The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL:	SB 296
INTRODUCER:	Senator Bracy
SUBJECT:	Statements Made by a Criminal Defendant
DATE:	February 20, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Hrdlicka	CJ	**Favorable**
2.			JU	
3.			RC	

I. Summary:

SB 296 creates statutory requirements for the electronic recording of custodial interrogations by law enforcement for the admission into evidence of an interrogee's statement, as an exception to the rule against hearsay, in a criminal court proceeding.

The bill provides exceptions to the rule against hearsay in ss. 90.803(18) and 90.804(2)(c), F.S., related to "admissions" and "statements against interest."

For the interrogee's statement to be admissible under either of the hearsay exceptions, law enforcement is required to produce a complete recording of the interrogation under specific circumstances set forth in the bill. Otherwise, the statement is subject to a rebuttable presumption of inadmissibility.

Provisions are made for the prosecution to rebut the presumption against admissibility of the interrogee's statement by showing, by clear and convincing evidence, that:

- The statement was freely and voluntarily given after the interrogee was advised of his or her constitutional rights, and
- Law enforcement had good cause, as defined, not to record the statement.

The bill contains legislative findings that support the determination that the act fulfills an important state interest.

The effective date of the bill is July 1, 2017.

II. Present Situation:

Current Law

The law governing the voluntariness of a defendant's statement and the admissibility of the statement against him or her in court is a creature of both case law and statutory law in Florida.

Constitutional Issues

For a defendant's statement to become evidence in a criminal case, the judge must first determine whether the statement was freely and voluntarily given, particularly if the statement was obtained by law enforcement during interrogation of the suspect or defendant.[1] The court may make that threshold determination during a pretrial hearing or during the trial. The court will consider the totality of the circumstances surrounding the statement, including:

- Whether the defendant was in custody at the time of the statement;
- Whether the defendant was unlawfully coerced to give the statement;
- The length of time and circumstances under which the defendant was in custody and being interrogated; and
- Whether the defendant understood his or her rights associated with custodial interrogation, and if those rights were waived by the defendant.

There is no current requirement that an interrogee's statement to law enforcement be electronically recorded; therefore, a judge in Florida will generally rely on witness testimony regarding the circumstances surrounding the statement.

If the judge concludes that the statement was freely and voluntarily given, it is likely that defense counsel will challenge the admissibility of the statement into evidence as a violation of the rule against hearsay evidence.

Hearsay Evidence

Hearsay evidence is inadmissible in court unless otherwise provided in statute.[2] Hearsay is defined in s. 90.801, F.S., as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[3]

For example, a law enforcement officer who was a witness to a defendant's interrogation, which yielded a statement, may be called upon by the prosecutor to testify in court about the content of the defendant's statement. Defense counsel, based on the rule against hearsay, would likely object to the officer's testimony. The judge must then make a ruling on the admissibility of the

[1] No person shall be . . . compelled in any criminal matter to be a witness against himself. Art. I, s. 9, Fla. Const.; "[P]rior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help, and that if they cannot pay for a lawyer one will be appointed to help them." *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992); No person…shall be compelled in any criminal case to be a witness against himself. USCS Const. Amend. 5; "The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it." *Miranda v. Ariz.*, 384 U.S. 436, 469 (U.S. 1966).

[2] Section 90.802, F.S.

[3] Section 90.801(1)(c), F.S.

defendant's statement by determining whether a statutory exception to the rule against hearsay renders the statement admissible.[4]

The defendant's or coconspirator's statement might be offered through the law enforcement officer's testimony as an "admission" under s. 90.803(18), F.S., which would make the hearsay testimony "not inadmissible."[5]

Additionally, a codefendant's or other witness's statement may be offered into evidence under s. 90.804(2)(c), F.S., as a "statement against interest."[6]

Other States

Currently twenty-three states and the District of Columbia record custodial interrogations statewide.[7] These states have statutes, court rules, or court cases that require law enforcement to make the recordings or allow the court to consider the failure to record a statement in determining the admissibility of a statement.[8] Although Florida is not one of these states, fifty-seven Florida law enforcement agencies have been identified as recording custodial interrogations, voluntarily, at least to some extent.[9]

False Confessions

In a comprehensive study of 125 false confession cases that only looked into "proven" false confessions, the confessions were found to be false under the following four circumstances:

- The suspect confessed to a crime that did not actually happen;[10]

[4] For example see ss. 90.803 and 90.804, F.S.

[5] Section 90.803(18)(a), F.S., defines an "admission" as a statement that is offered against a party and is the party's own statement. It may also be a statement that is offered against a party and made by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. s. 90.803(18)(e), F.S.

[6] A "statement against interest" is not excluded as hearsay provided that the declarant is not available as a witness. It is defined as "a statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement." s. 90.804(2)(c), F.S.

[7] *Compendium: Electronic Recording of Custodial Interrogations*, Thomas P. Sullivan, August, 2016, National Association of Criminal Defense Lawyers, found at https://www.nacdl.org/electronicrecordingproject (last visited February 16, 2017).

[8] *See Stephan v. State*, 711 P.2d 1156 (AK 1985); Ark. R. Crim. P. Rule 4.7 (2012); Cal Pen Code s. 859.5 (2016) and Cal Wel & Inst Code s. 626.8 (2014); C.R.S. 16-3-601 (2016); CT Gen. Stat. s. 54-1*o* (2011); D.C. Code s. 5-116.01 (2005); Hawaii was verified by the four departments that govern law enforcement in the state; 705 ILCS 405/5-401.5 (2016), 725 ILCS 5/103-2.1 (2017); Ind. R. Evid. 617 (2014); 25 M.R.S. s. 2803-B(1)(K) (2015); Md. CRIMINAL PROCEDURE Code Ann. ss. 2-401 – 2-402 (2008); MCLS ss. 763.7 – 763.9 (2013)**;** *State v. Scales*, 518 N.W.2d 587 (MN 1994); MO Rev. Stat. s. 590.700 (2017); MT Code Ann. ss. 46-4-406 – 46-4-411 (2009); NE Rev. Stat. Ann. ss. 29-4501 – 29-4508 (2008); NJ Court Rules, R. 3:17 (2006)*;* N.M. Stat. Ann. s. 29-1-16 (2006); N.C. Gen. Stat. s. 15A-211 (2011); OR Rev. Stat. s. 133.400 (2009); RIPAC, Accreditation Standards Manual, ch. 8, s. 8.10 (Rev. 2015); Utah R. Evid. Rule 616 (2016); 13 V.S.A. s. 5585 (2015); *State v. Jerrell C.J.*, 699 N.W.2d 110 (WI 2005); Wis. Stat. ss. 968.073 and 972.115 (2005); from *Compendium: Electronic Recording of Custodial Interrogations*, at page 8.

[9] *Compendium: Electronic Recording of Custodial Interrogations*, at pages 36-37.

[10] For example in the case of Dianne Tucker, Medell Banks, and Victoria Banks, three mentally-challenged defendants were convicted of killing Banks's newborn child. After serving several years in prison it was determined that Banks could not have given birth as she had a tubal ligation that prevented her from becoming pregnant. *The Problem of False Confessions in the Post-DNA World*, Steven A. Drizin, Richard A. Leo; March, 2004; 82 N.C.L. 891, 925.

- It was objectively established that it was a physical impossibility for the suspect to have committed the crime;[11]
- The true perpetrator was identified and his guilt was objectively established;[12] and
- When scientific evidence, most commonly DNA, establishes the suspect's innocence.[13]

The study determined that, most likely due to advancement in DNA technology but also possibly because of the increased use of recording in custodial interrogations, false confessions are being recognized earlier in the criminal justice process.[14]

Of the 125 cases, the outcomes were:
- Ten persons (8%) were arrested but never charged;
- Sixty-four (more than 50%) were indicted but charges were dropped before trial;
- Seven (6%) were prosecuted but acquitted; and
- Forty-four persons (35%) were convicted.[15]

III. Effect of Proposed Changes:

The bill creates circumstances under which a person's statement, obtained during custodial interrogation, may be admitted as hearsay evidence in a criminal hearing or trial.

The requirements for admissibility as an "admission" under s. 90.803(18), F.S., or as a "statement against interest" under s. 90.804(2)(c), F.S., focus on electronic recording by law enforcement in custodial interrogation situations.[16]

Section 1

The bill creates a new "admission" hearsay exception that provides for the admissibility of an interrogee's[17] custodial interrogation statement if the interrogation complies with the following requirements:
- The interrogation is reproduced in its entirety by an electronic recording;
- Before the interrogation begins, Miranda warnings must be given and waived by the suspect or defendant, all of which must be included on the recording;

[11] "In three different Chicago cases – Mario Hayes, Miguel Castillo, and Peter Williams – jail records showed the suspects were in jail at the time the crimes were committed." *The Problem of False Confessions in the Post-DNA World*, at 925-926.
[12] Christopher Ochoa, who confessed to the sexual battery and murder of Nancy DePriest, was freed in 2001 when Achim Marino came forward and confessed to the crime. Marino led law enforcement to the murder weapon and his DNA matched the semen found at the crime scene. *The Problem of False Confessions in the Post-DNA World*, at 926.
[13] Three teenage boys – Michael Crowe, Joshua Treadway, and Aaron Houser - were about to stand trial for the murder of Crowe's sister, Stephanie, when DNA testing proved that blood found on the sweatshirt of Richard Tuite was Stephanie's. Charges against the boys were dropped and Tuite was indicted for Stephanie's murder. *The Problem of False Confessions in the Post-DNA World*, at 926.
[14] *The Problem of False Confessions in the Post-DNA World*, at 950-951.
[15] *The Problem of False Confessions in the Post-DNA World*, Steven A. Drizin, Richard A. Leo; March, 2004; 82 N.C.L. 891, at 950-951.
[16] See footnotes 5 and 6.
[17] "Interrogee" is defined by the Merriam-Webster dictionary as "one who is interrogated." The use of this term throughout the bill could include any person who makes a statement while under custodial interrogation and therefore would not limit application of the hearsay exceptions to persons who are suspects, defendants, codefendants, or coconspirators. The bill provides that the interrogee is a person who is charged with a felony or suspected of involvement in a felony.

- The electronic recording device must be capable of making a true, complete, and accurate recording, the operator of the device must be competent, and the recording may not be altered;
- All persons appearing on the recording must be identified on the recording if those persons are material witnesses; and
- Under the rules of pretrial discovery,[18] the state must disclose and provide the suspect or defendant's attorney with a true, complete, and accurate copy of all electronic recordings of interrogations, no later than 20 days prior to the date of the proceeding at which the state will offer the evidence.

If no true, complete, and accurate electronic recording of the interrogation exists, the suspect or defendant's statement is presumed to be inadmissible hearsay evidence. The state may rebut the presumption against admissibility only by offering clear and convincing evidence that:

- The suspect or defendant made the statement voluntarily after receiving Miranda warnings, and the statement is reliable; and
- Law enforcement officers had good cause not to record all or part of the interrogation.

Under the bill, the term "good cause" includes but is not limited to the following circumstances:

- The interrogation took place under exigent circumstances in a location where recording equipment was not available;
- The interrogee refused to have the interrogation recorded and the refusal itself was recorded;
- Failure to record the interrogation in its entirety was the result of equipment failure and obtaining replacement equipment was not feasible; or
- The interrogee's statement was obtained during a legally conducted intercept of wire, oral, or electronic communication.

Statements obtained by federal officers conducting a federal investigation in compliance with federal law, or by an officer in another jurisdiction who is acting independently of officers in Florida and who follows the law of that jurisdiction, are admissible in a Florida court.

The bill provides for the preservation of recorded interrogations until certain case actions occur or deadlines are met.

The admissibility of statements that are not obtained as a result of a custodial interrogation is not limited by the bill's interrogation requirements.[19]

Section 2

The bill amends s. 90.804, F.S., the section of the evidence code containing exceptions to the rule against the admissibility of hearsay evidence when the one who made the hearsay statement is unavailable as a witness.

[18] Rule 3.220, Florida Rules of Criminal Procedure.

[19] The bill does not preclude the admission into evidence the interrogee's statement before a grand jury, spontaneous statement, statement that is part of the circumstances surrounding the crime or arrest itself, or statement made at trial or other hearing in open court.

Specifically, s. 90.804(2)(c), F.S., addresses "statements against interest" made by an unavailable witness (declarant). These are often statements made by an alleged coconspirator or codefendant. Such statements are inadmissible hearsay unless corroborating circumstances show trustworthiness of the absent witness's statement.[20]

The bill requires that if the statement of a witness who is unavailable is considered by the court for admission into evidence, and the statement was given under interrogation, it must meet the requirements set forth in the amendment created by the bill in s. 90.803(18)(f), F.S.

The bill makes certain findings resulting in the Legislature determining and declaring that the act fulfills an important state interest.

Finally, the bill states that the purpose of the act is to require complete electronic recordings of custodial interrogations in order to eliminate disputes about interrogations, improve prosecution of the guilty, protect the innocent, and increase court efficiency.

The bill becomes effective on July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

It is possible that the requirements of the bill related to electronic recording could result in local fund expenditures for equipment, maintenance, and operation. However, because any such local funding resulting from the requirements of the bill will directly relate to the defense and prosecution of criminal offenses, under subsection (d) of Article VII, Section 18 of the Florida Constitution, it appears there is no unfunded mandate.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

[20] Section 90.804(2)(c), F.S.

C. Government Sector Impact:

The Justice Administrative Commission reports no direct policy or fiscal impacts to the Commission.[21]

The Office of the State Courts Administrator reports: "On the one hand, there may be fewer pretrial motion to suppress hearings, which would reduce judicial workload. On the other hand, it seems likely that suspects will be less willing to speak with law enforcement if they know they are being recorded. Fewer defendant statements are likely to lead to fewer pleas and more trials, which would increase judicial workload. The net effect is too speculative to estimate."[22]

Although the Florida Police Chiefs Association believes there will be a fiscal impact for local law enforcement to purchase recording equipment, retain recorded statements, and store electronic recordings, the impact is indeterminate at this time.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 90.803 and 90.804.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[21] Justice Administrative Commission Impact Statement, Memorandum No. 004-17, Exec, January 18, 2017.
[22] Office of the State Courts Administrator, Judicial Impact Statement, January 24, 2017.