

## **BILL ANALYSIS**

Senate Research Center

S.B. 1120  
By: Armbrister  
Criminal Justice  
4-22-97  
Committee Report (Amended)

### **DIGEST**

Currently, the federal legislation cited as the "Communications Assistance for Law Enforcement Act of 1994" necessitates changes in Articles 18.20 and 18.21 of the Code of Criminal Procedure and Sections 16.02 through 16.05 of the Penal Code. Moreover, the enactment of S.B. 1067 of the 73rd Legislative Session produced a need for clarification and modification of the same statutes. There is also a need for some flexibility in certain cases to shift the appropriate court or prosecutor to be approached in cases involving potential official misconduct or technological confusion.

This legislation makes Articles 18.20 and 18.21 of the Code of Criminal Procedure and Chapter 16 of the Penal Code conform with Title 18 of the United States Code. The definitions of "wire communication" and "electronic communication" would now include the radio portion of a cordless telephone, while the definitions of "pen register" and "readily accessible to the general public," as well as other matters, would track earlier changes made in federal law. This bill would remove nine definitions in Article 18.21 and cross-reference them to their counterparts in Article 18.20; remove procedural matters from the Penal Code and move them to the Code of Criminal Procedure; and bring the defensive issues in Chapter 16 of the Penal Code in line with the new 1994 Penal Code. In addition, S.B. 1120 would clarify the particular court or prosecutor who could, given the proper cause, act in the area of wiretaps.

### **PURPOSE**

As proposed, S.B. 1120 establishes provisions regarding the interception of wire, oral, or electronic communications, the use of pen registers and trap and trace devices, and the civil and criminal consequences of improperly engaging in those activities.

### **RULEMAKING AUTHORITY**

This bill does not grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Subdivisions (1), (8), (14), (15), and (19), Section 1, Article 18.20, Code of Criminal Procedure, to redefine "wire communication," "prosecutor," "pen register," "electronic communication," and "readily accessible to the general public."

SECTION 2. Amends Section 3(b), Article 18.20, Code of Criminal Procedure, to authorize a judge appointed under Subsection (a), except as provided by Subsection (c), to act on an application for authorization to intercept wire, oral, or electronic communications if the judge is appointed as the judge of competent jurisdiction within certain administrative judicial districts, rather than authorizing only the judge of competent jurisdiction for the administrative judicial district in which the proposed interception will be made to act on an application to intercept certain communications.

SECTION 3. Amends Section 16, Article 18.20, Code of Criminal Procedure, to provide that a person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of this article, or in violation of Chapter 16, Penal Code, has a civil cause of action against any person who intercepts, discloses, or uses or solicits, rather than procures, another person to do the same, and is entitled to recover from the person certain damages and costs incurred. Establishes that a good faith reliance on a court order or legislative authorization constitutes a complete defense to an action,

rather than any civil or criminal action, brought under this section, rather than article. Sets forth the terms under which a person is subject to suit by the federal or state government for appropriate injunctive relief if the person engages in conduct that constitutes an offense under Section 16.05, Penal Code, and involves certain radio communications. Provides that a defendant is liable for a civil penalty of \$500 if it is shown at the trial that the defendant has been convicted of an offense under Section 16.05, Penal Code, or is found liable in a civil action brought under Subsection (a). Establishes that each violation of an injunction ordered under Subsection (c) is punishable by a fine of \$500. Sets forth the attorneys authorized to file suit under Subsection (c) on behalf of the state.

SECTION 4. Amends Section 17, Article 18.20, Code of Criminal Procedure, as follows:

Sec. 17. New heading: NONAPPLICABILITY. Provides that this article does not apply to conduct described as an affirmative defense under Section 16.02(c), Penal Code, rather than Section 16.02(c)(5), Penal Code. Deletes the existing section regarding exceptions.

SECTION 5. Amends Section 1, Article 18.21, Code of Criminal Procedure, to redefine "aural transfer," "communication common carrier," "electronic communication," "electronic communications service," "electronic communications system," "electronic storage," "pen register," "readily accessible to the general public," "trap and trace device," "user," and "wire communication." Makes conforming changes.

SECTION 6. Amends Section 2(f), Article 18.21, Code of Criminal Procedure, to provide that an order for the installation and utilization of a pen register or trap and trace device is valid for not more than 60, rather than 30, days after the date the device is installed or after 10 days after the date the order is entered, whichever occurs first, with certain exceptions. Prohibits the period of extension from exceeding 60, rather than 30, days for each extension granted, except in certain cases.

SECTION 7. Amends Section 3, Article 18.21, Code of Criminal Procedure, to delete the provision authorizing an authorized peace officer, designated by the director of the Department of Public Safety, to install and use a pen register or trap and trace device in certain circumstances. Requires an officer, if authorization is not obtained within 48 hours after the installation begins, to terminate use of the pen register or the trap and trace device on the expiration of the 48 hours or at the time the order is denied, whichever is earlier. Deletes the previous provisions regarding termination of the pen register or the trap and trace device, and the knowing installation or use by an authorized peace officer of either instruments. Prohibits the state from using as evidence in a, rather than any subsequent, criminal proceeding any information gained through the use of a pen register or trap and trace device installed, rather than issued, under this section if authorization is denied. Makes conforming changes.

SECTION 8. Amends Article 18.21, Code of Criminal Procedure, by adding Section 16, as follows:

Sec. 16. LIMITATION. Requires a governmental agency authorized to install and use a pen register under this article or other law to use reasonably available technology to only record and decode electronic or other impulses used to identify the numbers dialed or otherwise transmitted.

SECTION 9. Amends Sections 16.02(c), Penal Code, to provide that it is an affirmative defense to prosecution under Subsection (b) that a person acting under color of law intercepts a wire, oral, or electronic communication if oral or written, rather than prior, consent for the interception is given by a magistrate before the interception; or a person intercepts radio communication, other than a cordless telephone communication that is transmitted between a cordless telephone handset and a base unit that is transmitted by certain means.

SECTION 10. Amends Section 16.03(a) and (c)-(e), Penal Code, to provide that a person commits an offense if the person knowingly installs or uses a pen register or trap and trace device to record or decode electronic or other impulses for the purpose of identifying telephone numbers dialed or otherwise transmitted on a telephone line, rather than utilizing such instruments to record telephone numbers dialed from or to a telephone instrument. Sets forth the terms under which it is

an affirmative defense to prosecution under, rather than an exception to the application of, Subsection (a), that certain conditions exist. Makes conforming changes.

SECTION 11. Amends Section 16.04(e), Penal Code, to set forth the terms under which it is an affirmative defense to prosecution under, rather than an exception to the application of, Subsection (b), that the conduct was authorized by certain persons.

SECTION 12. Amends Sections 16.05(b)-(e), Penal Code, to provide that a person who provides electronic communications service to the public commits an offense if the person knowingly divulges the contents of a communication to another who is not the intended recipient of the communication. Deletes the previous provisions regarding the offense of intentionally divulging the contents of a communication to any person other than the addressee, the intended recipient, or the addressee's or intended recipient's agent. Sets forth the terms under which it is an affirmative defense to prosecution under Subsection (b) that the actor divulged the contents of the communication in a certain manner. Deletes the provision authorizing a person who provides electronic communications service to the public to divulge the contents in a certain manner. Establishes that except as provided by Subsection (e), an offense under Subsection (b) that involves a scrambled or encrypted radio communication is a state jail felony, rather than establishing that except as provided by Subsections (e) and (f), an offense under Subsection (b) is a state jail felony. Deletes text regarding an offense involving the radio portion of a cellular telephone communication.

SECTION 13. Repealer: Section 16.05(f), Penal Code (regarding injunctive relief and civil penalties for certain illegal divulgence of public communications).

SECTION 14. Effective date: September 1, 1997.

SECTION 15. Makes application of this Act prospective regarding SECTIONS 8-11 and 13.

SECTION 16. Emergency clause.

#### **SUMMARY OF COMMITTEE CHANGES**

Amendment 1.

Page 1, line 24, strike "a" and substitute "the," to amend the definition of "prosecutor."