

SENATE BILL REPORT

ESSB 5126

AS PASSED SENATE, MARCH 1, 1991

Brief Description: Authorizing the use of pen registers.

SPONSORS: Senate Committee on Law & Justice (originally sponsored by Senators Nelson, Madsen, Patterson, Rasmussen, Thorsness, Hayner, Johnson, A. Smith, Jesernig and L. Smith).

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5126 be substituted therefor, and the substitute bill do pass.

Signed by Senators Nelson, Chairman; Thorsness, Vice Chairman; Erwin, Hayner, Kreidler, L., Madsen, Newhouse, Rasmussen, and Smith, A.

Staff: Jon Carlson (786-7459)

Hearing Dates: January 21, 1991; January 28, 1991

BACKGROUND:

The pen register is a device which is used to tap into a criminal suspect's telephone and decode the number being dialed. A trap and trace device captures the incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

These devices were used by law enforcement to gather information regarding criminal activity, particularly in the area of illegal drug transactions, until 1986. At that time, the State Supreme Court held in State v. Gunwall, 106 Wn.2d 54, that pen registers without valid legal process violate privacy rights under the State Constitution. The court concluded that a pen register intercept comes within the definition of a "private communication transmitted by telephone" and may only be installed pursuant to the stricter requirements of Washington's statutes controlling electronic eavesdropping. The court further stated that because "no consent" interceptions of this kind require a valid court order, and can only be authorized by the courts in cases involving national security, danger to human life, or in the face of imminent arson or riot, legislative action may be required before a pen register can be authorized to intercept telephone information concerning illegal drug transactions.

It is suggested that law enforcement's ability to conduct effective criminal investigations would be enhanced if the Legislature statutorily authorized the use of pen registers and trap and trace devices. In addition, law enforcement has

recommended that the application of these devices be broadened to include all criminal activity.

SUMMARY:

A law enforcement officer may apply to superior court for an order authorizing the installation and use of a pen register or trap and trace device. The court must issue an authorizing order if the law enforcement officer has certified to the court that the information is likely to be relevant to an ongoing criminal investigation. No person may install or use a pen register or a trap or trace device without first obtaining a court order.

The authorizing order must specify the identities of both the suspect and the person who leases the telephone line to which the pen register or trap and trace device is attached. In addition, the order must indicate the location of the telephone line and, in the case of the trap and trace device, the geographic limits of the trap and trace order. The order is also required to state the offense which is likely to be charged as a result of the information obtained by these devices.

Upon the law enforcement officer's request, the order must direct the telephone company and others to furnish information, facilities, and technical assistance necessary to install the devices. The authorizing order is valid for a period not to exceed seven days, with a possible extension period not to exceed 14 days.

The person owning or leasing the line to which the device is attached, or who provides assistance to the applicant, must not disclose the existence of the device to any person, unless otherwise ordered by the court. Telephone companies and others must be reimbursed for reasonable expenses incurred in providing facilities and assistance.

No cause of action may be brought against a telephone company or other specified persons for complying with the terms of a court order. A good faith reliance on a court order is a complete defense against any civil or criminal action brought under these provisions.

The Office of the Administrator for the Courts must compile a history with respect to each application for an order authorizing the use of a pen register or trap and trace device. The Administrator shall file a report concerning these applications to the Legislature each December.

Appropriation: none

Revenue: none

Fiscal Note: requested January 16, 1991

TESTIMONY FOR:

Pen registers and trap and trace devices would provide a valuable tool for law enforcement during criminal investigations, particularly in the area of illegal drug trafficking.

TESTIMONY AGAINST:

These devices unnecessarily intrude upon the privacy rights of citizens.

TESTIFIED: Leo Poort, Seattle Police Department (pro); Lt. Dennis Nixdorf, Seattle Police Department (pro); Jerry Sheehan, American Civil Liberties Union (con)