845.

SUMMARY OF THE ARGUMENT

The district court erred when it denied the motion to suppress for three reasons. First, the law enforcement section does not exempt the recording of all calls from jail. Rather, it exempts police officers and prosecutors who use recordings in the ordinary course of their duties. Moreover, the calls in this case were recorded by a private party that contracts with the jail, not by law enforcement officers.

Second, Wood and SH did not consent to the disclosure of the calls. Knowledge of recording was not consent. And the notices alerted Wood and SH that the calls would be recorded, but not that the calls would be disclosed to the DA's Office without a warrant. The language in Utah Code section 77-23b-4(1) would have reinforced the understanding that the DA's Office required a warrant — a government entity may only "require the disclosure by a provider of electronic communication services of the contents of an electronic communication that is in electronic storage in an electronic communication system pursuant to a warrant issued under the Utah Rules of Criminal Procedure or an equivalent federal warrant."

Finally, the language in section 77-23b-4(1) independently required a warrant because the jail contracts with an electronic communication service to store jail calls electronically. Under section 77-23b-4(1), the government needs a warrant to require disclosure of the stored communications.

ARGUMENT

I. The district court erred when it ruled that the law enforcement section of the Act exempted the jail phone calls from interception.

The district court ruled that "the law enforcement section exempts the DA's Office from the procedures required under the Act." R:697. The operative language from the statute excludes from devices that intercept communications equipment being used by "an investigative or law enforcement officer in the ordinary course of his duties." Utah Code § 77-23a-3(8) (Relevant statutes and rules are included as Addendum B). "'Investigative or law enforcement officer' means any officer of the state or of a political subdivision, who by law may conduct investigations of or make arrests for offenses enumerated in this chapter, or any federal officer as defined in Section 53-13-106, and any attorney authorized by law to prosecute or participate in the prosecution of these offenses." *Id*. § 77-23a-3(11).

The district court relied on the federal case *United States v. Hammond*, 286 F.3d 189 (4th Cir. 2002). R:697. The analysis of the law enforcement exemption is brief: "Because the BOP was acting pursuant to its well-known policies in the ordinary course of its duties in taping the calls, the law

enforcement exception exempted the actions of the BOP from the prohibitory injunction of Section 2511." *Hammond*, 286 F.3d at 192. As defense counsel argued below, the language of the exemption is narrower than *Hammond* suggests: the "definition only states that police can use their own phones in the ordinary course of their duties while they are at work without getting a warrant to speak to others." R:460.

The Seventh Circuit explained that "[i]t is routine, standard, hence 'ordinary' for all calls to and from the police to be recorded. Such calls may constitute vital evidence or leads to evidence, and monitoring them is also necessary for evaluating the speed and adequacy of the response of the police to tips, complaints, and calls for emergency assistance." *Amati v. City of Woodstock*, 176 F.3d 952, 954 (7th Cir. 1999). But jail phone calls between an inmate and a third party do not involve "an investigative or law enforcement officer in the ordinary course of his duties." Utah Code § 77-23a-3(8). The exemption may cover phone calls to the police, or audio captured by police body cameras, but it is not broad enough to reach every call to private parties from jail inmates.

Moreover, the jail was not disclosing the calls at issue in the "ordinary course" of jail security and management; rather, the DA requested Wood's calls to investigate potential witness tampering, a crime the Act specifies that law enforcement must request a court order to intercept. Utah Code § 77-23a-8(2)(u); *United States v. Noriega*, 764 F. Supp. 1480, 1491 (S.D. Fla. 1991) ("If in fact the

interception of [the defendant's] conversations was unrelated to any institutional considerations, then it would fall outside the scope of an MCC official's 'ordinary course of duties.'"). In *United States v. Paul*, the Sixth Circuit acknowledged that the federal equivalent of Utah's Interception of Communications Act contains a "broad prohibition on most forms of warrantless wiretapping." *United States v. Paul*, 614 F.2d 115, 116 (6th Cir. 1980) (addressing 18 U.S.C. §§ 2510 et seq.). In *Paul*, the court specifically noted that the monitoring of jail calls in that case was in the ordinary course of the correctional officers' duties because it was "shown to be related to prison security." *Id.* at 117; *see United States v. Lewis*, 406 F.3d 11, 18 (1st Cir. 2005) ("That an individual is an investigative or law enforcement officer does not mean that all investigative activity is in the ordinary course of his duties. Indeed, the premise of Title III is that there is nothing 'ordinary' about the use of a device to capture communications for investigative purposes."). In contrast, although the jail records calls for safety reasons, R:694, the DA's Office requested Wood's calls to investigate an unrelated crime. R:588.

In *United States v. Green*, the court noted that "the special attention paid to [the defendant's] calls appear not at all routine or ordinary." *United States v. Green*, 842 F. Supp. 68, 73 (W.D.N.Y. 1994), *aff'd sub nom. United States v. Workman*, 80 F.3d 688 (2d Cir. 1996). This was because the lieutenant monitoring the calls was not "pursuing the prison's ordinary course of business in taping [the defendant's] calls"; rather the recording was "part of a criminal investigation which was clearly separate from the functions of the facility." *Id.* at

74. The same is true in Wood's case. The DA's Office requested Wood's calls as part of a criminal investigation into the crimes charged, which were unrelated to the functions of the jail. R:588.

Finally, the private company IC Solutions facilitated, recorded, and stored the calls. R:878-88. IC Solutions is a private company, not a law enforcement officer or agency. R:878. IC Solutions is not an officer of the state or of a political subdivision "who by law may conduct investigations of or make arrests for offenses" as the Act requires. Utah Code § 77-23a-3(11). Under the plain meaning of law enforcement, private entities are not "entitled to the protections of the law enforcement exception." *United States v. Faulkner*, 323 F. Supp. 2d 1111, 1117 (D. Kan. 2004), *aff'd*, 439 F.3d 1221 (10th Cir. 2006).[1]

In summary, the district court erred when it ruled that the jail calls fell within the law enforcement exemption. The calls were between private, non-law enforcement parties, they were not disclosed as part of the ordinary course of jail operations, and a private company recorded and stored the calls.

[1] The district court wrote, "The State also notes that disclosure of the recordings is lawful under GRAMA, Utah Code § 63G-2-206(9) ("Records that may evidence or relate to a violation of law may be disclosed to a government prosecutor.")." R:698. The district court did not rule that GRAMA created any additional statutory exceptions, however. R:698. And as Wood argued below, the Interception of Communications Act requires providers to provide assistance in interception after being provided with "a court order." Utah Code § 77-23a-4(3)(a)(i); R:645-46. And that subsection "supersede[s] any law to the contrary." Utah Code § 77-23a-4(3)(a)(i); R:645-46.

II. The district court erred when it ruled that Wood consented to the recording and disclosure of the jail calls.

The district court erred when it ruled that Wood consented to the recording, disclosure, and use of his jail calls.

It "tortures the meaning of the word to call it consent" when an inmate uses a phone with the notice of recording that Wood received. *United States v. Cheely*, 814 F. Supp. 1430, 1443 (D. Alaska 1992). "[K]nowledge and consent are not synonyms." *United States v. Daniels*, 902 F.2d 1238, 1245 (7th Cir. 1990). "We would be surprised at an argument that if illegal wiretapping were widespread anyone who used a phone would have consented to its being tapped and would therefore be debarred from complaining of the illegality." *Id.* "To take a risk is not the same thing as to consent. The implication of the argument is that since wiretapping is known to be a widely employed investigative tool, anyone suspected of criminal (particularly drug) activity who uses a phone consents to have his phone tapped." *United States v. Feekes*, 879 F.2d 1562, 1565 (7th Cir. 1989); *see Crooker v. U.S. Dep't of Just.*, 497 F. Supp. 500, 503 (D. Conn. 1980 ("knowledge of the monitoring (assuming, arguendo, that the inmates had actual knowledge) and the existence of a justifiable need for such monitoring are clearly not sufficient to establish consent"). Similarly, in Wood's case, the State's evidence that Wood consented to the monitoring of his calls was limited to notices that calls are monitored and recorded. R:889; 499; 514.

The district court in Wood's case based its ruling in part on the fact that Wood was not supposed to contact SH at all. R:694. But Wood's calls were not

monitored and recorded because he was calling SH. To the contrary, the fact that Wood was able to call SH demonstrates that the jail was not monitoring the calls to prevent contact with protected parties in the ordinary course of its operations. The fact that the jail could have prevented Wood from contacting SH, R:887, does nothing to suggest that Wood and SH consented to the monitoring, recording, and disclosure of their calls.

Wood did not consent to the disclosure and use of the jail calls. The signs said only that the phone calls were monitored and recorded. R:889; 499; 514. The notices in the jail did not go as far as the notices in *United States v. Amen*, which stated that calls were monitored and taped and that "use of institutional telephones constitutes consent to this monitoring." *United States v. Amen*, 831 F.2d 373, 379 (2d Cir. 1987). The notices in Wood's case were also short of the notice in *United States v. Rivera*, which advised that phone calls were "'subject to recording, monitoring and criminal, civil and/or administrative disciplinary actions.'" *United States v. Rivera*, 292 F. Supp. 2d 838, 840 (E.D. Va. 2003); *see, e.g.*, *State v. Andrews*, 176 P.3d 245, 247 (Kan. 2008) ("There are also visual warnings to the prisoners. Signs are posted with red lettering, stating: 'All calls from inmate telephones are subject to monitoring recording. If you use the telephone, you are agreeing to the monitoring and recording, and if you do not agree, you may utilize U.S. mail or the inmate visitation program.'").

The district court erred when it held that Wood's use of the jail phones meant he consented to the calls being disclosed to the DA's Office and used

against him in court. As defense counsel argued, in the *Miranda* context, officers must warn suspects that their statements will be used against them, and "a valid waiver will not be presumed simply from the silence of the accused after warnings are given." R:660 (quoting *Miranda v, Arizona*, 384 U.S. 436, 475 (1966)). In Wood's case, the jail informed inmates that all calls were monitored and recorded but did not inform them that calls would be disclosed and used for prosecution and did not obtain affirmative consent. Under these circumstances, the district court erred when it ruled that Wood and SH consented to the prosecution's use of the jail phone calls in court. R:694; 698.

Utah Code section 77-23b-4(1) underscores the absence of consent in Wood's case. It provides that a government entity may only "require the disclosure by a provider of electronic communication services of the contents of an electronic communication that is in electronic storage in an electronic communication system pursuant to a warrant issued under the Utah Rules of Criminal Procedure or an equivalent federal warrant." Utah Code § 77-23b-4(1). Even if jail inmates were aware that IC Solutions, a private company, was recording and monitoring calls, section 77-23b-4(1) would have assured them that the DA's Office would still need a warrant to require their disclosure.

III. The jail recordings were electronic communications stored with an electronic communications service and could not be disclosed without a warrant.

Utah Code section 77-23b-4(1) also independently requires that the DA's Office get a warrant to require the disclosure of the jail calls. IC Solutions is a

"provider of electronic communications" that kept the jail calls "in electronic storage" on a server. Utah Code § 77-23b-4(1); R:691. The government needs a warrant to require disclosure if the electronic communications are held on the service "solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any communication for purposes of providing any services other than storage or computer processing." Utah Code § 77-23b-4(2)(b). As such, the government could only require disclosure "pursuant to a warrant issued under the Utah Rules of Criminal Procedure or an equivalent federal warrant." *Id.* § 77-23b-4(1). As the district court acknowledged, IC Solutions is a private telephone carrier that stores calls on a server in Atlanta. R:691. Section 77-23b-4(1) therefore required that the DA's Office get a warrant.

CONCLUSION

For the reasons above, Wood respectfully requests that this Court reverse the district court's order denying the motion.

SUBMITTED this 11th day of April 2022.

___/s/ *Nathalie S. Skibine*_____
NATHALIE S. SKIBINE
Attorney for Defendant/Petitioner

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 3,227 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2019 in Georgia 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted from the foregoing brief of defendant/appellant.

/s/ *Nathalie S. Skibine*_____
NATHALIE S. SKIBINE

CERTIFICATE OF DELIVERY

I, NATHALIE S. SKIBINE, hereby certify that I have caused a searchable pdf of the foregoing brief to be attached to an email for filing to the Utah Supreme Court at supremecourt@utcourts.gov and a copy delivered by email to the Utah Attorney General's Office at criminalappeals@agutah.gov, this 11th day of April 2022. Physical copies will be delivered within seven business days.

/s/ *Nathalie S. Skibine*
NATHALIE S. SKIBINE

DELIVERED this 11th day of April 2022.

/s/ *MerriLyn*

ADDENDUM A

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. EUGENE VINCENT WOOD, Defendant.	MEMORANDUM DECISION AND ORDER Case Nos. 191910007 and 201905761 Judge James Blanch

This matter is before the court on Defendant Eugene Wood's Motion to Suppress Jail Phone Calls. An evidentiary hearing was held April 8, 2021, and oral arguments were held May 20, 2021.

On October 3, 2019, Mr. Wood was charged with aggravated assault and aggravated kidnapping (case 191910007). From jail, Mr. Wood made hundreds of phone calls to the alleged victim Shelley Harvey, his wife, despite a pretrial protective order prohibiting him from contacting her. On May 15, 2020, the State brought charges against Mr. Wood for witness tampering, retaliation against a witness/victim, and violations of a protective order based on those recorded phone calls (case 201905761). Defendant has moved to suppress the use of those phone calls in both above-referenced cases. He asks the court to prohibit the State from using the phone calls as substantive evidence against him in case 201905761, and he asks the court to prohibit the State from using the phone calls in case 191910007 as the basis for a motion the State has filed in that case asking the court to admit out-of-court statements of Ms. Harvey at trial, finding Mr. Wood has forfeited his confrontation right at trial under the doctrine of "forfeiture by wrongdoing" because of his phone calls to Ms. Harvey, which have allegedly resulted in her invocation of the

spousal privilege and refusal to testify against Mr. Wood. This Memorandum Decision and Order applies in both cases.

Mr. Wood argues the State unlawfully obtained his jail phone recordings and the court should suppress the contents of those recordings under the exclusionary rule in Utah's Interception of Communications Act ("Act"), Utah Code § 77-23a-1, *et seq*., which provides:

> When any wire, electronic, or oral communication has been intercepted, no part of the contents of the communication and no evidence derived from it may be received in evidence in any trial, hearing, or other proceeding . . . if the disclosure of that information would be in violation of this chapter.

Utah Code § 77-23a-7. Mr. Wood asserts the State—specifically prosecutor Deputy District Attorney Kent Davis—violated the Act when he received and relied on the recordings to bring the witness tampering, retaliation, and protective order violation charges against Mr. Wood in case 201905761 without first obtaining a warrant or court order. For the same reasons, Mr. Wood argues the State should be precluded from relying on the recordings to support its "forfeiture by wrongdoing" motion in case 191910007.

At the evidentiary hearing, Zelma Farrington testified. Ms. Farrington is the records supervisor and GRAMA coordinator at the Salt Lake County Jail. She explained that the jail's electronic service provider, Inmate Calling Solutions ("ICS"), is a private telephone carrier that contracts with the Utah Department of Corrections to provide telephone services to inmates, including the recording and saving of all inmate calls (except for calls between inmates and legal counsel). ICS stores recorded calls on a server in Atlanta, Georgia called the Enforcer. Ms. Farrington testified the jail staff monitor prisoners' phone calls for the purpose of ensuring safety in the facility. The jail's Policy # 4.02.01 requires staff to report any suspected crime occurring outside the jail to the South Salt Lake police department for investigation, or if the suspected crime is within the jail (such as possession of contraband), it is referred to jail staff. Ms. Farrington

stated she routinely provides recordings to law enforcement officers upon request. In this case, Deputy District Attorney Kent Davis, through his paralegal, requested copies of recordings of Mr. Wood's calls via GRAMA Form 007, "Prisoner Telephone Monitoring System Recording Request Form," in which the signer confirms that he or she represents a government entity enforcing the law and that the record is necessary for an investigation.

In response to Mr. Wood's motion, the State first argues that under the Act, Mr. Wood consented to the recording by the jail's telephone service provider. Utah is a one-party consent state:[1]

> A person not acting under color of law may intercept a wire, electronic, or oral communication if that person is a party to the communication or 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 state or federal laws.

Utah Code § 77-23a-8(7)(b). The State asserts Mr. Wood gave at least implied consent to the recording of his calls because: (a) he had received a prisoner handbook informing him that the "jail may monitor and/or record telephone calls," (b) preceding each call, both parties heard the phrase "this call will be recorded and subject to monitoring at any time" (or "Your calls may be recorded or monitored at any time"), and (c) placards are posted next to the jail phones stating "All calls may be monitored and/or recorded at any time." Because the recorded message is also heard

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[1] The Act's stated purpose reiterates that interception of telephone calls is of concern only when no parties to the call have consented.

> To safeguard the privacy of innocent persons, the interception of wire or oral communications *when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court* of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused.

Utah Code § 77-23a-2(4) (emphasis added).

by the other party to the call, the State argues Ms. Harvey also implicitly consented to the interception and recording of the telephone calls.

Mr. Wood counters that the above circumstances left him with no viable choice not to consent to the interceptions, that he never affirmatively agreed to the interceptions and was at most merely silent regarding the issue, and that therefore his alleged implied consent was not actually consent for purposes of the Act. Mr. Wood notes that the warnings did not require an affirmative act to accept the terms, and he argues the Supreme Court has rejected silence as an implied waiver of constitutional rights, albeit in the very different context of police interrogations and the Fifth Amendment. *Miranda v. Arizona*, 384 U.S. 436 (1966).

In addition, Mr. Wood argues ICS has a monopoly over the jail's telephone system, and the automated warning constitutes an adhesion contract to which inmates have no ability to refuse or negotiate. He again cites to legal authority arising in different contexts, which he argues the court should apply by analogy to the jail phone call interceptions at issue in these cases. *See Lebron v. Secretary, Florida Dept. of Childrens and Families*, 710 F.3d 1202 (11th Cir. 2013) ("[W]e have no reason to conclude that the constitutional validity of a mandated drug testing regime is satisfied by the fact that a state requires the affected population to 'consent' to the testing in order to gain access or retain a desired benefit."); and *Rozeboom v. Northwestern Bell Telephone Co*., 358 N.W.2d 241, 47 A.L.R.4th 869 (S.D. 1984) (holding that advertiser had a monopoly in the yellow pages business, and its "take it or leave it" terms disfavoring the customer were unconscionable). Mr. Wood complains, "Mr. Wood is stuck at the Salt Lake County Jail with no option to leave. Moreover, the State has opposed and the court has denied options suggested by counsel for Mr. Wood to have him participate in Veteran's Court or do go to inpatient programs or outpatient aftercare even after he completed the CATS program twice in the jail." At oral

argument, Mr. Wood's counsel suggested that prohibiting an inmate from any meaningful contact with the outside world is a human rights violation.

The court finds Mr. Wood's arguments unavailing and concludes he and Ms. Harvey impliedly consented to the interception of the phone calls by engaging in the calls despite knowledge they could be intercepted. Ample case law interpreting statutes similar to Utah's Act supports the conclusion that inmates who use phone systems at correctional facilities after being placed on notice that calls may be recorded have impliedly consented to their interception, regardless of whether they have a meaningful alternative for communicating with the outside world. As an inmate in a county jail, Mr. Wood is not entitled to unfettered and unmonitored telephonic communications. An inmate is subject to a multitude of restrictions on his or her rights. The jail can and does block inmates from contacting certain phone numbers. Indeed, most if not all of the phone calls took place while there was protective order in place prohibiting Mr. Wood from contacting Mr. Harvey at all. He thus cannot be heard to complain that the jail telephone system failed to give him an alternative means to communicate with Ms. Harvey that did not involve implied consent for the communications to be recorded, given that was prohibited from communicating with her under any circumstances during this period. To the extent the jail, through ICS, has a monopoly over inmates' contact with others, there is a good reason for that arrangement, and the policy of recording inmate phone calls not is an unconscionable adhesion contract. Mr. Wood has cited no case in which a court has held, under Utah's Act or any statute like it, that a jail cannot control, intercept, and record inmate telephone communications in a manner similar to the policies and procedures under which Mr. Wood called Ms. Harvey. It is clear Mr. Wood gave at least implied consent to the recording of his phone calls with Harvey, and that consent is valid.

Mr. Wood next argues that even if he gave implied consent to the recording of his calls, the notices state only that the calls are "recorded" and "monitored" but not that the calls could be "disclosed" or "used."[2] Mr. Wood claims that under the Act, the State must first obtain a warrant or court order to disclose the contents of his calls:

> (3)(a) Providers of wire or electronic communications service, their officers, employees, or agents, and any landlords, custodians, or other persons may provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance if the provider and its officers, employees, or agents, and any landlords, custodians, or other specified persons have been provided with:
>
> (i) a court order directing the assistance signed by the authorizing judge; or
> (ii) a certification in writing by a person specified in Subsection 77-23a-10(7), or by the attorney general or an assistant attorney general, or by a county attorney or district attorney or his deputy that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required. . . .

Id. at § 77-23a-4(3).[3] Mr. Wood relies on this provision and argues it "supersede[s] any law to the contrary." *Id*. at § 77-23a-4(6).

The State counters that the Act exempts law enforcement officers—which Mr. Wood does not dispute includes the DA's Office—from the definition of "interception" under the exclusionary rule:

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[2] Mr. Wood cites to the differing treatment in the Act between "interception" (recording) of a call from "disclosing" or "using" the contents of a call in a hearing or trial. For example, the Act provides that after calls are intercepted, "A government entity may only require the disclosure . . . of the contents of an electronic communication . . . pursuant to a warrant[.]" Utah Code § 77-23b-4. "The presence of the seal . . . is a prerequisite for the use or disclosure of the contents" of an intercepted communication. *Id*. at § 77-23a-10(9)(a).

[3] Mr. Wood also points to a section of the Act permitting the DA's Office to authorize an application to the court "for an order for an interception of wire, electronic, or oral communications by any law enforcement agency . . . that is responsible for investigating the type of offense for which the application is made." *Id*. at § 77-23a-8(1). The Act also requires an application for interception must be made upon oath or affirmation to a judge, the judge is to seal the recordings prior to for the use or disclosure of the contents the communications, and the contents of any intercepted communications must timely be given to each party prior to any court proceeding. *Id*. at § 77-23a-10.

> "Electronic, mechanical, or other device" means any device or apparatus that may be used to intercept a wire, electronic, or oral communication other than: (a) any telephone or telegraph instrument, equipment or facility, or a component of any of them: [being used by] an investigative or law enforcement officer in the ordinary course of his duties;

Id. at § 77-23a-3(8). "Intercept," in turn, means the acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device. *Id*. at § 77-23a-3(10). The State argues that because the DA's Office obtains inmate phone recordings in the ordinary course of its duties, accessing inmates' call recordings is not considered an "interception" that is subject to the Act and its exclusionary rule.[4]

Both Mr. Wood and the State acknowledge that there is no case law in Utah that directly addresses whether an inmate's consent to the recording of his or her calls necessarily implies the consent for law enforcement to use the contents of those calls as evidence in court. But Utah's Act is based on the federal "Title III" of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2517, which has generated voluminous relevant federal case law on this point.[5] For example, in *United States v. Hammond*, 286 F.3d 189 (4th Cir. 2002), the court affirmed the release of defendant's prison phone calls to the FBI, who had suspected that the defendant was using the phone for witness tampering. The defendant sought suppression of the recordings, arguing that the government did not comply with Title III and first obtain a judicial interception order to get the recordings from the prison. The *Hammond* court first noted that Title III's exclusionary rule does apply within prisons; however, "[t]hough the statute does reflect congressional concern for

[4] Wood argues that this section means only that law enforcement officers may use "their own phones in the ordinary course of their duties while they are at work without getting a warrant to speak to others." The court is not persuaded to interpret the statute so narrowly.

[5] The State has also cited numerous federal and state cases rejecting arguments under Title III and similar statutes that inmates did not impliedly consent to the interception of their phone calls despite notifications that the calls would be recorded—the issue discussed above. This case law supports the court's denial of Mr. Wood's motion regarding that point as well.

protecting privacy, that concern does not extend to prison inmates, given their substantially reduced expectation of privacy." *Id*. at 192-94. *Hammond* clarified that the defendant's phone recordings were properly used by the FBI only if "(1) the initial interception by the BOP was lawful pursuant to an exception to the general injunction prohibiting use of wiretaps, and (2) the FBI's subsequent acquisition/use of the tapes was lawful." *Id*. As for the initial interception, the court found that two exceptions to Title III applied: first, the defendant consented to the recordings, as he had been notified several times that all calls were recorded; and second, the "law enforcement exception" rendered the recordings permissible. Title III's law enforcement exception is similar to Utah's version, both providing that the "interception" of recordings does not apply to "an investigative or law enforcement officer in the ordinary course of his duties." *Id*. *See also United States v. Lewis*, 406 F.3d 11, 19 (1st Cir. 2005) ("a recording made pursuant to a routine prison practice of monitoring all outgoing inmate calls under a documented policy of which inmates are informed does not constitute an interception for Title III purposes."). In its briefing, the State cites numerous cases from the federal system and other states supporting the same conclusion in essentially identical contexts.

In this case, the same two exceptions to the Act's exclusionary rule noted in *Hammond* also apply: Mr. Wood consented to the recording of his phone calls, and the law enforcement section exempts the DA's Office from the procedures required under the Act. The State also points to other exceptions under the Act that permit law enforcement officers to obtain, use, disclose, and testify in court to the content of recorded calls:

> (7) A person acting under color of law may intercept a wire, electronic or oral communication if that person is a party to the communication or one of the parties to the communication has given prior consent to the interception.[6]

[6] Wood asserts that this section applies only when a law enforcement officer is a party to the call, but he ignores the "or" before the consent option.

> . . .
> (9)(b) A person or entity providing electronic communications service to the public may divulge the contents of any communication:
> (i) as otherwise authorized under this section or Section 77-23a-9;
> (ii) with lawful consent of the originator or any addressee or intended recipient of the communication; …[7]

Id. at §§ 77-23a-4(7) and (9)(b). Thus, providers such as ICS are permitted to divulge the contents of recorded calls to the following:

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, electronic, or oral communication, or evidence derived from any of these, may disclose those contents to another investigative or law enforcement officer 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) . . . may use those contents to the extent the use is appropriate to the proper performance of his official duties.
> (3) . . . may disclose the contents of that communication or the 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.

Id. at § 77-23a-9. This section appears to furnish an additional basis for ICS to release the contents of Mr. Wood's recorded calls to an appropriate law enforcement officer such as the DA's Office. The State also notes that disclosure of the recordings is lawful under GRAMA, Utah Code § 63G-2-206(9) ("Records that may evidence or relate to a violation of law may be disclosed to a government prosecutor.").

Like Title III, Utah's Act is focused primarily on wiretapping and does not mention the monitoring of communications within jails or prisons. At some point, the court must apply common sense to determine whether an inmate's implied consent to the recording of calls includes the associated consent to disclose the content those recordings to law enforcement for a legitimate purpose. *See Hammond* 286 F.3d at 193 (under Title III, "an interception is something that is

[7] Mr. Wood argues this section does not apply here because ICS does not offer services "to the public." The court does not find that to be a pertinent distinction.

obtained and held, contemplating the 'disclosure' and 'use' of 'intercepted communications'"). Common sense mandates a conclusion that when Mr. Wood consented to the recording of his calls, he implicitly consented to the disclosure and use of the content of those calls. At that point, the Act's requirement for a court order preceding release of recorded calls ceased to apply. Beyond the consent exception, the Act also includes several exceptions relating to law enforcement officers in the regular course of their duties. It also bears repeating that Mr. Wood's phone calls were in violation of a protective order prohibiting him from contacting Ms. Harvey. Thus, even if there are categories of communications as to which the law must allow inmates to enjoy an unmonitored connection to the outside world (communications with counsel, perhaps, which ICS does not monitor), such requirements certainly do not extend to communications that are prohibited by law under any circumstances, such as repeated phone calls made in violation of protective orders.

For the foregoing reasons, Mr. Wood's Motion to Suppress Jail Phone Calls is respectfully DENIED.

IT IS SO ORDERED.

DATED this 22nd day of June, 2021.

Judge James Blanch
District Court Judge

ADDENDUM B

This act[1] shall be known and may be cited as the “Interception of Communications Act.”

Credits

Laws 1980, c. 15, § 2.

Chapters 1 to 21 appear in this volume.

Footnotes

1 Laws 1980, c. 12, enacted Chapter 23a.

U.C.A. 1953 § 77-23a-1, UT ST § 77-23a-1
Current with laws through the 2021 Second Special Session. Some statutes sections may be more current, see credits for details.

Utah Code § 77-23a-2. Legislative findings

The Legislature finds and determines that:

(1) Wire communications are normally conducted through facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications.

(2) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, it is necessary for the legislature to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of these communications and the use of the contents thereof in evidence in courts and administrative proceedings.

(3) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(4) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused.

Credits

Laws 1980, c. 15, § 2.

Utah Code § 77-23a-3. Definitions

As used in this chapter:

(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 any transfer containing the human voice at any point between and including the point of origin and the point of reception.

(3) “Communications common carrier” means any person engaged as a common carrier for hire in intrastate, interstate, or foreign communication by wire or radio, including a provider of electronic communication service. However, a person engaged in radio broadcasting is not, when that person is so engaged, a communications common carrier.

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

(5) “Electronic communication” means any transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system, but does not include:

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

(b) any wire or oral communications;

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

(d) any communication from an electronic or mechanical device that permits the tracking of the movement of a person or object.

(6) “Electronic communications service” means any service that provides for users the ability to

send or receive wire or electronic communications.

(7) “Electronic communications system” means any wire, radio, electromagnetic, photoelectronic, or photo-optical facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of the communication.

(8) “Electronic, mechanical, or other device” means any device or apparatus that may be used to intercept a wire, electronic, or oral communication other than:

(a) any telephone or telegraph instrument, equipment or facility, or a component of any of them:

(i) furnished by the provider of wire or electronic communications service or by the subscriber or user, and being used by the subscriber or user in the ordinary course of its business; or

(ii) being used by a provider of wire or electronic communications service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties; or

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

(9) “Electronic storage” means:

(a) any temporary intermediate storage of a wire or electronic communication incident to the electronic transmission of it; and

(b) any storage of the communication by an electronic communications service for the purposes of backup protection of the communication.

(10) “Intercept” means the acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(11) “Investigative or law enforcement officer” means any officer of the state or of a political subdivision, who by law may conduct investigations of or make arrests for offenses enumerated in this chapter, or any federal officer as defined in Section 53-13-106, and any attorney authorized by law to prosecute or participate in the prosecution of these offenses.

(12) “Judge of competent jurisdiction” means a judge of a district court of the state.

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

(14) “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 communications service for cost accounting or other like purposes in the ordinary course of its business.

(15) “Person” means any employee or agent of the state or a political subdivision, and any individual, partnership, association, joint stock company, trust, or corporation.

(16) “Readily accessible to the general public” means, regarding a radio communication, that the communication is not:

(a) scrambled or encrypted;

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

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

(d) transmitted over a communications 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, 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) "Trap and trace device" means a device, process, or procedure 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 is transmitted.

(18) "User" means any person or entity who:

(a) uses an electronic communications service; and

(b) is authorized by the provider of the service to engage in the use.

(19)(a) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, including the use of the connection in a switching station, furnished or operated by any person engaged as a common carrier in providing or operating these facilities for the transmission of intrastate, interstate, or foreign communications.

(b) "Wire communication" includes the electronic storage of the communication, but does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.

Credits

Laws 1980, c. 15, § 2; Laws 1988, c. 251, § 2; Laws 1989, c. 122, § 1; Laws 1994, c. 201, § 1; Laws 1998, c. 282, § 78, eff. May 4, 1998.

Utah Code § 77-23a-4. Offenses--Criminal and civil--Lawful interception

(1)(a) Except as otherwise specifically provided in this chapter, any person who violates Subsection (1)(b) is guilty of an offense and is subject to punishment under Subsection (10), or when applicable, the person is subject to civil action under Subsection (11).

(b) A person commits a violation of this subsection who:

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

(ii) intentionally or knowingly 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 the device is affixed to, or otherwise transmits a signal through a wire, cable, or other like connection used in wire communication or when the device transmits communications by radio, or interferes with the transmission of the communication;

(iii) intentionally or knowingly discloses or endeavors 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

(iv) intentionally or knowingly uses or endeavors 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.

(2) The 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 may 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. However, a provider of wire communications service to the public may not utilize service observing or random monitoring except for mechanical or service quality control checks.

(3)(a) Providers of wire or electronic communications service, their officers, employees, or agents, and any landlords, custodians, or other persons may provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance if the provider and its officers, employees, or agents, and any landlords, custodians, or other specified persons have been provided with:

(i) a court order directing the assistance signed by the authorizing judge; or

(ii) a certification in writing by a person specified in Subsection 77-23a-10(7), or by the attorney general or an assistant attorney general, or by a county attorney or district attorney or his deputy that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required.

(b) The order or certification under this subsection shall set the period of time during which the provision of the information, facilities, or technical assistance is authorized and shall specify the information, facilities, or technical assistance required.

(4)(a) The providers of wire or electronic communications service, their officers, employees, or agents, and any landlords, custodians, or other specified persons may not disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance regarding which the person has been furnished an order or certification under this section except as is otherwise required by legal process, and then only after prior notification to the attorney general or to the county attorney or district attorney of the county in which the interception was conducted, as is appropriate.

(b) Any disclosure in violation of this subsection renders the person liable for civil damages under Section 77-23a-11.

(5) A cause of action does not lie in any court against any provider of wire or electronic communications service, its officers, employees, or agents, or any landlords, custodians, or other specified persons for providing information, facilities, or assistance in accordance with the terms

of a court order or certification under this chapter.

(6) Subsections (3), (4), and (5) supersede any law to the contrary.

(7)(a) A person acting under color of law may intercept a wire, electronic, or oral communication if that person is a party to the communication or one of the parties to the communication has given prior consent to the interception.

(b) A person not acting under color of law may intercept a wire, electronic, or oral communication if that person is a party to the communication or 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 state or federal laws.

(c) An employee of a telephone company may intercept a wire communication for the sole purpose of tracing the origin of the communication when the interception is requested by the recipient of the communication and the recipient alleges that the communication is obscene, harassing, or threatening in nature. The telephone company and its officers, employees, and agents shall release the results of the interception, made under this subsection, upon request of the local law enforcement authorities.

(8) A person may:

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

(b) intercept any radio communication transmitted by:

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

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

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

(iv) by a marine or aeronautics communications system;

(c) 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; or

(d) as one of a group of users of the same frequency, 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.

(9)(a) Except under Subsection (9)(b), a person or entity providing an electronic communications service to the public may not intentionally divulge the contents of any communication, while in transmission of that service, to any person or entity other than an addressee or intended recipient of the communication or his agent.

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

(i) as otherwise authorized under this section or Section 77-23a-9;

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

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

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

(10)(a) Except under Subsection (10)(b) or (11), a violation of Subsection (1) is a third degree felony.

(b) If the offense is a first offense under this section 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 regarding which the offense was committed is a radio communication that is not scrambled or encrypted:

(i) if the communication is not the radio portion of a cellular telephone communication, a public land mobile radio service communication, or paging service communication, and the conduct is not under Subsection (11), the offense is a class A misdemeanor; 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 offense is a class B misdemeanor.

(c) Conduct otherwise an offense under this section is not an offense if the conduct was not done for the purpose of direct or indirect commercial advantage or private financial gain, and consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled, and is either 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 in any event not including data transmissions or telephone calls.

(11)(a) A person is subject to civil suit initiated by the state in a court of competent jurisdiction when his conduct is prohibited under Subsection (1) and the conduct involves a:

(i) 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

(ii) radio communication that is transmitted on frequencies allocated under Subpart D, Part 74, Rules of the Federal Communication 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.

(b) In an action under Subsection (11)(a):

(i) if the violation of this chapter is a first offense under this section and the person is not found liable in a civil action under Section 77-23a-11, the state may seek appropriate injunctive relief; or

(ii) if the violation of this chapter is a second or subsequent offense under this section, or the person has been found liable in any prior civil action under Section 77-23a-11, the person is subject to a mandatory $500 civil penalty.

(c) The court may use any means within its authority to enforce an injunction issued under Subsection (11)(b)(i), and shall impose a civil fine of not less than $500 for each violation of the injunction.

Credits

Laws 1980, c. 15, § 2; Laws 1988, c. 251, § 3; Laws 1989, c. 122, § 2; Laws 1993, c. 38, § 97; Laws 1994, c. 12, § 114; Laws 2010, c. 324, § 132, eff. May 11, 2010; Laws 2011, c. 340, § 46, eff. May 10, 2011.

Utah Code § 77-23a-7. Evidence--Exclusionary rule

When any wire, electronic, or oral communication has been intercepted, no part of the contents of the communication and no evidence derived from it 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 state, or a political subdivision of the state, if the disclosure of that information would be in violation of this chapter.

Credits

Laws 1980, c. 15, § 2; Laws 1988, c. 251, § 5.

Utah Code § 77-23a-8. Court order to authorize or approve interception--Procedure

Effective: July 1, 2019

(1) The attorney general of the state, any assistant attorney general specially designated by the attorney general, any county attorney, district attorney, deputy county attorney, or deputy district attorney specially designated by the county attorney or by the district attorney, may authorize an application to a judge of competent jurisdiction for an order for an interception of wire, electronic, or oral communications by any law enforcement agency of the state, the federal government or of any political subdivision of the state that is responsible for investigating the type of offense for which the application is made.

(2) The judge may grant the order in conformity with the required procedures when the interception sought may provide or has provided evidence of the commission of:

(a) any act:

(i) prohibited by the criminal provisions of:

(A) Title 58, Chapter 37, Utah Controlled Substances Act;

(B) Title 58, Chapter 37c, Utah Controlled Substance Precursor Act; or

(C) Title 58, Chapter 37d, Clandestine Drug Lab Act; and

(ii) punishable by a term of imprisonment of more than one year;

(b) any act prohibited by the criminal provisions of Title 61, Chapter 1, Utah Uniform Securities Act,[1] and punishable by a term of imprisonment of more than one year;

(c) an offense:

(i) of:

(A) attempt, Section 76-4-101;

(B) conspiracy, Section 76-4-201;

(C) solicitation, Section 76-4-203; and

(ii) punishable by a term of imprisonment of more than one year;

(d) a threat of terrorism offense punishable by a maximum term of imprisonment of more than one year, Section 76-5-107.3;

(e)(i) aggravated murder, Section 76-5-202;

(ii) murder, Section 76-5-203; or

(iii) manslaughter, Section 76-5-205;

(f)(i) kidnapping, Section 76-5-301;

(ii) child kidnapping, Section 76-5-301.1;

(iii) aggravated kidnapping, Section 76-5-302;

(iv) human trafficking or human smuggling, Section 76-5-308; or

(v) aggravated human trafficking or aggravated human smuggling, Section 76-5-310;

(g)(i) arson, Section 76-6-102; or

(ii) aggravated arson, Section 76-6-103;

(h)(i) burglary, Section 76-6-202; or

(ii) aggravated burglary, Section 76-6-203;

(i)(i) robbery, Section 76-6-301; or

(ii) aggravated robbery, Section 76-6-302;

(j) an offense:

(i) of:

(A) theft, Section 76-6-404;

(B) theft by deception, Section 76-6-405; or

(C) theft by extortion, Section 76-6-406; and

(ii) punishable by a maximum term of imprisonment of more than one year;

(k) an offense of receiving stolen property that is punishable by a maximum term of imprisonment of more than one year, Section 76-6-408;

(l) a financial card transaction offense punishable by a maximum term of imprisonment of more than one year, Section 76-6-506.2, 76-6-506.3, 76-6-506.5, or 76-6-506.6;

(m) bribery of a labor official, Section 76-6-509;

(n) bribery or threat to influence a publicly exhibited contest, Section 76-6-514;

(o) a criminal simulation offense punishable by a maximum term of imprisonment of more than one year, Section 76-6-518;

(p) criminal usury, Section 76-6-520;

(q) a fraudulent insurance act offense punishable by a maximum term of imprisonment of more than one year, Section 76-6-521;

(r) a violation of Title 76, Chapter 6, Part 7, Utah Computer Crimes Act, punishable by a maximum term of imprisonment of more than one year, Section 76-6-703;

(s) bribery to influence official or political actions, Section 76-8-103;

(t) misusing public money or public property, Section 76-8-402;

(u) tampering with a witness or soliciting or receiving a bribe, Section 76-8-508;

(v) retaliation against a witness, victim, or informant, Section 76-8-508.3;

(w) tampering with a juror, retaliation against a juror, Section 76-8-508.5;

(x) extortion or bribery to dismiss criminal proceeding, Section 76-8-509;

(y) obstruction of justice, Section 76-8-306;

(z) destruction of property to interfere with preparation for defense or war, Section 76-8-802;

(aa) an attempt to commit crimes of sabotage, Section 76-8-804;

(bb) conspiracy to commit crimes of sabotage, Section 76-8-805;

(cc) advocating criminal syndicalism or sabotage, Section 76-8-902;

(dd) assembly for advocating criminal syndicalism or sabotage, Section 76-8-903;

(ee) riot punishable by a maximum term of imprisonment of more than one year, Section 76-9-101;

(ff) dog fighting, training dogs for fighting, or dog fighting exhibitions punishable by a maximum term of imprisonment of more than one year, Section 76-9-301.1;

(gg) possession, use, or removal of an explosive, chemical, or incendiary device and parts, Section 76-10-306;

(hh) delivery to a common carrier or mailing of an explosive, chemical, or incendiary device, Section 76-10-307;

(ii) exploiting prostitution, Section 76-10-1305;

(jj) aggravated exploitation of prostitution, Section 76-10-1306;

(kk) bus hijacking or assault with intent to commit hijacking, Section 76-10-1504;

(ll) discharging firearms and hurling missiles, Section 76-10-1505;

(mm) violations of Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act, and the offenses listed under the definition of unlawful activity in the act, including the offenses not punishable by a maximum term of imprisonment of more than one year when those offenses are investigated as predicates for the offenses prohibited by the act, Section 76-10-1602;

(nn) communications fraud, Section 76-10-1801;

(oo) money laundering, Sections 76-10-1903 and 76-10-1904; or

(pp) reporting by a person engaged in a trade or business when the offense is punishable by a maximum term of imprisonment of more than one year, Section 76-10-1906.

Credits

Laws 1980, c. 15, § 2; Laws 1988, c. 251, § 6; Laws 1989, c. 122, § 4; Laws 1991, c. 10, § 12; Laws 1993, c. 38, § 98; Laws 1994, c. 201, § 2; Laws 2001, c. 307, § 4, eff. April 30, 2001; Laws 2002, c. 166, § 20, eff. May 6, 2002; Laws 2004, c. 104, § 8, eff. May 3, 2004; Laws 2004, c. 140, § 6, eff. May 3, 2004; Laws 2008, c. 268, § 3, eff. May 5, 2008; Laws 2010, c. 334, § 12, eff. May 11, 2010; Laws 2013, c. 196, § 15, eff. May 14, 2013; Laws 2016, c. 399, § 3, eff. May 10, 2016; Laws 2019, c. 211, § 10, eff. July 1, 2019.

Utah Code § 77-23b-4. Disclosure by a provider--Grounds for requiring disclosure--Court order

(1) A government entity may only require the disclosure by a provider of electronic communication services of the contents of an electronic communication that is in electronic storage in an electronic communication system pursuant to a warrant issued under the Utah Rules of Criminal Procedure or an equivalent federal warrant.

(2) Subsection (1) applies to any electronic communication that is held or maintained on that service:

(a) on behalf of and received by means of electronic transmission from or created by means of computer processing of communications received by means of electronic transmission from a subscriber or customer of the remote computing service; and

(b) solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any communication for purposes of providing any services other than storage or computer processing.

(3)(a)(i) Except under Subsection (3)(a)(ii), a provider of electronic communication services or remote computing services may disclose a record or other information pertaining to a subscriber to or customer of the service, not including the contents of communication covered by Subsection (1), to any person other than a governmental agency.

(ii) A provider of electronic communication services or remote computing services shall disclose a record or other information pertaining to a subscriber to or customer of the service, not including the contents of communication covered by Subsection (1), to a governmental entity only when the entity:

(A) uses an administrative subpoena authorized by a state or federal statute or a state or federal grand jury subpoena;

(B) obtains a warrant issued under the Utah Rules of Criminal Procedure or an equivalent federal warrant;

(C) obtains a court order for the disclosure under Subsection (4); or

(D) has the consent of the subscriber or customer to the disclosure.

(b) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(4)(a) A court order for disclosure under this section may be issued only if the governmental entity shows there is reason to believe the contents of a wire or electronic communication, or the records or other information sought, are relevant to a legitimate law enforcement inquiry.

(b) A court issuing an order under this section, on a motion made promptly by the service provider, may quash or modify the order, if the information or records requested are unusually voluminous in nature or compliance with the order otherwise would cause an undue burden on the provider.

(5) A cause of action may not be brought in any court against any provider of wire or electronic communications services, its officers, employees, agents, or other specified persons, for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, or certification under this chapter.

Credits

Laws 1988, c. 251, § 18; Laws 2012, c. 115, § 1, eff. May 8, 2012.