

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 721 Admissibility of Statements of a Criminal Defendant in Felony Cases

SPONSOR(S): Thurston and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1434

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Homeland Security & Public Safety</u>	_____	<u>Padgett</u>	<u>Kramer</u>
2) <u>Safety & Security Council</u>	_____	_____	_____
3) <u>Policy & Budget Council</u>	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

HB 721 creates a specific hearsay exception in the Florida Evidence Code for statements made by an interrogee in a felony case during the course of a custodial interrogation. The bill outlines numerous requirements that law enforcement officials must comply with to have statements made by an interrogee during a custodial interrogation admitted into evidence. Such requirements include:

- the interrogation must be electronically recorded in its entirety
- the interrogee must be given all required constitutional warnings and waive all constitutional rights that would preclude admission of the statement
- the electronic recording device must be capable of making a true, complete, and accurate recording
- all persons recorded on the electronic recording device must identify themselves
- a copy of the electronic recording must be provided to the interrogee no later than 20 days prior to the date of the proceeding in which the prosecution seeks to use the statements given under a custodial interrogation

The bill provides that in the absence of an electronic recording, the prosecution may rebut a presumption of inadmissibility if the prosecution can demonstrate an interrogee was fully advised of all constitutionally required warnings and law enforcement officers had good cause not to make an electronic recording of the custodial interrogation.

The bill provides statements made by an interrogee during a custodial interrogation that occurs outside of the jurisdiction of Florida are admissible if the law enforcement agencies in the other jurisdiction properly obtained the statements according to all applicable federal and local laws.

The bill has an effective date of July 1, 2008.

The bill appears to have an insignificant fiscal impact on state and local governments.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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DATE: 3/24/2008

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

Chapter 90, F.S. is the Florida Evidence Code (Code). The Code governs the admissibility of testimony of witnesses, judicial conduct during trial, the admission of physical evidence and procedures for admitting such evidence in court, etc. Section 90.801, F.S. defines “hearsay” to mean a statement,¹ other than by the declarant² while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay evidence is inadmissible, except as provided by statute.³ The statutory exceptions fall into two broad categories; situations where the declarant’s availability as a witness is immaterial, and situations where the declarant is unavailable as a witness.⁴ The exceptions are generally limited to circumstances in which it is highly probable the hearsay statement is truthful and credible. Examples include spontaneous statements, regularly conducted records of business activities, a statement against the declarant’s interest, and former testimony given under oath.⁵

Currently, the statements of a defendant made during a custodial interrogation are admissible as evidence as an admission or a statement against interest.⁶ To be admissible, statements made during a custodial interrogation must also comply with all federal and state laws, such as informing the accused of their constitutional rights prior to interrogation. The prosecution must provide these

¹ A “statement” is defined to mean an oral or written assertion; or nonverbal conduct of a person if it is intended by the person as an assertion. Section 90.801, F.S.

² A “declarant” is defined to mean a person who makes a statement. Id.

³ Section 90.802, F.S.

⁴ “Unavailability as a witness” is defined to mean that the declarant: is exempted by a ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant’s effectiveness during the trial; is unable to be present or to testify at the hearing because of death or because of the existing physical or mental illness or infirmity; or is absent from the hearing, and the proponent of a statement has been unable to procure the declarant’s attendance or testimony by process or other reasonable means. However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of the party who is proponent of his or her statement in preventing the witness from attending to testifying. Section 90.804(1), F.S.

⁵ Section 90.803, 90.804, F.S.

⁶ Id.

statements and any recordings of these statements to the defendant's attorney within 15 days of the date from which the defendant's attorney files a demand for discovery.⁷

Proposed Changes

HB 721 adds a specific hearsay exception for statements made by a party during a custodial interrogation⁸ that are electronically recorded.⁹

Hearsay Exceptions when the Declarant is Available for Trial

The bill adds a hearsay exception when an interrogee's¹⁰ statement is the result of a custodial interrogation. The bill requires an oral, written, or sign-language statement made during a custodial interrogation must comply with the following requirements for the interrogee's statements to be admissible:

- the interrogation must be reproduced in its entirety by means of an electronic recording
- immediately prior to the commencement of the interrogation, and as part of the electronic recording, the interrogee is given all constitutionally required warnings and the interrogee knowingly, intelligently, and voluntarily waives any rights set out in the warnings that would, absent such waiver, otherwise preclude the admission of the statement
- the electronic recording device must be capable of making a true, complete, and accurate recording of the interrogation, the operator of the device must be competent, and the electronic record must not have been altered
- all persons recorded on the electronic recording who are material to the custodial interrogation must be identified on the electronic recording
- during discovery pursuant to Rule 3.220, Florida Rules of Criminal Procedure a true, complete, and accurate copy of the electronic recording must be provided to the attorney of the interrogee no later than the 20th day before the date of proceeding in which the prosecution seeks to use the statement

The bill provides that in the absence of an electronic recording of a custodial interrogation, the prosecution may rebut a presumption of inadmissibility only by offering clear and convincing evidence that:

- the statement was both voluntary and reliable, made after the interrogee was fully advised of all constitutionally required warnings; and

⁷ Rule 3.220 F.R.C.P.

⁸ The bill defines "custodial interrogation" or "interrogation" to mean questioning of an interrogee in circumstances in which a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest.

⁹ The bill defines an "electronic recording" to mean a true, complete, and accurate reproduction of a custodial interrogation. An electronic recording may be created by motion picture, videotape, audiotape, or digital or other media.

¹⁰ The bill defines "interrogatee" to mean a person who, at the time of the interrogation and concerning any topic of the interrogation, is: charged with a felony; or suspected by those conducting the interrogation of involvement in the felony.

- law enforcement officers had “good cause” not to electronically record all or part of the interrogation.

The bill provides “good cause” includes, but is not limited to the following:

- the interrogation occurred in a location other than an interrogation facility¹¹ under exigent circumstances where the electronic recording equipment was not readily available and there was no reasonable opportunity to move the interrogatee to an interrogation facility or to another location at which the electronic recording equipment was available;
- the interrogatee refused to have the interrogation electronically recorded, and such refusal was electronically recorded;
- the failure to electronically record an entire interrogation was the result of equipment failure, and obtaining replacement equipment was not feasible; or
- the statement of the interrogatee was obtained in the course of electronic eavesdropping that was being conducted pursuant to a properly obtained and issued warrant or that the eavesdropping was otherwise legally conducted.

For custodial interrogations conducted by law enforcement officers outside the jurisdiction of the state, the bill provides that a written, oral, or sign-language statement of the interrogatee is admissible in a criminal proceeding in this state if:

- the statement was obtained in another jurisdiction by investigative personnel of that jurisdiction acting independently of law enforcement personnel in Florida; or
- the statement was obtained by a federal officer during a lawful federal investigation.

Preservation of Electronic Recordings of Interrogations

The bill requires the electronic recording of the custodial interrogation must be preserved until the interrogatee’s conviction for any offense relating to the interrogation is final and all direct appeals and collateral challenges are exhausted, barred by law (i.e. the statute of limitations), or the prosecution waives in writing any future prosecution of the interrogatee for any offense related to the interrogation.

Admissibility in Certain Circumstances

The bill does not preclude the admissibility of statements made by the interrogatee:

- at trial or hearings held in open court;
- before a grand jury;
- that is the res gestae of the arrest of the offense; or
- that does not arise from a custodial interrogation or that is a spontaneous statement.

¹¹ The bill defines an “interrogation facility” to mean a law enforcement facility, correctional facility, community correctional center, detention facility, law enforcement vehicle, courthouse, or other secure environment.

Hearsay Exceptions when the Declarant is Unavailable

The bill requires that any hearsay statements made by an interrogatee during a custodial interrogation who is unavailable for trial must comply with all of the above requirements.

Legislative Findings

The bill provides the Legislature makes the following findings:

“...reputations of countless hard-working law enforcement officers are needlessly attacked by criminal suspects who falsely claim the officers have violated the suspects’ constitutional rights, that limited trial court resources are squandered in hearings on motions seeking to suppress statements made by criminal suspects who are given the opportunity to make such claims because no recordings of their interrogations exist, and, further, that judicial resources are squandered when criminal suspects, after having been convicted of their crimes, file frivolous and unnecessary appeals. This process costs the taxpayers of this state untold dollars each year, dollars that could be better spent enhancing the administration of the criminal justice system. Low-cost technology is now available in every jurisdiction to record each custodial interrogation of a criminal suspect, eliminating this gross waste of resources and enhancing the reliability and reputation of law enforcement officers. Therefore, the Legislature determines and declares that this act fulfills an important state interest.”

The Legislature also declares that “the purpose of this act is to require the creation of an electronic record of an entire custodial interrogation in order to eliminate disputes about interrogations, thereby improving prosecution of the guilty while affording protection to the innocent and increasing court efficiency.”

The bill has an effective date of July 1, 2008.

C. SECTION DIRECTORY:

Section 1 Amends s. 90.803, F.S., relating to hearsay exceptions; availability of declarant immaterial.

Section 2 Amends s. 90.804, F.S., relating to hearsay exceptions; declarant unavailable.

Section 3 Outlines Legislative findings and intent.

Section 4 Provides an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

State law enforcement agencies would be required to have access to electronic recording equipment for all custodial interrogations. State law enforcement would be responsible for storing the electronic recordings until the conclusion of all appeals.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

Local law enforcement agencies would be required to have access to electronic recording equipment to record all custodial interrogations. Any local jurisdictions that do not currently have such equipment would have to purchase the equipment. Local jurisdictions would also be responsible for storage of all electronic recordings until the conclusion of all appeals or until the statute of limitations has run.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

To the extent that political subdivisions, including cities and counties (through the police department or the sheriff's department), are obligated to pay for recording equipment, the bill could constitute a mandate as defined in Article VII, Section 18(a) of the Florida Constitution for which no funding source is provided to such political subdivisions.

For purposes of legislative application of Article VII, Section 18 of the Florida Constitution, the term "insignificant" has been defined as a matter of legislative policy as an amount not greater than the average statewide population for the applicable fiscal year times ten cents. For the Fiscal Year

2008-09, the expenditure threshold for determining whether a potential local mandate represents an insignificant fiscal impact will be \$1.9 million on an aggregate basis for all cities and counties in the state. It is unknown at this time how much counties and cities would be required to spend to implement an electronic recording program, in expenditures to provide a suitable system, not including recurring/maintenance costs. Arguably, the agency or office does not have to implement such a policy, but due to the presumption created, and the narrowly carved rebuttal to that presumption, an officer's work in securing the statement is otherwise meaningless if statements are rendered inadmissible in court proceedings.

If it is determined that this bill does constitute a mandate, it does include constitutionally required language that provides that the Legislature has determined that this legislation fulfills an important state interest, in accordance with Section 18 of Article VII of the State Constitution. In order to bind the counties and municipalities under this provision, a 2/3 vote of the membership of each house would be required.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

- The bill does not increase the scope of hearsay statements admissible in court. Rather, the bill imposes additional restrictions on hearsay exceptions that are currently admissible as an admission or a statement against interest. The effect of the bill would be to restrict the admissibility of hearsay statements currently allowed by law.
- The bill provides that the statements obtained through custodial interrogations must comply with federal laws and the laws of Florida to be admissible. This language is unnecessary because any statement that does not comply with current federal or state laws is inadmissible apart from any hearsay concerns.
- The bill provides a list of specific circumstances in which statements made during a custodial interrogation are admissible. However, the language in s. 90.803(18)(a), F.S. has not been amended to exclude custodial interrogations from all other types of admissions.
- The exceptions to the new requirements listed in 90.803(18)(f)6, F.S. are unnecessary because they do not relate to statements obtained through custodial interrogations and include exceptions to the hearsay rule that are currently listed elsewhere in statute.
- The bill contains an exception for admissibility of statements of an interrogatee obtained during electronic eavesdropping. By the definition of "interrogatee" provided in the bill, an interrogatee must be a person who is being questioned in an interrogation. A situation involving electronic eavesdropping would not be a custodial interrogation, and thus, there could be no interrogatee. Since this provision is already excluded by the definition of "interrogatee," it is unnecessary and should be removed.

- The bill seeks to make a legislative finding that amending ss. 90.803 and 90.804, F.S. would reduce hearings, motions, and appeals by the interrogatee. The findings do not contemplate that, due to the burden of admissibility shifting to the prosecution, the possible increase in hearings, motions, and appeals filed by the prosecution to have statements made during custodial interrogations admitted into evidence if the electronic recording requirements are not complied with in full.
- The bill does not specify the presumption of inadmissibility applies only to interrogations which occur after the effective date of the bill. As a result, it is not clear whether the provisions of the bill would bar the admissibility of an interrogation that takes place before the bill takes effect. Further, the act takes effect on July 1, 2008. Law enforcement agencies will have a short amount of time to comply with the requirements of the bill.

D. STATEMENT OF THE SPONSOR

This legislation will require the taping of all custodial interrogations of persons suspected of a felony. It amends the Florida Evidence Code to require that hearsay statements made during custodial interrogations comply with certain requirements in order to be admissible. It allows for audio taping, as well as videotaping. This legislation will assist both prosecutors and defense attorneys in evaluating and negotiating case resolutions.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES