
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1924 **Hearing Date:** June 28, 2016
Author: Low
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Urgency: Yes **Fiscal:** Yes
Consultant: MK

Subject: *Pen Registers: Trap and Trace Devices: Orders*

HISTORY

Source: Los Angeles County Sheriff's Department

Prior Legislation: AB 929 (Chau) – Ch. 204, Stats. 2015

Support: California Civil Liberties Advocacy; California State Sheriffs' Association;
California Police Chiefs Association; California District Attorneys Association;
San Diego County District Attorney; Los Angeles District Attorney's Office

Opposition:

Assembly Floor Vote: 72 - 0

PURPOSE

The purpose of this bill is to provide an exemption from the Electronic Communications Privacy Act (ECPA) for pen registers and trap and trace devices to permit authorization for the devices to be used for 60 days.

Existing Constitutional law provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. (U.S. Constitution 4th Amend.; California Constitution art. I, § 13.)

Existing federal law provides that, except as provided, no person may install or use a pen register or a trap and trace device without first obtaining a court order under section 3123 of this *title* [18 USCS § 3123] or under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.). (18 USCS § 3121.)

- The prohibition does not apply with respect to the use of a pen register or a trap and trace device by a provider of electronic or wire communication service relating to the operation, maintenance, and testing of a wire or electronic communication service or to the protection of the rights or property of such provider, or to the protection of users of that service from abuse of service or unlawful use of service; or to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire

communication, or a user of that service, from fraudulent, unlawful or abusive use of service; or where the consent of the user of that service has been obtained.

- A government agency authorized to install and use a pen register or trap and trace device under this chapter (18 USCS §§ 3121 *et seq*) or under State law shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing, routing, addressing, and signaling information utilized in the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications. (18 USCS § 3121 (c).)
- Whoever knowingly violates the prohibition shall be fined under this title or imprisoned not more than one year, or both. . (18 USCS § 3121 (a) & (b).)

Existing federal law provides that unless prohibited by state law, a state investigative or law enforcement officer may make application for an order or an extension of an order authorizing or approving the installation and use of a pen register or a trap and trace device under this chapter, in writing under oath or equivalent affirmation, to a court of competent jurisdiction of such state. (18 USCS § 3122.)

Existing federal law provides that an attorney for the Government, upon an application, the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device anywhere within the United States, if the court finds that the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation. The order, upon service of that order, shall apply to any person or entity providing wire or electronic communication service in the United States whose assistance may facilitate the execution of the order. Whenever such an order is served on any person or entity not specifically named in the order, upon request of such person or entity, the attorney for the Government or law enforcement or investigative officer that is serving the order shall provide written or electronic certification that the order applies to the person or entity being served. (18 USCS § 3121 (a)(1).)

Existing federal law provides that a state investigative or law enforcement officer, upon an application made as specified, the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device within the jurisdiction of the court, if the court finds that the State law enforcement or investigative officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation. (18 USCS § 3121 (a)(2).)

Existing federal law provides that where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public, the agency shall ensure that a record will be maintained which will identify:

- Any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network;
- The date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information;
- The configuration of the device at the time of its installation and any subsequent modification thereof; and
- Any information which has been collected by the device. (18 USCS § 3121(a)(3).)

Existing federal law provides to the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of such device. (18 USCS § 3121(a)(3).)

Existing federal law states that the record maintained shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof). (18 USCS § 3121(a)(3).)

Existing federal law provides that an order issued for installation of a pen register or track and trace device shall include:

- The identity, if known, of the person to whom is leased or in whose name is listed the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied;
- The identity, if known, of the person who is the subject of the criminal investigation;
- The attributes of the communications to which the order applies, including the number or other identifier and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied, and, in the case of an order authorizing installation and use of a trap and trace device, the geographic limits of the order; and
- A statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates; and
- Shall direct, upon the request of the applicant, the furnishing of information, facilities, and technical assistance necessary to accomplish the installation of the pen register or trap and trace device. : (18 USCS § 3121(b).)

Existing federal law provides that an order issued under this section shall authorize the installation and use of a pen register or a trap and trace device for a period not to exceed sixty days.

- Extensions of such an order may be granted, but only upon an application for an order and upon the judicial finding required as specified. The period of extension shall be for a period not to exceed sixty days.
- Nondisclosure of existence of pen register or a trap and trace device. An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that the order be sealed until otherwise ordered by the court; and the person owning or leasing the line or other facility to which the pen register or a trap and trace device is attached, or applied, or who is obligated by the order to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court. (18 USCS § 3121c.)

Existing federal law provides that notwithstanding any other provision, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General, or by the principal prosecuting attorney of

any state or subdivision thereof acting pursuant to a statute of that state, who reasonably determines that:

- an emergency situation exists that involves immediate danger of death or serious bodily injury to any person;
- conspiratorial activities characteristic of organized crime;
- an immediate threat to a national security interest; or
- an ongoing attack on a protected computer that constitutes a crime punishable by a term of imprisonment greater than one year; (18 USCS § 3125.)

Existing federal law provides that in the absence of an authorizing order, such use shall immediately terminate when the information sought is obtained, when the application for the order is denied or when forty-eight hours have lapsed since the installation of the pen register or trap and trace device, whichever is earlier. (18 USCS § 3125.)

Existing law defines a “search warrant” as an order in writing in the name of the People, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and in the case of a thing or things or personal property, bring the same before the magistrate. (Penal Code § 1523.)

Existing law provides that a search warrant may be issued upon any of the following grounds:

- 1) When the property was stolen or embezzled;
- 2) When the property or things were used as the means of committing a felony;
- 3) When the property or things are in the possession of any person with the intent to use them as a means of committing a public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing them from being discovered;
- 4) When the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony;
- 5) When the property or things to be seized consist of evidence that tends to show that sexual exploitation of a child, or possession of matter depicting sexual conduct of a person under the age of 18 years, has occurred or is occurring;
- 6) When there is a warrant to arrest a person;
- 7) When a provider of electronic communication service or remote computing service has records or evidence, showing that property was stolen or embezzled constituting a misdemeanor, or that property or things are in the possession of any person with the intent to use them as a means of committing a misdemeanor public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing their discovery;
- 8) When the property to be seized includes evidence of a violation of specified Labor Code sections;
- 9) When the property to be seized includes a firearm or deadly weapon or any other deadly weapon at the scene of a domestic violence offense;
- 10) When the property to be seized includes a firearm or deadly weapon owned by a person apprehended because of his or her mental condition;
- 11) When the property to be seized is a firearm in possession of a person prohibited under the family code;

- 12) When the information to be received from the use of a tracking device under shows a specified violation of the Fish and Game Code or Public Resources Code;
- 13) When a sample of blood would show evidence of a DUI; or,
- 14) Starting January 1, 2016, when the property to be seized is a firearm owned by a person subject to a gun violence restraining order. (Penal Code § 1524(a).)

Existing law provides that a search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched. (Penal Code, § 1525.)

Existing law requires a magistrate to issue a search warrant if he or she is satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence. (Pen. Code, § 1528 (a).)

Existing law generally prohibits a person from installing or using a pen register or trap and trace device except by court order or by the provider of electronic or wire communication under specified circumstances. (Penal Code § 638.51))

Existing law provides that a peace officer may make an application to a magistrate for an order authorizing the installation and use of a pen register or a trap and trace device under specified circumstances. The application shall be in writing under oath. The applicant shall certify that the information likely to be obtained is relevant to an ongoing criminal investigation and shall include a statement of the offense to which the information likely be obtained by the pent register or trap and trace device. (Penal Code § 638.52)

Existing law, as part of the Electronic Communications Privacy ACT (ECPA), specifies how and when a government entity may access electronic device information by means of physical interaction or electronic communication with the device. (Penal Code § 1546.1)

This bill provides a statutory exemption in ECPA for pen registers and trap and trace devices that will ensure that orders for these devices are valid for 60 days rather than 10 days provided for in ECPA.

This bill ensures that telecommunication providers are compensated for their work when complying with a court order for a pen register or trap and trace device.

This bill clarifies that courts may suppress any information illegally obtained from a pen register or trap trace device.

This bill provides that a government entity that obtains information from a trap and trace device or a pen register shall provide notice to the targets, as specified.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as “of December 9, 2015, 112,510 inmates were housed in the State’s 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015.” (Defendants’ December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State’s 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants’ December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

Federal law allows law enforcement agencies to use pen register and trap and trace devices, but they must obtain a court order from a judge prior to the installation of the device. However, during an emergency situation, they may use these devices without a court order if they obtain the court order within 48 hours of the use of the device. Law enforcement agencies must demonstrate that there is

reasonable suspicion that the use of the device is relevant to an ongoing criminal investigation and will lead to obtaining evidence of a crime for a judge to authorize the use.

Last year AB 929 (Chau)... authorized California law enforcement officers to apply for the installation of a pen register and trap and trace device as well as an emergency oral pen register and trap and trace device under state, not federal law...

Last year Governor Brown also signed the Electronic Communication Privacy Act (SB 178) into law on October 8, 2015. The ECPA adds Chapter 3.6 to the Penal Code. Absent a statutory exemption, Penal Code section 15471(a) will preclude a government entity from compelling the production of or access to electronic communication information from a service provider, compelling the production of or access to electronic device information from any person or entity other than the authorized possessor of the device, or accessing electronic device information by means of physical interaction or electronic communication with the electronic device.

A government entity must obtain a search warrant issued pursuant to Chapter 3 (commencing with Penal Code section 1523) and subject to the requirement of Penal Code section 1546.1(d) to compel the production of or access to electronic communication information from a service provider, or compel production of or access to electronic device information from any person or entity other than the authorized possessor of the device.

The ECPA was undoubtedly drafted to regulate law enforcement's use of electronic serial number (ESN) identification technology. However, an unintended consequence of the ECPA is the potential nullification of AB 929. The ECPA's definitions of electronic communication and electronic communication information include the call detail records that are captured by a pen register/trap and trace device. The ECPA requires the issuance of a search warrant pursuant to Chapter 3 (PC 1523 et. Seq.) for electronic information. The new pen register/trap and trace device statute is in Chapter 1. The ECPA would therefore require law enforcement to seek a search warrant in order to obtain a pen register. Search warrants are valid for ten days, whereas pen register/trap and trap device orders are valid for 60 days under federal law and AB 929.

Furthermore, the AB 929 amendment process resulted in a drafting error. Language regarding the compensation of telecommunication providers by law enforcement for reasonable expenses incurred while complying with the court's order was inadvertently deleted from section 638.52, which applies to written applications for a pen register/trap and trace order. The language was only included in section 638.53, which governs an oral application for an order in an emergency.

AB 1924 still requires a court to make a finding that there is probable cause to grant an order for a pen register or a trap and trace device. We are working with the ACLU to draft amendments that would require law enforcement to provide notice to the identified targets of a pen register/trap trace order and to add suppression language that would statutorily authorize the suppression of any electronic information obtained from a pen register/trap trace order via a Penal Code Section 1538.5 motion.

2. Pen Registers and Trap and Trace Devices

Federal law allows law enforcement agencies to use pen register and trap and trace devices, but they must obtain a court order from a judge prior to the installation of the device. However, during an emergency situation, law enforcement agencies may use these devices without a court order if they obtain the court order within 48 hours of the use of the device. Law enforcement agencies must demonstrate that there is reasonable suspicion that the use of the device is relevant to an ongoing criminal investigation and will lead to obtaining evidence of a crime for a judge to authorize the use.

Though federal law authorizes states and local law enforcement officers to use pen register and trap and trace devices by obtaining a court order first, it does not allow them to obtain an emergency order unless there is a state statute authorizing and creating a process for states and local law enforcement officers to do so.

Pen registers and track and trace devices generally track incoming and outgoing telephone calls. They are often utilized by law enforcement to track which people in an investigation are communicating with one another and at what times. Unlike a wiretap authorization, pen registers and track and trace devices do not provide law enforcement with the content of the messages which are transmitted. Wiretap authorizations are therefore subject to a much higher standard of scrutiny. Under federal law, these authorizations can be granted on a reasonable suspicion standard, while search warrants are subject to a higher standard of probable cause.

AB 929 (Chau), Chapter 204, Statutes of 2015 authorized state and local law enforcement to use pen register and trap and trace devices under state law, and permitted the issuance of emergency pen registers and trap and trace devices. Under this legislation, the authorization for the use of a trap and trace device or a pen register was for 60 days from the date of issuance, with extensions of up to 60 days. However, the governor signed AB 929 prior to signing the ECPA and as a result the authorization was chaptered out by the ECPA's 10-day authorizations.

3. Electronic Communications Privacy Act (ECPA)

Last year the legislature passed SB 178 (Leno), Chapter 651, Statutes of 2015, which prohibited a government entity from compelling the production of, or access to, electronic-communication information or electronic-device information without a search warrant or wiretap order, except under specified emergency situations. Specifically, this new law prohibits a government entity from:

- a) Compelling the production, of or access to, electronic communication information from a service provider;
- b) Compelling the production of or access to electronic device information from any person or entity other than the authorized possessor of the device; and,
- c) Accessing electronic device information by means of physical interaction or electronic communication with the device, although voluntary disclosure to a government entity is permitted.

The ECPA also permits a government entity to compel the production of, or access to, electronic communication information subject from a service provider, or compel the production of or access to electronic device information from any person or entity other than the authorized possessor of the device pursuant to a warrant, wiretap order, order for electronic reader records, or subpoena issued pursuant to existing state law, as specified.

4. Allowance of Pen Registers and Trap Devices

This bill makes an exception to the ECPA, allowing pen registers and trap or trace devices to be installed for 60 days. It also places notice requirements on the entity that obtains the information.

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