SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 78-B

SPONSOR: Committee on Criminal Justice and Senators Brown-Waite and Smith

SUBJECT: Detention of Material Witness

DATE: October 24, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable/CS
2.			RC	
3.				
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 78-B provides for the temporary detention of certain witnesses with information material in a criminal investigation or other proceeding involving a suspected or charged violation of state law which relates to an act of terrorism or is in furtherance of an act of terrorism. An application for detention is filed under the authority of the Governor, the Attorney General, the Statewide Prosecutor, or the State Attorney. This application is supported by an affidavit filed by the Department of Law Enforcement, which avers that the testimony of the person (for whom detention is sought) is: 1) material in a criminal investigation or other proceeding involving a suspected or charged violation of state law which relates to an act of terrorism or is in furtherance of an act of terrorism; and 2) it may become impracticable to secure the presence of the person by subpoena. The circuit judge before whom the application is pending may order the detention of that person for a period not to exceed 4 calendar days upon a finding that the detention is necessary to prevent a failure of justice.

The CS provides that not later than 48 hours after being detained the material witness is entitled to a hearing before the circuit judge who issued the order of detention to determine whether further detention is necessary to prevent a failure of justice. In order for the court to direct the continued detention of the material witness, the court must issue a written order of detention which contains findings that justify the continued detention of the material witness.

Evidence offered in support of the application for an order of detention or offered at the hearing conducted to determine whether further detention is necessary must be clear and convincing.

This CS creates new and as yet unnumbered sections of the Florida Statutes.

II. Present Situation:

A. Florida Law

Section 902.17, F.S., provides that if a witness required to enter into a recognizance to appear refuses to comply with the order, the magistrate shall commit the witness to custody until she or he complies or she or he is legally discharged.

If it appears from examination on oath of a witness who states that she or he is unable to give security for her or his appearance, or on oath by any other person that the witness is unable to give security, the magistrate or the court having jurisdiction to try the defendant shall make an order finding that fact, and the witness shall be detained pending application for her or his conditional examination. Within 3 days from the entry of the order, the witness shall be conditionally examined on application of the state or the defendant. At the completion of the examination, the witness shall be discharged. If a conditional examination is not made within the 3 days, the witness shall be discharged.

In *State ex rel. Gebhardt v. Buchanan*, 175 So.2d 803 (Fla. 3rd DCA 1965), the Third District Court of Appeal reviewed a petition for writ of habeas corpus by the Petitioner, who was confined in the Dade County jail as a material witness in a first-degree murder case. Petitioner alleged that his confinement was illegal because he had not been discharged pursuant to s. 902.17(4), F.S., which provides for the release of a person detained under that section if the conditional examination is not held within 3 days from the entry of the order finding that the detainee is unable to give security.

The Third District issued a writ of habeas corpus and a return was filed. The return of the writ described that the petitioner was in custody pursuant to an order of the circuit court wherein he was ordered to post a material witness bond or remain in custody until criminal cases pending against another person were terminated. Subsequently, the petitioner and this other man were bound over to the Dade County Grand Jury on warrants charging them with first degree murder. The grand jury returned true bills against the other person, charging him with first degree murder. The Petitioner entered into an agreement with the state and the grand jury that he would testify in the pending murder cases in exchange for not being prosecuted. The grand jury returned a no true bill as to the Petitioner.

To insure the Petitioner's compliance with the agreement, the state moved the circuit court to set a material witness bond for the Petitioner. The court issued an order declaring the Petitioner to be a material witness in the pending murder case. The Petitioner appeared and testified in one case, but another case was continued because of legal issues that had to be settled by the Florida Supreme Court.

In *Gebhardt*, the Third District was called upon to determine whether s. 902.17, F.S., applied to the Petitioner so that his restraint was now illegal. The appellate court first pointed out that:

> . . . [Section 902.17] is not the only basis for the authority of the circuit court to hold a necessary and material witness in jail in a first-degree murder case. The authority of such courts to hold a material witness is an element of the jurisdiction

to try such cases. It is an inherent power long recognized by the law. *Crosby v. Potts*, 8 Ga.App. 463, 68 S.E. 582 (1910); *Lowe v. Taylor*, 180 Ga. 654, 180 S.E. 223 (1935). The courts of Georgia have had the opportunity to discuss the subject under consideration. We hereby adopt the reasoning in those cases and set forth the following, which is part thereof:

> '[T]he power to take every adequate means to compel the attendance of witnesses or the production of testimony inhered in the courts of the common law as part of their necessary powers. . . .
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> '[There is] a plenary power in the courts to exercise over officers, parties, witnesses, and all others who may become connected in any way with a case pending before the court, such control as shall be adequate to carry out its full jurisdiction to administer legal justice in the case. Officers may be compelled to perform duties even without pay, as where for a pauper party the sheriff serves papers, or the clerk makes records or copies, or an attorney is appointed and defends. Parties may be compelled to execute consents, or to appear in person, or to submit to physical examinations of themselves, of their property, or of their documents, and in extreme cases may be held in prison awaiting the determination of some asserted right, even of a civil nature, as where a party is held under ne exeat. Third persons may be compelled to lay down their private enterprises in order to come to the court to sit as jurors. Other outsiders may be compelled to appear as witnesses, and to bring their private books and papers to be used as evidence. Many of these things thus required of the citizenry of the state are, on their face, hardships, which the relationship of citizen and state impose as the result of a natural and necessary obligation.
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> 'The point is that the court as an arm of the state has the right to impose hardship upon the citizen whenever the state's interests being administered in the court require the imposition. It is a hardship upon one, whose only connection with a case is that he happens to know some material fact in relation thereto, that he should be taken into control by the court and held in the custody of the jailer unless he gives bond (which, from poverty, he may be unable to give), conditioned that he will appear and testify; but the exigencies of particular instances do often require just such stringent methods in order to compel the performance of the duty of the witness appearing and testifying. There are many cases in which an ordinary subpoena would prove inadequate to secure the presence of the witness at the trial. The danger of punishment for contempt on account of a refusal to appear is sometimes too slight to deter the witness from absenting himself. Especially is this true where there are but few ties to hold the witness in the jurisdiction where the trial is to be held, and there are reasons why he desires not to testify; for, when once he has crossed the state line, he is beyond the grasp of any of the court's processes to bring him to the trial or to punish him for his refusal to answer to a subpoena. We conclude, therefore, that since the law manifestly intends that the courts shall have

> adequate power to compel the performance of the respective duties falling on those connected in any wise with the case, it may, where the exigencies so require, cause a witness to be held in custody, and in jail if need be, unless he gives reasonable bail for his appearance at the trial.
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> 'It is hardly necessary to say that the imprisoning of a witness to secure his attendance is a harsh remedy--one that should be very sparingly exercised. No court should ever order a witness to be imprisoned in default of bond, except from grave necessity. Unless his testimony is material and important, and unless there is strong likelihood that, if he is not restrained by confinement or bond, he will violate the mandates of the subpoena and flee the limits of the state, the power should not be exercised. This is a matter as to which every court, when it is presented, must exercise a broad, humane discretion, having in view the rights of the citizen, and even higher rights of justice and of the state.' *Crosby v. Potts, supra*, 69 S.E. at 584.

Id. at 805-806.

The Third Circuit concluded that the Petitioner was being held under the inherent power of the circuit court to hold a material witness, not s. 902.17. The Court further concluded that, since the Petitioner was unable to make bond,

> . . . the interest of justice dictates that he should not be released from custody. The petitioner is not entitled to the benefit of the statute because his incarceration is not a result of the independent action of the State in taking and holding him as a material witness. His incarceration is the result of his own action in allegedly making the agreement to ally himself with the prosecution against [the person charged with first degree murder]. In other words he acknowledges that this temporary loss of liberty is a result of his own machinations. We hold that his incarceration is not illegal and that it cannot be said to be illegal so long as there is any lawful purpose to be served by that detention.

Id. at 807.

In *Rodriguez v. Sandstrom*, 382 So.2d 778 (Fla. 3rd DCA 1980), the Third Circuit cited *Gebhardt* as supporting authority for the court's inherent power to hold a necessary and material witness in jail in a first degree murder case. The Court also remarked that "[t]he circuit court also has the statutory authority to [hold a necessary and material witness in a first degree murder case] . . . and may set bail to guarantee the witness' appearance before the court. . . ." *Id*. at 779, citing to ss. 902.15 and 902.17, F.S. However, the Court determined that

> [c]entral to the exercise of the circuit court's authority in such case . . . is that a first degree murder charge must be pending before the circuit court at the time such material witness is committed to custody in lieu of bail. Our review of the Georgia cases upon which this court relied in the Gebhardt case convinces us that first degree murder charges must be pending before the court as a pre-condition to

> the court's authority to commit a witness to custody in lieu of bail as a material and necessary witness in the cause.
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> In the instant case, it is undisputed that a first degree murder charge is not pending before the circuit court in this cause. As such, it is our view that, under the established law of this state, the circuit court had no authority to commit the petitioner to custody in lieu of bail as a necessary and material witness. We reject the state's contention that the circuit court has inherent authority to guarantee the appearance of a witness by a material witness bond in a state attorney investigation under Section 27.04, Florida Statutes (1979), into a possible first degree murder. We are unable to discover any authority in this state or elsewhere to sustain such a position and have been cited to none by the state.

Id.

On this basis. the Third Circuit granted the writ of habeas corpus and discharged the Petitioner.

B. Federal Law

"The duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness." *Stein v. New York*, 346 U.S. 156, 184 (1953), quoted in *Hurtado v. United States*, 410 U.S. 578, 588, n. 9 (1973).

Title 18 U.S.C s. 3144 provides:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

Rule 15 of the Federal Rules of Criminal Procedure provides that upon written notice of a material witness and the parties, the Court may issue an order that the witness' deposition be taken, and after the taking of such deposition, that the witness be discharged.

Parties include both the state and the criminal defendant whose case is the subject of the material witness' possible detention. The "failure of justice" might be the inadequacy of the deposition procedure. The defendant may argue that the need to confront the witness at trial outweighs the material witness' liberty interest in immediate release. The state might argue that a "failure of justice" would result because the witness' testimony is pivotal.

The federal statute provides that a judicial officer *may* order the arrest of the person and treat the person in accordance with 18 U.S.C s. 3142. This statute relates to release or detention of a witness pending trial. There are provisions of this statute governing release on personal recognizance or upon execution of an unsecured appearance bond; release on a condition or combination of conditions specified in the statute (*e.g.*, executing a bail bond with solvent sureties); temporary detention to permit revocation of conditional release, deportation, or exclusion (*e.g.*, an illegal alien who may flee or pose a danger to a person or the community); or detention after a hearing (prescribed by the statute) wherein "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. . . ." The statute prescribes no time period, except for a maximum threshold of 10 working days (excluding holidays) for a temporary detention to permit revocation of conditional release, deportation, or exclusion. "[Title] 18 U.S.C. [ss.] . . . 3144 and 3142 provide for the detention of material witnesses in a criminal case. Neither section sets a time limit for such detention." *Aguilar –Ayala v. Ruiz*, 973 F.2d 411, 416 (5th Cir. 1992), *reh. denied*, quoting *J. Jesus Faustino Aguilar-Ayala, et al. v. Cecilio Ruiz, et al.*, No. CA-B-88-12 (S.D.Tex. June 3, 1991) (unpublished order).

C. Terrorism

There is presently no state definition of the term "terrorism." One federal definition of an "act of terrorism" in 18 U.S.C. s. 3077 describes that act as follows:

(1) "act of terrorism"" means an activity that -
(A) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and
(B) appears to be intended -
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by assassination or kidnapping. . . .

Recent federal legislation amends 18 U.S.C s. 2331 to create a definition of "domestic terrorism" that is almost identical to the definition of "act of terrorism" in 18 U.S.C. s. 3077. This legislation adds "mass destruction" to unlawful acts that affect the conduct of government. *See e.g.*, H.R. 2975, the "USA Act of 2001" (107th Congress).

III. Effect of Proposed Changes:

The CS provides for the temporary detention of certain witnesses with information material in a criminal investigation or other proceeding involving a suspected or charged violation of state law which relates to an act of terrorism or is in furtherance of an act of terrorism. An application for detention is filed under the authority of the Governor, the Attorney General, the Statewide Prosecutor, or the State Attorney. This application is supported by an affidavit filed by the Department of Law Enforcement, which avers that the testimony of the person (for whom detention is sought) is: 1) material in a criminal investigation or other proceeding involving a suspected or charged violation of state law which relates to an act of terrorism or is in furtherance of an act of terrorism; and 2) it may become impracticable to secure the presence of

the person by subpoena. The circuit judge before whom the application is pending may order the detention of that person for a period not to exceed 4 calendar days upon a finding that the detention is necessary to prevent a failure of justice.

The CS provides that not later than 48 hours after being detained the material witness is entitled to a hearing before the circuit judge who issued the order of detention to determine whether further detention is necessary to prevent a failure of justice. In order for the court to direct the continued detention of the material witness, the court must issue a written order of detention which contains findings that justify the continued detention of the material witness.

Evidence offered in support of the application for an order of detention or offered at the hearing conducted to determine whether further detention is necessary must be clear and convincing.

The CS defines the term "terrorism." The definition is patterned after the federal definition in 18 U.S.C s. 3077. The substantive differences between the definition in the legislation and the federal definition are that the state definition adds violent acts or acts dangerous to human life which are violations of state or federal law; and that appear to be intended to *injure* a civilian population; or affect the conduct of government through *destruction of property* or *murder*.

"Failure of justice" is defined as "a serious risk exists that witness will flee or will obstruct or attempt to obstruct justice or threaten, injure, or intimidate, or attempt to intimidate, or attempt to threaten, injure, or intimidate another prospective witness or any other person or that the witness poses a serious risk to the safety of any other person or the community." The federal material witness statute contains no specific definition of "failure of justice." The definition in the legislation is relatively limited in scope.

The legislation provides for the right to retain counsel or to seek the appointment of counsel, if the person is indigent and desires counsel, for the purpose of representation at the hearing to determine whether detention is warranted.

Pretrial release is not specifically addressed, though it may arguably be inferred from Art I, sec. 14, Fla. Const., as specifically prescribed therein.

A separate section provides that an arrest and detention as a material witness under the newly created "material witness" section is not an arrest for purposes of an employment application or application for professional licensure.

The CS takes effect upon becoming a law, and contains a provision to sunset the law on July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The legislation may affect those detained in terms of lost income, attorney's fees and other costs.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The legislation is intended to aid in the apprehension or prosecution of suspected or charged terrorists by ensuring that witnesses with testimony material to investigations and other proceedings that involve terrorist activity appear to provide that testimony. Some of these witnesses (certainly not all) will have some knowledge of acts of terrorism or persons associated with such acts, and some may even be involved, directly or indirectly, in such acts. At a minimum, the temporary detention, lessens the risk of flight or being spirited away, and limits the immediate opportunity to assist or engage in terrorist activities. These considerations have become especially important in light of the recent terrorist attacks on the World Trade Center and the Pentagon, as federal, state, and local law enforcement agencies struggle to ascertain the scope of terrorist networks in the United States and their potential to conduct further attacks on the United States from within its borders.

VIII. Amendments:

None.