

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas
2 84th General Assembly
3 Regular Session, 2003
4

As Engrossed: H4/1/03 S4/11/03

A Bill

HOUSE BILL 2502

5 By: Representatives Adams, Childers, Sullivan
6 By: *Senator Glover*
7

For An Act To Be Entitled

10 AN ACT CONCERNING THE INTERCEPTION AND USE OF
11 WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS; AND FOR
12 OTHER PURPOSES.
13

Subtitle

15 AN ACT CONCERNING THE INTERCEPTION AND
16 USE OF WIRE, ORAL, OR ELECTRONIC
17 COMMUNICATIONS.
18
19

20 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
21

SECTION 1. Definitions.

As used in this act:

24 (1) "Aggrieved person" means a person who was a party to an
25 intercepted wire, oral, or electronic communication, or a person against whom
26 the interception was directed;

27 (2) "Aural transfer" means a transfer containing the human voice at
28 any point between and including the point of origin and the point of
29 reception;

30 (3) "Communication common carrier" means a person engaged as
31 a common carrier for hire in the transmission of wire or electronic
32 communications;

33 (4) "Contents", when used with respect to a wire, oral, or electronic
34 communication, includes any information concerning the substance, purport, or
35 meaning of that communication;

36 (5) "Covert entry" means any entry into, or onto premises which, if



1 made without a court order, would be a violation of the Arkansas Criminal
2 Code;

3 (6) "Director" means the Director of the Department of Arkansas
4 State Police or, if the director is absent or unable to serve, the person
5 designated by the director to serve in the director's capacity of the
6 Department of Arkansas State Police;

7 (7)(A) "Electronic communication" means a transfer of signs, signals,
8 writing, images, sounds, data, or intelligence of any nature transmitted in
9 whole or in part by a wire, radio, electromagnetic, photoelectronic, or
10 photo-optical system.

11 (B) "Electronic communication" does not include:

12 (i) A wire or oral communication;

13 (ii) A communication made through a tone-only paging
14 device; or

15 (iii) A communication from a tracking device;

16 (8) "Electronic communications service" means a service offered to the
17 public that provides to users of the service the ability to send or receive
18 wire or electronic communications;

19 (9)(A) "Electronic, mechanical, or other device" means a device
20 that may be used for the nonconsensual interception of wire, oral, or
21 electronic communications.

22 (B) "Electronic, mechanical, or other device" does not
23 include a telephone or telegraph instrument, the equipment, or a facility
24 used for the transmission of electronic communications, or a component of the
25 equipment if the instrument, equipment, facility, or component is:

26 (i) Furnished to the subscriber or user by a provider of
27 wire or electronic communications service in the ordinary course of the
28 provider's business and is used by the subscriber or user in the ordinary
29 course of its business;

30 (ii) Furnished by a subscriber or user for connection to
31 the facilities of a wire or electronic communications service for use in the
32 ordinary course of the subscriber's or user's business;

33 (iii) Used by a communications common carrier or
34 electronic communication service in the ordinary course of its business; or

35 (iv) Used by a certified law enforcement officer in the
36 ordinary course of the officer's duties;

1 (10) "Electronic storage" means:

2 (A) A temporary, intermediate storage of a wire or electronic
3 communication that is incidental to the electronic transmission of the
4 communication; or

5 (B) Storage of a wire or electronic communication by an
6 electronic communications service for purposes of backup protection of the
7 communication;

8 (11) "Enumerated offense" means one of the following criminal offenses
9 and any solicitation, attempt, or conspiracy thereof:

10 (A) Capital Murder, § 5-10-101;

11 (B) Murder in First Degree, § 5-10-102;

12 (C) Kidnapping, § 5-11-102;

13 (D) Aggravated Robbery, § 5-12-103;

14 (E) Terroristic Act, § 5-13-310;

15 (F) Rape, § 5-14-103;

16 (G) Computer child pornography, § 5-27-603;

17 (H) Causing a catastrophe, § 5-38-202;

18 (I) Continuing criminal enterprise, § 5-64-414;

19 (J) Operating a Gambling House, § 5-66-103;

20 (K) Criminal possession of explosives, § 5-73-109;

21 (L) Engaging in continuing criminal gang organization or
22 enterprise, § 5-74-104; or

23 (M) Unlawful discharge of a firearm from a vehicle, § 5-74-107;

24 (12) "Intercept" means the aural or other acquisition of the contents
25 of a wire, oral, or electronic communication through the use of an
26 electronic, mechanical, or other device;

27 (13)(A) "Oral communication" means an oral communication uttered by a
28 person exhibiting an expectation that the communication is not subject to
29 interception under circumstances justifying that expectation.

30 (B) "Oral communication" does not include an electronic
31 communication;

32 (14)(A) "Pen register" means a device that attaches to a telephone
33 line and records or decodes electronic or other impulses to identify numbers
34 dialed or otherwise transmitted on the telephone line.

35 (B) This term does not include a device used by a provider or
36 customer of:

1 (i) A wire or electronic communication service for
2 purposes of charging a fee for the service; or

3 (ii) A wire or electronic communication service during the
4 ordinary course of the provider's or customer's business, including cost
5 accounting and security control;

6 (15) "Readily accessible to the general public" means, with respect to
7 a radio communication, a communication that is not:

8 (A) Scrambled or encrypted;

9 (B) Transmitted using modulation techniques whose essential
10 parameters have been withheld from the public with the intention of
11 preserving the privacy of the communication;

12 (C) Carried on a subcarrier or other signal subsidiary to a
13 radio transmission;

14 (D) Transmitted over a communication system provided by a common
15 carrier, unless the communication is a tone-only paging system communication;

16 (E) Transmitted on frequencies allocated under Part 25, Subpart
17 D, E, or F of Part 74, or Part 94 of the rules of the Federal Communications
18 Commission as they existed on January 1, 2003, unless, in the case of a
19 communication transmitted on a frequency allocated under Part 74 that is not
20 exclusively allocated to broadcast auxiliary services, the communication is a
21 two-way voice communication by radio; or

22 (F) An electronic communication;

23 (16) "Residence" means a structure or the portion of a structure used
24 as a person's home, or fixed place of habitation to which the person
25 indicates an intent to return after any temporary absence;

26 (17) "User" means a person who uses an electronic communications
27 service and is authorized by the provider of the service to use the service;

28 (18)(A) "Wire communication" means an aural transfer made in whole or
29 in part, through the use of facilities for the transmission of communications
30 by the aid of wire, cable, or other like connection between the point of
31 origin and the point of reception, including the use of a connection in a
32 switching station, furnished or operated by a person authorized to engage in
33 providing or operating the facilities for the transmission of communications
34 as a communications common carrier;

35 (B) "Wire communication" includes the electronic storage of a
36 wire communication;

1
2 SECTION 2. Prohibition of use as evidence of intercepted
3 communications.

4 (a) The contents of an intercepted communication and evidence derived
5 from an intercepted communication may not be received in evidence in any
6 trial, hearing, or other proceeding in or before any court, grand jury,
7 department, officer, agency, regulatory body, legislative committee, or other
8 authority of the United States or of this state, or a political subdivision
9 of this state if the disclosure of that information would be in violation of
10 this act.

11 (b) The contents of an intercepted communication and evidence derived
12 from an intercepted communication may be received in a civil trial, hearing,
13 or other proceeding only if the civil trial, hearing, or other proceeding
14 arises out of a violation of an enumerated offense.

15
16 SECTION 3. Judges authorized to consider interception applications.

17 (a) A circuit judge may act on an application for authorization to
18 intercept wire, oral, or electronic communications if one of the following is
19 located within the judicial district of the circuit judge:

20 (1) The site of:

21 (A) The proposed interception; or

22 (B) The interception device to be installed or monitored;

23 (2) The communication device to be intercepted;

24 (3) The billing, residential, or business address of the
25 subscriber to the electronic communications service to be intercepted;

26 (4) The headquarters of the law enforcement agency that makes a
27 request for or executes an order authorizing an interception; or

28 (5) The headquarters of the service provider.

29 (b)(1) If the circuit judge is absent or unable to serve or if exigent
30 circumstances exist, the application may be made to a circuit judge within an
31 adjacent judicial circuit.

32 (2)(A) Exigent circumstances does not include a denial of a
33 previous application based on the same facts and circumstances.

34 (B) To be valid, the application must fully explain the
35 circumstances justifying application under this subsection.

36 (C) The application shall disclose whether it or any substantially

1 similar application has been denied.

2
3 SECTION 4. Offenses for which interceptions may be authorized.

4 A judge may issue an order authorizing interception of wire, oral, or
5 electronic communications only if the prosecutor applying for the order shows
6 probable cause to believe that the interception will provide evidence of the
7 commission of an enumerated offense.

8
9 SECTION 5. Control of intercepting devices.

10 (a)(1) Only the Department of Arkansas State Police is authorized by
11 this act to own, possess, install, operate, or monitor electronic,
12 mechanical, or other devices except that nothing in this act shall serve or
13 be interpreted to prohibit, restrict, or limit in any way a communication
14 common carrier or a provider of wire or electronic communication from owning,
15 possessing, installing, operating, monitoring, or otherwise using an
16 electronic, mechanical, or other intercepting device in the ordinary course
17 of the provider's business as necessary for quality control and network
18 security purposes.

19 (2) The Department of Arkansas State Police may be assisted by a
20 certified law enforcement officer in the operation and monitoring of an
21 interception of wire, oral, or electronic communications, if a certified law
22 enforcement officer of the Department of Arkansas State Police is present at
23 all times.

24 (b) The director shall designate in writing the certified law
25 enforcement officers of the Department of Arkansas State Police who are
26 responsible for the possession, installation, operation, and monitoring of
27 electronic, mechanical, or other devices for the department.

28
29 SECTION 6. Request for application for interception.

30 (a) The director may, based on written affidavits, request in writing
31 that a prosecutor apply for an order authorizing interception of wire, oral,
32 or electronic communications.

33 (b)(1) Using written affidavits, the chief of a municipal police
34 department or the sheriff of any county, or the acting chief or sheriff
35 thereof, may request in writing that a prosecutor apply for an order
36 authorizing the interception of wire, oral, or electronic communications.

1 (2) Before requesting an application under this subsection (b),
2 the chief of a municipal police department or the sheriff of any county must
3 submit the request and supporting affidavits to the director, who shall make
4 a finding, in writing, whether the request and supporting affidavits
5 establish;

6 (A) That other investigative procedures have been tried
7 and failed;

8 (B) That other methods reasonably appear unlikely to
9 succeed, or to be too dangerous if tried;

10 (C) That the order is feasible and justifiable; and

11 (D) Whether the Department of the Arkansas State Police
12 has the necessary resources available.

13 (3) The prosecutor may file the application only after a written
14 positive finding on all of the requirements by the director.

15
16 SECTION 7. Authorization for disclosure and use of intercepted
17 communications.

18 (a) A certified law enforcement officer who, by any means authorized
19 by this act, obtains knowledge of the contents of a wire, oral, or electronic
20 communication or evidence derived from the communication may:

21 (1) Disclose the contents or evidence to other certified law
22 enforcement officers to the extent that the disclosure is appropriate to the
23 proper performance of the official duties of the officer making or receiving
24 the disclosure;

25 (2) Use as appropriate to the proper performance of his or her
26 official duties.

27 (3) Disclose the contents of that communication or the
28 derivative evidence while giving testimony under oath in any proceeding held
29 under the authority of the United States, of this state, or of a political
30 subdivision of this state.

31 (b) An otherwise privileged wire, oral, or electronic communication
32 intercepted in accordance with, or in violation of, this act does not lose
33 its privileged character, and any evidence derived from the privileged
34 communication against the party to the privileged communication shall be
35 considered privileged also.

36 (c)(1) If an investigative or certified law enforcement officer, while

1 engaged in intercepting wire, oral, or electronic communications in a manner
2 authorized by this act, intercepts wire, oral, or electronic communications
3 relating to offenses other than those specified in the order of
4 authorization, the contents of, and evidence derived from the communication
5 may be disclosed or used as provided by subdivisions (a)(1) and (a)(2) of
6 this section.

7 (2) The contents and any evidence derived therefrom may be used
8 under subdivision (a)(3) of this section if authorized by a circuit judge and
9 where the judge finds, on subsequent application, that the contents were
10 otherwise intercepted in accordance with this act. The application shall be
11 made as soon as practicable.

12
13 SECTION 8. Application for interception authorization.

14 (a)(1) To be valid, an application for an order authorizing the
15 interception of a wire, oral, or electronic communication must be made in
16 writing under oath to a circuit judge and must state the applicant's
17 authority to make the application.

18 (2) An applicant must include the following information in the
19 application:

20 (A) The identity of the prosecutor making the application
21 and of the officer requesting the application;

22 (B) A complete statement of the facts and circumstances
23 relied on by the applicant to justify his or her belief that an order should
24 be issued, including:

25 (i) Details about the particular offense that has
26 been, is being, or is about to be committed;

27 (ii) A particular description of the nature and
28 location of the facilities from which, or the place where, the communication
29 is to be intercepted;

30 (iii) A particular description of the type of
31 communication sought to be intercepted; and

32 (iv) The identity of the person, if known,
33 committing the offense and whose communications are to be intercepted;

34 (C) A complete statement as to whether or not other
35 investigative procedures have been tried and failed or why they reasonably
36 appear to be unlikely to succeed or to be too dangerous if tried;

1 (D) A statement of the period of time for which the
2 interception must be maintained and, if the nature of the investigation is
3 such that the authorization for interception should not automatically
4 terminate when the described type of communication is first obtained, a
5 particular description of facts establishing probable cause to believe that
6 additional communications of the same type will occur after the described
7 type of communication is obtained;

8 (E) A statement of whether a covert entry will be
9 necessary to properly and safely install the wiretapping or electronic
10 surveillance or eavesdropping equipment and, if a covert entry is requested,
11 a statement as to why the entry is necessary and proper under the facts of
12 the particular investigation, including a complete statement as to whether
13 other investigative techniques have been tried and have failed or why they
14 reasonably appear to be unlikely to succeed or to be too dangerous if tried
15 or are not feasible under the circumstances or exigencies of time;

16 (F) A complete statement of the facts concerning all
17 applications known to the prosecutor making the applications that have been
18 previously made to a circuit judge for authorization to intercept wire, oral,
19 or electronic communications involving any of the persons, facilities, or
20 places specified in the application and of the action taken by the circuit
21 judge on each application; and

22 (G) If the application is for the extension of an order, a
23 statement of the results already obtained from the interception or a
24 reasonable explanation of the failure to obtain results.

25 (b) The circuit judge may, in an ex-parte hearing in chambers, require
26 additional testimony or documentary evidence in support of the application,
27 and the testimony or documentary evidence shall be preserved as part of the
28 application.

29
30 SECTION 9. Action on application for interception order.

31 (a) On receipt of an application, the circuit judge may enter an ex-
32 parte order, as requested or as modified, authorizing interception of wire,
33 oral, or electronic communications if the judge determines from the evidence
34 submitted by the applicant that:

35 (1) There is probable cause to believe that a person is
36 committing, has committed, or is about to commit a particular enumerated

1 offense or any attempt, conspiracy, or solicitation thereof;

2 (2) There is probable cause to believe that particular
3 communications concerning that offense will be obtained through the
4 interception;

5 (3) Normal investigative procedures have been tried and have
6 failed or reasonably appear to be unlikely to succeed or to be too dangerous
7 if tried;

8 (4) There is probable cause to believe that the facilities from
9 which, or the place where, the wire, oral, or electronic communications are
10 to be intercepted are being used, or are about to be used, in connection with
11 the commission of an offense or are leased to, listed in the name of, or
12 commonly used by the person; and

13 (5) A covert entry is or is not necessary to properly and safely
14 install the wiretapping or electronic surveillance or eavesdropping
15 equipment.

16 (b) An order authorizing the interception of a wire, oral, or
17 electronic communication must specify:

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

20 (2) The nature and location of the communications facilities as
21 to which, or the place where, authority to intercept is granted;

22 (3) A particular description of the type of communication sought
23 to be intercepted and a statement of the particular offense to which it
24 relates;

25 (4) The identity of the officer making the request and the
26 identity of the prosecutor;

27 (5) The time during which the interception is authorized,
28 including a statement of whether or not the interception will automatically
29 terminate when the described communication is first obtained; and

30 (6) Whether or not a covert entry or surreptitious entry is
31 necessary to properly and safely install wiretapping, electronic
32 surveillance, or eavesdropping equipment.

33 (c)(1) In an order authorizing the interception of a wire, oral, or
34 electronic communication, the circuit judge issuing it, on request of the
35 applicant, shall direct that a provider of wire or electronic communications
36 service, a communication common carrier, landlord, custodian, or other

1 person, furnish the applicant all information, facilities, and technical
2 assistance necessary to accomplish the interception unobtrusively and with a
3 minimum of interference with the services that the provider, carrier,
4 landlord, custodian, or other person, is providing the person whose
5 communications are to be intercepted.

6 (2) Any provider of wire or electronic communications service,
7 communication common carrier, landlord, custodian, or other person furnishing
8 facilities or technical assistance is entitled to compensation by the
9 applicant for the facilities or assistance at the prevailing rates.

10 (d)(1) An order entered under this section may not authorize the
11 interception of a wire, oral, or electronic communication for longer than is
12 necessary to achieve the objective of the authorization and in no event may
13 it authorize interception for more than thirty (30) days.

14 (2) The issuing judge may grant extensions of an order, but only
15 on application for an extension made under section 8 of this act and the
16 court making the findings required by subsection (a) of this section.

17 (3) The period of extension may not be longer than the
18 authorizing judge deems necessary to achieve the purposes for which it is
19 granted and in no event may the extension be for more than thirty (30) days.

20 (4) To be valid, each order and extension of an order must
21 provide that the authorization to intercept be executed as soon as
22 practicable, be conducted in a way that minimizes the interception of
23 communications not otherwise subject to interception under this act, and
24 terminate on obtaining the authorized objective or within thirty (30) days,
25 whichever occurs sooner.

26 (e) An order entered under this section may not authorize a covert
27 entry into a residence solely for the purpose of intercepting a wire or
28 electronic communication.

29 (f) An order entered under this section may not authorize a covert
30 entry into or onto a premises for the purpose of intercepting an oral
31 communication unless:

32 (1) The circuit judge, in addition to making the determinations
33 required under subsection (a) of this section, determines that:

34 (A)(i) The premises into or onto which the covert entry is
35 authorized, or the person whose communications are to be obtained, has been
36 the subject of a pen register previously authorized in connection with the

1 same investigation;

2 (ii) The premises into or onto which the covert
3 entry is authorized or the person whose communications are to be obtained has
4 been the subject of an interception of wire or electronic communications
5 previously authorized in connection with the same investigation; and

6 (iii) That the procedures have failed; or

7 (B) That the procedures enumerated in subdivision
8 (f)(1)(A) of this subsection reasonably appear to be unlikely to succeed or
9 to be too dangerous if tried or, are not feasible under the circumstances or
10 exigencies of time; and

11 (2) The order, in addition to the matters required to be
12 specified under subsection (b) of this section, specifies that the covert
13 entry is for the purpose of intercepting oral communications of two or more
14 persons and that there is probable cause to believe they are committing, have
15 committed, or are about to commit a particular enumerated offense, or any
16 attempt, conspiracy, or solicitation thereof.

17 (g) Whenever an order authorizing interception is entered under this
18 act, the order may require reports to the circuit judge who issued the order
19 showing what progress has been made toward achievement of the authorized
20 objective and the need for continued interception. Reports shall be made at
21 any interval the circuit judge requires.

22 (h) A circuit judge who issues an order authorizing the interception
23 of a wire, oral, or electronic communication may not hear a criminal
24 prosecution in which evidence derived from the interception may be used or in
25 which the order may be an issue.

26
27 SECTION 10. Procedure for preserving intercepted communications by law
28 enforcement.

29 (a)(1) The contents of a wire, oral, or electronic communication
30 intercepted by means authorized by this act shall be recorded on tape, wire,
31 or other comparable device.

32 (2) The recording of the contents of a wire, oral, or electronic
33 communication under this subsection shall be done in a way that protects the
34 recording from editing or other alterations.

35 (b)(1) Immediately on the expiration of the period of the order and
36 all extensions, if any, the recordings shall be made available to the circuit

1 judge issuing the order, and sealed under his or her directions.

2 (2) Custody of the recordings shall be wherever the circuit
3 judge orders.

4 (3) The recordings may not be destroyed until at least ten (10)
5 years after the date of expiration of the order and the last extension, if
6 any.

7 (4) A recording may be destroyed only by order of the circuit
8 judge for the judicial circuit in which the interception was authorized.

9 (c)(1) Duplicate recordings may be made for use or disclosure under
10 subsections (a) and (b) of section 7 of this act for investigations.

11 (2) However, duplicate recordings are subject to the same
12 controls on dissemination and use as the original.

13 (d) The presence of the seal required by subsection (b) of this
14 section or a satisfactory explanation of its absence is a prerequisite for
15 the use or disclosure of the contents of a wire, oral, or electronic
16 communication or evidence derived from the communication under subsection (c)
17 of section 7, of this act.

18
19 SECTION 11. Sealing of orders and applications by law enforcement.

20 (a) The circuit judge shall seal each application made, and order
21 granted under this act.

22 (b) Custody of the applications and orders shall be wherever the
23 circuit judge directs.

24 (c) An application or order may be disclosed only on a showing of good
25 cause before a circuit judge and may not be destroyed until at least ten (10)
26 years after the date it is sealed.

27 (d) An application or order may be destroyed only by order of the
28 circuit judge of the judicial district in which it was made or granted.

29
30 Section 12. Contempt.

31 A violation of section 10 or 11 of this act may be punished as contempt
32 of court.

33
34 SECTION 13. Notice and disclosure of interception to a party.

35 (a) Within a reasonable time but not later than ninety (90) days after
36 the date an application for an order is denied or after the date an order or

1 the last extension, if any, expires, the circuit judge who granted or denied
2 the application shall cause to be served on the persons named in the order,
3 or the application, and any other parties to intercepted communications, if
4 any, an inventory, which must include notice:

5 (1) Of the entry of the order or the application;

6 (2) Of the date of the entry and the period of authorized
7 interception or the date of denial of the application; and

8 (3) That during the authorized period wire, oral, or electronic
9 communications were or were not intercepted.

10 (b) The circuit judge, on motion, may in his or her discretion make
11 available to a person or his or her counsel for inspection, any portion of an
12 intercepted communication, application, or order that the judge determines,
13 in the interest of justice, to disclose to that person.

14 (c)(1) On an ex-parte showing of good cause to the circuit judge, the
15 -serving of the inventory required by this section may be postponed, but in no
16 event may any evidence derived from an order under this act be disclosed in
17 any trial, until after the inventory has been served.

18 (2) Additional postponements of up to ninety (90) days may be
19 granted upon showing of good cause, but such showings are required for each
20 application.

21 (3) Under no circumstances shall the postponements total more
22 than two (2) years.

23
24 SECTION 14. Preconditions to use as evidence.

25 (a)(1) The contents of an intercepted wire, oral, or electronic
26 communication, or evidence derived from the communication may not be received
27 in evidence or otherwise disclosed in a trial, hearing, or other proceeding
28 in a federal or state court unless each party, not later than the 10th day
29 before the date of the trial, hearing, or other proceeding, has been
30 furnished with a copy of the court order and application under which the
31 interception was authorized or approved.

32 (2) This ten-day period may be waived by the circuit judge if he
33 or she finds that it is not possible to furnish the party with the
34 information ten (10) days before the trial, hearing, or proceeding and that
35 the party will not be prejudiced by the delay in receiving the
36 information.

1 (b) An aggrieved person charged with an offense in a trial, hearing,
2 or proceeding, in or before a court, department, officer, agency, regulatory
3 body, or other authority of the United States, or of this state or a
4 political subdivision of this state, may move to suppress the contents of an
5 intercepted wire, oral, or electronic communication or evidence derived from
6 the communication on the grounds that:

7 (1) The communication was unlawfully intercepted;

8 (2) The order authorizing the interception is insufficient on
9 its face; or

10 (3) The interception was not made in conformity with the order.

11 (c) A person identified by a party to an intercepted wire, oral, or
12 electronic communication during the course of that communication may move to
13 suppress the contents of the communication on the grounds provided in
14 subsection (b) of this section, or on the ground that the harm to the person
15 resulting from his or her identification in court exceeds the value to the
16 prosecution of the disclosure of the contents.

17 (d)(1) The motion to suppress must be made before the trial, hearing,
18 or proceeding unless there was no opportunity to make the motion or the
19 person was not aware of the grounds of the motion.

20 (2)(A) The hearing on the motion shall be held in camera upon
21 the written request of the aggrieved person.

22 (B) If the motion is granted, the contents of the
23 intercepted wire, oral, or electronic communication and the evidence derived
24 from the communication shall be treated as having been obtained in violation
25 of this act.

26 (C) The circuit judge, on the filing of the motion by the
27 aggrieved person, shall make available to the aggrieved person, or his or her
28 counsel, for inspection any portion of the intercepted communication or
29 evidence derived from the communication that the judge determines, in the
30 interest of justice, to make available.

31 (e) Any circuit judge of this state, upon hearing a pretrial motion
32 regarding conversations intercepted by wire under this act, or who otherwise
33 becomes informed that there exists on the intercepted wire, oral, or
34 electronic communication, identification of a specific individual who is not
35 a party or suspect to the subject of interception:

36 (1) Shall give notice and an opportunity to be heard on the

1 matter of suppression of references to that person if identification is
2 sufficient so as to give notice; or

3 (2) Shall suppress references to that person if identification
4 is sufficient to potentially cause embarrassment or harm which outweighs the
5 probative value, if any, of the mention of the person, but insufficient to
6 require the notice provided for in subdivision (1) of this subsection.

7
8 SECTION 15. Reports concerning intercepted wire, oral, or electronic
9 communications.

10 (a) Within thirty (30) days after the date an order or the last
11 extension, if any, expires, or after the denial of an order, the issuing or
12 denying judge shall report to the Administrative Office of the Courts:

13 (1) The fact that an order or extension was applied for;

14 (2) The kind of order or extension applied for;

15 (3) The fact that the order or extension was granted as applied
16 for, was modified, or was denied;

17 (4) The period of interceptions authorized by the order and the
18 number and duration of any extensions of the order;

19 (5) The offense specified in the order or application or
20 extension;

21 (6) The identity of the officer making the request and the
22 prosecutor; and

23 (7) The nature of the facilities from which, or the place where,
24 communications were to be intercepted.

25 (b) In January of each year each prosecutor shall report to the
26 Administrative Office of the Courts the following information for the
27 preceding calendar year:

28 (1) The information required by subsection (a) of this section
29 with respect to each application for an order or extension made;

30 (2) A general description of the interceptions made under each
31 order or extension, including the approximate nature and frequency of
32 incriminating communications intercepted, the approximate nature and
33 frequency of other communications intercepted, the approximate number of
34 persons whose communications were intercepted, and the approximate nature,
35 amount, and cost of the manpower and other resources used in the
36 interceptions;

1 (3) The number of arrests resulting from interceptions made
2 under each order or extension, and the offenses for which arrests were made;

3 (4) The number of trials resulting from interceptions;

4 (5) The number of motions to suppress, made with respect to
5 interceptions, and the number granted or denied;

6 (6) The number of convictions resulting from interceptions, the
7 offenses for which the convictions were obtained, and a general assessment of
8 the importance of the interceptions; and

9 (7) The information required by subdivisions (b)(2) through
10 (b)(6) of this section with respect to orders or extensions obtained.

11 (c)(1) Any circuit judge or prosecutor required to file a report with
12 the Administrative Office of the Courts shall forward a copy of the report to
13 the Director of the Department of Arkansas State Police.

14 (2) By March 1 of each year, the director shall submit to the
15 Governor, Lieutenant Governor, Speaker of the House of Representatives,
16 Chairperson of the Senate Judiciary Committee, and Chairperson of the House
17 Judiciary Committee, a report of all intercepts conducted under this act and
18 terminated during the preceding calendar year. The report shall include:

19 (A) The reports of circuit judges and prosecuting
20 attorneys forwarded to the director as required in this section;

21 (B) The number of Department of Arkansas State Police
22 personnel authorized to possess, install, or operate electronic, mechanical,
23 or other devices;

24 (C) The number of Department of Arkansas State Police and
25 other law enforcement personnel who participated or engaged in the seizure of
26 intercepts under this act during the preceding calendar year; and

27 (D) The total cost to the Department of Arkansas State
28 Police of all activities and procedures relating to the seizure of intercepts
29 during the preceding calendar year, including costs of equipment, manpower,
30 and expenses incurred as compensation for use of facilities or technical
31 assistance provided to the department.

32
33 SECTION 16. Recovery of civil damages authorized.

34 (a) A person whose wire, oral, or electronic communication is
35 intercepted, disclosed, or used in violation of this act has a civil cause of
36 action against any person who intercepts, discloses, or uses or solicits

1 another person to intercept, disclose, or use the communication, and is
2 entitled to recover from the person:

3 (1) Actual damages but not less than liquidated damages computed
4 at a rate of one hundred dollars (\$100) a day for each day of violation or
5 one thousand dollars (\$1,000), whichever is greater;

6 (2) Punitive damages; and

7 (3) A reasonable attorney's fee and other litigation costs
8 reasonably incurred.

9 (b) A good faith reliance on a court order or legislative
10 authorization constitutes a complete defense to an action brought under this
11 section.

12 (c) A subscriber or customer of a wire or electronic communications or
13 remote computing service does not have a cause of action against a wire or
14 electronic communications or remote computing service, its officers,
15 employees, agents, or other specified persons for providing information,
16 facilities, or assistance as required by court order, warrant, subpoena, or
17 certification under this act.

18
19 SECTION 17. This act expires September 1, 2007, and shall not be in
20 force on and after that date.

21
22 SECTION 18. Communication common carrier exception.

23 Notwithstanding any other provision in this act to the contrary, it
24 shall not be unlawful for a wire or electronic communication service provider
25 or any communication common carrier, or a switchboard operator, officer,
26 employee, or agent thereof, whose facilities are used in the transmission of
27 a wire or electronic communication, to intercept, disclose, store, or use
28 that communication in the normal course of its employment or business while
29 engaged in any activity which is a necessary incident to the rendition of its
30 service or to the protection of its rights or property, except that a
31 provider of wire communication service to the public shall not utilize
32 service observing or random monitoring except for mechanical or service
33 quality control checks.

34
35 SECTION 19. Nothing in this act shall restrict or prohibit
36 interception and recording of communications not otherwise prohibited by

1 Arkansas Code § 5-60-120.

2
3 SECTION 20. Emergency interception and use of wire, oral, or
4 electronic communications.

5 (a) A law enforcement officer authorized under section 5(b) of this act, designated in writing by the
6 prosecuting attorney or circuit judge of the county where the installation will be used, may install and use a live
7 intercept if the prosecuting attorney determines in writing, upon affidavit by a certified law enforcement officer and
8 the concurrence of the Director or Deputy Director of the Department of Arkansas State Police, that:

9 (1) An emergency requiring the installation of a live intercept
10 before an order authorizing the installation and use can, with due diligence,
11 be obtained, exist involving immediate danger of death or serious injury to
12 any person; and

13 (2) No circuit judge with jurisdiction is immediately available, and there are grounds
14 under this act on which an order could be entered to authorize the
15 installation and use of a live intercept.

16 (b)(1) If an authorized law enforcement officer installs a live
17 intercept under subsection (a) of this section, the prosecuting attorney
18 shall obtain an order from a circuit judge with jurisdiction approving
19 installation immediately upon the availability of the circuit judge, but in
20 no instance more than forty-eight (48) hours after the installation begins.

21 (2) If authorization is not obtained within forty-eight (48) hours, the officer shall terminate use of
22 the live intercept on the expiration of the forty-eight (48) hours or at the time the application for the order is denied,
23 whichever is earlier.

24 (c) The state may not use as evidence in a criminal proceeding any
25 information gained, or any information derived from the information so
26 gained, through the use of a live intercept installed under this section if
27 authorization for the live intercept is denied unless the information would
28 have been inevitably discovered through other lawful investigation, or by
29 other constitutionally permissible investigation.

30 (d) The information gained or derived through the emergency live intercept shall not be considered in any
31 judicial determination as to whether grounds existed under subdivision (a)(1) of this section.

32
33 SECTION 21. (a) It shall be unlawful for any person who knows or
34 learns of the existence of a pen register, tracking device, trap and trace
35 device, or any other kind of electronic intercept, to disclose that fact to
36 the person who is the target of the investigation, or to any other person.

