SUBJECT: Authorizing the issuance of subsequent search warrants

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Place, Talton, Greenberg, Pickett, Pitts

1 nay — Farrar

3 absent — Hudson, Nixon, Solis

SENATE VOTE: On final passage, April 12 — voice vote

WITNESSES: For — Barry Macha

Against — Keith Hampton, Texas Criminal Defense Lawyers Association

On — Lon Curtur, Texas District and County Attorneys Association; J.R. Urbanovsky; Ross Rayburn; Jade Meeker

BACKGROUND: Texas law recognizes two types of search warrants: the "standard" search warrant and an evidentiary search warrant. A standard search warrant may be issued by any magistrate based on a sworn affidavit establishing probable cause. These search warrants may be issued to search for specific persons and for tangible items including:

- contraband and property acquired by theft or other criminal means;
- implements or instruments used in the commission of a crime;
- drugs kept in violation of the law;
- gambling devices or equipment;
- obscene material kept for commercial distribution;
- prohibited weapons, and
- seizable property.

An officer executing a standard search warrant may also seize any item in plain view for which a standard search warrant could issue or any evidence in plain view. These search warrants may also be used to search for property or items constituting evidence that a crime was committed or that

a particular person committed an offense. However, if such evidence is the *only* thing to be searched for, an evidentiary search warrant must be issued.

Evidentiary search warrants may only be issued by certain magistrates (justices of the supreme court or court of criminal appeals, district judges, statutory county court judges and municipal court judges who are licensed attorneys). An affidavit for an evidentiary search warrant must show probable cause that a specific offense has been committed and that evidence of that crime may be found at the location or on the person to be searched. With an evidentiary search warrant an officer may only seize the evidence listed in the warrant or an item in plain view for which a standard search warrant may issue, but may not seize mere evidence of a crime not listed by the warrant.

Evidentiary warrants are limited in two ways. First, they may not be used to seize evidence that is the personal writings of the accused. Second, they may not be issued again for the same person, place or thing previously searched under another evidentiary search warrant.

Federal search warrant law makes no distinction between warrants issued to search for mere evidence of a crime and other items or persons. Nor does it limit issuance of subsequent warrants issued for mere evidence. Texas law does not prohibit subsequent evidentiary warrants issued and executed under federal law. (*King v. State*, 746 S.W.2d 515 (Tex. App.—Dallas, 1988)).

DIGEST:

CSSB 1349 would permit a subsequent evidentiary search warrant to be issued to search the same person, place or thing previously searched under another evidentiary search warrant if the subsequent warrant was issued by a district judge, judge of a court of appeals or justice of the supreme court or court of criminal appeals.

This bill would take effect on September 1, 1995, but could be used to issue a subsequent warrant even if the first warrant was issued before the effective date.

SUPPORTERS SAY:

The prohibition against the use of subsequent search warrants is an anomaly of Texas law that should be corrected. The most unreasonable

instance of the application of this law comes from a case out of the 11th Court of Appeals. In this case, a man was suspected of the capital murder, aggravated robbery and sexual assault of a woman in 1981. The first blood sample from the accused was inconclusive. However, after DNA blood tests were approved in Texas, a second blood test proved conclusive and a grand jury indicted the suspect. The trial court subsequently suppressed this evidence because it was obtained through a second evidentiary search warrant. The court of appeals sustained the trial court's decision stating that it had to follow the language in the statute. (*State v. Flores*, 856 S.W.2d 614, 615 (Tex. App.—Eastland, 1993)).

The circumstances that forced the dismissal of the indictment in the *Flores* case are exactly the type of circumstances that this bill is intended to stop. Cases such as the *Flores* case that are dismissed because of a technicality do not serve justice but merely perpetuate the impression that a criminal can always find a technicality to circumvent the law.

SB 1349 would not extend beyond current federal search warrant law, so it would not violate the constitutional prohibition against unreasonable searches and seizures. It actually would provide more protection by stating that subsequent evidentiary warrants may only be issued by a district or appellate judge.

The application of this legislation to evidentiary search warrants that were issued before this bill would become effective does not create an *ex post facto* situation because this is merely a procedural matter. The application of this bill to cases where a search was conducted before the effective date is a central component of the bill; it would allow law enforcement personnel to close cases that have remained unprosecutable for years because the technology was not available to adequately test the evidence obtained the first time.

Subsequent evidentiary search warrants would not be used for harassment because they could only issue upon a finding of probable cause.

OPPONENTS SAY:

Evidentiary search warrants are treated differently than ordinary search warrants because there is a greater potential for abuse. As the Fourth Court of Appeals put it, "We believe the evil sought to be prevented by the Legislature was repeated general exploratory searches of the same person, place or thing so as to constitute harassment." (*Gordon v. State*, 640 S.W.2d 743, 755 (Tex. App.—San Antonio, 1982)). This bill would not remedy the fact that these subsequent warrants could be used exactly as the Fourth Court of Appeals feared. While there could be some exception providing for new evidence or new techniques of analyzing evidence, unlimited use of subsequent evidentiary search warrants, as this bill would provide, would be subject to abuse.

Another troubling aspect of this legislation is its retroactivity. This bill would allow re-opening searches of cases that have been closed for years. The people accused in these cases could have gone on to lead very positive lives but would be subjected to having their privacy invaded again in the desperate search of law enforcement officers to find some evidence to link them to unsolved crimes.

NOTES:

The committee substitute added that a subsequent evidentiary search warrant could only be issued by a district or appellate judge and made a conforming change.