

SUBJECT: Contraband offenses, TDCJ detecting and monitoring cell phones

COMMITTEE: Corrections — committee substitute recommended

VOTE: 6 ayes — McReynolds, Madden, England, Marquez, Martinez, Ortiz

2 nays — Hodge, Kolkhorst

1 present, not voting — Sheffield

2 absent — Dutton, S. Miller

WITNESSES: For — Beverly Elam; Peggy Tipton

Against — None

On — Gina DeBottis, Special Prosecution Unit; Brad Livingston, Texas Department of Criminal Justice

BACKGROUND: Penal Code, sec. 38.11 makes it a criminal offense to provide certain prohibited substances and items to an inmate of a correctional facility or to a juvenile in the custody of a secure correctional or detention facility. Prohibited substances and items include alcoholic beverages, controlled substances, dangerous drugs, weapons, cellular telephones, other wireless communications devices, components of cell phones or wireless devices, cigarettes, tobacco products, and money.

Subsec. (j) deals specifically with cell phones in the Texas Department of Criminal Justice (TDCJ) and juvenile facilities. Under this section it is an offense for TDCJ inmates or juveniles in secure custody to possess a cell phone or wireless communication device or one of its components.

Code of Criminal Procedure, Art. 18.20 governs the interception and use of wire, oral, and electronic communications. Under art. 18.20, sec. 5, only the Department of Public Safety (DPS) can own, possess, install, operate, or monitor certain devices used for nonconsensual interception of wire, oral, or electronic communications, with some exceptions. DPS can be assisted by investigative or law enforcement officers or others in the operation and monitoring of communications if the other person is

designated by the DPS director and acts in the presence and under the direction of a commissioned DPS officer.

Art. 18.20, sec. 4 authorizes judges to issue orders allowing the interception of wire, oral, or electronic communications only if prosecutors show probable cause that the interception will provide evidence of certain specified crimes.

Penal Code, sec. 16.02 makes the unlawful interception, use, or disclosure of wire, oral, or electronic communications a crime. These offenses are second-degree felonies (two to 20 years in prison and an optional fine of up to \$10,000)

DIGEST:

CSHB 1481 would expand the current offense of providing certain prohibited substances and items to inmates in correctional facilities or to a juvenile in the custody of a secure correctional or detention facility. It also would give the Texas Department of Criminal Justice and the Texas Youth Commission (TYC) expanded authority in dealing with nonconsensual interception devices for wire, oral, or electronic communications.

The bill would take effect September 1, 2009, and the sections altering or adding Penal Code offenses would apply only to offenses committed on or after that date.

Providing prohibited substances and items. CSHB 1481 would expand the current offense for providing certain prohibited substances and items to inmates in correctional facilities or to a juvenile in the custody of a secure correctional or detention facility to include *possessing* the substances or items with the intent to provide them to an inmate or juvenile in custody.

The bill would add a new offense to that section if a person:

- acquired a cell phone, wireless device, or component to be delivered to an inmate or person in custody;
- provided a cell phone, wireless device, or component to another person for delivery to an inmate or person in custody; or
- made a payment to a communications common carrier as defined by Code of Criminal Procedure, Art. 18.20, or to any communication service that provided wire or electronic communications.

The offense would have to be committed with intent to provide or make available a cell phone, wireless communications device, or a component to an inmate or youth in a correctional or detention facility,

CSHB 1481 would add a definition of component to the offense in the Penal Code for providing certain prohibited substances and items to inmates or juveniles in custody. A component would be defined, in part, as any item necessary for the operation of a cell phone or wireless communication device, including purchased minutes for communications.

Use of interception devices by TDCJ, TYC. CSHB 1481 would authorize the TDCJ and the TYC to own devices for the nonconsensual interception of wire, oral, or electronic communications for authorized uses. The bill would authorize the possession, installation, operation, and monitoring of the devices by the inspectors general of the two agencies, a commissioned officer of those offices, or a person acting in the presence and under the direction of one of these commissioned officers. The inspectors general would be required to designate in writing the commissioned officers of their offices who would be authorized to work with the equipment.

Investigative and law enforcement officers, or other persons, upon request of the Office of the Inspector General, could assist the office in the operation and monitoring of an interception device if the person was designated by the agency executive head and acted in the presence and under the direction of a commissioned officer or the inspector general.

The Office of Inspector General of TDCJ would be authorized to:

- without a warrant, use electronic, mechanical, or other devices to detect the presence or use of a cellular telephone or other wireless communications device in a correctional facility;
- without a warrant, intercept, monitor, detect, or, as authorized by federal laws and regulations, prevent the transmission of any communication transmitted through the use of a cell phone or other wireless communications device in a correctional facility; and
- use this information, including an intercepted communication, in any criminal or civil proceeding before a court or government agency or entity.

The inspector general would have to report use of a device within 30 days to a prosecutor in the county in which it was used or to the special prosecution unit, if the unit had jurisdiction in the county in which the device was used.

The inspector general would have to minimize the impact of the device on any communications that were not reasonably related to the detection or presence of a cell phone or other wireless communication device in a correctional facility.

Persons confined in correctional facilities would not have an expectation of privacy with respect to any possession or use of a cell phone or other wireless communication device on the premises of the facility. The person confined and anyone they communicated with through a cell phone or wireless communication device would not have an expectation of privacy with respect to the contents of communications transmitted by these devices.

The bill would add the offense of providing certain prohibited substances and items to inmates and certain juveniles in custody to the list of specified felony crimes for which judges were authorized to order the interception of communications upon showing of probable cause. It also would add delivery of abusable volatile chemicals to a minor to that list and would remove offenses involving inhalant paraphernalia, which are misdemeanors, from the list.

SUPPORTERS
SAY:

CSHB 1481 would give the state additional tools to combat cell phone use in prisons and youth correctional facilities. There has been heightened concern about the problem of contraband cell phones in prisons since October 2008 when a death row inmate was caught with a cell phone. This February alone, TDCJ found 115 contraband cell phones. Cell phones in prison are a security threat and have been used to plan crimes, threaten witnesses, and more. The authority in CSHB 1481 would be justified given the serious threat to public safety and prison security issues involved in these cases.

Intent to provide prohibited substances and items. CSHB 1481 would expand the current offense for providing certain kinds of contraband to inmates to include *intending* to provide the items to give authorities another tool to stop contraband before it got into prisons. The change would make it easier to prosecute someone possessing the contraband and

intending to provide it to an offender even if the person had not yet actually given it to the offender.

The bill would add a definition of component to the description of the offense so that authorities could more easily prosecute persons providing to inmates cell phone parts, such as batteries and minutes, that are necessary for the operation of a phone or other device. This would help address situations in which one person purchased a cell phone for an inmate and someone else bought the minutes for the phone.

TDCJ detection, monitoring of devices, transmissions. CSHB 1481 would give TDCJ and TYC the necessary tools to combat cell phone use in correctional facilities. The current process for using interception devices involves going through the Department of Public Safety, following detailed procedures, and for certain actions, court approval. This process can be cumbersome and time consuming and may not always permit the inspector general to move quickly enough. Many prison investigations into cell phones are time sensitive and must happen rapidly upon learning about the contraband because the phones can be easily concealed, passed around, and thrown away.

With the authority to possess, under strict guidelines, detection equipment for investigations of offenses involving contraband, TDCJ and TYC would be ready to move quickly to combat contraband when necessary. TDCJ's inspector general would be able to use the equipment to detect the presence or use of cell phones and wireless devices and to monitor, detect, or prevent transmission of communications through these devices so that they could gather evidence. Although frequency jamming of the cell phone signals currently is illegal under federal law, there are discussions about changing that law. CSHB 1481 would give the inspector general authority to prevent these transmissions if federal law were changed.

Safeguards in the bill would ensure that the equipment was used only under strict guidelines and that the authority was not abused. The inspector general would have to notify the prosecutor or the special prosecution unit within 30 days if a detection device were used, providing an important check and balance on this authority. In addition, the inspector general would be required to minimize the impact on other communications not related to detecting a cell phone or other device. Also, unlawful interception of wire, oral, or electronic communications would remain a crime.

OPPONENTS
SAY:

CSHB 1481 could give too much power to the inspectors general of TDCJ and TYC. Allowing the inspector general of TDCJ to use detection and interception equipment without a warrant could stray too far from current requirements for these devices, which generally regulate the use so that there is a statewide policy with uniform standards. TDCJ should be able to address contraband problems using current procedures for interception devices, especially given other changes approved by the House this session for these cases, such as allowing TDCJ's inspector general to issue administrative subpoenas to telecommunications companies.

NOTES:

The committee substitute made several changes to the original bill, including adding the provision making possessing contraband with the intent to provide it to an inmate an offense; adding the definition of component; and adding provisions giving TDCJ authority to detect, use, intercept, and monitor cell phone and wireless presence and use.