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Offenses Against Public Order and Safety HB 55

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CRIMES AND OFFENSES

Offenses Against Public Order and Safety: Amend Part 1 of Article 3 of Chapter 11 of Title 16 of the Official Code of Georgia Annotated, Relating to Wiretapping, Eavesdropping, Surveillance, and Related Offenses, so as to Change Provisions Relating to Interception of Wire or Oral Transmissions by Law Enforcement Officers; Change Provisions Relating to the Application and Issuance of Orders Authorizing Installation and Use of Pen Register and Trap and Trace Device; Provide for Related Matters; Provide for an Effective Date; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS:	O.C.G.A §§ 16-11-64, -64.1 (amended)
BILL NUMBER:	HB 55
ACT NUMBER:	2
GEORGIA LAWS:	2013 Ga. Laws 4
SUMMARY:	The Act clarifies the jurisdictional requirements of a judge issuing a wiretap authorization. A superior court judge that has jurisdiction over the crime under investigation may issue investigation warrants permitting the use of surveillance devices, such as wiretaps. The Act provides these warrants shall have state-wide application. Likewise, the Act grants state-wide application to warrants that authorize and approve the installation of pen register and trap and trace devices. Further, the Act allows the interception devices to be located anywhere in the state.
EFFECTIVE DATE:	February 13, 2013

History

On January 7, 2013, the Georgia Supreme Court ruled that the Gwinnett County Superior Court lacked jurisdiction to issue a wiretap warrant where the tapped phones or listening posts were located outside the issuing judge's judicial circuit.[1] The decision immediately affected over thirty defendants on certiorari for wide-ranging drug importation indictments[2] and restricted police officers' ability to do their investigative jobs. The Court based its decision on legislative interpretation of the Georgia Wiretap Statute.[3]

Before the year 2000, the Georgia Wiretap Statute included a territorial jurisdiction limitation that authorized only the superior court judges of the circuit wherein the interception device was to be placed to issue the applicable warrants.[4] The legislature later amended the statute to allow superior court judges having jurisdiction over the crime being investigated to issue warrants permitting the use of interception devices.[5] In doing so, the General Assembly changed the focus from the device's physical location to the location of the underlying crime.[6]

The statute was again amended in 2002, as part of Georgia's Support of the War on Terrorism Act of 2002, and provided:

> Upon written application, under oath, of the prosecuting attorney having jurisdiction over prosecution of the crime under investigation, or the Attorney General, made before a judge of superior court, said court may issue an investigation warrant permitting the use of [a wiretapping] device . . . for the surveillance of such person or place to the extent the same is consistent with and subject to the terms, conditions, and

1. Luangkhot v. State, 292 Ga. 423, 427, 736 S.E.2d 397, 401 (2013).

2. Tyler Estep, *DA: Ruling Would Let 35 Drug Traffickers Off The Hook*, GWINNETT DAILY POST, Jan. 7, 2013, *available at* http://www.gwinnettdailypost.com/news/2013/jan/07/da-supreme-court-decision-would-let-35-drug.

3. *Luangkhot*, 292 Ga. at 424–25, 736 S.E.2d at 399.

4. Luangkhot v. State, 313 Ga. App. 599, 602, 722 S.E.2d 193, 196 (2012) (citing O.C.G.A. § 16-11-64(b)(1) (1999)), *rev'd*, 292 Ga. 423, 736 S.E.2d 397 (2013).

5. *Id.*

6. *Id.*

> procedures provided for by Chapter 119 of Title 18 of the United States Code Annotated, as amended.[7]

This language removed the jurisdictional requirements on superior court judges and added conditional language requiring consistency with the federal wiretap statute.[8] Ultimately, this led to the Georgia Supreme Court's decision in *Luangkhot v. State*.[9]

Despite multiple attempts by the legislature to broaden the jurisdictional scope of superior court judges regarding wiretaps,[10] in *Luangkhot v. State* the Georgia Supreme Court found the Gwinnett County Superior Court lacked jurisdiction to issue wiretap warrants.[11] In that case, over thirty indicted defendants moved to suppress evidence obtained through wiretap investigations, claiming the Gwinnett court lacked jurisdiction to issue the wiretap warrants where the phones and listening posts were located outside of Gwinnett County, even though the crimes under investigation were committed inside the county.[12] The defendants, in interpreting the Georgia wiretap statute, relied primarily on federal statute 18 U.S.C. § 2518(1) and (3)[13] which provide that "'a judge of competent jurisdiction . . . may enter an ex parte order . . . authorizing or approving interception of wire . . . communications within the territorial jurisdiction of the court in which the judge is sitting[.]'"[14] According to the defendants, the language of the federal statute "imposes a 'territorial jurisdiction' upon Georgia superior court judges that is limited to the county in which the judge sits, and that therefore the Gwinnett County Superior Court judges . . . could not issue wiretap warrants for interceptions occurring beyond the bounds of Gwinnett County."[15]

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7. O.C.G.A. § 16-11-64(c) (2011).
8. *Id.*
9. *Luangkhot*, 292 Ga. 423, 736 S.E.2d 397.
10. *Luangkhot*, 313 Ga. App. at 602, 722 S.E.2d at 196–97.
11. *Luangkhot*, 292 Ga. at 428, 736 S.E.2d at 401.
12. *Id.* at 398.
13. *Luangkhot*, 313 Ga. App. at 601, 722 S.E.2d at 195.
14. *Id.*; 18 U.S.C. § 2518(3) (2008) ("Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction) . . . .").
15. *Luangkhot*, 313 Ga. App. at 601, 722 S.E.2d at 195.

The Georgia Court of Appeals denied the defendants' motion, stating their reliance on the federal statute was misplaced.[16] Instead, the court held the "territorial jurisdiction" language of 18 U.S.C. § 2518(3) applied to federal court judges issuing wiretap warrants pursuant to the federal wiretap statute and not to state court judges issuing wiretap warrants pursuant to the state wiretap statute.[17] Agreeing with the State's reliance on the Eleventh Circuit's decision in *Adams v. Lankford*,[18] the court stated "it is clear that Congress intended that state law would define the 'territorial jurisdiction' of each state court."[19] Thus, the Georgia Court of Appeals turned to the state statute to determine the scope of an issuing superior court judge's territorial jurisdiction.[20] The statute's plain language placed a territorial limitation on the prosecuting attorney applying for the warrant[21] but only required that a superior court judge issue the warrant.[22] Absent an express territorial limitation, the court then focused on the legislative history of the Georgia wiretap statute which clearly broadened jurisdictional authority with each amendment.[23] Given the plain language and legislative history of the statute, combined with Congress's intent for the states to define "territorial jurisdiction," the Georgia Court of Appeals held that Code section 16-11-64(c) authorized Gwinnett County Superior Court judges to issue wiretap warrants for interceptions that occurred

16. *Id.* at 601, 722 S.E.2d at 195–96.

17. *Id.* at 602, 722 S.E.2d at 196.

18. The defendants in the *Lankford* case were participating in a lottery ring operating in Atlanta. Adams v. Lankford, 788 F.2d 1493, 1494 (11th Cir. 1986). The evidence against the defendants was gathered pursuant to twelve wiretap warrants issued by a Fulton County Superior Court judge. *Id.* Out of forty-one tapped phones, twenty-three were located outside of Fulton County, thus the defendants claimed the Fulton County judge lacked jurisdiction to issue warrants over those twenty-three phones. *Id.* at 1494–95. The Fulton County Superior Court had jurisdiction over the crimes, therefore the only error the defendants alleged was that "the district attorney who applied for the wiretap orders and the judge who issued them were from the county 'next door.'" *Id.* at 1497–98. The Eleventh Circuit held that the issuance of warrants for the twenty-three phones outside Fulton County was not a cognizable error in a federal habeas corpus proceeding because the alleged violations did not implicate Congress' core concerns in passing Title III. *Id.* at 1500.

19. *Luangkhot*, 313 Ga. App. at 601, 722 S.E.2d at 196 (quoting Adams v. Lankford, 788 F.2d 1493, 1500 (11th Cir. 1986)).

20. *Id.* at 602, 722 S.E.2d at 196.

21. *Id.*; O.C.G.A. § 16-11-64(c) (2011) ("the prosecuting attorney having jurisdiction over prosecution of the crime under investigation").

22. O.C.G.A. § 16-11-64(c) (2011); *Luangkhot*, 313 Ga. App. at 602, 722 S.E.2d at 196.

23. *See* O.C.G.A. § 16-11-64(c) (2011); OCGA § 16-11-64(b)(1) (2000); O.C.G.A. § 16-11-64(b)(1) (1999); *Luangkhot*, 313 Ga. App. at 602, 722 S.E.2d at 196.

outside of the county because the judges had jurisdiction over the investigated crimes.[24] In doing so, the Court of Appeals denied the defendants' motion to suppress evidence.

However, the Georgia Supreme Court disagreed and held Georgia state law defined "territorial jurisdiction" as the judicial circuit in which the superior court judge presides.[25] Admitting the legislature was authorized to carve out exceptions to this rule, the Georgia Supreme Court pointed out that it did not expressly do so, and thus applied this "default rule."[26] The Court did not agree with the Court of Appeals that the state wiretap statute's general language permitting "'a judge of superior court . . . [to] issue an investigative warrant,'" expressly granted superior courts broad authority to issue warrants outside of their judicial circuits.[27] Instead, it held such a broad grant of power, absent any "evidence, textual or otherwise," could not be granted under such terms.[28] The Court went on to say that the legislature could have explicitly granted such authority.[29] Moreover, the fact that the legislature expanded territorial jurisdiction in other areas of the same bill gave weight to the presumption that its lack of explicitly granting the same broad authority in the wiretap statute was intentional.[30]

This decision, handed down by the Georgia Supreme Court on January 7, 2013, created uncertainty for incarcerated offenders and defendants indicted on evidence gathered under wiretap warrants issued by a neighboring county. In response to the decision, Senator Jesse Stone (R-23rd) remarked that "'[i]t's not feasible to believe every circuit could afford to operate a $750,000 surveillance

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24. *Luangkhot*, 313 Ga. App. at 603, 722 S.E.2d at 197.

25. *Luangkhot*, 292 Ga. at 428, 736 S.E.2d at 400. Several Georgia cases and statutes supported the Court's conclusion. *See, e.g.*, O.C.G.A. § 15-6-10 (1998) (a superior court judge "shall discharge all the duties required of him . . . for the circuit for which he was elected or appointed"); OCGA § 15-6-23 (1998) (a superior court judge may sign warrants and other official documents "in any county comprising a part of his circuit"); State v. Lejeune, 277 Ga. 749, 752, 594 S.E.2d 637, 641 (2004) (stating a superior court's authority to issue warrants is generally "limited to places within that court's territorial jurisdiction[]"); Granese v. State, 232 Ga. 193, 197, 206 S.E.2d 26, 31 (1974) (holding, under a prior version of the wiretap statute, that a superior court judge may issue warrants from any county within his circuit).

26. *Luangkhot*, 292 Ga. at 427, 736 S.E.2d at 401.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

monitoring center'"[31] and that the ruling "'jeopardized bringing to justice drug cartels and other organized crimes because of a technicality about the current code's allowance of surveillance devices.'"[32]

Bill Tracking of HB 55

Consideration and Passage by the House

Representatives Rich Golick (R-40th), Matt Ramsey (R-72nd), Alex Atwood (R-179th), B.J. Pak (R-108th), Christian Coomer (R-14th), and House Minority Leader Stacey Abrams (D-89th) sponsored House Bill (HB) 55.[33] On January 16, 2013, the bill was read for the first time and Speaker of the House David Ralston (R-7th) assigned it to the House Judiciary Non-Civil Committee.[34] The second reading occurred on January 17, 2013.[35] On the following day, the Committee met to discuss the bill.[36] The discussion was led by Representative Golick (R-40th), along with David McDade of the Douglas County District Attorney's Office, Dan Mayfield of the Gwinnett County District Attorney's Office, and Jason Saliba of the Cobb County District Attorney's Office.[37] During the meeting, Representative Golick (R-40th) voiced his concern that the word "communication" in the pen register section of the amendment was ambiguous.[38] Because the amendments were proposed in response to the Georgia Supreme Court's interpretation of the law, Representative Golick (R-40th) felt the amendment should be as clear as possible.[39] At the suggestion of Dan Mayfield, the

31. Press Release, Georgia Senate Press Office, Senate Passes Bill Allowing State-Wide Surveillance Devices (Feb. 12, 2013), http://senatepress.net/senate-passes-bill-allowing-state-wide-surveillance-devices.html.

32. *Id.*

33. HB 55, as introduced, 2013 Ga. Gen. Assem.

34. Video Recording of House Proceedings, Jan. 16, 2013 at 20 min., 00 sec., (remarks by Speaker of the House David Ralston (R-7th)), http://www.gpb.org/lawmakers/2013/day-3.

35. State of Georgia Final Composite Status Sheet, HB 55, May 9, 2013.

36. Video Recording of House Judiciary Non-Civil Committee, Jan. 18, 2013, http://www.house.ga.gov/Committees/en-US/CommitteeArchives146.aspx. [hereinafter House Committee Video].

37. *Id.*

38. *Id.* at 41 min., 50 sec. (remarks by Rep. Rich Golick (R-40th)).

39. *Id.*

Committee amended the statutory language from "[s]uch order shall have state-wide application and interception of *communications* shall be permitted in any location in this state" to "[s]uch order shall have state-wide application and the interception by use of a *pen register or trap and trace device* shall be permitted in any location in this state."[40] On January 28, 2013, the House Committee favorably reported the bill by substitute.[41] After the bill was read a third time on January 31, 2013, the House passed it by a 164 to 1 vote and immediately transferred the bill to the Senate.[42]

Consideration and Passage by the Senate

On February 1, 2013, the Senate read and referred the bill to the Senate Judiciary Non-Civil Committee[43] and on February 6, 2013, the Committee favorably reported the bill.[44] The second reading took place on February 7 and on February 12th the Senate read the bill a third time.[45] The Senate then passed HB 55 by a 48 to 6 vote.[46] On February 13, 2013 the House sent the bill to Governor Nathan Deal (R) to be signed into law.[47]

The Act

The Act amends Title 16 of the Official Code of Georgia Annotated with the purpose of clarifying the jurisdiction and authority of a superior court judge granting a wiretap or electronic surveillance investigative warrant, along with granting state-wide application of such surveillance methods.

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40. *Id.* at 55 min., 08 sec. (remarks by Rep. Rich Golick (R-40th)) (emphasis added); *compare* HB 55, as introduced, § 2, p. 2, ln. 35–36, 2013 Ga. Gen. Assem., *with* HB 55 (HCS), § 2, p. 2, ln. 35–36, 2013 Ga. Gen. Assem.

41. *Id.*

42. *See* House Committee Video, *supra* note 36, at 55 min., 08 sec. (remarks by Rep. Rich Golick (R-40th)); Georgia House of Representatives Voting Record, HB 55 (Jan. 31, 2013).

43. State of Georgia Final Composite Status Sheet, HB 55, May 9, 2013.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

Section 1 of the Act amends Code section 16-11-64.[48] This section pertains to the statutory authority for capturing or intercepting the actual content of a communication,[49] such as a phone conversation. The Act allows a district attorney with jurisdiction over a crime under investigation, or the state Attorney General, to apply for an investigative warrant permitting the use of surveillance devices, such as wiretaps.[50] The Act specifies that a superior court judge may issue such warrants if he or she has jurisdiction over the crime under investigation.[51] In a likely attempt to remove textual restrictions that would not encompass technological advances, the Act removed the reference to Code section 16-11-60 that defines the type of listening devices that can be used to effectuate these investigative warrants.[52] Furthermore, the Act gives such warrants state-wide application, allowing the interception of communications from anywhere within the state.[53] Now, a district attorney with jurisdiction over a crime under investigation can apply for a wiretap warrant from a judge of a superior court also having jurisdiction over the crime, and the interception of the communications, or listening posts, can be located anywhere in the state.

Section 2 of the Act revises Code section 16-11-64.1 to expressly allow state-wide application of warrants authorizing pen register or trap and trace devices.[54] These devices allow investigators to gather real-time electronic recordings of the establishment of a connection between two phones, but they do not capture the content of the communication.[55] Such data is used for monitoring and can be used as evidence in applying for a wiretap warrant.[56] The Act additionally permits interception locations to be anywhere in Georgia.[57]

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48. O.C.G.A. § 16-11-64(c) (Supp. 2013).

49. *Id.*; *see* House Committee Video, *supra* note 36, at 37 min., 51 sec. (remarks by David McDade of the Douglas County District Attorney's Office).

50. O.C.G.A. § 16-11-64(c) (Supp. 2013).

51. *Id.*

52. Video Recording of Senate Proceedings, Feb. 12, 2013 at 1 hr., 14 min., 4 sec. (remarks by Sen. Jesse Stone (R-23rd)), http://www.gpb.org/lawmakers/2013/day-16.

53. O.C.G.A. § 16-11-64(c) (Supp. 2013).

54. O.C.G.A. § 16-11-64.1 (Supp. 2013).

55. *See* House Committee Video, *supra* note 36, at 37 min., 51 sec. (remarks by David McDade of the Douglas County District Attorney's Office).

56. *Id.*

57. O.C.G.A. § 16-11-64.1 (Supp. 2013).

Analysis

Under the statutory interpretation principle "expressio unius est exclusio alterius," if the legislature sets forth a list without a modifying term like "for example," then a court will infer that the legislature intended to exclude all items not listed.[58] Section 2 of the Act states that an order issued by a superior court judge "shall have state-wide application and the interception by use of a pen register or trap and trace device shall be permitted in any location in this state."[59] Thus, a court applying the principle "expressio unius est exclusio alterius" to the Act will likely infer that the legislature intended to exclude all methods of interception that do not use a pen register or trap and trace device. As technology advances, such an interpretation could prove problematic. This issue was addressed, however, during the House Judiciary Non-Civil Committee hearing on the bill.[60] In response to a question on this very issue, Jason Saliba of the Cobb County District Attorney's Office said that "trap and trace" and "pen register" are terms of art that have been used for twenty years and expressed his belief that the terms are defined broadly enough in Code section 16-11-60 to account for technological changes.[61]

The legislature intended for the Act to be a narrow response that would return wiretap authorization to the status quo thought to exist before the Supreme Court of Georgia's decision in *Luangkhot v. State*.[62] It was not meant to expand or reduce wiretap capabilities.[63] By using terms of art that have specific meaning in the area of wiretap authorization, the legislature hopefully avoided the statutory construction problems that led to the decision in *Luangkhot v. State*.[64]

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58. *See, e.g.*, Couch v. Red Roof Inns, 291 Ga. 359, 729 S.E.2d 378 (2012).
59. O.C.G.A. § 16-11-64.1 (Supp. 2013).
60. *See* House Committee Video, *supra* note 36, at 43 min., 30 sec. (remarks by Jason Saliba of the Cobb County District Attorney's Office).
61. *Id.*
62. *Id.* at 26 min., 45 sec. (remarks by Rep. Rich Golick (R-40th)).
63. *Id.*
64. *Id.*