

SUBJECT: Local law enforcement authority use of pen registers and ESN readers

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Keel, Riddle, Denny, Escobar, Pena

0 nays

4 absent — Hodge, P. Moreno, Raymond, Reyna

SENATE VOTE: On final passage, May 3 — 31-0, on Local and Uncontested Calendar

WITNESSES: For — Breck McDaniel, Houston Police Department

Against — None

BACKGROUND: Under Code of Criminal Procedure, Art. 18.20, sec.5(a), only the Department of Public Safety (DPS) may own, possess, install, operate, or monitor pen registers and ESN readers. Pen registers are devices that record or decode the telephone phone numbers dialed by a phone. ESN readers record certain information from wireless telephones, cellular telephones, or similar devices. Trap and trace devices record incoming phone numbers.

Code of Criminal Procedure, Art. 18.20, sec. 8A, makes an exception to the requirement that only DPS possess and install intercepting devices for emergency situations in which an immediate life-threatening situation exists.

Prosecutors file applications with district courts for the installation of pen registers, ESN readers, or similar equipment. Prosecutors can file these applications on their own motion or the motion of an authorized peace officer. If the application is filed on the prosecutor's own motion or on the request of a peace officer who is not a DPS officer, the application must be made personally and not through an assistant or other person.

Prosecutors can use assistants or others to file applications for pen

registers, ESN readers, or similar equipment made on the request of a DPS officer. Assistants also can be used to file applications for trap and trace devices on the application of any authorized peace officers whether or not they are DPS officers.

**DIGEST:**

SB 905 would allow a designated police agency to own and possess a pen register, ESN reader, or similar equipment. A designated police agency would be defined as a police department in a city with a population of 500,000 or more (Houston, Dallas, San Antonio, Austin, El Paso, Fort Worth).

Peace officers of designated police agencies would be authorized to possess, install, operate, or monitor pen registers, ESN readers, or similar equipment if the officer was certified by the agency chief to DPS as being trained in the installation and use of the equipment. The chief of a designated police agency would have to submit to DPS a list of the agency's officers authorized to possess, install, monitor, or operate the equipment.

SB 905 would allow prosecutors to file applications through assistants or others for a pen register, ESN reader, or similar equipment on the request of non-DPS peace officers if the officers were employed by a designated police agency. SB 905 would authorize judges to approve these requests.

The bill also would continue the current law on the interception and use of wire, oral, or electronic communications by repealing a provision that makes Code of Criminal Procedure Art. 18.20 expire on September 1, 2005.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2005, and would apply only to applications for the use of equipment made on or after the bill's effective date.

**SUPPORTERS  
SAY:**

SB 905 would expand the authority for peace officers to own and use pen registers and similar devices so that officers in large cities could respond more quickly to crime situations when necessary. The state's limited authority to operate pen registers can impede law enforcement investigations. Currently, only DPS is allowed to own and install the devices. The state is divided into DPS regions, with each region having a limited number of machines and personnel dedicated to operating them.

If a city police department gets judicial approval to install a pen register, the agency must wait for DPS personnel and equipment to be available. This is not acceptable in many situations, especially given the advent of cell phones. For example, in a kidnapping situation, law enforcement officers may need to move quickly to find out what numbers are being dialed by a kidnapper's cell phone. Criminals can change cell phones quickly, making delays in installing these devices unacceptable in some cases.

SB 905 would solve this problem by allowing certain officers in the state's largest cities to install and operate pen registers. This expansion of authority would be reasonable and limited. It would be limited to law enforcement agencies in the state's largest cities, which have the resources to train and monitor officers. In addition, police agencies would have to submit to DPS a list of officers trained and authorized to use them.

Numerous safeguards in current law ensure that pen registers would not be abused by those with authority to operate them under SB 905. All requests to use pen registers still would have to be approved by a judge before they could be used or, in emergency situations, immediately afterward. Any evidence obtained through the improper use of a pen register would not be admissible, and the Penal Code makes it a criminal offense unlawfully to use wire, oral or electronic communications. In addition, although some pen registers could be used to hear conversations, the machines contain safeguards to ensure that this feature is not used unless specifically authorized. The machines require a special key to turn on the wiretap function and make a written record of any recording.

SB 905 would help law enforcement agencies by allowing quicker authorization to operate pen registers by peace officers with authority to use them under the bill. Applications could be made by a representative of a prosecutor, and there still would be clear accountability for the request through the assistant prosecutor straight to the chief prosecutor.

SB 905 would repeal a provision that, in effect, would sunset the current law on the interception and use of wire, oral, or electronic communications because the practices are now well established and do not need to be reviewed systematically. The sunset provision worked to ensure that the law received periodic scrutiny but now that the use of these communications devices is established, accepted, and regulated, this

provision is unnecessary. The Legislature would continue to have authority to change the law at any time.

OPPONENTS  
SAY:

The use of pen registers and similar devices was restricted to DPS officers, in part, to help ensure that their use was not abused. By keeping the pool of officers who can use the devices small, it is easier to monitor their use. The need for this oversight has not lessened.

OTHER  
OPPONENTS  
SAY:

If expanding the installation and use of pen registers is appropriate, it should apply statewide so that smaller jurisdictions could take advantage of quicker installation and use of the devices.