

AN ACT

ENTITLED, An Act to revise certain provisions regarding the interception of certain communications.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 23A-35A-1 be amended to read:

23A-35A-1. Terms used in this chapter mean:

- (1) "Aggrieved person," a person who was a party to any intercepted wire, electronic, or oral communication or a person against whom the interception was directed;
- (2) "Attorney general," the attorney general of the State of South Dakota;
- (3) "Chapter 119 of the United States Code," Chapter 119 of Part I of Title 18, United States Code, being Public Law 90-351, the Omnibus Crime Control and Safe Streets Act of 1968;
- (4) "Communications common carrier," the meaning given to the term, common carrier, by section 153 of Title 47 of the United States Code;
- (5) "Contents," with respect to any wire, electronic, or oral communication, any information concerning the identity of the parties to the communication or the existence, substance, purport, or meaning of that communication;
- (6) "Eavesdropping device," any electronic, mechanical, or other apparatus which is intentionally used to intercept a wire, electronic, or oral communication other than:
 - (a) Any telephone, telegraph instrument, or electronic communication device, equipment, or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of business and being used by the subscriber or user in the ordinary course of business; or (ii) being used by a communications common carrier in the ordinary course of business, or

- by an investigative or law enforcement officer in the ordinary course of duty; or
- (b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal;
- (7) "Intercept," the aural acquisition of the contents of any wire, electronic, or oral communication through the use of any eavesdropping device;
- (8) "Investigative or law enforcement officer," any officer of the State of South Dakota or any political subdivision of this state who is empowered by the laws of this state to conduct investigations of or to make arrests for offenses designated and enumerated in this chapter, any law enforcement officer of the United States and any attorney authorized by the laws of this state to prosecute or participate in the prosecution of offenses designated and enumerated in this chapter;
- (9) "Judge," or "judge of competent jurisdiction," the judge of any circuit court of the State of South Dakota;
- (10) "Oral communication," any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation;
- (11) "Pen register," a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the communication system that the device is attached. The term does not include any device used by a provider or customer of a wire communication service for billing, or recording as an incident to billing, for communications services provided by the provider or customer of a wire communication service for cost accounting or other similar purposes in the ordinary course of business;
- (12) "Person," any employee, or agent of the United States or any state or political subdivision

thereof, and any individual, partnership, limited liability company, association, joint stock company, trust, or corporation;

(13) "State's attorney," the state's attorney of any county of the State of South Dakota;

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

(15) "Wire communication," any communication made through the use of facilities for the transmission of communications by the aid of wire, cable, radio, or other connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating the facilities for the transmission of interstate or foreign communications;

(16) "Electronic communication," any transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature transmitted by a wire, radio, electromagnetic, electronic, or optical system.

Section 2. That § 23A-35A-2 be amended to read:

23A-35A-2. Any order authorizing or approving the interception of wire, electronic, or oral communications may be granted, subject to the provisions of this chapter, if the interception may provide or has provided evidence of the commission of, or of any conspiracy to commit, the following offenses as otherwise defined by the laws of this state: murder; kidnapping; gambling; robbery; bribery; theft; unlawful use of a computer; unauthorized manufacturing, distribution or counterfeiting of controlled substances or marijuana; and rape.

Section 3. That § 23A-35A-3 be amended to read:

23A-35A-3. The attorney general or any state's attorney may apply to any circuit judge for an order to authorize or approve the interception of wire, electronic, or oral communications by an

investigative or law enforcement officer having the responsibility of investigating the offense for which the application is made and any offense pursuant to § 23A-35A-2. The attorney general or the state's attorney applying may designate a deputy or assistant to make any subsequent applications or presentations necessary to implement the order or comply with any of the provisions of this chapter.

Section 4. That § 23A-35A-4 be amended to read:

23A-35A-4. The attorney general or state's attorney shall make an application pursuant to § 23A-35A-3 in writing and upon the oath or affirmation of the applicant. The application shall include:

- (1) The name and title of the applicant;
- (2) A full and complete statement of the facts and circumstances relied upon by the applicant, including the supporting oath or affirmation of the investigating officer of any police department of the state or any political subdivision thereof, or the investigating sheriff or deputy of any county, to justify the belief that an order should be issued, including:
 - (a) Details as to the particular crime that has been, is being, or is about to be committed;
 - (b) The identity of the person, if known, believed to be committing the offense and whose communications are to be intercepted;
 - (c) A particular description of the type of communications sought to be intercepted;
 - (d) A particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted; and
 - (e) In the case of a telegraphic, electronic, or telephonic communication, identifying the particular telephone number or telegraph line involved;
- (3) A full and complete statement as to if other investigative procedures have been tried and failed, why other investigative procedures reasonably appear to be unlikely to succeed if

tried, or to be too dangerous;

- (4) A statement of the period of time the interception is required to be maintained. If the nature of the investigation is such that authorization to intercept should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur after the first communication obtained;
- (5) A full and complete statement of the facts concerning all previous applications known to the person authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, electronic, or oral communications involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each such application; and
- (6) If the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

Section 5. That § 23A-35A-5 be amended to read:

23A-35A-5. Only a judge of a circuit court of the State of South Dakota may grant orders authorizing the interception of wire, electronic, or oral communications.

Section 6. That § 23A-35A-6 be amended to read:

23A-35A-6. Upon proper application, a judge may enter an ex parte order, as requested or with any appropriate modifications, authorizing wiretapping or eavesdropping if the judge determines based on the facts submitted by the applicant that:

- (1) There is probable cause to believe that a person is committing, has committed, or is about to commit a particular crime pursuant to § 23A-35A-2;
- (2) There is probable cause to believe that particular communications concerning that offense

will be obtained through the interception;

- (3) Normal investigative procedures have been tried and have failed, reasonably appear to be unlikely to succeed if tried, or to be too dangerous; and
- (4) There is probable cause to believe that the facilities from which or the place where the wire, electronic, or oral communications are to be used, in connection with the commission of the offense, or are leased to, listed in the name of or commonly used by the person.

Section 7. That § 23A-35A-7 be amended to read:

23A-35A-7. Each order authorizing the interception of any wire, electronic, or oral communication shall specify:

- (1) The identity of the person, if known, whose communications are to be intercepted;
- (2) The nature and location of the communications facilities as to which, or the place where authority to intercept is granted;
- (3) A particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
- (4) The identity of the agency authorized to intercept the communications, and of the person authorizing the application;
- (5) The period of time the interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained; and
- (6) That the authorization for wiretapping or eavesdropping be executed as soon as practicable; that the wiretapping or eavesdropping be conducted in such a way as to minimize interception of communications not otherwise subject to interception under this section; and that the wiretapping or eavesdropping shall terminate upon attainment of the

authorized objective, or on the date specified, whichever comes first.

Section 8. That § 23A-35A-10 be amended to read:

23A-35A-10. No order entered under this section may authorize the interception of any wire, electronic, or oral communication for any period longer than is necessary to achieve the objective of the authorization, in any event no longer than thirty days. Any extension of any order may be granted, but only upon application for an extension made in accordance with § 23A-35A-4 and the judge makes the required findings pursuant to § 23A-35A-6. The period of extension may not be longer than the authorizing judge deems necessary to achieve the purposes for which the extension was granted and in no event for longer than thirty days.

Section 9. That § 23A-35A-13 be amended to read:

23A-35A-13. The contents of any wire, electronic, or oral communication intercepted by any means authorized by this statute shall, if possible, be recorded. The recording of the contents of any wire, electronic, or oral communication under this section shall be done in a way to protect the recording from editing or alteration. Immediately upon the expiration of the period of the order or extension, the recordings shall be made available to the judge issuing the order or extension and sealed under the judge's direction.

Section 10. That § 23A-35A-14 be amended to read:

23A-35A-14. Within ninety days after an application under § 23A-35A-3 is denied, or the period of an order or extension expires, the issuing or denying judge shall cause the persons named in the order or application and any other parties to intercepted communications as the judge may determine the interests of justice require, to be served with an inventory including notice of:

- (1) The fact of the entry of the order or the application;
- (2) The date of the entry and the period of authorized interception, or the denial of the application; and

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

On motion, the judge may make available to the person or the person's counsel for inspection the portions of the intercepted communications, applications, and order as the judge determines to be in the interest of justice. On an ex parte showing of good cause to the judge, the serving of the notice required by this section may be postponed.

Section 11. That § 23A-35A-15 be amended to read:

23A-35A-15. 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 the contents, may disclose the contents to another investigative or law enforcement officer to the extent that a disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

Section 12. That § 23A-35A-16 be amended to read:

23A-35A-16. 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 the contents may use the contents to the extent appropriate to the proper performance of the officer's official duties.

Section 13. That § 23A-35A-17 be amended to read:

23A-35A-17. Any person, who has received, by any means authorized by this chapter or chapter 119 of the United States Code, or a like statute of another state, any information concerning the contents of a wire, electronic, or oral communication, or evidence derived from the contents, intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or any derivative evidence while giving testimony under oath or affirmation in any proceeding in any court in this state, before any grand jury in this state, in any court of the United

States or of any other state, or in any federal or state grand jury proceeding.

Section 14. That § 23A-35A-18 be amended to read:

23A-35A-18. If an investigative or law enforcement officer, while engaged in intercepting wire, electronic, or oral communications in the manner authorized by this chapter, intercepts wire, electronic, or oral communications relating to offenses not specified in the order of authorization or approval, the contents of the communication, and evidence derived from the communication, may be disclosed or used as provided in §§ 23A-35A-15 and 23A-35A-16. The contents and any evidence derived from the contents may be used under § 23A-35A-17 if authorized or approved by a circuit court judge where the judge finds on subsequent application, made as soon as practicable, that the contents were otherwise intercepted in accordance with the provisions of this chapter.

Section 15. That § 23A-35A-19 be amended to read:

23A-35A-19. No otherwise privileged wire, electronic, or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter may lose its privileged character.

Section 16. That § 23A-35A-20 be amended to read:

23A-35A-20. Except as provided in § 23A-35A-21, a person is guilty of a Class 5 felony who is not:

- (1) A sender or receiver of a communication who intentionally and by means of an eavesdropping device overhears or records a communication, or aids, authorizes, employs, procures, or permits another to overhear or record, without the consent of either a sender or receiver of the communication;
- (2) A person present during a conversation or discussion who intentionally and by means of an eavesdropping device overhears or records the conversation or discussion, or aids, authorizes, employs, procures, or permits another to overhear or record, without the consent of a party to the conversation or discussion; or

- (3) A member of a jury who intentionally records or listens to by means of an eavesdropping device the deliberations of the jury or aids, authorizes, employs, procures, or permits another to record or listen.

Section 17. That § 23A-35A-21 be amended to read:

23A-35A-21. The following is exempt from the provisions of this chapter:

- (1) Wiretapping and eavesdropping pursuant to an ex parte order granted pursuant to § 23A-35A-6;
- (2) The normal use of services, equipment, and facilities provided by a common carrier pursuant to tariffs on file with the Public Utilities Commission of the State of South Dakota or the federal communications commission;
- (3) The normal functions of any operator of a switchboard;
- (4) Any officer, agent, or employee of a communications common carrier engaged in the business of providing service, equipment, and facilities for communication who performs acts otherwise prohibited by this chapter in providing such communication services, equipment, and facilities or in constructing, maintaining, repairing, operating, or using same, including the obtaining of billing and accounting information, the protecting of the communication services, equipment, and facilities from illegal use in violation of tariffs on file with the corporation commission of this state or the federal communications commission and the protecting of the common carrier from the commission of fraud against it;
- (5) The providing of requested information or other response to a subpoena or other order issued by a court of competent jurisdiction or on demand of other lawful authority; and
- (6) Any officer, agent, or employee of a communications common carrier, or any common carrier, who provides information, facilities, or technical assistance to an investigative or

law enforcement officer authorized to intercept or eavesdrop pursuant to an ex parte order granted pursuant to § 23A-35A-6.

Section 18. That § 23A-35A-23 be amended to read:

23A-35A-23. The prohibition in § 23A-35A-22 does not apply with respect to the use of a pen register or a trap and trace device by a provider of wire or electronic communication service:

- (1) Relating to the operation, maintenance, and testing of a wire or electronic communication service or to the protection of the rights or property of the provider, or to the protection of users of that service from abuse of service or unlawful use of service;
- (2) To record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful, or abusive use of service; or
- (3) If the consent of the user of that service has been obtained.

Section 19. That § 23A-35A-27 be amended to read:

23A-35A-27. An order issued under § 23A-35A-26:

- (1) Shall specify the identity, if known, of the person whose name is listed on the telephone line or electronic communication device that the pen register or trap and trace device is to be attached; the identity, if known, of the person who is the subject of the criminal investigation; the number and, if known, the physical location of the telephone line or electronic communication device that the pen register or trap and trace device is to be attached and, in the case of a trap and trace device, the geographic limits of the trap and trace order; and a statement of the offense the information likely to be obtained by the pen register or trap and trace device relates to; and
- (2) Shall direct, upon the request of the applicant, the furnishing of information, facilities, and

technical assistance necessary to accomplish the installation of the pen register or trap and trace device under §§ 23A-35A-30 to 23A-35A-33, inclusive.

Section 20. That § 23A-35A-31 be amended to read:

23A-35A-31. Upon the request of a prosecuting attorney or an officer of a law enforcement agency authorized to receive the results of a trap and trace device under § 23A-35A-1 or §§ 23A-35A-22 to 23A-35A-34, inclusive, a provider of a wire or electronic communication service, landlord, custodian, or other person shall install the device immediately on the appropriate line or electronic device and shall furnish the investigative or law enforcement officer all additional information, facilities, and technical assistance including installation and operation of the device unobtrusively and with minimal interference with the services the person ordered by the court provides the party with respect to the installation and use is to take place, if the installation and assistance is directed by a court order as provided in § 23A-35A-27. Unless otherwise ordered by the court, the results of the trap and trace device shall be furnished to the officer of a law enforcement agency, designated in the court order, at reasonable intervals during regular business hours for the duration of the order.

An Act to revise certain provisions regarding the interception of certain communications.

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I certify that the attached Act
originated in the
HOUSE as Bill No. 1028

Chief Clerk
=====

Speaker of the House

Attest:

Chief Clerk

President of the Senate

Attest:

Secretary of the Senate

House Bill No. 1028
File No. _____
Chapter No. _____

=====
Received at this Executive Office
this ____ day of _____ ,
20__ at _____ M.

By _____
for the Governor
=====

The attached Act is hereby
approved this _____ day of
_____, A.D., 20__

Governor

=====
STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed _____, 20__
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State