

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 777 Tampering With or Fabricating Physical Evidence

SPONSOR(S): Criminal Justice & Public Safety Subcommittee, Garrison

TIED BILLS: **IDEN./SIM. BILLS:** SB 1566

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice & Public Safety Subcommittee	16 Y, 0 N, As CS	Padgett	Hall
2) Justice Appropriations Subcommittee	15 Y, 0 N	Smith	Keith
3) Judiciary Committee			

SUMMARY ANALYSIS

After committing a criminal offense, a suspect's primary focus is often on concealing or destroying evidence that a crime was committed. In some criminal cases, such as drug offenses or murder, it is difficult, if not impossible, to successfully prosecute a suspect without introducing certain evidence at trial, such as the drugs or murder weapon.

Section 918.13, F.S., prohibits a person, knowing that a criminal trial or proceeding, or an investigation by a prosecuting authority, law enforcement agency, grand jury, or legislative committee is pending or about to be instituted, from:

- Altering, destroying, concealing, or removing any record, document, or thing with the purpose to impair its verity or availability in the proceeding or investigation; or
- Making, presenting, or using any record, document, or thing, knowing it to be false.

A person convicted of tampering with or fabricating physical evidence commits a third degree felony. Under current law, the criminal penalty does not vary based on the severity of the underlying crime that is being investigated or prosecuted, so a person convicted of tampering with evidence in a murder investigation is subject to the same penalty as a person that tampers with evidence in a case involving misdemeanor marijuana possession.

CS/HB 777 amends s. 918.13, F.S., to provide enhanced penalties if a person tampers with or fabricates physical evidence in specified criminal trials or investigations. A person who tampers with or fabricates evidence commits:

- A Level 7 first degree felony if the investigation or trial relates to a capital felony or criminal offense involving the death of a person.
- A Level 4 second degree felony if the investigation or trial relates to a violent felony offense described in s. 775.084(1)(b)1., F.S., which includes the crimes of: arson; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; aggravated assault with a deadly weapon; murder; manslaughter; aggravated manslaughter of an elderly person or disabled adult; aggravated manslaughter of a child; unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary; aggravated battery; or aggravated stalking.

A conviction for tampering with or fabricating evidence in an investigation or court proceeding involving any other crime remains a third degree felony. Tampering with evidence remains a Level 3 offense on the Criminal Punishment Code's offense severity ranking chart (OSRC). The bill ranks the previously unranked offense of fabricating physical evidence as a Level 3 offense on the OSRC.

The Criminal Justice Impact Conference considered the bill on March 8, 2020, and determined the bill would have a positive indeterminate impact on prison beds by creating new felony offenses.

The bill provides an effective date of October 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Tampering With or Fabricating Physical Evidence

After committing a criminal offense, a suspect's primary focus is often on concealing or destroying evidence that a crime was committed. In some criminal cases, such as drug offenses or murder, it is difficult, if not impossible, to successfully prosecute a suspect without introducing certain evidence at trial, such as the drugs or murder weapon.

Section 918.13, F.S., prohibits a person, knowing that a criminal trial or proceeding, or an investigation by a prosecuting authority, law enforcement agency, grand jury, or legislative committee is pending or about to be instituted, from:

- Altering, destroying, concealing, or removing any record, document, or thing with the purpose to impair its verity or availability in the proceeding or investigation, or
- Making, presenting, or using any record, document, or thing, knowing it to be false.¹

A person convicted of tampering with or fabricating physical evidence commits a third degree felony.^{2,3} Under current law, the criminal penalty does not vary based on the severity of the underlying crime that is being investigated or prosecuted, so a person convicted of tampering with evidence in a murder investigation is subject to the same penalty as a person that tampers with evidence in a case involving misdemeanor marijuana possession.

Courts have held that a person may be convicted of tampering with evidence only in circumstances where the person has the specific intent to destroy or conceal evidence to such an extent that it is unavailable for trial or investigation.⁴ For example, a person who is approached by a law enforcement officer for suspicion of possession of an illegal drug can be convicted of tampering with evidence where the person swallows the drug before law enforcement can seize it⁵ or where a person tosses cocaine out of a moving vehicle during a police chase while continuing to flee.⁶ Courts have held that discarding evidence in the presence of a law enforcement officer during an investigation, without additional evidence of intent, is insufficient to maintain a conviction for tampering with evidence. For example, courts have held that a suspect who was confronted by a law enforcement officer and tossed a piece of crack cocaine on the ground while in view of the officer merely abandoned the evidence because it could be easily recovered and was not altered in any manner.⁷

¹ S. 918.13(1), F.S.

² A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

³ S. 918.13(2), F.S.

⁴ "[T]he offense of tampering is committed only when the defendant takes some action that is designed to actually alter or destroy the evidence rather than just removing it from his or her person." *E.I. v. State*, 25 So.3d 625, 627 (Fla. 2d DCA 2009).

⁵ *State v. Jennings*, 666 So.2d 131 (Fla.1995).

⁶ *Chapman v. State*, 36 So.3d 822 (Fla. 4th DCA 2010).

⁷ *Evans v. State*, 997 So.2d 1281 (Fla. 4th DCA 2009); *Thomas v. State*, 581 So.2d 993 (Fla. 2d DCA 1991).

Perjury

The crimes of tampering with or fabricating physical evidence and perjury are similar offenses in that both involve attempts to mislead an investigation or court proceeding by deceit. Section 837.02, F.S., relating to perjury, prohibits a person from making a false statement which he or she does not believe to be true, under oath in an official proceeding.⁸ A person convicted of perjury commits a third degree felony.⁹ If a person commits perjury in an official proceeding that relates to the prosecution of a capital felony, the person commits a second degree felony.^{10,11}

Serious Felony Offenses

In Florida, a capital felony is the most serious classification of felony offenses. A capital felony is a crime that is punishable by either death or life imprisonment without the possibility of parole.¹² Examples of a capital felony offense include first degree murder,¹³ capital sexual battery,¹⁴ and specified drug trafficking offenses.¹⁵

There are several provisions in statute that provide enhanced penalties for serious felony offenses based on a defendant's prior criminal history. One such section is s. 775.084(1)(b), F.S., which provides for enhanced criminal penalties for a defendant who is classified as a habitual violent felony offender (HVFO). To be classified as an HVFO, a defendant must have:

- Previously been convicted of:
 - Arson,
 - Sexual battery,
 - Robbery,
 - Kidnapping,
 - Aggravated child abuse,
 - Aggravated abuse of an elderly person or a disabled adult,
 - Aggravated assault with a deadly weapon,
 - Murder,
 - Manslaughter,
 - Aggravated manslaughter of an elderly person or disabled adult,
 - Aggravated manslaughter of a child,
 - Unlawful throwing, placing, or discharging of a destructive device or bomb,
 - Armed burglary,
 - Aggravated battery, or
 - Aggravated stalking, and
- Committed the offense for which he or she is being sentenced:
 - While he or she was serving a prison sentence or under supervision for a conviction of one of the specified felony offenses, or
 - Within five years of the date of conviction, release from prison, or release from supervision of one of the specified felony offenses.¹⁶

Offense Severity Ranking Chart

Felony offenses subject to the Criminal Punishment Code (CPC) are listed in a single offense severity ranking chart (OSRC), which uses 10 offense levels to rank felonies from least severe (Level 1) to most

⁸ "Official proceeding" means a proceeding heard, or which may be or is required to be heard, before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, general or special magistrate, administrative law judge, hearing officer, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with any such proceeding. S. 837.011(1), F.S.

⁹ S. 837.02(1), F.S.

¹⁰ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

¹¹ S. 837.02(2), F.S.

¹² S. 775.082(1)(a), F.S.

¹³ S. 782.04(1)(a), F.S.

¹⁴ S. 794.011(2)(a), F.S.

¹⁵ S. 893.135, F.S.

¹⁶ S. 775.084(1)(b), F.S.

severe (Level 10). Each felony offense is assigned to a level according to the severity of the offense, commensurate with the harm or potential for harm to the community that is caused by the offense, as determined by statute. A person's primary offense, any other current offenses, and prior offenses are scored using the points designated for the offense severity level of each offense. The final calculation, following the scoresheet formula, determines the lowest permissible sentence that the trial court may impose, absent a valid reason for departure.¹⁷ If an offense is unranked, the CPC specifies a default level on the OSRC depending on the felony degree of the offense.

The criminal offense of altering, destroying, or concealing physical evidence is ranked as a Level 3 offense on the OSRC.¹⁸ The criminal offense of making, presenting, or using physical evidence while knowing it is false is not ranked on the OSRC and defaults to a Level 1 offense.¹⁹

Effect of Proposed Changes

CS/HB 777 amends s. 918.13, F.S., to provide enhanced penalties if a person tampers with or fabricates physical evidence in specified criminal trials or investigations. A person who tampers with or fabricates evidence commits:

- A second degree felony if the investigation or trial related to any of the violent felony offenses described in s. 775.084(1)(b)1., F.S., which includes the crimes of: arson; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; aggravated assault with a deadly weapon; murder; manslaughter; aggravated manslaughter of an elderly person or disabled adult; aggravated manslaughter of a child; unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary; aggravated battery; or aggravated stalking.
 - The offense is unranked and defaults to a Level 4 offense on the OSRC.
- A first degree felony if the investigation or trial related to a capital felony or criminal offense involving the death of a person.²⁰
 - The offense is unranked and defaults to a Level 7 offense on the OSRC.

A conviction for tampering with or fabricating evidence in an investigation or court proceeding involving any other crime remains a third degree felony. Tampering with evidence remains a Level 3 offense on the OSRC. The bill ranks the previously unranked crime of fabricating evidence as a Level 3 offense on the OSRC.

The bill provides an effective date of October 1, 2021.

B. SECTION DIRECTORY:

Section 1: Amends s. 918.13, F.S., relating to tampering with or fabricating physical evidence.

Section 2: Amends s. 922.0022, F.S., relating to the Criminal Punishment Code; offense severity ranking chart.

Section 3: Provides an effective date of October 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

¹⁷ S. 921.0022, F.S.

¹⁸ *Id.*

¹⁹ S. 921.0023, F.S.

²⁰ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

The Criminal Justice Impact Conference considered the bill on March 8, 2020, and determined the bill would have a positive indeterminate impact on prison beds by creating new felony offenses.²¹

Per the Department of Corrections, in FY 18-19, there were 68 new commitments to prison for tampering with evidence (incarceration rate: 12.1%). In FY 19-20, there were 57 new commitments (incarceration rate: 13.3%). There were no new commitments for fabricating physical evidence. It is not known how many additional offenders would fall under this new language.²²

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 3, 2021, the Criminal Justice & Public Safety Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Ranked the previously unranked crime of fabricating evidence as a Level 3 offense on the OSRC.
- Changed the term “capital offense” to “capital felony.”
- Made other technical, clarifying, and stylistic changes to the bill.

²¹ Criminal Justice Impact Conference, *CS/HB 777 – Tampering With or Fabricating Physical Evidence*, March 8, 2021, On file with the House Justice Appropriations Subcommittee.

²² *Id.*

This analysis is drafted to the committee substitute as passed by the Criminal Justice & Public Safety Subcommittee.