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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

SECOND EXTRAORDINARY SESSION, 2007



ENROLLED

House Bill No. 204

(By Mr. Speaker, Mr. Thompson, and Delegate Armstead)
[By Request of the Executive]



Passed August 21, 2007

In Effect from Passage

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H. B. 204

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(BY MR. SPEAKER, MR. THOMPSON, AND DELEGATE ARMSTEAD)
[BY REQUEST OF THE EXECUTIVE]

[Passed August 21, 2007; in effect from passage.]

AN ACT to amend and reenact §62-1D-3 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new article, designated §62-1F-1, §62-1F-2, §62-1F-3, §62-1F-4, §62-1F-5, §62-1F-6, §62-1F-7, §62-1F-8 and §62-1F-9, all relating to electronic interception of a nonconsenting party's conduct or oral communications in his or her home by an investigative or law enforcement officer or an informant invited into said home; excepting electronic interceptions of a nonconsenting party's conduct or communications occurring in his or her home from the wiretapping and electronic surveillance act; providing definitions; requiring court order to perform electronic interception of a nonconsenting party's conduct or communications occurring in his or her home and exceptions thereto; providing for state supreme court to establish requirements for providing after hours availability of magistrates and judges; authorizing law-enforcement to apply for interception orders and providing criteria therefor; authorizing magistrates and circuit court judges to issue electronic interception orders; setting forth requirements for electronic interception order applications; requiring orders setting forth information; setting forth scope and duration of orders; setting forth procedures for maintaining, disclosing and disposing of electronic intercepts; requiring recording and summaries of electronic intercepts; establishing requirements

for custody and destruction of said recordings; placing applications and orders under seal; authorizing use of information relating to other criminal violations under certain circumstances; placing restrictions on disclosure and use of electronically intercepted conduct and communications and related information derived therefrom; and providing for electronic intercepts in exigent circumstances without prior judicial approval subject to retroactive approval.

Be it enacted by the Legislature of West Virginia:

That §62-1D-3 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto a new article, designated §62-1F-1, §62-1F-2, §62-1F-3, §62-1F-4, §62-1F-5, §62-1F-6, §62-1F-7, §62-1F-8 and §62-1F-9, all to read as follows:

ARTICLE 1D. WIRETAPPING AND ELECTRONIC SURVEILLANCE ACT.

§62-1D-3. Interception of communications generally.

1 (a) Except as otherwise specifically provided in this
2 article it is unlawful for any person to:

3 (1) Intentionally intercept, attempt to intercept or procure
4 any other person to intercept or attempt to intercept, any wire,
5 oral or electronic communication; or

6 (2) Intentionally disclose or intentionally attempt to
7 disclose to any other person the contents of any wire, oral or
8 electronic communication, knowing or having reason to
9 know that the information was obtained through the
10 interception of a wire, oral or electronic communication in
11 violation of this article; and

12 (3) Intentionally use or disclose or intentionally attempt
13 to use or disclose the contents of any wire, oral or electronic
14 communication or the identity of any party thereto, knowing
15 or having reason to know that such information was obtained

16 through the interception of a wire, oral or electronic
17 communication in violation of this article.

18 (b) Any person who violates subsection (a) of this section
19 is guilty of a felony, and, upon conviction thereof, shall be
20 imprisoned in the penitentiary for not more than five years or
21 fined not more than ten thousand dollars or both fined and
22 imprisoned.

23 (c) It is lawful under this article for an operator of a
24 switchboard or an officer, employee, or provider of any wire
25 or electronic communication service whose facilities are used
26 in the transmission of a wire communication to intercept,
27 disclose or use that communication or the identity of any
28 party to that communication in the normal course of his or
29 her employment while engaged in any activity which is a
30 necessary incident to the rendition of his or her service or to
31 the protection of the rights or property of the carrier of the
32 communication. Providers of wire or electronic
33 communication services may not utilize service observing or
34 random monitoring except for mechanical or service quality
35 control checks.

36 (d) Notwithstanding any other law, any provider of wire
37 or electronic communications services, or the directors,
38 officers, employees, agents, landlords or custodians of any
39 such provider, are authorized to provide information,
40 facilities or technical assistance to persons authorized by this
41 article to intercept wire, oral or electronic communication if
42 such provider or its directors, officers, employees, agents,
43 landlords or custodians has been provided with a duly
44 certified copy of a court order directing such assistance and
45 setting forth the period of time during which the provision of
46 the information, facilities, or technical assistance is
47 authorized and specifying the information, facilities or
48 assistance required. No cause of action shall lie in any court
49 against any such provider of wire or electronic
50 communication services, its directors, officers, agents,
51 landlords or custodians for providing information facilities or
52 assistance in accordance with the terms of any such order.

53 (e) It is lawful under this article for a person to intercept
54 a wire, oral or electronic communication where the person is
55 a party to the communication or where one of the parties to
56 the communication has given prior consent to the interception
57 unless the communication is intercepted for the purpose of
58 committing any criminal or tortious act in violation of the
59 constitution or laws of the United States or the constitution or
60 laws of this state:

61 (f) notwithstanding the provisions of this article or any
62 other provision of law, an electronic interception as defined
63 by section one, article one-f of this chapter, is regulated
64 solely by the provisions of article one-f of this chapter, and
65 no penalties or other requirements of this article are
66 applicable.

**ARTICLE 1F. ELECTRONIC INTERCEPTION OF
PERSON'S CONDUCT OR ORAL
COMMUNICATIONS IN HOME BY
LAW ENFORCEMENT**

§62-1F-1. Definitions.

1 (a) For the purposes of this article, the following terms
2 have the following meanings.

3 (1) "Body wire" means: (a) an audio and/or video
4 recording device surreptitiously carried on or under the
5 control of an investigative or law enforcement officer or
6 informant to simultaneously record a non-consenting party's
7 conduct or oral communications; or (2) radio equipment
8 surreptitiously carried on or under the control of an
9 investigative or law enforcement officer or informant to
10 simultaneously transmit a non-consenting party's conduct or
11 oral communications to recording equipment located
12 elsewhere or to other law-enforcement officers monitoring
13 the radio transmitting frequency.

14 (2) "Home" means the residence of a non-consenting
15 party to an electronic interception, provided that access to the
16 residence is not generally permitted to members of the public

17 and the non-consenting party has a reasonable expectation of
18 privacy in the residence under the circumstances.

19 (3) “Informant” means a person acting in concert with
20 and at the direction of a law-enforcement officer in the
21 investigation of possible violations of the criminal laws of
22 this state or the United States.

23 (4) “Investigative or law-enforcement officer” means any
24 officer empowered by law to conduct investigations of or to
25 make arrests for criminal offenses enumerated in this code or
26 an equivalent offense in another jurisdiction.

27 (5) “Electronically intercept” or “electronic interception”
28 mean the simultaneous recording with a body wire of a non-
29 consenting party’s conduct or oral communications in his or
30 her home by an investigative or law-enforcement officer or
31 informant who is invited into the home and physically
32 present with the non-consenting party in the home at the time
33 of the recording.

34 (b) Words and phrases that are not defined in this article,
35 but which are defined in article one-d of this chapter, shall
36 have the same meanings established in article one-d unless
37 otherwise noted.

**§62-1F-2. Electronic interception of conduct or oral
communications in the home authorized.**

1 (a) Prior to engaging in electronic interception, as defined
2 in section one of this article, an investigative or law-
3 enforcement officer shall, in accordance with this article, first
4 obtain from a magistrate or a judge of a circuit court within
5 the county wherein the non-consenting party’s home is
6 located an order authorizing said interception. The order
7 shall be based upon an affidavit by the investigative or law-
8 enforcement officer or an informant that establishes probable
9 cause that the interception would provide evidence of the
10 commission of a crime under the laws of this state or the
11 United States.

12 (b) The Legislature hereby requests the supreme court
13 of appeals to promptly undertake all necessary actions and
14 promulgate any requisite rules to assure a magistrate or
15 circuit judge is available after normal business hours to
16 authorize warrants.

§62-1F-3. Application for an order authorizing interception.

1 (a) Each application for an order authorizing electronic
2 interception in accordance with the provisions of this article
3 shall be made only to the magistrate or judge of the circuit
4 court by petition in writing upon oath or affirmation and shall
5 state the applicant's authority to make the application. Each
6 application shall set forth the following:

7 (1) The identity of the investigative or law-enforcement
8 officer making the application, and of the person authorizing
9 the application, who shall be the head of the investigative or
10 law-enforcement agency or an officer of the investigative or
11 law enforcement agency designated in writing by the head of
12 that agency: *Provided*, That an application made by a
13 member of the State Police or an officer assigned to a
14 multijurisdictional task force authorized under section four,
15 article ten, chapter fifteen of this code also may be authorized
16 by the supervisor of that member or officer if the supervisor
17 holds a rank of sergeant or higher;

18 (2) A full and complete statement of the facts and
19 circumstances relied upon by the applicant, to justify his or
20 her belief that an order should be issued, including (i) details
21 as to the particular offense that has been, is being, or is about
22 to be committed, (ii) a description of the person whose
23 conduct or communications are sought to be intercepted and
24 a particular description of the home at which it is anticipated
25 that the interception would occur: *Provided*, That the
26 description of the home may be omitted where there is good
27 cause to believe that the location is subject to change, (iii) a
28 particular description of the type of conduct or
29 communications sought to be intercepted, and (iv) the
30 identity of the person, if known, committing the offense and
31 whose conduct or communications are to be intercepted;

32 (3) A statement of the period of time for which the
33 interception is required to be maintained. If the nature of the
34 investigation is such that the authorization for interception
35 should not automatically terminate when the described
36 conduct or communication has been first obtained, a
37 particular description of facts establishing probable cause to
38 believe additional conduct or communications of the same
39 type will occur thereafter; and

40 (4) Where the application is for the extension of an order,
41 a statement setting forth the results obtained pursuant to such
42 order from the interception or a reasonable explanation of the
43 failure to obtain any such results.

44 (b) The magistrate or judge of the circuit court may
45 require the applicant to furnish additional testimony or
46 documentary evidence in support of the application.

47 (c) Notwithstanding the provisions of subsection (a) of
48 this section, the magistrate or judge may take an oral
49 statement under oath in which the applicant must set forth the
50 information required in subsection (a) of this section. The
51 applicant shall swear the oath by telephone. A magistrate or
52 judge administering an oath telephonically under this
53 subsection shall execute a declaration that recites the manner
54 and time of the oath's administration. The oral statement
55 shall be recorded. The recording shall be considered to be an
56 application for the purposes of this section. In such cases, the
57 recording of the sworn oral statement and the transcribed
58 statement shall be certified by the magistrate or judge
59 receiving it and shall be retained as a part of the record of
60 proceedings for the issuance of the order.

§62-1F-4. Order authorizing interception.

1 (a) Upon application filed pursuant to the provisions of
2 section three of this article, the magistrate or judge of the
3 circuit court may enter an ex parte order, as requested or as
4 modified or moulded, authorizing an electronic interception
5 in a home if the magistrate or judge determines on the basis
6 of the evidence and argument presented by the applicant that:

7 (1) There is probable cause to believe that one or more
8 individuals are committing, have committed, or are about to
9 commit one or more specified crimes under the laws of this
10 state or the United States^{that} will be obtained through
11 interception; and

12 (2) There is probable cause to believe that the home
13 where the electronic interception is to occur is being used, or
14 is about to be used, in connection with the commission of the
15 offense, or offenses: *Provided*, That such determination shall
16 not be required where the identity of the person committing
17 the offense and whose conduct or communications are to be
18 intercepted is known, and the applicant makes an adequate
19 showing as required pursuant to paragraph (ii), subdivision
20 two, subsection (a), section three of this article that the
21 location cannot be predetermined.

22 (b) Each order authorizing an electronic interception in
23 accordance with the provisions of this article shall specify: (i)
24 the identity of the person, if known, whose conduct or
25 communications are to be intercepted, (ii) the nature and
26 location of the home for which authority to intercept is
27 granted, if necessary under subdivision three, subsection (a)
28 of this section, (iii) a particular description of the type of
29 conduct or communications sought to be intercepted and a
30 statement of the particular offense to which it relates, (iv) the
31 identity of the law-enforcement officer or officers applying
32 for authorization to electronically intercept and of the officer
33 authorizing the application and (v) the period of time during
34 which the interception is authorized, including a statement as
35 to whether or not the interception automatically terminates
36 when the described conduct or communication is first
37 obtained.

38 (c) An order entered pursuant to the provisions of this
39 section may authorize the electronic interception for a period
40 of time that is necessary to achieve the objective of the
41 authorization, not to exceed twenty days. Such twenty-day
42 period begins on the day the order is entered. Extensions of
43 an order may be granted, but only upon application for an
44 extension made as provided in subsection (a) of this section

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Suzanne M. Boy
Chief of the House

45 and upon the magistrate or judge of the circuit court making
46 the findings required by subsection (b) of this section. The
47 period of extension may be no longer than the magistrate or
48 judge deems necessary to achieve the purposes for which it
49 was granted and, in no event, for longer than twenty days.
50 Every order and extension thereof shall contain a provision
51 that the authorization to electronically intercept be executed
52 as soon as practicable, be conducted in such a way as to
53 minimize the interception of conduct or communications not
54 otherwise subject to interception under this article and
55 terminate upon attainment of the authorized objective, or in
56 any event within the hereinabove described twenty-day
57 period relating to initial applications.

§62-1F-5. Recording of intercepted communications.

1 (a) If recorded, the contents of any conduct or oral
2 communications electronically intercepted shall be recorded
3 on tape or wire or other comparable device and done in such
4 a way or ways as will protect the recording from editing or
5 alterations thereto.

6 (b) Whenever practicable, the investigative or law
7 enforcement officer overseeing the recording of an electronic
8 interception shall keep a signed, written record of:

9 (1) The date and hours of the surveillance;

10 (2) The time and duration of each electronic interception;

11 (3) The participants, if known, in each electronic
12 interception; and

13 (4) A summary of the content of each intercepted
14 communication.

15 (c) Immediately upon the expiration of the period of time
16 during which interception and recording is authorized by the
17 order, or extensions thereof, such recordings shall be made
18 available, if requested, to the magistrate or judge issuing such
19 order. Custody of the recordings shall be with the law-

20 enforcement officer authorizing the application underlying
21 the order. Such recordings may not be destroyed except upon
22 an order of the magistrate or judge to whom application was
23 made or a circuit judge presiding over any subsequent
24 prosecution related to the electronic interception. The records
25 shall be maintained by the magistrate court clerk or circuit
26 clerk of the county where the application was filed.
27 Duplicate recordings may be made for use or disclosure
28 pursuant to the provisions of subsections (a) and (b), section
29 nine, article one-d of this chapter for investigations by law-
30 enforcement agencies.

§62-1F-6. Sealing of applications, orders and supporting papers.

1 Applications made and orders granted under this article
2 shall be ordered sealed by the magistrate or judge of the
3 circuit court to whom the application is made, and maintained
4 under seal in the custody of the magistrate court clerk or the
5 circuit clerk of the county in where the application was filed.
6 The applications and orders are discoverable and may be
7 disclosed only in accordance with the applicable provisions
8 of this code and the rules of criminal procedure for the State
9 of West Virginia, and may not be destroyed except upon
10 order of such magistrate or judge, and in any event shall be
11 kept for not less than ten years.

**§62-1F-7. Investigative disclosure or use of contents of wire,
electronic or oral communications or derivative
evidence.**

1 (a) Any law enforcement officer who has obtained
2 knowledge of the contents of any electronic interception, or
3 evidence derived therefrom, may disclose such contents or
4 evidence to another law enforcement officer to the extent that
5 such disclosure is appropriate to the proper performance of
6 the official duties of the officer making or receiving the
7 disclosure.

8 (b) Any law enforcement officer who, by any means
9 authorized by this article, has obtained knowledge of the
10 contents of any electronic interception or any evidence

11 derived therefrom may use such contents or evidence to the
12 extent such use is appropriate to the proper performance of
13 his or her official duties.

14 (c) Any person who by any means authorized by this
15 article, has obtained knowledge of the contents of any
16 electronic interception or evidence derived therefrom, may
17 disclose such contents or evidence to a law enforcement
18 officer and may disclose such contents or evidence while
19 giving testimony under oath or affirmation in any criminal
20 proceeding in any court of this State or of another state or of
21 the United States or before any state or Federal grand jury or
22 investigating grand jury.

§62-1F-8. Interception of communications relating to other offenses.

1 When a law enforcement officer, while engaged in court
2 authorized electronic interception in the manner authorized
3 herein, intercepts communications relating to offenses other
4 than those specified in the order of authorization, the contents
5 thereof, and evidence derived therefrom, may be disclosed or
6 used as provided in section seven. Such contents and
7 evidence may be disclosed in testimony under oath or
8 affirmation in any criminal proceeding in any court of this
9 State or of another state or of the United States or before any
10 state or Federal grand jury when authorized by a judge who
11 finds on subsequent application that the contents were
12 otherwise intercepted in accordance with the provisions of
13 this article. Such application shall be made as soon as
14 practicable.

§62-1F-9. Retroactive authorization.

1 Notwithstanding any other provision of this article, when
2 (1) a situation exists with respect to engaging in electronic
3 interception before an order authorizing such interception can
4 with due diligence be obtained;(2) the factual basis for
5 issuance of an order under this article exists; and (3) it is
6 determined that exigent circumstances exist which prevent
7 the submission of an application under section three of this

8 article, conduct or oral communications in the person's home
9 may be electronically intercepted on an emergency basis if an
10 application submitted in accordance with section three of this
11 article is made to a magistrate or judge of the circuit within
12 the county wherein the person's home is located as soon as
13 practicable, but not more than three business days after the
14 aforementioned determination. If granted, the order shall
15 recite the exigent circumstances present and be retroactive to
16 the time of such determination. In the absence of an order
17 approving such electronic interception, the interception shall
18 immediately terminate when the communication sought is
19 obtained or when the application for the order is denied,
20 whichever is earliest.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Handwritten Signature]

Chairman Senate Committee

[Handwritten Signature]

Chairman House Committee

Originating in the House.

In effect from passage.

[Handwritten Signature]

Clerk of the Senate

[Handwritten Signature]

Clerk of the House of Delegates

[Handwritten Signature]

President of the Senate

[Handwritten Signature]

Speaker of the House of Delegates

The within is appended this the 5th
day of September, 2007.

[Handwritten Signature]
Governor

PRESENTED TO THE
GOVERNOR

Date 8/21/07

Time 11:15 AM