SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	AB 1948	**Hearing Date:**	June 19, 2018
Author:	Jones-Sawyer		
Version:	January 29, 2018		
Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

Subject: ***Interception of Electronic Communication***

HISTORY

Source: Los Angeles District Attorney's Office

Prior Legislation: SB 955 (Mitchell) Chapter 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: California Association of Code Enforcement Officers; California College and University Police Chiefs; California Correctional Supervisors Organization; California District Attorneys Association; California Narcotic Officers Association; California State Sheriffs' Association; California Statewide Law Enforcement Association; Los Angeles County Professional Peace Officers Association; Los Angeles County Sheriff's Department; Riverside Sheriffs' Association

Opposition: None known

Assembly Floor Vote: 77 - 1

PURPOSE

The purpose of this bill is to add fentanyl to the list of controlled substances for which interception of wire or electronic communications may be ordered.

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, restricted biological agents or human trafficking. (Penal Code § 629.52.)

Existing law specifies that fentanyl is a Schedule II controlled substance. (Health & Safety Code, § 11055 (c)(8).)

Existing law prohibits possession for sale or purchase for sale of fentanyl, and provides for imprisonment in a county jail for two, three, or four years for a violation of this provision. (Health & Safety Code § 11351.)

Existing law prohibits transporting, importing into this state, selling, furnishing, administering, or giving away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport fentanyl, and provides for imprisonment in a county jail for three, four, or five years for a violation of this provision. (Health & Safety Code § 11352.)

Existing law prohibits manufacturing, compounding, converting, producing, deriving, processing, or preparing, either directly or indirectly by chemical extraction or independently by means of chemical synthesis, fentanyl, and provides for imprisonment in a county jail for 3, 5 or 7 years and by a fine not exceeding $50,000. (Health & Safety Code § 11379.6.)

This bill adds fentanyl to the narcotics for which an interception order may be made when there is probably cause to believe a person has committed the offense of importing, possessing for sale, transporting or manufacturing the narcotic.

COMMENTS

1. Need for This Bill

According to the sponsor the Los Angeles District Attorney's Office:

> …Because of the high demand and profitability of fentanyl California has seen a dramatic increase in fentanyl seizures by law enforcement. According to the DEA, 48 kilograms of fentanyl were seized in California in 2015. In 2016, 244 kilograms were seized. As of June 2017, 104 kilograms have been seized in California. Most alarming, there were only 8 law enforcement (state and federal) seizures of fentanyl in California in 2015; by 2016, the number of seizures increased to 37. As of June 2017, there have been 46 seizures of fentanyl.
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> Unfortunately, one of the most successful tools law enforcement has to tackle a problem like the one fentanyl poses is the use of wiretaps. Penal Code section 692.52 (a) enumerates the offenses for which a wiretap may be authorized. This list includes certain narcotic offenses, murder, aggravated kidnapping, any felony violation of Penal Code section 186.22 [gangs], human trafficking, and attempts or conspiracies to commit these enumerated offenses.
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> In particular, Penal Code section 692.52(a)(1) lists heroin, cocaine, PCP, methamphetamine, or their precursors or analogs where the substance exceeds 10 gallons by liquid volume or three pounds of solid substance by weight.
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> Absent form Penal Code section 629.52(a)(1) is fentanyl, which is 50 to 100 times more potent than morphine. In comparison, heroin is roughly twice as potent as morphine. Overdosing on fentanyl is relatively easy, especially for heroin users who may underestimate fentanyl's potency.
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> AB 1948 amends California's wiretap statute to add fentanyl to the list of enumerated controlled substances.
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> The interception of wire and electronic communications (cell phones, text messages, etc.) compromises the ideal tool to investigate, infiltrate, dismantle, and prosecute drug trafficking organizations. The ubiquity of cell phones in virtually all sophisticated criminal enterprises cannot be understated. The ubiquity of cell phones in virtually all sophisticated criminal enterprises cannot be understated. There is not more powerful and irrefutable evidence that can be presented in court than the very words of the defendant describing his or her involvement in the charged crime.

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 which crimes for which an interception may be sought to the following:

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

4. Addition of fentanyl to wiretap provisions

This bill would add fentanyl to the crimes for which an interception (wiretap) may be sought.

The Drug Enforcement Administration (DEA) publishes an annual illicit drug "threat assessment." The assessment reviews trends and issues concerning major drugs of abuse. The 2017 Threat Assessment stated as to fentanyl:

> "Illicit fentanyl and other synthetic opioids — primarily sourced from China and Mexico and shipped directly to the United States or trafficked overland via Mexico and Canada — are contributing factors in the current synthetic opioid overdose epidemic. Traffickers in the United States usually mix fentanyl into heroin products and sometimes other illicit drugs, or press it into counterfeit prescription pills, often without users' awareness, which leads to overdose incidents…
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> "In CY 2016, law enforcement agencies across the United States seized a record high 287 kilograms of fentanyl; a 72 percent increase from the 167 kilograms seized in 2015." (https://www.dea.gov/docs/DIR-040-17_2017-NDTA.pdf)

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