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Criminal Procedure; Interception of Inmate Telephone Calls

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magistrate having jurisdiction over the property.¹¹ A seizure without process may be made, however, if the seizure is incident to an arrest¹² or the law enforcement agency has probable cause to believe that the property was used in a manner that would cause the property to be subject to forfeiture.¹³ Forfeiture proceedings for property seized without process must begin promptly, and take precedence over other proceedings.¹⁴

Furthermore, under Chapter 449 the seizing agency may place the property under seal,¹⁵ remove it to a designated storage place,¹⁶ or remove it for disposal if authorized by statute.¹⁷ Upon a decision by the court that the seized property is forfeited, the seizing agency may retain the property for official use,¹⁸ sell property that is not required to be destroyed by law,¹⁹ or remove the property for disposition.²⁰

11. *Id.* c. 449, §3(1), at 1135.

12. *Id.* c. 449 §3(2)(a), at 1135.

13. *Id.* c. 449, §3(2)(b), at 1135; *see also* *One 1970 Chevrolet v. Nye County*, 90 Nev. 31, 34, 518 P.2d 38, 40 (1974) (application of similar provisions to controlled substances).

14. 1983 Nev. Stat. c. 449, §3(3), at 1135. Once the property is seized, it is in the custody of the law enforcement agency, subject only to the court having jurisdiction over the property. If the seizing agency does not file a complaint for forfeiture within sixty days from the time of seizure, the property will be subject to an action to claim delivery. *Id.*

15. *Id.* c. 449, §3(4)(a), at 1136.

16. *Id.* c. 449, §3(4)(b), at 1136.

17. *Id.* c. 449, §3(4)(c), at 1136.

18. *Id.* c. 449, §3(5)(a), at 1136.

19. *Id.* c. 449, §3(5)(b), at 1136.

20. *Id.* c. 449, §3(5)(c), at 1136.

Criminal Procedure; interception of inmate telephone calls

NEV. REV. STAT. §§209.— (new); §200.620 (amended).
SB 117 (Committee on Judiciary); 1983 STAT. Ch 287

Existing law prohibits the interception¹ of wire communications² unless (1) the interception is made with the consent of the parties to the communication,³ (2) a court order is obtained,⁴ or (3) exigent circumstances exist and it is impractical to obtain a court order before the interception.⁵ In addition, existing law does not apply to a business pro-

1. NEV. REV. STAT. §179.430 (definition of intercept).

2. *Id.* §§179.455, 200.610(2) (definition of wire communication).

3. *Id.* §200.620(1)(a).

4. *Id.* §§179.410.515.

5. *Id.* §200.620(1)(b). The interception is subject to NEV. REV. STAT. §200.620(3) requiring ratification by a supreme court judge or a district court judge within 72 hours of the interception. Ratification is possible only when (1) an emergency situation exists and it is impractical to obtain a court order, and (2) except for the absence of a court order, the interception meets the require-

viding services and facilities for wire communications where the interception is made in order to maintain or operate the facilities of the person being intercepted.⁶ Law enforcement and fire fighting agencies are also free to monitor wire communications for emergency calls requesting aid from these agencies.⁷ Furthermore, wire communications initiated by these agencies while responding to an original call may be recorded if the other party to the conversation is informed of the monitoring.⁸

Chapter 287 expands existing law⁹ by permitting the monitoring of telephone calls made by prison inmates from within an institution to persons outside the institution.¹⁰ The interception, however, must be made by an authorized employee of the Department of Prisons¹¹ and signs must be posted near all institution telephones to notify the prisoners that their communications are subject to interception.¹² In addition, Chapter 287 requires that both the inmate and the person receiving the inmate's telephone call be notified that the conversation is being intercepted.¹³

Chapter 287 also requires the Director of Prisons¹⁴ to adopt regulations providing alternative methods of communication for confidential matters.¹⁵ A communication is confidential if made to (1) a federal or state officer,¹⁶ (2) a local officer responsible for the custody of the offender,¹⁷ (3) an officer of the court,¹⁸ (4) an attorney,¹⁹ (5) a media employee,²⁰ (6) the Director of Prisons,²¹ or (7) an employee of the Department of Prisons designated by the director.²²

ments of NEV. REV. STAT. §§179.410-.515. Should ratification be denied the applicant may not use the information intercepted and must notify the conversants that their communication was intercepted. *Id.*

6. *Id.* §200.620(2) (*e.g.*, public utility). Public utilities intercepting telephone conversations made by offenders have a complete defense if they rely in good faith on an order from the director or an authorized representative of the department. 1983 Nev. Stat. c. 287, §2(5), at 682.

7. NEV. REV. STAT. §200.620(4).

8. *Id.*

9. Compare *id.* §200.620 (amended by 1983 Nev. Stat. c. 287, §§1, 2, at 681-82) with 1975 Nev. Stat. c. 471, §1, at 747 (amending NEV. REV. STAT. §200.620).

10. 1983 Nev. Stat. c. 287, §2(1)(2), at 682.

11. *Id.* c. 287, §2(1)(a), at 682.

12. *Id.* c. 287, §2(1)(b), at 682.

13. *Id.* c. 287, §2(2), at 682 (periodic sound heard over the telephone is deemed adequate notice).

14. NEV. REV. STAT. §209.061 (definition of director); see *id.* §209.131 (general duties of the director).

15. 1983 Nev. Stat. c. 287, §2(3), at 682.

16. *Id.* c. 287, §2(4)(a), at 682.

17. *Id.* c. 287, §2(4)(b), at 682.

18. *Id.* c. 287, §2(4)(c), at 682.

19. *Id.* c. 287, §2(4)(d), at 682.

20. *Id.* c. 287, §2(4)(e), at 682.

21. *Id.* c. 287, §2(4)(f), at 682.

22. *Id.* c. 287, §2(4)(g), at 682.

Comment

Monitoring communications for the purpose of maintaining security²³ in a prison appears to be a reasonable intrusion upon an inmate's fourth amendment rights when balanced against legitimate governmental interests.²⁴ In two areas, however, Chapter 287 may violate fourth amendment rights. First, Chapter 287 does not establish boundaries limiting the scope of "administrative"²⁵ monitoring²⁶ and, therefore, the intrusion in some areas may not be reasonable.²⁷ Although monitoring to maintain prison security may be recognized as reasonable, it is unclear whether *unlimited* monitoring for any security purpose will be recognized as reasonable²⁸. Secondly, the scope of confidentiality in Chapter 287 may be too narrow²⁹ by not providing for additional confidential relationships.³⁰ The need to monitor, therefore, may not outweigh the nature of the intrusion into these normally

23. See *Procunier v. Martinez*, 416 U.S. 396 (1973). The governmental interest in the administration of prisons includes the preservation of internal order and discipline, the maintenance of institutional security against escapes or unauthorized entries, and the rehabilitation of prisoners. *Id.* at 412; see also Giannelli and Gilligan, *Prison Searches and Seizures: "Locking" The Fourth Amendment Out of Correctional Facilities*, 62 VA. L. REV. 1045, 1071 (1976) (protecting guards and inmates from assaults, controlling contraband, and preventing escapes are legitimate security interests that may affect fourth amendment rights).

24. 3 W. LAFAVE, *SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT* 420-21 (1978); see *State v. Ryan*, 367 A.2d 920, 922-23 (articulation of the special governmental interest making the monitoring system reasonable).

25. Giannelli, *supra* note 23, at 1077-78. *Administrative searches* are based on institutional needs such as security interests associated with administering prisons as contrasted with *law enforcement searches* that are directed at solving a particular crime. *Id.* See *Camara v. Municipal Ct.*, 387 U.S. 523, 536-37 (1967) (where traditional probable cause standards would thwart legitimate governmental interests courts adopt a more flexible approach to accommodate these interests). See generally 3 W. LAFAVE, *supra* note 24, at 420-21 (monitoring not directed at particular individuals).

26. 1983 Nev. Stat. c. 287, §2, at 682 (allowing monitoring but not limiting interception to designated security interests). See generally 3 W. LAFAVE, *supra* note 24, at 420-21 (suggesting that monitoring should be allowed only to the extent that special security interests are implicated).

27. See generally *Camara v. Municipal Ct.*, 387 U.S. 523, 536-38 (1967) (balancing the need to search against the nature of the intrusion); Giannelli, *supra* note 23, at 1071-89. A danger is that "administrative searches" under the cloak of "prison security" will be used as a subterfuge for law enforcement searches. *Id.* at 1071, 1083.

28. See 3 W. LAFAVE, *supra* note 24, at 418. The courts must assess whether the monitoring of conversations is a reasonable step in the interest of maintaining security in jails and prisons. If this assessment is made, the conclusion that unlimited eavesdropping is needed is questionable. *Id.* See generally *Palmigiano v. Travisono*, 317 F.Supp. 776, 791 (D.R.I. 1970) (suggesting that experience has more clearly demonstrated that eavesdropping is not essential to the maintenance of security).

29. Compare 1983 Nev. Stat. c. 287, §2(4)(a)-(g), at 682 (all conversations subject to monitoring except those expressly designated as confidential) with CAL. ADMIN. CODE tit. 15, §3282(e)-(f) (1983) (allowing inmates to make confidential calls to any other person when authorized by designated staff).

30. See, e.g., NEV. REV. STAT. §§49.015-405 (recognizing accountant-client, doctor-patient, priest-penitent, and husband-wife as privileged communications). See generally Giannelli and Gilligan, *supra* note 23, at 1075. The need for prison security will in most instances diminish the inmate's protection under traditional fourth amendment analysis; however, in some circumstances the inmate may deserve more protection. *Id.*

privileged communications.³¹

Although the prohibition against the unauthorized interception of "any wire or oral communication" found within Title III of the Omnibus Crime Control and Safe Streets Act of 1968³² appears to apply to³³ and preempt all state legislation in the field of wiretapping and electronic surveillance,³⁴ some courts have held that prison officials are outside the scope of this Act.³⁵ This recent trend permits prison officials to monitor inmate calls if done for a clearly legitimate purpose³⁶ and with notice to the conversants.³⁷ If this trend prevails, Chapter 287 will not violate the provisions of Title III.³⁸

31. See generally *Camara v. Municipal Ct.*, 387 U.S. 523, 536-37 (1967) (balancing private and governmental interests in determining the reasonableness of the intrusion); *Gianelli and Gilligan*, *supra* note 23, at 1088. Not all conversations by inmates need to be monitored to adequately maintain security. A means of distinguishing between allowable and non-allowable electronic surveillance must be found. *Id.* See 3 W. LAFAYE, *supra* note 24, at 418 (citing *Giannelli supra* note 23).

32. 18 U.S.C. §§2510-2520 (1968).

33. See *U.S. v. Paul*, 614 F.2d 115, 116 n.2 (6th cir. 1980); *Campiti v. Walonis*, 453 F.Supp. 819, 823 (D. Mass. 1980), *aff'd*, 611 F.2d 387 (1st cir. 1979); *Crooker v. U.S. Dept. of Justice*, 97 F.Supp. 500, 502 (D. Conn. 1980) (squarely rejecting the argument that Title III does not apply to prison monitoring); see also S. Rep. No. 1097, 90th Cong., 2d Sess. 67-69 (1968) (congressional intent and relevant history).

34. S. Rep. No. 1097, 90th Cong., 2d Sess. 92 (1968). Congress has broad powers to preempt in areas arising under the Bill of Rights and due process clause of the 14th amendment. *Katzenback v. Morgan*, 384 U.S. 641, 647-51 (1966) and the commerce clause are authority. *Id.* See also *Halpin v. Superior Ct.*, 6 Cal. 3d 885, 899 (1972), 101 Cal. Rptr. 375, 385, 495 P.2d 1295, 1305 (upholding the constitutionality of Title III in superseding state rights by use of the commerce clause).

35. Compare *Jandak v. Village of Brookfield*, 520 F.Supp. 815, 821-25 (D. Ill. 1981) (careful analysis of 18 U.S.C. §2510(5)(a)(ii) allowing telephone equipment being used by investigative or law enforcement officers in their ordinary course of duties to be exempt from Title III and its application of prison monitoring); *Adams v. State*, 406 A.2d 637, 644-45 (1979), *aff'd*, 289 Md. 221, 424 A.2d 344 (1981); *Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414, 418-20 (5th cir. 1980) with *People v. Tebo*, 194 N.W. 2d 517, 521-22 (1971); *U.S. v. Harpel*, 493 F.2d 346, 351 (10th cir. 1974) (law enforcement officers act in their ordinary course of duty only when the electronic interception is authorized).

36. See *Jandak v. Village of Brookfield*, 520 F.Supp. 815, 824 (D. Ill. 1981). Monitoring to assure that phones were not misused for private purposes or in violation of established regulations has been considered properly within the ordinary course of law enforcement duties. *Id.* (for Title III purposes).

37. *Id.* at 823-24 (noting that courts have found violations of Title III where monitoring was done without notice or for illicit purposes); *id.* at 824, fn. 7 (comparing decisions that have decided what interceptions are within the ordinary course of law enforcement duty and what interceptions are not).

38. See generally 1983 Nev. Stat. c. 287, §§2(1)(b), 2(2), at 682 (providing inmates with notice of interception). Cf. *Supra* note 35, 37 (violation of Title III is theoretically possible if the Tenth Circuit is followed or if the monitoring is done for illicit purposes).