

SB 94 Criminal Procedure; require a procedure for enhancing witness identification accuracy

Bill Summary: SB 94 requires law enforcement agencies that conduct live lineups, photo lineups, or showups, to adopt written policies for using such procedures. These policies must contain the following requirements: if using a live lineup procedure, a person who does not know the identity of the suspect must be the one to conduct the procedure; or if using a photo lineup, the person conducting the procedure must either not know the identity of the suspect or use a procedure that randomly places photographs in folders so that the conductor cannot physically see which photograph is being viewed by the witness until the procedure is complete.

In either case, the witness must be instructed that the perpetrator of the alleged crime may or may not be present in the lineup.

There must be at least four individuals who are not suspects ("fillers") in live lineups and at least five in photo lineups. These fillers must generally resemble the witness's description of the perpetrator.

The witness who makes the identification, whether at a live lineup, photo lineup, or showup, must make and document a clear statement in their own words about their confidence level in the identification.

These policies will be subject to public disclosure. If an agency fails to comply with these requirements, the judge may consider such failure, but is not required to exclude identification evidence obtained.

SB 94 also amends the law regarding search and seizure.

1) Search Incident to Arrest - The bill first revises the Code section regarding search incident to a lawful arrest. Most of the changes in this section are stylistic. For example, the bill allows an officer to search the individual arrested, as well as the area within the person's immediate presence, for the purposes of

"discovering or seizing any property" which may have been used in the crime. The definition of property now includes intangible items in an attempt to ensure that items other than traditional physical instrumentalities are seizable.

The bill also changes language regarding exactly what an officer may seize in the course of a search incident to arrest. Also, the bill strikes language about what may be seized in a search incident to arrest and replaces it with the defined term "contraband." The definition of contraband is the same as the language that the term replaced.

2) Issuance of Search Warrants - Under current law, when seeking a search warrant, an officer is required to establish by probable cause that a crime is being or has been committed. This bill adds an option for an officer to establish by probable cause that a crime "is about to be committed." The bill expands which judges are allowed to issue search warrants. Under current law, the only judicial officers authorized to issue search warrants are those "authorized to hold a court of inquiry to examine into an arrest of an offender against the penal laws" as well as retired, senior, or emeritus judges if the active judge authorizes such judges to issue warrants. This bill allows "any judge of a court of this state" to issue warrants.

3) What A Search Warrant May Be Issued For - A judicial officer may issue a warrant for "stolen" property, but the bill strikes the word "embezzled." Also, the bill allows a search warrant to be issued for the seizure of any property that is evidence of the commission of the crime. The bill removes the exemption for private papers that are only tangible evidence of the commission of the crime. A warrant may also be issued for the search or seizure of an individual who has been kidnapped "or unlawfully restrained." Finally, if an individual has a warrant for his/her arrest and is located within another person's property, a warrant may be issued for the search of that other person's property. The changes for what may be seized in a search incident to arrest are also applied to the provisions regarding what may be seized when effecting a valid search warrant.

4) Use of Certain Devices in Search Warrant Execution - This bill allows other personnel acting on behalf of a peace officer to assist in the execution of a warrant. The bill also allows the use of a "device" when executing a warrant. A device means an electronic instrument used for overhearing sounds or for observing images. This also includes instruments that can be used to intercept a wire, oral, or electronic communication. Certain instruments are excluded from the definition of device, such as hearing aids or "trap and trace" devices.

5) Records of Search Warrants and Supporting Documents - This bill prevents search warrants from being subject to public inspection until they are executed or returned as not executed. This applies to the documents supporting the warrant as well.

6) Ex Parte petition for Sealing of Search Warrants and Supporting Documentation - SB 94 allows a prosecuting attorney to petition the court ex parte for a search warrant and supporting documentation to be filed under seal with the clerk. The prosecutor must show "reasonable cause" to believe that disclosure of such materials may endanger the life of an individual, cause an individual to flee from prosecution, lead to destruction of evidence/ intimidation of a witness, or otherwise jeopardize an investigation or delay a trial. A judge may order such sealing for up to 60 days, and the period of sealing cannot extend beyond the return of indictment or filing of accusation where evidence seized may be admitted. If an individual is not available, a copy of the warrant must be left in a conspicuous place. If the warrant has been ordered to be sealed, however, a copy may not be left in a conspicuous place.

7) Written Return of Property Seized - Current law allows a written return of property seized to be made before any judicial officer named in the search warrant or before "any court of competent jurisdiction." This bill requires such report to be made before a judicial officer of the same court as the judicial officer who issued the search warrant.

8) Special Masters in Serving Search Warrants - Current law requires an attorney to serve as a special master and accompany a peace officer when serving a search warrant. This bill provides that an attorney shall not be appointed if there is a significant risk that his/her own interests or duties to another client will be affected by such appointment.

9) Prosecuting Attorney May Designate Individual to Observe Search Warrant Execution - If practicable, the peace officer serving the search warrant should not participate in the search, but should only accompany the special master who is conducting the search. This bill allows the prosecuting attorney to designate an attorney or investigator to observe the execution of the search warrant.

PART 2 Search and Seizure of Wire and Electronic Communications

1) Subpoena, Court Order, or Warrant requiring Disclosure of Wire/Electronic Communications - This bill first states that a peace officer, prosecuting attorney, or attorney general may require wire/electronic communications to be disclosed by subpoena, court order, or search warrant as provided by the laws of the United States. A subpoena may be issued if it is shown that the material relates to a pending criminal investigation. A provided or electronic communication service must provide the contents of and records pertaining to such communications when there is a request made that complies with the laws of the United States. If a search warrant requires the production of wire/electronic communications, it shall have state-wide application or application as provided by federal law when issued by a judicial officer with jurisdiction over the crime under investigation. If allowed under federal law, judges having jurisdiction over the crime being investigated may issue orders requiring production of such communications. These orders shall have state-wide application or application as provided by federal law. A person violating this section may be subject to contempt.

2) Installation of Tracking Device by Issuance of Search Warrant - The bill allows, by search warrant, the installation of a tracking device on a physical object provided that the warrant identifies the object and specifies a reasonable length of time, which cannot exceed 45 days, that the device will be used. The installation of the device must take place in the county within the jurisdiction of the warrant-issuing judge. The device can be monitored from any location in the state. The warrant must mandate that the installation is completed within 10 days of the warrant's issuance. The officer must also make a written return of such warrant to the judicial officer named in the warrant or before any court of competent jurisdiction to the judge named in the warrant. On the return, the officer must enter the exact date and time the device was installed or monitoring began if no installation was required. They must also list the dates and times the devices were used. The warrant must be returned within 10 days of the tracking ending. Also within 10 days of the termination of tracking, the officer must serve the search warrant on the person or owner of the physical object being tracked. A judge may order this service be delayed if he finds certain circumstances exist, such as endangerment or flight of the individual.

3) Pen Register and Trap and Trace Device - A district attorney or attorney general is authorized to apply for an order authorizing the use or extension of a Pen Register or Trap and Trace device. The application must be to a judge of the superior court of the district attorney's judicial circuit or any judicial circuit if the applicant is an Attorney General. The judge may enter such order if authorized by the law of the United States and the order shall have state-wide application. An officer designated in writing by the attorney general or district attorney may install and use a pen register or trap and trace device before obtaining an order authorizing such installation and use if: he/she determines there are grounds upon which an order could be granted; within 48 hours of installation, an order approving the installation and use is issued; or he/she reasonably determines that a situation exists that involves danger of death or injury or conspiratorial activities indicative of organized crime.

4) Inapplicable to Officers Ferreting Out or Watching Suspected Criminals for the Purposes of Apprehension - Except when using a device in a way that would constitute a violation of the eavesdropping statute (OCGA §16-11-62), the provisions of this bill do not apply to officers ferreting out offenders or suspects for the purposes of apprehending those individuals.

5) Investigation Warrants - A judge of a superior court having jurisdiction over prosecution of a crime under investigation may issue an investigation warrant permitting the use of a device for surveillance of an individual or place to the extent such surveillance is consistent with and subject to terms and procedure of federal law. The warrant issued shall have state-wide application. Any evidence obtained is only admissible in courts that have misdemeanor AND felony jurisdiction. An individual acting in good faith reliance on a court order or legislative authorization will have a complete defense to a criminal or civil action brought under this or any other law.

6) Emergency Situations - Notwithstanding the requirements of this bill, a district attorney or attorney general may intercept wire/electronic communications or record an individual's activities without a court authorization if: they determine that there is an emergency situation which requires such interception or recording; and grounds exist upon which an investigation warrant could be issued, and they apply for such warrant within 48 hours of the surveillance or monitoring begins. If such warrant is granted, the execution must comply with this bill and must cease after the emergency situation stops. If the warrant is denied, the evidence obtained prior to it is confidential and may not be used in court.

(7) Consent to interception - Notwithstanding the other provisions of this bill, wire/electronic communication may be intercepted when the party intercepting is party to the communication OR when one of the parties consents to interception.

8) Recording and Dissemination of a Minor's Communications - Communication of a child under the age of 18 may be recorded and divulged either by court order, parent, guardian, or legal custodian. If sought by a court order, the judge shall only issue such an order if he/she finds by probable cause that a crime has been committed or he/she finds that the child understands that the conversation is to be recorded and the child agrees to participate. A parent or guardian may also record, monitor, or intercept the communications of a child if the communication takes place through a device within the family home. The parent may disclose the contents of communication to the authorities if he/she reasonably believes the conversation is evidence of criminal conduct. Such disclosed evidence is admissible in a judicial proceeding.

9) Remedies--Exclusionary and Criminalization - Evidence obtained in a manner that violates this bill is inadmissible. Privileged information is also not admissible notwithstanding anything in this bill. A violation of this bill constitutes a felony.

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