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September 6, 2012

The Honorable Jerry Brown
Governor, State of California
State Capitol
Sacramento, CA 95814

**SENATE BILL 1434 (LENO)
REQUEST FOR VETO**

Dear Governor Brown:

The Los Angeles County District Attorney's Office respectfully requests that you veto Senate Bill 1434 (Leno).

SB 1434 would require a government entity to obtain a search warrant in order to obtain GPS location information from a cellular phone.

Our office believes that SB 1434 will have negative impacts on law enforcement's ability to investigate and prosecute serious and violent felonies in California which in turn will result in dangerous offenders remaining on our streets as a continuing threat to public safety. While SB 1434 is well intended, it should not be enacted in its current form.

Our office is the sponsor of Assembly Bill 2055 (Fuentes) this session which is similar to SB 1434. AB 2055 would also require the issuance of a search warrant before a law enforcement agency could obtain GPS location information from any electronic tracking device.

While these two measures are similar, there are significant differences between the two measures. SB 1434 attempts to treat the installation of GPS tracking devices like a wiretap order, whereas our bill treats GPS tracking devices as searches which is what the United States Supreme Court recently ruled they are in *United States v. Jones* (2012) 132 S.Ct. 945.

Both bills require the issuance of a search warrant in order to track GPS location information in most instances, however rather than amend California's search warrant statutes (and thereby be able to utilize the voluminous case law regarding the service and use of search warrants) SB 1434 creates a new Chapter and sections of law in the Penal Code. AB 2055 follows the Supreme Court's holding in *Jones* and treats requests to track GPS location information as a search and therefore appropriately amends California's existing search warrant statutes.

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AB 2055 is modeled on Rule 41(e)(2)(C) of the Federal Rules of Criminal Procedure which is the federal law which authorizes the installation of GPS tracking devices. AB 2055 allows law enforcement to obtain GPS location information in conformity with existing federal law (Federal Rule of Criminal Procedure Rule 41 and 18 U.S.C. Section 3117, subdivision (b)). AB 2055 creates a state mechanism to allow law enforcement to do that which they can do lawfully under existing federal law. By modeling AB 2055 on existing federal law which has withstood court challenge guarantees the constitutionality of AB 2055 against any attack in the court system. SB 1434 does not follow the model laid out in federal law.

In addition to not following Rule 41 of the Federal Rules of Criminal Procedure, SB 1434 makes other deviations from federal law. One of the most significant deviations from federal law that SB 1434 seeks to institute is the requirement that law enforcement obtain a search warrant in order to obtain stored GPS location information from a wireless service provider. This proposed change would have a devastating impact on law enforcement's ability to successfully investigate serious and violent crimes such as gang shooting and murders as well as drug trafficking and drug conspiracy investigations.

Stored GPS location information is data pertaining to GPS signals received in the past. For example, if officers wanted to know if a murder suspect had been near the location where the victim's body had been found, they would seek stored GPS location information for this time period from the suspect's wireless service provider.

Under federal law, law enforcement is required to obtain a court order (not a search warrant) in order to obtain stored GPS location information that is less than 60 days old. Federal law requires a search warrant to obtain stored GPS location information more than 60 days old.

In order to obtain stored GPS location information less than 60 days old requires law enforcement to obtain a court order known as a D-Order. While a D-Order requires judicial review just like a search warrant, a D-Order has a lower level of showing than a search warrant. To obtain a D-Order law enforcement must set forth specific facts showing that there are reasonable grounds to believe that an individual's stored GPS location information would be both relevant and material to an ongoing criminal investigation. (18 U.S.C. Section 2703(d)).

Federal law recognized that law enforcement rarely has the probable cause necessary for a search warrant at the time stored GPS location information is most critical to a criminal investigation. In most cases, stored GPS location information is used to develop the probable cause necessary to obtain a search warrant or an arrest warrant. It also is used to clear a suspect from further investigation in connection with the criminal investigation.

The use of stored GPS location information is often a critical tool that allows law enforcement to solve serious and violent crimes in our communities. For example, two Chinese college foreign exchange students were recently murdered in front of the USC campus in Los Angeles. The detectives investigating these brutal murders discovered that one of the victim's cell phones had

been stolen at the time of the murders. The detectives were able to trace the victim's cell phone to a known criminal street gang's territory. Detectives received tips that unknown members of the criminal street gang where the cell phone was traced to were responsible for both murders. Surveillance footage showed that one of the gang's known vehicles was in the vicinity of the USC campus murders when they occurred. In order to follow up and determine if this lead was good or not, the detectives obtained a D-Order for the vehicle's owner stored GPS location information and were able to trace his cell phone location information and compared it to the GPS location information of the victim's cell phone. The information turned out to be an exact match. This information allowed the detectives to obtain both a search warrant and an arrest warrant for one of the people involved in the double homicide. Without the stored GPS location information it would have been uncertain if this case would have been successfully solved. It is important to point out that while the detectives had specific facts at the time of the surveillance footage they did not have enough facts to make a showing of probable cause necessary to obtain a warrant as SB 1434 would require in cases like this.

Without the ability to obtain stored GPS location information in cases like this, it is highly unlikely that law enforcement would be able to successfully investigate them. It should also be pointed out that unlike real time GPS tracking (which we agree should require a warrant because it is consistent with the holding in *United States v. Jones*) obtaining stored GPS location information is less intrusive than real time tracking because without additional investigation of the stored GPS location information, this type of information in and of itself is useless. While federal law recognizes this fact and therefore only requires the obtaining of a D-Order, SB 1434 fails to recognize this fact.

Another important deviation from federal law and state law made by SB 1434 is there is no provision for the delay of the service on the person who was tracked or whose property was tracked. Normally law enforcement is required to provide a copy of the warrant on the person who was tracked or whose property was tracked within 10 days after the use of the GPS tracking device has ended. There are many occasions where law enforcement will legitimately wish to delay service of the warrant to protect an ongoing criminal investigation. AB 2055 provides for a delay of the service of the warrant upon a showing of good cause in conformity with both federal and state law. SB 1434 contains no provision for the delay of service of the warrant and will therefore inevitably conflict with the legitimate law enforcement needs for such delays.

SB 1434 also fails to include a knock-notice exemption. Unless law enforcement has a valid knock-notice exemption, both federal and state laws require law enforcement to knock and announce their presence before executing a warrant. In cases involving the placing of a clandestine GPS tracking device the requirement to announce to the party that is going to be tracked that law enforcement is installing the GPS tracking device defeats the entire point of the clandestine installation of the GPS tracking device, not to mention alerting the party that they are the subject of a criminal investigation which in effect destroys the whole investigation. AB 2055

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contains a knock-notice exemption in conformity with existing law. (See *Dalia v. United States* (1979) 441 U.S. 238, 247-248; *Ker v. California* (1963) 374 U.S. 23; *United States v. Agrusa* (8th Cir. 1976) 541 F.2d 690, 696-698).

SB 1434 also provides that a search warrant may only be issued for a period of 30 days, "commencing on the day of the initial obtaining of location information". This term is ambiguous and could be argued that the term relates back to the initial obtain of information by law enforcement prior to seeking a warrant. The ambiguity of the language – at best – will result in litigation to clarify the phrase.

SB 1434 also requires that GPS location information be obtained by a "valid search warrant". Existing law simply refers to "search warrants". It appears that the additional word "valid" as contained in SB 1434 is either intended or could be used to argue that the "good faith exception" created by the United States Supreme Court in *United States v. Leon* (1984) 468 U.S. 897, does not apply to warrants issued pursuant to SB 1434. This phrase apparently seeks to limit by statute what cannot be limited under the California Constitution's Right to Truth-In-Evidence clause. (California Constitution, Article I, Section 28; *People v. McKay* (2002) 27 Cal.4th 601, 611.)

In addition to the above mentioned issues with SB 1434, SB 1434 inexplicably defines the term "user" as "a person or entity that uses an electronic device". If a criminal steals a cell phone a then uses the cell phone he/she would be a user under the provisions of SB 1434. SB 1434 should have defined the term user the same way it defined the term "owner". This is important because the warrant exceptions laid out in SB 1434 refer to the "user's" consent or "user's" call for emergency services. Once stolen and used, the criminal becomes the user under SB 1434 and the criminal is highly unlikely to give law enforcement consent to obtain the cell phone's GPS location information.

SB 1434 also overly limits the exigency language it contains. Under SB 1434 provides that an exigency exists where there is an "emergency involving immediate danger of death or serious physical injury. However, per the California Supreme Court an exigency applies to situations other than those involving death or threat of serious injury. In *People v. Ramey*, the Supreme Court defined "exigent circumstances to include an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property. (*People v. Ramey* (1976) 16 Cal.3d 263, 276). In *People v. Panah*, the California Supreme Court once again defined an exigency to include "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. (*People v. Panah* (2005) 35 Cal.4th 395, 465.)

Finally, SB 1434 conflicts with the California Constitution's Right to Truth-In-Evidence clause (California Constitution, Article I, Section 28). Under the Right to Truth-In-Evidence provision all relevant evidence is admissible in California courts unless specifically prohibited by the United States Constitution as interpreted by the United States Constitution. Since the United

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States Supreme Court has never held that a search warrant is necessary pursuant to the 4th Amendment for the obtaining of stored GPS location information, California courts are prohibited per the Right to Truth-In-Evidence provision from creating a new exclusionary rule preventing the admission of this evidence in the absence of a search warrant. SB 1434 recognizes this conflict by stating, "no evidence obtained in violation of this chapter shall be admissible in a *civil or administrative proceeding*. Because of the wording of SB 1434 the author appears to acknowledge that evidence obtained in violation of this chapter *would be admissible in a criminal proceeding*. However SB 1434 also provides that evidence of law enforcement's failure to obtain a warrant can be used, "*as proof of a violation of this chapter*". The only purpose for this language is to create a civil cause of action against a peace officer who fails to obtain a warrant as required by SB 1434. Why should a peace officer face a civil cause of action for doing what both the California Constitution and the United States Supreme Court says is proper or necessary?

SB 1434 is opposed by the California State Sheriff's Association, the California District Attorneys Association, the Los Angeles County District Attorney's Office, the Crime Victims Action Alliance and several other law enforcement organizations.

We respectfully request you return Senate Bill 1434 to the legislature without your signature.

If you have any questions or need additional information, please feel free to contact our office at (916) 442-0668.

Very truly yours,

STEVE COOLEY
District Attorney

By



DANIEL FELIZZATTO
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cc: Senator Leno
June Clark, Deputy Legislative Secretary