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OPINION NO. 2014-02

POLICE; PRIVACY AND SECURITY;  
SAFETY; STATUTES; WIRETAPPING;

Nevada law does not prohibit the monitoring of oral statements in barricade or hostage situations so long as the suspects and hostages have no reasonable expectation of privacy in those statements. Because suspects who have erected a barricade or taken a hostage to avoid arrest create a potentially deadly crisis that warrants an extraordinary response from law enforcement they generally have no reasonable expectation of privacy in oral statements made during the duration of the crisis.

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District Attorney Wolfson:

In a letter dated December 9, 2013, you requested an opinion from the Office of the Attorney General (Office) concerning the lawfulness of surreptitious police monitoring of oral statements made by persons involved in a barricade or hostage

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situation. This Office is informed that the following circumstances are relevant to the request.

### BACKGROUND

A barricade situation arises when a person, intent on evading arrest, takes up a defensive position wherein he or she is armed with a gun, explosive, or other weapon capable of harming others, or is believed to be so armed; and presents a potentially deadly hazard to arresting officers. A hostage situation arises when a person holds another against his or her will.

When confronted with a barricade or hostage situation, the usual police response in Clark County is to call in tactical units, including a special weapons and tactical (SWAT) unit and crisis negotiator, in an attempt to resolve the situation in a manner that ensures the safety of any hostages, suspects, members of the public, and police personnel. The tactical unit is trained to surround the suspect's defensive position and to evacuate any persons within harm's way. Once the suspect's defensive position is surrounded and secured, police attempt to make contact with the suspect and negotiate his or her safe surrender and the release of any hostages.

To facilitate negotiations with the suspect, the tactical unit may provide the suspect with a wireless "rescue" or "throw phone." In addition to facilitating communication with the suspect, such phones have the capability to record sounds within the proximity of the device, including the oral statements of suspects or hostages, and to wirelessly transmit these sounds back to the tactical unit in real time. In addition to rescue phones, the tactical unit may deploy other devices or probes that, once placed on or within the suspect's defensive position, allow the unit to surreptitiously monitor the oral statements of the suspect and any hostages within the range of the device. As a matter of course, the tactical unit also seeks a telephonic search warrant to intercept any wire communications originating from the defensive position.

The monitoring of oral statements during a barricade or hostage situation may provide the tactical unit with information crucial to the unit's goal of preserving human life such as how many suspects and hostages are involved, the location of the suspects and hostages within the defensive position, the plan or intentions of the suspects, and when to abandon negotiations and make a tactical entry.

### QUESTION

Does Nevada law prohibit law enforcement officers from engaging in the surreptitious interception or monitoring of the oral statements of suspects and hostages during a barricade or hostage situation?

### ANALYSIS

The short answer to your question is that Nevada law does not prohibit the monitoring of oral statements in barricade or hostage situations so long as the suspects and hostages have no reasonable expectation of privacy in those statements. While Nevada law generally prohibits the surreptitious monitoring of "private conversations" without the authorization of at least one party to the conversation, an exception exists where the person being monitored has no reasonable expectation of privacy in his or her oral statements. Because suspects who have erected a barricade or taken a hostage to avoid arrest create a potentially deadly crisis that warrants an extraordinary response from law enforcement, they generally have no reasonable expectation of privacy in oral statements made during the duration of the crisis.

- A. While Nevada Law Generally Prohibits Interception Of Wire Communications And Private Conversations, An Exception Exists For Oral Statements That Do Not Meet The Statutory Definitions Of Either A "Wire Communication" Or An "Oral Communication."

Nevada statutes generally prohibit the interception of wire communications and private conversations without the consent of at least one of the parties to the conversation. NRS 200.620 prohibits the interception of wire communications. A "wire communication" is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by wire, cable, or other similar connection between points of origin and reception of such transmission . . . ." NRS 200.610(2).

The surreptitious interception of private conversations is prohibited by NRS 200.650 as follows:

Except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195, a person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

The term "private conversation" as used in the statute is not expressly defined, and there appears to be no Nevada law interpreting the term.

In the absence of an express definition, courts first look to the plain meaning of the undefined term. *Davis v. Beling*, 278 P.3d 501, 508 (128 Nev. Adv. Op. 28, June 14, 2012) (citation omitted). "Private" is commonly defined as "[a]ffecting or belonging to private individuals, as distinct from the public generally." BLACK'S LAW DICTIONARY (9<sup>th</sup> ed. 2009). Webster's dictionary defines "conversation" as "oral exchange of sentiments, observations, opinions, or ideas." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 273 (11 ed. 2005).

In addition to giving undefined statutory terms their plain meaning, "[s]tatutes within a scheme and provisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results." *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001). NRS 200.650, the statute in question, prohibits the surreptitious electronic interception of "any private conversation," "except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195 . . . ." Among the statutes referenced in the exception clause of NRS 200.650 is NRS 179.440, which defines "oral communication" as "any verbal message uttered by a person exhibiting an expectation that such communication is not subject to interception, under circumstances justifying such exception." NRS 179.460, another statute referenced in NRS 200.650, sets forth a process to obtain a judicial order authorizing "the interception of wire or oral communications . . . ." NRS 179.460(1). The statutory provision setting out the judicial authorization process does not refer to "private conversations." *See id.*

Interpreting the statutory scheme as a whole, this Office reads NRS 200.650's prohibition on electronic interception of "any private conversation" to contain an exception for oral statements that do not meet the statutory definition of an "oral communication" as found in NRS 179.440.<sup>1</sup> This conclusion is based on

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<sup>1</sup> Interception of an oral statement may also be prohibited by NRS 200.620 if the statement is transmitted by a wire or other similar connection and this transmission is intercepted by police. In the event that the transmission in question is a "wire communication" as defined by Nevada law, judicial authorization is required to intercept the transmission in all but limited circumstances. *See* NRS 200.620(1) (prohibiting interception of wire communications unless interception is made with prior consent of one of the parties *and* an emergency situation exists that makes it impractical to obtain judicial authorization pursuant to NRS 179.460); *see also* NRS 200.610(2) (defining "wire communication"). Oral statements transmitted by a wireless device (e.g., a cellular phone) are also likely "wire communications" as defined by Nevada law, and judicial authorization is therefore required to intercept these transmissions as well. *See In re U.S. for an Order Authorizing Roving Interception of Oral Commc'ns*, 349 F.3d 1132, 1138 n.12 (9<sup>th</sup> Cir. 2003) ("Despite the apparent wireless nature of cellular phones, communications using cellular phones are considered wire communications under the [federal wiretap] statute, because cellular telephones use wire and cable connections when connecting calls."); *see also Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1179, 969 P.2d 938, 940 (1998) (noting that Nevada laws prohibiting interception of wire and oral communications are based on federal wiretap statutes). As noted above, it is the practice of the Clark County tactical units to seek judicial authorization to intercept wire communications transmitted from the defensive position when confronted with a barricade situation.

NRS 200.650's express reference to the definition of "oral communication" in its exception clause and NRS 179.460(1)'s use of the term "oral communications" in place of "private conversations" in the statutory provision establishing a judicial authorization process for the interception of wire or oral communications. This conclusion finds further support in the overlap between the plain meaning of the phrase "private conversation" and the statutory definition of "oral communication," as well as the view that interpreting the statute in this way preserves the statute's broad purpose of prohibiting interception of private conversations under circumstances where the speaker has a reasonable expectation of privacy.

- B. Persons Involved In Barricade Situations Generally Have No Reasonable Expectation That Their Oral Statements Will Not Be Monitored Or Intercepted By Law Enforcement Officers, And The Statements Are Therefore Not "Oral Communications" As Defined By Nevada Law.

To avoid the prohibition on surreptitious interception of "private conversations" or "oral communications," the oral statements must be outside the scope of the term "oral communication" as defined by Nevada law. Nevada defines "oral communication" to mean "any verbal message" so long as the message was uttered (1) "by a person exhibiting an expectation that such communication is not subject to interception," and (2) "under circumstances justifying such expectation." NRS 179.440. Thus, for a statement to qualify as an "oral communication," the conduct of the person uttering the statement must exhibit an actual or subjective expectation of privacy under circumstances where, viewed objectively, the person's expectation was reasonable. Because both requirements must be met for the statement to be considered an "oral communication" under Nevada law, and because the subjective expectations of the person making the statement will vary from case to case, the remainder of this opinion will focus on whether suspects or hostages in a barricade situation have a reasonable or objective expectation of privacy in their oral statements.

The Nevada Supreme Court has noted in the analogous context of Fourth Amendment jurisprudence that an objective expectation of privacy is "one which society recognizes as reasonable." *Young v. State*, 109 Nev. 205, 211, 849 P.2d 336, 340 (1993) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)). Neither the Nevada Supreme Court nor the United States Supreme Court has developed a fixed standard by which to evaluate the objective reasonableness of an asserted expectation of privacy; instead, they have considered factors such as the Framers' intent, the uses to which an individual has put a location, and society's understanding that certain areas warrant protection from governmental intrusions. See *id.* (discussing factors recognized in *Oliver v. United States*, 466 U.S. 170, 177 (1984)).

At least two courts outside Nevada have addressed these factors as applied to a suspect or defendant involved in a barricade or hostage situation. In *State v. Arias*,

661 A.2d 850 (N.J. Super. Ct. Law Div. 1992), a New Jersey appellate court considered whether the defendant had standing to raise a Fourth Amendment challenge to evidence seized without a warrant at the crime scene. The defendant had forced his way into the home of the parents of his former lover, shot two persons, taken a child hostage, and engaged in a lengthy standoff with police before surrendering. *Arias*, 661 A.2d at 852. In considering whether the defendant had standing to challenge the subsequent search and seizure of evidence at the crime scene, the court noted that while the United States Supreme Court has predicated standing on a showing of a "legitimate expectation of privacy," New Jersey law afforded standing based only on a possessory interest in the place searched or the property seized. *Id.* at 853. The court "reluctantly" held that the defendant did have standing to raise the claim under New Jersey's generous standard, but also emphasized that the defendant was the "ultimate uninvited guest," and further expressed substantial doubt that the Framers of the Constitution intended to protect this type of defendant when they drafted the Fourth Amendment. *Id.* at 854.

The Supreme Judicial Court of Maine reached a similar conclusion in *State v. Boutot*, 325 A.2d 34 (Me. 1974). There, the defendant had taken a hostage and stolen an automobile for the purpose of escaping the scene where he had shot two other persons. *Boutot*, 325 A.2d at 35. In evaluating the defendant's subsequent challenge to a search of the vehicle, the court ruled that "this Defendant, escaping the scene of the crime with a hostage, in a car stolen from his victim, had no expectation of privacy which the law is willing to recognize as reasonable." *Id.* at 41-42.

While neither *Arias* nor *Boutot* addresses the specific question of whether a suspect in a barricade or hostage situation may have a reasonable expectation that his or her oral statements will not be intercepted by police, they do offer support for the general proposition that the reasonableness of any asserted expectation of privacy must be considered in the context of the public safety emergency created by the unlawful conduct of the suspect. As indicated in the opinion request letter, an armed suspect who erects a barricade or takes a hostage to avoid arrest creates a potentially deadly crisis that warrants an extraordinary response from law enforcement. In responding to such a crisis, law enforcement personnel are tasked with the dangerous and difficult challenge of resolving the crisis peacefully and preserving human life. Given the exigent and inherently dangerous nature of barricade and hostage situations, it can also be assumed that the suspect knows, or should know, that the law enforcement personnel surrounding his or her position will attempt to resolve the crisis by any peaceful means, including the interception of oral statements made by the suspects or hostages.

Due to the exigent nature and public safety issues presented in barricade and hostage situations, it is the opinion of this Office that suspects and hostages will often have no reasonable expectation that their oral statements made during the crisis will not

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be subject to interception. Where no such reasonable expectation exists, interception of oral statements is not prohibited by Nevada law even in the absence of an order authorizing the interception made pursuant to NRS 179.460. However, the reasonableness of any asserted privacy expectation will vary from case to case, and law enforcement should therefore carefully evaluate the totality of the circumstances prior to monitoring the oral statements of barricade suspects and hostages. Law enforcement should also seek judicial authorization pursuant to NRS 179.460 before monitoring oral communications in barricade or hostage situations where appropriate and where circumstances permit to minimize any risk that their actions will later be deemed unlawful.

#### CONCLUSION

Nevada law does not prohibit the interception of oral statements in barricade or hostage situations where the suspects and hostages have no reasonable expectation that their oral statements will not be intercepted by police.

Sincerely,

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