SFA BILL ANALYSIS

Senate Fiscal Agency • Lansing, Michigan 48909 • (517) 373-5383

Senate Bill 125
Sponsor: Senator Nick Smith
Committee: Judiciary

Date Completed: 2-23-89

SUMMARY OF SENATE BILL 125 as introduced 2-9-89:

The bill would create a new act to permit the interception of wire or oral communication pursuant to judicial authorization in the investigation of specific drug-related offenses, and to do the following:

- **Permit applications for wiretapping to be authorized by a prosecutor to a judge, and approved by the judge for up to 30 days, if other investigative techniques had failed or would fail or be too dangerous.**
- **Permit the contents of an intercepted communication or evidence derived from it to be used or disclosed by an investigative or law enforcement officer in the performance of his or her duties, or to be disclosed by a person giving testimony.**
- **Prohibit the disclosure or use of the contents of a communication that was wrongfully intercepted.**
- **Prohibit the manufacture, possession or sale (except by communication common carriers and governmental officials and employees), or the advertisement of devices primarily used for wiretapping.**
- **Require that persons named in an application or order be given notice of the application and its approval or denial.**
- **Allow a party to an intercepted communication, or a person against whom interception was directed, to move to suppress admission in evidence of the contents of the communication or evidence derived from it.**
- **Require the development of a wiretapping training program for law enforcement officers.**
- **Establish reporting requirements for judges, prosecutors, and the Attorney General, and require the Attorney General to report annually to the Legislature and the Governor.**
- **Require employees of a communication common carrier to report the existence of an interception device to local prosecutors.**
- **Create a civil cause of action for victims of a wrongful interception; make good faith reliance on an authorization a complete defense to civil or criminal liability; and create specific exceptions to liability.**
- **Repeal eavesdropping provisions of the Michigan Penal Code.**

The proposed Act would be repealed three years after its enactment.

Definitions

"Oral communication" would mean any oral

communication uttered by a person exhibiting an expectation that the communication was not subject to interception under circumstances justifying the expectation. "Wire communication" would mean any communication made entirely or partly through the use of facilities for the transmission of communications by wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by a person engaged as a communication common carrier. "Communication common carrier" would mean a person engaged as a common carrier for hire, in communication by wire or radio or in radio transmission of energy; a person would not be considered a communication common carrier while engaged in radio broadcasting.

"Intercept" would mean the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device. "Contents" would mean any information concerning the identity of the parties to an oral or wire communication or the existence, substance, purport, or meaning of the communication.

Prohibited Interception/Disclosure

Except as otherwise provided in the bill, it would be a felony to do or endeavor to do any of the following:

- -- Willfully intercept any wire or oral communication, or procure another to do so.
- -- Willfully use, or procure another to use or endeavor to use, any "electronic, mechanical, or other device" (defined in the bill) to intercept any oral communication if 1) the device were affixed to, or otherwise transmitted a signal through, a wire cable, or similar connection used in wire communication; and/or 2) the device transmitted, or interfered with the transmission of, radio communications.
- -- Willfully disclose to another the contents of a wire or oral communication, knowing or having reason to know that the information was obtained through the prohibited interception of a wire or oral communication.
- -- Willfully use the contents of a wire or oral communication, knowing or having reason to know that it was intercepted in violation of these provisions.

These prohibitions would be subject to the following:

- -- A switchboard operator or an officer, employee, or agent of a communication common carrier whose facilities were used in the transmission of wire communication could intercept, disclose, or use that communication in the normal course of employment if engaged in an activity that was a necessary incident to rendering services or protecting the rights or property of the carrier, unless the interception resulted from the carrier's use of service observing or random monitoring for purposes other than mechanical or service quality control checks.
- -- An officer, employee, or agent of a communication common carrier could provide information, facilities, or technical assistance to an investigative or law enforcement officer who was authorized to intercept communication.
- -- A person acting under "color of law" (the appearance or semblance, without the substance, of legal right) could intercept a wire or oral communication if he or she were a party to the communication or if one of the parties had given prior consent to the interception.
- -- A person not acting under color of law could intercept a communication if he or she were a party to the communication, unless the communication were intercepted for the purpose of committing any criminal or tortious act in violation of law or any other injurious act.

(Since the bill does not specify a penalty for the proposed felony, it would be punishable by imprisonment for up to four years and/or a maximum fine of $2,000 pursuant to MCL 750.503, which sets that penalty for a felony for which no other punishment is prescribed in

statute.)

Prohibited Manufacture/Possession/Advertisement

Except as provided below for communication common carriers and governmental officers or employees, it would be a felony to do any of the following:

- Manufacture, assemble, possess, or sell any electronic, mechanical, or other device, knowing or having reason to know that its design made it primarily useful for the surreptitious interception of wire or oral communication.
- Advertise such a device in a publication, having such knowledge or reason to know of the device's design.
- Place in a publication an advertisement that promoted the use of an electronic, mechanical, or other device for the surreptitious interception of wire or oral communication.

An electronic, mechanical, or other device could be manufactured, assembled, possessed, or sold, with knowledge or reason to know that its design made it primarily useful for the surreptitious interception of wire or oral communication, however, by either of the following:

- An officer, agent, or employee of, or a person under contract with, the United States, this State, or a political subdivision (i.e., a county, city, township, or village) of this State, in the normal course of the activities of the United States, State, or political subdivision.
- A communication common carrier or an officer, agent, or employee of, or a person under contract with, a communication common carrier, in the normal course of the carrier's business.

Interception Order: Controlled Substance Offenses

A prosecutor (i.e., the State Attorney General or the principal prosecuting attorney of the county in which an interception was to be made, or the designee of the Attorney General or prosecutor) could authorize an application to a judge of competent jurisdiction for, and the judge could grant in conformity with the bill, an order authorizing or approving the interception of a wire or oral communication by the investigative or law enforcement officer having responsibility for the investigation of the offense for which the application was made, if the interception could provide or had provided evidence of any of the following offenses:

- The manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified as a narcotic drug on Schedule 1 or 2 of Chapter 7 of the Public Health Code. (Those schedules include substances such as opium, opium derivatives, certain hallucinogenic substances, stimulants and depressants having potential for abuse, and cocaine.)
- The creation, delivery, or possession with intent to deliver, a counterfeit substance classified as a narcotic drug on Schedule 1 or 2.
- The knowing or intentional possession, except pursuant to a valid prescription, of a controlled substance classified as a narcotic drug on Schedule 1 or 2 in an amount of 50 grams or more.
- A conspiracy to commit one of the foregoing offenses.

("Judge of competent jurisdiction" would mean a Supreme Court justice, a judge of the Court of Appeals, or a Circuit Court judge.)

Interception Order: Application

An application for an interception order would have to be made in writing upon oath or affirmation to a judge of competent jurisdiction, would have to state the applicant's authority to make the application, and would have to include the following information:

- The identity of the investigative or law enforcement officer making the application, and the prosecutor authorizing it.

-- A complete statement of the facts and circumstances relied upon by the applicant to justify his or her belief that an order should be issued, including details as to the particular offense that had been, was being, or was about to be committed; a particular description of the nature and location of the facilities or place where the communication was to be intercepted; a particular description of the type of communication in question; and the identity, if known, of the person committing the offense and whose communication was to be intercepted.
-- A complete statement as to whether other investigative procedures had been tried and had failed, or why other procedures reasonably appeared unlikely to succeed or too dangerous.
-- A statement of the period of time for which the interception had to be maintained. If, due to the nature of the investigation, the authorization for interception should not automatically terminate when the communication had been first obtained, the application would have to describe facts establishing probable cause to believe that additional communications of the same type would subsequently occur.
-- A complete statement of the facts concerning all known previous applications made to any judge for authorization or approval to intercept involving any of the same persons, facilities, or places, and the action taken by the judge on each application.
-- A statement of the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain results, if the application were for the extension of an order.

Application made and orders granted under the bill would have to be sealed by the judge. Custody of the applications and orders would be wherever the judge directed. The applications and orders could be disclosed only upon a showing of good cause before a judge of competent jurisdiction. They would have to be retained for 10 years and could be destroyed only on order of the judge.

("Investigative or law enforcement officer" would mean any officer of this State or a political subdivision of the State empowered by law to conduct investigations of, or to make arrests for, the pertinent drug-related offenses, and certified under the proposed certification requirements.)

Interception Order: Authorization/Duration

Based upon filed application, the judge could enter an order authorizing or approving interception if the judge determined on the basis of the facts submitted by the applicant all of the following:

-- There was probable cause to believe that an individual was committing, had committed, or was about to commit, a particular substance abuse offense as described above.
-- There was probable cause to believe that particular communications concerning the offense would be obtained through the interception.
-- Normal investigative procedures had been tried and had failed or reasonably appeared unlikely to succeed or too dangerous.
-- There was probable cause to believe that the facilities or place where the interception was to be made were being or were about to be used in connection with the commission of the offense, or were leased to, listed in the name of, or commonly used by the person identified as committing the offense and whose communication was to be intercepted.

An interception order would have to specify all of the following:

-- The identity, if known, of the person whose communication was to be intercepted.
-- The nature and location of the communication facilities as to which, or the place where, authority to intercept was granted.
-- A particular description of the type of communication sought to be intercepted

and a statement of the offense to which it related.

-- The identity of the agency authorized to intercept the communication and the person authorizing the application.
-- The period of time during which the interception was authorized or approved, including a statement as to whether the interception would automatically terminate when the described communication had been first obtained.

An interception order could require reports to be made to the issuing judge showing what progress had been made toward achieving the authorized objective and the need for continued interception.

An interception order could not authorize or approve interception for a period longer than necessary to achieve the objective of the authorization or, in any event, for longer than 30 days. Extensions of an order could be granted upon application for an extension and upon the judge making the required findings. The period of extension could be no longer than the judge considered necessary to achieve the purposes of the order or, in any event, longer than 30 days.

Each order and extension would have to provide that the authorization to intercept would have to be executed as soon as practicable, conducted in such a way as to minimize the interception of communications not otherwise subject to interception under the bill, and terminated upon attainment of the authorized objective or, in any event, in 30 days.

Further, upon request of the applicant, an interception order would have to direct that a communication common carrier, landlord, custodian, or other person immediately furnish the applicant with all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that the carrier, landlord, custodian, or other person was providing to the person whose communication was to be intercepted. The applicant would be required to compensate the carrier, landlord, etc. at the prevailing rate for furnishing such facilities or technical assistance.

Interception Order: Recording

The contents of an intercepted communication would have to be recorded on tape or wire or other comparable device in a way that would protect the recording from editing or other alterations. Immediately upon the expiration of the order or extension, all recording would have to be made available to the issuing judge and sealed under his or her directions. The presence of the seal, or a satisfactory explanation for the absence of a seal, would be a prerequisite for the use or disclosure by a person giving testimony as to the contents of the communication or evidence derived from it.

Custody of the recordings would be wherever the judge ordered. The recordings would have to be retained for 10 years and could be destroyed only upon an order of the judge. Duplicate recordings could be made for use or disclosure by an investigative or law enforcement officer to another officer or for use by an officer in the proper performance of his or her duties (as discussed below).

Notice to Named Persons

Within a reasonable time, but not later than 90 days after the filing of an application that was denied or the termination of an order or extension, the judge would have to cause service on the persons named in the application or order, and other parties to the intercepted communication as the judge determined was in the interest of justice, of notice of all of the following:

-- The fact of the entry of the application or order.
-- The date of the entry and the period of authorized, approved, or disapproved interception, or the denial of the application.
-- The fact that during that period wire or oral communications were or were not intercepted.

The serving of the inventory could be postponed for good cause.

Upon the filing of a motion by a person given notice, the judge could allow the person or his or her counsel to inspect the portions of the intercepted communications, applications, and orders as the judge determined to be in the interest of justice.

Disclosure

The contents of an intercepted communication and any evidence derived from it could not be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the State or a political subdivision of the State, if disclosure would violate the bill.

An investigative or law enforcement officer who, by any means authorized by the bill, had obtained knowledge of the contents of a wire or oral communication or evidence derived from it could do the following:

- -- Disclose the contents of the communication or the evidence to another investigative or law enforcement officer, or to an officer, agent, or official of a Federal law enforcement agency, to the extent that the disclosure was appropriate to the proper performance of the officer's official duties.
- -- Use the contents of the communication or the evidence to the extent the use was appropriate to the proper performance of the officer's official duties.

A person who received, by any authorized means, any information concerning an intercepted communication or evidence derived from it could disclose the contents of the communication or the evidence if giving testimony under oath or affirmation in any proceeding held under the authority of the United States, this State, or a political subdivision of this State.

If an officer, while engaged in authorized interception, intercepted a communication relating to an offense other than that specified in the interception order, the contents of the communication and derived evidence could be disclosed or used by the officer as provided above. The contents and evidence could be disclosed in testimony if authorized or approved by a judge of competent jurisdiction, if the judge found on subsequent application that the contents were otherwise intercepted in compliance with the bill. The subsequent application would have to be made as soon as practicable after the interception. The bill specifies, however, that these provisions would not authorize the disclosure or use in any manner of the contents of, or evidence derived from, a wire or oral communication relating to the offense of sodomy or an offense that is punishable by imprisonment for four years or less or by only a fine.

A privileged communication intercepted in accordance with or in violation of the bill would not lose its privileged character.

Admission in Evidence/Suppression/Appeal/Contempt

The contents of an intercepted communication or evidence derived from it could not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a court unless each party, not less than 10 days before the proceeding, had been given a copy of the application and order. The 10-day period could be waived if the court found that it was not possible to furnish a party with the application and order within that period and that the party would not be prejudiced by the delay.

An "aggrieved person" (i.e., a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed) in a trial, hearing, or other proceeding in or before a court, department, officer, agency, regulatory body, or other authority of the State or a political subdivision of the State, could move to suppress the contents of an intercepted communication on one or more of the following grounds:

-- The communication was unlawfully

intercepted.
- -- The order of authorization or approval was insufficient on its face.
- -- The interception was not made in conformity with the order.

A motion to suppress would have to be made before the proceeding unless there was not an opportunity to do so or the aggrieved person was not aware of the grounds of the motion before the proceeding. The person or his or her attorney could inspect a portion of the communication or evidence as the judge determined to be in the interests of justice. If the motion were granted, the communication or evidence would have to be treated as having been obtained in violation of the bill.

In addition to any other right to appeal, the prosecutor could appeal from an order granting a motion to suppress, or the denial of an application for an order, if the prosecutor certified to the judge or other official granting the motion or denying the application that the appeal was not taken for purposes of delay. The appeal would have to be taken within 30 days after the date the order granting the motion was entered or the application was denied, and would have to be diligently prosecuted.

The judge who approved or denied an application for interception could punish as contempt a violation of the bill's provisions relating to recording the contents of an interception, and sealing applications and orders.

Law Enforcement Training/Standards

The Attorney General and the Director of the Department of State Police would be required to establish a course of training in the legal and technical aspects of wiretapping and electronic surveillance, to establish regulations for the training program, and to establish minimum standards for certification and periodic recertification of State investigative officers or officers of a law enforcement agency who were eligible to conduct wiretapping or surveillance under the bill. The State Police Director would have to charge each officer who enrolled in the training program a reasonable enrollment fee to offset the costs of training.

Reporting Requirements

Within 30 days after the expiration of an interception order, or the extension or denial of an order, the issuing or denying judge would have to report all of the following to the administrative office of the United States courts and the State Court Administrator:

- -- The fact that an order or extension was applied for.
- -- The kind of order or extension applied for.
- -- The fact that the order or extension was granted as applied for, was modified, or was denied.
- -- The period of the interception authorized and the number and duration of any extensions.
- -- The offense specified in the order, application, or extension.
- -- The identity of the officer and agency making the application and the authorizing prosecutor.
- -- The nature of the facilities from which or the place where communications were to be intercepted.

In January of each year, the Attorney General would have to report to the administrative office of the U.S. courts, to the State Court Administrator, and to the Judiciary Committees of the Senate and House, all of the following regarding applications, orders, and interceptions:

- -- The information described above with respect to each approved application for an order or extension made during the preceding year.
- -- A general description of the interceptions made, including approximations of: the nature and frequency of incriminating communications intercepted; the nature and frequency of other intercepted communications; the number of persons whose communications were intercepted; and the nature, amount, and cost of the

manpower and other resources used in the interceptions.
- -- The number of arrests resulting from interceptions and the offenses for which arrests were made.
- -- The number of motions to suppress made with respect to the interceptions and number granted or denied.
- -- The number of convictions resulting from the interceptions, the offenses for which the convictions were obtained, and a general assessment of the importance of the interceptions.

All of that information regarding applications, orders, and interceptions would have to be reported to the Attorney General on or before January 10 of each year by the principal prosecuting attorney of each county.

A copy of a judge's report would have to be sent to the State Attorney General. On or before March 1 of each year, the Attorney General would have to submit to the Governor, Secretary of the Senate, and Clerk of the House a report of all interceptions conducted under the bill and terminated during the preceding calendar year.

Common Carrier Reporting

Any officer, employee, or agent of a communication common carrier who, whether in the course of employment or otherwise, learned of the existence of an interception device, would be required to report that fact to the principal prosecuting attorney of the county where the device was located. If the prosecuting attorney determined that the placement of the device was not authorized by court order, the prosecutor would immediately have to inform the person whose communication was intercepted of the device.

The bill specifies that these provisions would not diminish or excuse any obligation of the prosecuting attorney, the officer, employee, or agent of the carrier, or any other person to remove the device or to take any other action required by law, regulation, or policy.

Civil Actions

Except as provided below, a person whose communication was intercepted, disclosed, or used in violation of the bill would have a civil cause of action against any person who intercepted, disclosed, used, or procured another to intercept, disclose, or use the communication or its contents. The person would be entitled to recover all of the following:

- -- Actual damages, but not less than $1,000 a day for each day of a violation.
- -- Exemplary damages.
- -- Reasonable attorney fees and other reasonable litigation costs.

A good faith reliance on a court order or legislative authorization would be a complete defense to any civil or criminal action brought under the bill or any law.

These provisions would not apply to the following:

- -- A person acting under color of law who intercepted a wire or oral communication if the person were a party to the communication or if one of the parties to the communication had given prior consent to the interception.
- -- A person not acting under color of law who intercepted a communication if the person were a party to the communication, unless the communication were intercepted for the purpose of committing any criminal or tortious act or any other injurious act.
- -- A switchboard operator or an officer, employee, or agent of a communication common carrier whose facilities were used in the transmission of a wire communication who intercepted a communication or disclosed or used an intercepted communication in the normal course of employment if engaged in an activity that was necessary to rendering service or protecting the rights or property of the carrier, unless the interception resulted from the carrier's use of service observing or random monitoring for purposes other than

mechanical or service quality control checks.

-- An officer, employee, or agent of a communication common carrier who provided information, facilities, or technical assistance to an investigative or law enforcement officer who was authorized to intercept a communication.

Construction

The bill specifies that if it contains provisions identical or similar to provisions of the Federal wiretapping law (18 USC 2510 et seq.), the State courts in construing the bill would have to follow the construction given to the Federal provisions by the United States Supreme Court or the United States Court of Appeals of the Sixth Circuit.

Repeal

The bill would repeal provisions of the Michigan Penal Code (MCL 750.539a-750.539i) that do the following:

-- Make it a misdemeanor to trespass on property of another to subject that person to eavesdropping or surveillance.
-- Make it a misdemeanor to use any device willfully to eavesdrop.
-- Make it a felony to install in any private place, without the consent of the person(s) entitled to privacy there, any device for observing, photographing, or eavesdropping upon the sounds or events in that place, or to use any such unauthorized installation.
-- Make it a felony to use or divulge any information the person knows or reasonably should know was obtained in violation of the preceding prohibitions.
-- Make it a felony to manufacture, possess, or transfer to another any device designed or commonly used for eavesdropping, knowing that it is to be so used.
-- Create exceptions for peace officers, communications common carriers, and public utilities.
-- Provide civil remedies to parties to a conversation upon which eavesdropping is practiced contrary to the Act.

Legislative Analyst: P. Affholter

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on State and local government. Costs would depend on the number of cases that involved electronic interception and the resources used. Minimal administrative costs would result due to the reporting requirements.

If the bill lead to increased convictions, an indeterminable amount of additional revenue under the drug forfeiture law could result.

Fiscal Analyst: F. Sanchez

S8990\S125SA