SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 298	**Hearing Date:**	April 14, 2015
Author:	Block		
Version:	February 23, 2015		
Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

Subject: ***Money Laundering: Interception of Electronic Communications***

HISTORY

Source: California Attorney General

Prior Legislation: SB 955 (Mitchell) Ch.712, Stats. 2014
SB 61 (Pavley) Ch. 663, Stats. 2011
SB 1428 (Pavley) – Ch. 707 Stats. 2010
AB 569 (Portantino) – Ch. 307, Stats. 2007
AB 74 (Washington) – Ch. 605, Stats. 2002
Proposition 21 – approved March 7, 2000
SB 1016 (Boatwright) – Ch. 971, Stats. 1995
SB 800 (Presley) – Ch. 548, Stats. 1993
SB 1120 (Presley) – 1991
SB 83 – amended out in part and chaptered in part as SB 1499 (1988)
SB 1499 – Ch. 111, Stats. 1988

Support: Alameda County District Attorney; Association for Los Angeles Deputy Sheriffs; Association of Deputy District Attorneys; California Correctional Supervisors Organization; California Narcotic Officers Association; California State Sheriffs' Association; California Statewide Law Enforcement Association; Los Angeles Protective League; Peace Officers Research Association; Riverside Sheriffs Association

Opposition: American Civil Liberties Union; California Public Defenders Association

PURPOSE

The purpose of this bill is to add money laundering for criminal profiteering to the crimes for which a wiretap may be sought.

Existing law authorizes the Attorney General, chief deputy attorney general, chief assistant attorney general, district attorney or the district attorney's designee to apply to the presiding judge of the superior court for an order authorizing the interception of wire or electronic communications under specified circumstances. (Penal Code §§ 629.50 *et. seq*.)

Existing law provides that the court may grant oral approval for an emergency interception of wire, electronic pager or electronic cellular telephone communications without an order as specified. Approval for an oral interception shall be conditioned upon filing with the court, within 48 hours of the oral approval, a written application for an order. Approval of the ex parte

order shall be conditioned upon filing with the judge within 48 hours of the oral approval. (Penal Code § 629.56.)

Existing law provides that no order entered under this chapter shall authorize the interception of any wire, electronic pager or electronic cellular telephone or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days. (Penal Code §629.58.)

Existing law requires that written reports showing what progress has been made toward the achievement of the authorized objective, including the number of intercepted communications, be submitted at least every 10 days to the judge who issued the order allowing the interception. (Penal Code § 629.60.)

Existing law requires the Attorney General to prepare and submit an annual report to the Legislature, the Judicial Council and the Director of the Administrative Office of the United States Court on interceptions conducted under the authority of the wiretap provisions and specifies what the report shall include. (Penal Code § 629.62.)

Existing law provides that applications made and orders granted shall be sealed by the judge. Custody of the applications and orders shall be where the judge orders. The applications and orders shall be disclosed only upon a showing of good cause before a judge and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for 10 years. (Penal Code § 629.66.)

Existing law provides that a defendant shall be notified that he or she was identified as the result of an interception prior to the entry of a plea of guilty or *nolo contendere*, or at least 10 days, prior to any trial, hearing or proceedings in the case other than an arraignment or grand jury proceeding. Within 10 days prior to trial, hearing or proceeding the prosecution shall provide to the defendant a copy of all recorded interceptions from which evidence against the defendant was derived, including a copy of the court order, accompanying application and monitory logs. (Penal Code § 629.70.)

Existing law provides that any person may move to suppress intercepted communications on the basis that the contents or evidence were obtained in violation of the Fourth Amendment to the United States Constitution or of California electronic surveillance provisions. (Penal Code § 629.72.)

Existing law provides that the Attorney General, any deputy attorney general, district attorney or deputy district attorney or any peace officer who, by any means authorized by this chapter has obtained knowledge of the contents of any wire, electronic pager, or electronic communication or evidence derived therefrom, may disclose the contents to one of the individuals referred to in this section and to any investigative or law enforcement officer as defined in subdivision (7) of Section 2510 of Title 18 of the United State Code to the extent that the disclosure is permitted pursuant to Section 629.82 and is appropriate to the proper performance of the official duties of the individual making or receiving the disclosure. No other disclosure, except to a grand jury, of intercepted information is permitted prior to a public court hearing by any person regardless of how the person may have come into possession thereof.. (Penal Code § 629.74.)

Existing law provides that if a law enforcement officer overhears a communication relating to a crime that is not specified in the wiretap order, but is a crime for which a wiretap order could have been issued, the officer may only disclose the information and thereafter use the evidence, if, as soon as practical, he or she applies to the court for permission to use the information. If an officer overhears a communication relating to a crime that is not specified in the order, and not one for which a wiretap order could have been issued or any violent felony, the information may not be disclosed or used except to prevent the commission of a crime. No evidence derived from the wiretap can be used unless the officers can establish that the evidence was obtained through an independent source or inevitably would have been discovered. In all instances, the court may only authorize use of the information if it reviews the procedures used and determines that the interception was in accordance with state wiretap laws. (Penal Code § 629.82 (b).)

Existing law specifies the crimes for which an interception order may be sought: murder, kidnapping, bombing, criminal gangs, and possession for sale, sale, transportation, or manufacturing of more than three pounds of cocaine, heroin, PCP, methamphetamine or its precursors, possession of a destructive device, weapons of mass destruction or restricted biological agents, human trafficking. (Penal Code § 629.52.)

This bill adds to the list of crimes for which a wiretap may be sought money laundering for the benefit of or in association with an ongoing organization that has engaged in criminal profiteering and if the values of the transactions exceed $50,000.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight 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 February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 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).

While significant gains have been made in reducing the prison population, the state now 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:

> Transnational criminal organizations situated outside the country, such as Mexican drug cartels, are able to thrive only when they can access the proceeds of their illicit activities. By helping them hide and transport illicit proceeds across state lines undetected, money laundering permits these organizations to reap the lucrative rewards of trafficking humans, drugs, and weapons.
>
> As an international hub at the center of global commerce, California is an epicenter of money laundering activities. According to the El Paso Intelligence Center, a federal clearinghouse of data on currency and narcotics seizures, California is one of the top two states through which drug money flows and in which such money is seized.[1] In 2012, as much as $40 billion—or 2 percent of California's gross domestic product—may have been laundered in the state.[2] These funds not only fuel the ongoing operations of criminal organizations around the world, but also supply those organizations with the means to expand and extend their global influence.
>
> To shut off this unprecedented flow of illicit funds into and out of California, state and local law enforcement urgently need the kind of tools that law enforcement at the federal level[3] and in other states (such as Hawaii,[4] New York,[5] and Oregon[6])

---

[1] Money Laundering Threat Assessment Working Group, *U.S. Money Laundering Threat Assessment* (Dec. 2005), p. 38 (Tables 8 & 9), accessible at http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/mlta.pdf.
[2] Office of the Attorney General, *Gangs Beyond Borders: California and the Fight Against Transnational Organized Crime* (Mar. 2014), p. 24.
[3] 18 U.S.C. § 2516(c).
[4] Haw. Rev. Stat. § 803-44.
[5] N.Y. CPL § 700.05(8)(o).
[6] Or. Rev. Stat. §§ 133.74, 166.720.

have. One such tool that law enforcement in California currently lack is authority to use wiretaps to investigate large-scale money laundering activities.

While the existing wiretap statute, Penal Code section 629.52, authorizes wiretaps to investigate trafficking activities and street gang felonies, it fails to address the sophisticated money laundering operations that often go along with these crimes. SB 298 would offer state and local law enforcement a strictly regulated avenue for using wiretaps to investigate large-scale money laundering activities, and thereby directly target the financial pipeline that sustains transnational organized crime. In particular, SB 298 would add money laundering by organized crime groups to the list of predicate offenses for which wiretaps may be authorized. This new authority would be limited only to cases where the value of the money laundered exceeds $50,000.

2. Federal Wiretapping Law

a. The Fourth Amendment Protects Telephone Communications

The United States Supreme Court ruled in *Katz v. United States* (1967) 389 U.S. 347, 88 S.CT. 507, 19 L.ED.2D 576, that telephone conversations were protected by the Fourth Amendment to the United States Constitution. Intercepting a conversation is a search and seizure similar to the search of a citizen's home. Thus, law enforcement is constitutionally required to obtain a warrant based on probable cause and to give notice and inventory of the search.

b. Title III Allows Wiretapping Under Strict Conditions

In 1968, Congress authorized wiretapping by enacting Title III of the Omnibus Crime Control and Safe Streets Act. (See 18 USC Section 2510 et seq.) Out of concern that telephonic interceptions do not limit the search and seizure to only the party named in the warrant, federal law prohibits electronic surveillance except under carefully defined circumstances. The procedural steps provided in the Act require "strict adherence." (*United States v. Kalustian*, 529 F.2d 585, 588 (9th Cir. 1976)), and "utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III.") Several of the relevant statutory requirements may be summarized as follows:

i. Unlawfully intercepted communications or non-conformity with the order of authorization may result in the suppression of evidence.
ii. Civil and criminal penalties for statutory violations.
iii. Wiretapping is limited to enumerated serious felonies.
iv. Only the highest ranking prosecutor may apply for a wiretap order.
v. Notice and inventory of a wiretap shall be served on specified persons within a reasonable time but not later than 90 days after the expiration of the order or denial of the application.
vi. Judges are required to report each individual interception. Prosecutors are required to report interceptions and statistics to allow public monitoring of government wiretapping.

c. The Necessity Requirement – Have Other Investigative Techniques Been Tried Before Applying to the Court for a Wiretap Order?

3. Wire or Electronic Communication

Under existing law, the Attorney General or a district attorney may make an application to a judge of the superior court for an application authorizing the interception of a wire, electronic pager or electronic cellular telephone. The law regulates the issuance, duration and monitoring of these orders and imposes safeguards to protect the public from unreasonable interceptions. The law also limits the crimes for which an interception may be sought to the following:

- Importation, possession for sale, transportation or sale of controlled substances;
- Murder or solicitation of murder or commission of a felony involving a destructive device;
- A felony in violation of prohibitions on criminal street gangs;
- Possession or use of a weapon of mass destruction;
- Human trafficking; or
- An attempt or conspiracy to commit any of the above.

4. Money Laundering

This bill would add money laundering in support of criminal profiteering activity in an amount greater than $50,000 to the crimes for which a wiretap may be sought. The sponsor believes this bill is necessary to assist in the prosecution of transnational criminal organizations.

5. Are These Activities Already Covered?

It is unclear that the expansion of the wiretap provisions to money laundering is necessary since many of the crimes associated with organizations that also launder money are covered and many of the offenses are international and thus would be prosecuted by the Federal government. The Office of the Attorney General's report *Gangs beyond Borders: California and the Fight Against Transnational Organized Crime* (Mar 2014) investigated the harm done by transnational organizations in California. In the report the money laundering seems to be mostly associated with transnational gangs that also import drugs and/or participate in human trafficking, both crimes of which a search warrant can already be sought. Since these are international crimes, if federal law enforcement officials are involved they have the ability to get a wiretap if an organization is solely involved in money laundering with no other related offenses.

6. Opposition

The ACLU opposes this bill stating:

> The ACLU of California has consistently opposed expansion of the state's wiretap law. Our objections are based on our ongoing concern that wiretapping violates basic privacy rights. Because it picks up both sides of all conversations of all calls made by or to all persons using the telephone under surveillance, a wiretap by definition constitutes a general search—committed not only against the person under suspicion but against countless other callers connected with the suspect, often only remotely or not at all.

California's current wiretap statute already grants broad parents to law enforcement to intercept wire or electronic communications of individuals they suspect of committing money laundering as part of a pattern of a criminal profiteering, thus exposing countless individuals to privacy invasions described above. [footnotes admitted] Given law enforcement's current wiretap capabilities, further expansion of the statute is unnecessary, and will only needlessly expose additional innocent parties to the inevitable privacy violations that come with this practice.

-- END –