
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 539 **Hearing Date:** June 13, 2017
Author: Acosta
Version: April 4, 2017
Urgency: No **Fiscal:** No
Consultant: SC

Subject: *Search Warrants*

HISTORY

Source: California District Attorneys Association

Prior Legislation: AB 539 (Levine), Chapter 118, Statutes of 2015
AB 1104 (Rodriguez), Chapter 124, Statutes of 2015
AB 1310 (Gatto), Ch. 643, Stats. 2015
SB 178 (Leno), Ch. 651, Stats. 2015
AB 1014 (Skinner), Ch. 872, Stats. 2014
SB 717 (DeSaulnier), Chapter 317, Statutes of 2013

Support: California State Sheriffs' Association; San Diego County District Attorney's Office

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association

Assembly Floor Vote: 73 - 0

PURPOSE

The purpose of this bill is to authorize the issuance of a search warrant for violations of invasion of privacy laws.

Existing 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. Const., 4th Amend.; Cal. Const., Art. I, § 13.)

Existing law defines a "search warrant" as a written order in the name of the people, signed by a magistrate and 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. (Pen. Code, § 1523.)

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

- When the property was stolen or embezzled; (Pen. Code, § 1524, subd. (a)(1).)

- When the property or things were used as the means of committing a felony; (Pen. Code, § 1524, subd. (a)(2).)
- 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 person to whom the property or things were delivered for the purpose of concealing them or preventing them from being discovered; (Pen. Code, § 1524, subd. (a)(3).)
- 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; (Pen. Code, § 1524, subd. (a)(4).)
- 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; (Pen. Code, § 1524, subd. (a)(5).)
- When there is a warrant to arrest a person; (Pen. Code, § 1524, subd. (a)(6).)
- 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; (Pen. Code, § 1524, subd. (a)(7).)
- When the property or things to be seized include an item or any evidence that tends to show a violation of the Labor Code, as specified; (Pen. Code, § 1524, subd. (a)(8).)
- When the property or things to be seized include a firearm or any other deadly weapon at the scene of, or at the premises occupied or under the control of the person arrested in connection with, a domestic violence incident involving a threat to human life or a physical assault; (Pen. Code, § 1524, subd. (a)(9).)
- When the property or things to be seized include a firearm or any other deadly weapon that is owned by, or in the possession of, or in the custody or control of, a person as specified, in the Welfare and Institutions Code; (Pen. Code, § 1524, subd. (a)(10).)
- When the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is subject to the prohibitions regarding firearms under specified provisions of the Family Code; (Pen. Code, § 1524, subd. (a)(11).)
- When the information to be received from the use of a tracking device constitutes evidence that tends to show either a felony or a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code has been committed or is being committed; (Pen. Code, § 1524, subd. (a)(12).)
- When a sample of the blood of a person constitutes evidence that tends to show a violation of misdemeanor driving under the influence and the person from whom the

sample is being sought has refused an officer's request to submit to, or has failed to complete, a blood test; (Pen. Code, § 1524, subd. (a)(13).)

- When the property or things to be seized are firearms or ammunition or both that are owned by, in the possession of, or in the custody or control of a person who is the subject of a gun violence restraining order, as specified; (Pen. Code, § 1524, subd. (a)(14).)
- Beginning January 1, 2018, when the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is a convicted felon, and the court has found that the person has failed to relinquish the firearm as required by law; (Pen. Code, § 1524, subd. (a)(15).)
- When the property or things to be seized are controlled substances or a device, contrivance, instrument, or paraphernalia used for unlawfully using or administering a controlled substance, as specified; and (Pen. Code, § 1524, subd. (a)(16).)
- When all of the following apply: (1) a blood sample constitutes evidence that tends to show a violation of specified sections of the Harbors and Navigation Code relating to the operation of a marine vessel while under the influence of drugs or alcohol; (2) the person from whom the sample is being sought has refused an officer's request to submit to, or has failed to complete, a blood test; and (3) the sample will be drawn from the person in a reasonable, medically approved manner. This provision is not intended to abrogate a court's mandate to determine the propriety of the issuance of a search warrant on a case-by-case basis. (Pen. Code, § 1524, subd. (a)(17).)

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. (Pen. 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, subd. (a).)

Existing law makes it a misdemeanor for any person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, camcorder, or mobile phone, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside. (Pen. Code § 647, subd. (j)(1).)

Existing law makes it a misdemeanor for any person to use a concealed device to secretly videotape or record by electronic means another identifiable person under or through his or her clothing, for the purpose of viewing that person's body or undergarments without consent and under circumstances in which that person has a reasonable expectation of privacy, if the perpetrator commits the act with a prurient intent. (Pen. Code § 647, subd. (j)(2).)

Existing law makes it a misdemeanor for any person who uses a concealed device to secretly videotape or record another identifiable person who is in a state of full or partial undress, for the purpose of viewing that person's body or undergarments without consent while that person is in a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the

interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that individual. (Pen. Code § 647, subd. (j)(3).)

This bill would expand the grounds for issuance of a search warrant to include when the property or things to be seized consists of evidence that tends to show a violation of invasion of privacy laws, as specified.

COMMENTS

1. Need for This Bill

According to the author:

Riley v. California (2014) __ U.S. __, 134 S.Ct. 2473 requires a search warrant for most cell phone searches, and California's Electronic Communication Privacy Act (Penal Code section 1546.1) now requires a warrant to search for electronic device information absent "specific consent." With specified exceptions, PC 1524 generally provides for a warrant to search for evidence of a felony (subd. (a)(4)) or "[w]hen 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" (subd. (a)(3)). Thus, it has become difficult to obtain crucial digital evidence of misdemeanor crimes that have already been committed with the use of an electronic device unless there is also probable cause to believe that the device is possessed with the intent to use it to commit a public offense in the future.

Penal Code section 647(j) proscribes . . . significant misdemeanor invasions of personal privacy committed with the use of a photographic or other device and AB 539 impacts Paragraphs 1-3. Paragraph (1) proscribes peeking into a bedroom, bathroom, dressing room, or other interior private area by means of an instrumentality such as a phone, camera or binoculars with an intent to invade the occupant's privacy. Paragraph (2) proscribes the use of a photographic device to record under or through another person's clothing without their consent and with sexual intent. Paragraph (3) proscribes using a photographic device to record another identifiable person in a state of full or partial undress in a bedroom, bathroom, or other interior private area in order to view their body or undergarments without their consent.

Penal Code section 1524 provides for a search warrant for evidence of Penal Code section 311.3 and 311.11 violations – crimes involving minor victims (see subd. (a)(5)). However, there is no similar provision when an adult victim is photographed without his or her consent. At UC Santa Cruz alone, there were seven reported PC 647(j) incidents from April 2015 to January 2016 where a cell phone or other device was utilized to spy on and/or photograph an unconsenting adult female in a bathroom stall or shower. One victim's suicide demonstrates the great harm that can flow from the use of a phone to surreptitiously record a person in a bathroom stall. It is unfathomable that a suspect should be allowed to keep a partially or fully unclothed image of his victim because law enforcement cannot

get a search warrant for a cell phone or device containing evidence of a 647(j)(1-3) violation that has already occurred.

2. The Fourth Amendment and Search Warrants

Both the United States and the California constitutions guarantee the right of all persons to be secure from unreasonable searches and seizures. (U.S. Const., amend. IV; Cal. Const., art. 1, sec. 13.) This protection applies to all unreasonable government intrusions into legitimate expectations of privacy. (*United States v. Chadwick* (1977) 433 U.S. 1, 7, overruled on other grounds by *California v. Acevedo* (1991) 500 U.S. 565.) In general, a search is not valid unless it is conducted pursuant to a warrant. A search warrant may not be issued without probable cause. "Reasonable and probable cause exists if a man of ordinary care and prudence would be led to conscientiously entertain an honest and strong suspicion that the accused is guilty." (*People v. Alvarado* (1967) 250 Cal.App.2d 584, 591.) The mere reasonableness of a search, assessed in light of the surrounding circumstances, is not a substitute for the warrant required by the Constitution. (*Arkansas v. Sanders* (1979) 442 U.S. 753, 758, overruled on other grounds by *California v. Acevedo*, supra.) There are exceptions to the warrant requirement, but the burden of establishing an exception is on the party seeking one. (*Arkansas v. Sanders* (1979) 442 U.S. 753, 760, overruled on other grounds by *California v. Acevedo*, supra.)

In California, Penal Code section 1524 provides the statutory grounds for the issuance of warrants. Under these provisions, a search warrant may be issued "[w]hen property or things were used as the means to commit a felony." (Pen. Code, § 1524, subd. (a)(2).) There are other enumerated circumstances that authorize a search warrant regardless of whether the crime was a felony or misdemeanor, such as "[w]hen the property subject to search was stolen or embezzled." (Pen. Code, § 1524, subd. (a)(1).) Additionally, Penal Code section 1524 provides that a search warrant may be issued "[w]hen 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. . . ." (Pen. Code, § 1524, subd. (a)(3).) A "public offense" is defined as crimes which include felonies, misdemeanors, and infractions. (Pen. Code, § 16.)

This bill adds specified provisions of misdemeanor invasion of privacy crimes to the narrowly defined list of misdemeanors for which a search warrant may be sought, when the evidence tends to show that the specified crimes has occurred or is occurring.

3. Electronic Information and Privacy Rights

In *Riley v. California* (2014) 573 U.S. ____ [134 S.Ct. 2473, 2495], the United States Supreme Court held that law enforcement officers generally must secure a warrant before searching the digital content of a cell phone incident to an arrest, observing that a cell phone "not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form...." (*Id.* at p. 2491.) "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life' [citation]." (*Id.* at pp. 2494–2495.)

The California Electronic Communications Privacy Act (Leno), Chapter 651, Statutes of 2015, is a comprehensive digital privacy law which took effect on January 1, 2016 (§ 1546 et seq.).

[I]t requires all California state and local law enforcement agencies to obtain a search warrant or wiretap order before they can access any electronic communication information. The law defines ‘electronic communication information’ in the broadest terms possible so that it includes emails, digital documents, text messages, location information, and any digital information stored in the cloud. The law protects all aspects of electronic communication information, not just its contents, but also metadata information relating to the sender, recipient, format, time, date, and location of the communications, including IP addresses.

CalECPA also limits the ability of California law enforcement to obtain information directly from a smartphone or similar device, or to track them. Law enforcement must either obtain a warrant or get the consent of the person possessing the electronic device.

(Daniels, *California Updates Privacy Rights with the Electronic Communications Privacy Act* (Nov. 17, 2015) JDSupra.)

Much of the evidence that would be sought in cases of invasion of privacy would likely be on an electronic device such as a cell phone or on a computer. The CalECPA requires a search warrant whenever law enforcement seeks to obtain electronic information on a cell phone or similar electronic device and contains additional specified requirements for such warrants and the handling of electronic information obtained through the warrant.

Should this bill be amended to specify that a search warrant sought pursuant to the provisions of this bill are subject to the requirements in CalECPA?

4. Argument in Support

The California State Sheriffs’ Association writes in support of this bill:

Current statute outlines four significant misdemeanor invasion of personal privacy offenses. Existing law, however, generally provides for a warrant to search for evidence only if the suspected offense is a felony.

AB 539 would authorize the issuance of search warrants to collect evidence that would show misdemeanor violations of the invasion of privacy.

5. Argument in Opposition

The California Public Defenders Association writes in opposition of this bill:

Under current law, California restricts the use of search warrants, that is, judicially sanctioned orders permitting police intrusion into our most private spaces, to investigations generally involving serious, felonious, criminal conduct. Thus, law enforcement is permitted to violate the privacy of the family home only where the need is significant, but is not permitted to do so when the alleged violation is minor. While law enforcement may seek court permission to intrude on a family home or access a private computer in instances where the police wish to recover items used in the commission of a felony, they are barred from doing

so when investigating a misdemeanor violation of disturbing the peace. (See Pen. Code, § 1524.)

AB 539 seeks to expand the scope of offenses that permit police intrusion into the family home by authorizing the issuance of search warrants in cases involving any misdemeanor violation of section 647(j). Such an expansion is contrary to the current statutory restriction to such warrants to investigations involving serious offenses.

-- END --