EXHIBIT C

California Bill Analysis, S.B. 1428 Sen., 4/13/2010

California Bill Analysis, Senate Committee, 2009-2010 Regular Session, Senate Bill 1428

April 13, 2010
California Senate
2009-2010 Regular Session

SENATE COMMITTEE ON PUBLIC SAFETY

Senator Mark Leno, Chair

S 2009-2010 Regular Session B 1 4 2 SB 1428 (Pavley) 8 As Introduced February 19, 2010

CRIMINAL INVESTIGATION: INTERCEPTION OF COMMUNICATIONS HISTORY Source: Los Angeles District Attorney's Office Prior Legislation: 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 Peace Officers' Association; California Police Chiefs Association; California District Attorneys Association; California State Sheriffs' Association Opposition:American Civil Liberties Union; California Attorneys for Criminal Justice (More) SB 1428 (Pavley) PageB

KEY ISSUES SHOULD THE TYPE OF COMMUNICATIONS THAT MAY BE INTERCEPTED BY A "WIRETAP" ORDER BE CHANGED TO INCLUDE THE INTERCEPTION OF MODERN TYPES OF TWO-WAY CONTEMPORANEOUS ELECTRONIC COMMUNICATIONS" SHOULD CHANGES BE MADE TO SOME OF THE TIME FRAMES IN THE COMMUNICATION INTERCEPT PROVISIONS" PURPOSE The purpose of this bill is to amend the existing wiretap provisions to include the interception of modern types of contemporaneous two-way electronic communications and to make other changes to the intercept law.
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, electronic digital pager, or electronic cellular telephone communications under specified circumstances. (Penal Code 629.50.)
This bill provides instead that the superior court can make an order authorizing the interception of wire or electronic communications and makes conforming changes in other sections to reference "electronic communications" instead of "electronic digital pager or electronic cellular communications."
Existing law defines "wire communication, electronic pager communication," "electronic cellular communication," and "aural transfer" for the purposes of wiretaps. (Penal Code 629.51.)
Existing law defines aural transfer as a transfer containing the human voice at any point between and including the point of origin and the point of reception.
This bill defines "electronic communication" as any transfer of signs, signals, writing, images, sounds, data, or intelligence (More) SB 1428 (Pavley) PageC of any nature in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system, but does not include any of the following: Any wire communication as defined in the section. Any communication made through a tone-only paging device. Any communications from a tracking device. Electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

This bill defines "tracking device" as an electronic or mechanical device that permits the tracking of the movement of a person or object.
This bill defines aural transfer as an electronic or mechanical device that permits the tracking of the movement of a person or object.
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. (Penal Code 629.52.)
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 with in 48 hours of the oral approval. (Penal Code 629.56.)
This bill provides instead that the above apples to the interception of wire or electronic communications and provides that the filing with the judge must be by midnight of the second (More) SB 1428 (Pavley) PageD full court day after the oral approval.
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 a any period loner than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days. (Penal Code 629.58.)
This bill clarifies that no order shall authorize interception of any wire 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, commencing on the day of the initial interception, or 10 days after the issuance of the order, whichever comes first.
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 6 days to the judge who issued the order allowing the interception. (Penal Code 629.60.)
This bill provides instead that the reports shall be submitted at least once every 10 days commencing with the date of the signing of the order.
Existing law provides that whenever an order authorizing an interception is entered the order shall require a report be made to the Attorney General showing what persons, facilities, or places are to be intercepted pursuant to the application, and the action taken by the judge on each of these applications. (Penal Code 629.61.)
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.) (More) SB 1428 (Pavley) PageE
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.)
This bill provides that the orders shall also be disclosed for compliance with the provisions of section 629.70.
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 cellular telephone 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 (More) SB 1428 (Pavley) PageF 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.)
This bill provides that the contents of any wire or electronic communication may also be disclosed to any judge or magistrate in the state.
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 provides that the provisions governing wiretap sunsets on January 1, 2012. (Penal Code 629.98.)
This bill also makes conforming changes. RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION The severe prison overcrowding problem California has experienced for the last several years has not been solved. In December of 2006 plaintiffs in two federal lawsuits against the Department of Corrections and Rehabilitation sought a (More) SB 1428 (Pavley) PageG court-ordered limit on the prison population pursuant to the federal Prison Litigation Reform Act. On January 12, 2010, a federal three-judge panel issued an order requiring the state to reduce its inmate population to 137.5 percent of design capacity -- a reduction of roughly 40,000 inmates -- within two years. In a prior, related 184-page Opinion and Order dated August 4, 2009, that court stated in part: "California's correctional system is in a tailspin," the state's independent oversight agency has reported. . . . (Jan. 2007 Little Hoover Commission Report, "Solving California's Corrections Crisis: Time Is Running Out"). Tough-on-crime politics have increased the population of California's prisons dramatically while making necessary reforms impossible. . . . As a result, the state's prisons have become places "of extreme peril to the safety of persons" they house, . . . (Governor Schwarzenegger's Oct. 4, 2006 Prison Overcrowding State of Emergency Declaration), while contributing little to the safety of California's residents, ... California "spends more on corrections than most countries in the world," but the state "reaps fewer public safety benefits." . . . . Although California's existing prison system serves neither the public nor the inmates well, the state has for years been unable or unwilling to implement the reforms necessary to reverse its continuing deterioration. (Some citations omitted.) . .. The massive 750% increase in the California prison population since the mid-1970s is the result of political decisions made over three decades, including the shift to inflexible determinate sentencing and the passage of harsh mandatory minimum and three-strikes laws, as well as the state's counterproductive parole system. Unfortunately, as California's prison population has grown, California's political decision-makers have failed to provide the resources (More) SB 1428 (Pavley) PageH and facilities required to meet the additional need for space and for other necessities of prison existence. Likewise, although state-appointed experts have repeatedly provided numerous methods by which the state could safely reduce its prison population, their recommendations have been ignored, underfunded, or postponed indefinitely. The convergence of tough-on-crime policies and an unwillingness to expend the necessary funds to support the population growth has brought California's prisons to the breaking point. The state of emergency declared by Governor Schwarzenegger almost three years ago continues to this day, California's prisons remain severely overcrowded, and inmates in the California prison system continue to languish without constitutionally adequate medical and mental health care.

[FN1]. The court stayed implementation of its January 12, 2010 ruling pending the state's appeal of the decision to the U.S. Supreme Court. That appeal, and the final outcome of this litigation, is not anticipated until later this year or 2011.

This bill does not appear to aggravate the prison overcrowding crisis described above. COMMENTS
1.Need for This Bill According to the author: ----------

[FN1]. Three Judge Court Opinion and Order, Coleman v. Schwarzenegger, Plata v. Schwarzenegger, in the United States District Courts for the Eastern District of California and the Northern District of California United States District Court composed of three judges pursuant to Section 2284, Title 28 United States Code (August 4, 2009). (More) SB 1428 (Pavley) PageI California's current wiretap law, (Penal Code 629.50), sunsets on January 1, 2012, and allows wiretapping (interception) of telephone communications and electronic digital pages by law enforcement under specific circumstances. This bill re-enacts the basic provisions of the current wiretap statute, but also updates California's wiretapping law to include interception of communications by e-mail, blackberry, instant messaging by phone and other forms of contemporaneous two way electronic communication. According to the author, the "Digital Age" in which we now live has offered tremendous opportunities in telecommunications for both consumers and businesses alike, but unfortunately, has provided new options for today's criminals to coordinate illicit activities. The ability to intercept new forms of electronic communication recognizes law enforcement's periodic need to obtain critical evidence in some of the state's most serious criminal investigations, especially when pursuing organized crime and drug trafficking operations. Criminals should not simply and trivially be able to move to electronic communications and so easily escape law enforcement's reach. California's current wiretap law is used only through due process of law, only for specific serious crimes and only as a last resort when other investigative techniques have been exhausted. California law enforcement and multi-agency task forces have used the law with great success since its enactment to solve some of the most difficult crimes, while maintaining a strict emphasis on the protection of individual privacy. SB 1428 recognizes the expanding use of electronic communications in the planning of criminal activity and modernizes our state wiretap law so that court-approved interceptions of communication from the latest technologies are a relevant option for law enforcement investigations. (More) SB 1428 (Pavley) PageJ In Los Angeles County, it is estimated that 50-75 major narcotic division cases (usually involving large seizures and multiple defendants) and approximately 25-40 homicide cases are affected annually by California's wiretap statute. 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. There are civil and criminal penalties for statutory violations. (More) SB 1428 (Pavley) PageK 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 Both federal and California law require that each wiretap application include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." (18 USC Section 2518 (1)(c); Penal Code Section 629.50 (d).) Often referred to as the "necessity requirement," it exists in order to limit the use of wiretaps, which are highly intrusive. (United States v. Bennett, 219 F.3d 1117, 1121 (9th Cir. 2000).) The original intent of Congress in enacting such a provision was to ensure that wiretapping was not resorted to in situations where traditional investigative techniques would suffice to expose the crime. The United States Court of Appeals for the Ninth Circuit recently suppressed wiretap evidence against a defendant and reversed his conviction for failure of the government to

make a showing of necessity for the electronic monitoring. Purged of material omissions and misstatements, the Court held that the application failed to contain sufficiently specific facts to satisfy the requirements of 18 USC Section 2518(1)(c). (United States v. Blackmon, 2001 U.S. App. LEXIS 26428, 2001 Cal. Daily Op. Service 10328; 2001 Daily Journal DAR 12897.) (More) SB 1428 (Pavley) PageL

3.DOJ's 2006 Legislative Report On August 2, 2006, DOJ released the AG's "Annual Report on Electronic Interceptions" for 2005. Specifically, the report articulated the following: Thirteen counties (Alameda, Fresno, Imperial, Los Angeles, Monterey, Orange, Riverside, Sacramento, San Bernardino, San Diego, San Luis Obispo, Stanislaus, and Ventura) submitted reports to the AG's Office detailing their use of electronic intercepts. The remaining 45 counties reported no electronic intercept activity during 2005. The total number of intercept orders granted by superior court judges increased from 190 in 2004 to 282 in 2005. Of the 282 wiretap orders granted by California superior courts in 2005, 245 were used to investigate narcotics offenses, while 36 were used to investigate violent crimes. Nine hundred and eighty individuals were arrested as a result of the 282 wiretaps authorized in 2005. The cost of electronic intercepts is as follows: Total Cost: $25,514,664; Average Cost Per Arrest: $16,703; Average Cost Per Conviction: $33,407; Average Cost Per Order: $6,813. Of the total 283 wiretap orders sought, 282 were granted by superior court judges. Ninety-five thousand, one hundred and sixty nine incriminating conversations were intercepted while 566,060 non-incriminating conversations were intercepted.

4.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 defines wire communication, (More) SB 1428 (Pavley) PageM electronic pager communication and electronic cellular telephone communication for the purposes of the intercept orders. (More) This bill changes the types of equipment that may have an intercept order placed on it to include wire or electronic communication. It defines "electronic communication" as any transfer of signals, writings, images, sounds, data, or intelligence of any nature in whole or in part by a wire, radio, electromagnetic photoelectric, or photo-optical system but does not include any of the following: any communication defined as a "wire communication" in the code; any communication made through a tone-only paging device; any communication from a tracking device or electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds. The change to the types of communications is intended to reflect current and future electronic communications. The intent is to access simultaneous conversations going on with today's technology. Regular email messages and accounts would still be more appropriately accessed by a search warrant.

5.Emergency Interceptions . The law provides that under specified circumstance and after specific findings the judge may issue an oral approval for an interception without an order provided that the approval for the interception be conditioned upon the filing within 48 hours of a written application for the order. This bill changes that time frame to midnight of the second full court day after the oral approval. Therefore, under this bill if the emergency order is granted on a Friday the application would not need to be filed until midnight on the following Tuesday where under existing law it would have had to been filed at some point on Sunday. IS THE EXTENSION OF TIME FOR THE FILING OF THE APPLICATION AFTER AN EMERGENCY INTERCEPT ORDER APPROPRIATE"

6.Limit on Length of Intercept Under existing law no order shall authorize the interception for (More) SB 1428 (Pavley) PageO any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days. This bill provides that 30 days commences on the day of the initial order or 10 days after the issuance, whichever comes first. When the time frame starts under current law is vague as to whether the 30 days begins to run at the initial order or when the actual intercept begins. The language in this bill clarifies this and conforms the language to federal law. SHOULD THE 30 DAY TIME FRAME FOR AN ORDER COMMENCE AT THE TIME OF THE INITIAL INTERCEPT OR 10 DAYS AFTER THE ORDER, WHICHEVER COMES FIRST"

7.Time Frame for Reports Reports must be made to the judge who issues any order for interception of communications. Under existing law the reports shall be filed with the court at the intervals the judge may require but not less than one for each period of six days and shall be made by any reliable means as determined by the court. This bill extends the period in which reports must be made to not less than 10 days. AB 74 (Washington) Chapter 605, Stats. 2002 changed the period in which reports must be filed was 72 hours instead of 6 days to give more flexibility. The sponsor argues that judges still have the authority to order reports on a more frequent basis. SHOULD THE TIME FRAME FOR ISSUING REPORTS BE NOT MORE THAN EVERY 10 DAYS INSTEAD OF NOT MORE THAN EVERY 6

DAYS" **********

CA B. An., S.B. 1428 Sen., 4/13/2010

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