

- SUBJECT:** Local law enforcement authority use of pen registers and ESN readers
- COMMITTEE:** Criminal Jurisprudence — favorable, without amendment
- VOTE:** 6 ayes — Peña, Vaught, Riddle, Escobar, Mallory Caraway, Pierson
0 nays
3 absent — Hodge, Moreno, Talton
- WITNESSES:** For — Lance Long, Harris County District Attorney’s Office; Breck McDaniel, Houston Police Department; (*Registered, but did not testify:* Tom Gaylor, Texas Municipal Police Association; James Jones, Southeast Texas Law Enforcement Administrators Association; Hans Marticiuc, Houston Police Officers Union; Gary Tittle, Dallas Police Department)

Against — None

On — James Brubaker, Texas Dept. of Public Safety
- 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 numbers dialed by a telephone. 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, authorizes a peace officer to possess and install intercepting devices in the case of an immediate life-threatening situation with sufficient grounds on which to obtain an order authorizing interception.

Under Art. 18.21, prosecutors may file applications with district courts for the installation of pen registers, ESN readers, or similar equipment 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 may use assistants or others to file applications for pen registers, ESN readers, or similar equipment made on the request of an authorized DPS officer. Assistants also may file applications for trap and trace devices on the application of authorized peace officers whether or not they are DPS officers.

DIGEST:

HB 357 would amend Code of Criminal Procedure, ch. 18 to allow a designated police agency to own and possess a pen register, ESN reader, or similar equipment. A designated police agency would be a police department in a city with a population of 500,000 or more (Houston, Dallas, San Antonio, Austin, El Paso, and 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 officers were certified in writing to DPS by the agency chief as being trained in the installation and use of the equipment. The chief of a designated police agency would submit to DPS a list of the agency's officers authorized to possess, install, monitor, or operate the equipment.

HB 357 also would allow a prosecutor to file an application through an assistant or another person for a pen register, ESN reader, or similar equipment on the request of a non-DPS peace officer if the officer were employed by a designated police agency. HB 357 would authorize judges to approve these requests.

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, 2007, and would apply only to applications for the use of equipment made on or after that date.

**SUPPORTERS
SAY:**

HB 357 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 may 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 become

available. This does not always permit law enforcement officers to move quickly enough, especially given the widespread use 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, and delays in installing these devices may hinder the ability to respond.

HB 357 would address this problem by allowing certain officers in the state's largest cities to install and operate pen registers. The expansion of authority would be reasonable and limited. Bigger cities have a lighter DPS presence than more rural areas, and law enforcement agencies in the state's largest cities 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 these devices, allowing DPS to continue to monitor those who conduct these operations.

Many safeguards in current law ensure that pen registers would not be abused by those with authority to operate them under HB 357. All requests to use pen registers still would have to be approved by a judge or, in emergency situations, immediately afterward. Evidence obtained through the improper use of a pen register would not be admissible. Also, it is a criminal offense unlawfully to use wire, oral, or electronic communications (Penal Code, sec. 16.02). 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 anything.

HB 357 would help law enforcement agencies by allowing quicker authorization to operate pen registers by peace officers with authority to use them under the bill. Also, applications could be made by a representative of a prosecutor, and there still would be accountability for the request through the assistant prosecutor straight to the chief prosecutor.

**OPPONENTS
SAY:**

Under current law, all wiretapping in the state runs through the Department of Public Safety. This ensures uniform application of DPS internal standards across the state. This kind of uniform implementation would not be possible if other agencies were allowed to perform the same function. This would make future wiretaps more susceptible to judicial review, which could result in the exclusion of critical evidence.

Expanding who may conduct wiretaps is not necessary because four of the six departments that would be allowed to conduct their own wiretapping did not engage in a single wiretap between 1998 and 2005, the last year for which the statistics are available, according to the Administrative Office of United States Courts. Taxpayers in these cities should not have to pay for equipment and training when it will be rarely used. It is an especially bad investment, when these departments already go to a centralized provider. Taxpayers do not need this redundancy.

OTHER
OPPONENTS
SAY:

If extending 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.

NOTES:

HB 357 is similar to SB 905 by Whitmire, which passed the Senate during the 2005 regular session and was placed on the May 24 General State Calendar, where it died when the House took no further action.