

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: SB 1936

SPONSOR: Senator Geller

SUBJECT: Custodial Interrogations in Cases Involving Capitol Felonies

DATE: March 5, 2004

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Lang</u>	<u>JU</u>	<u>Favorable</u>
2.	_____	_____	<u>CJ</u>	_____
3.	_____	_____	<u>ACJ</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill requires certain custodial interrogations to be electronically recorded. Under this bill, a presumption is created that statements secured through custodial interrogation are inadmissible in court proceedings, unless electronically recorded, to include Miranda warnings and waiver, using functioning equipment without alteration of the recording, with voices identified, and after the defense attorney is provided a copy by a specified date. This bill otherwise requires a showing of clear and convincing evidence that the statement was voluntary and reliable, and that the officers acted in good faith, to rebut the presumption. Certain statements are exempted under this bill.

This bill potentially constitutes a mandate as defined in Article VII, Section 18(a) of the Florida Constitution for which no funding source is provided.

This bill creates s. 901.241 of the Florida Statutes.

II. Present Situation:

Electronic Recording Policies in Florida

Senate Criminal Justice staff conducted an interim project in 2003 on the issue of electronically recorded interrogations.¹ A sample of municipal police departments received a survey, of which twenty-one agencies responded. Of the sixty-seven Florida sheriffs, forty-eight responded. Among responding agencies, three basic categories of official policies/informal practices emerged regarding electronic recording of suspect interrogations. These policies are as follows: recording is discretionary, recording is encouraged but not required, or recording is mandatory.

¹ Interim Project Report 2004-123, Florida Senate Committee on Criminal Justice (January 2004)

Florida Sheriff's Departments responded as follows:

- 28 departments record interrogations at the discretion of the investigator;
- 13 encourage, but do not require, recordings when practical;
- 3 require recordings for serious felonies;
- 4 do not record interrogations.

Florida Police Departments responded as follows:

- 5 departments record interrogations at the discretion of the investigator;
- 7 encourage recordings;
- 8 require recordings for serious felonies;
- 1 is currently drafting a policy on recordings.

Combined totals for responses indicate:

- 33 record interrogations at the discretion of the investigator;
- 20 encourage recordings;
- 11 require recordings for serious felonies;
- 4 do not record;
- 1 is developing a recording policy.

Nine of the eleven responding agencies that require recording have adopted official policies, while the remaining two agencies have an informal practice of recording. Required recording is usually limited to serious felonies, such as those involving serious bodily injury, sex crimes, and homicide investigations, although one agency records all felonies unless the suspect refuses. That agency reports that approximately 90 percent of suspects consent to the recording.

Regarding complete versus partial recordings, three responding agencies electronically record only confessions or summaries of the suspect's statement. Six responding agencies record the entire interrogation. The remaining two of the eleven agencies that require recording failed to specify how much of the interrogation they record.

Some agencies indicated that they have not adopted a policy due to cost. Examples of start-up costs, from agencies who have implemented electronic recording, are as follows:

- \$1,500 – This department has been recording for about four to five years using multiple video systems; the video room had been pre-wired for audio. The department procures audiotapes at fifty cents each and videotapes for a dollar each, purchased in bulk.
- \$2,000 – This department has been recording since 1997. In an effort to keep pace with advancing technology, the department is in the process of remodeling, to provide 3 video-equipped interview rooms. The cost of the upgrade is expected to be about \$15,000.
- \$4,900 – In December 2003 this department equipped two interview rooms with cameras, a DVD recorder and TV/VCR combinations as back-up equipment.

- \$36,000 – This is a large department that modified existing space to create two interview rooms with three cameras each and various recording equipment. Despite this substantial expenditure, the department reports problems with the equipment, requiring repairs and potential replacement.
- \$75,000 – This large department equipped three interview rooms with soundproofing material and DVD and VHS recording equipment. The estimate of annual recording cost is \$25,000. It should be noted that the department provides original recordings to the prosecutor who forwards an original to the defense attorney, during discovery.

Though the departments failed to consistently report on-going maintenance and repair costs, these expenses should be considered inevitable.

Two counties, Duval and Broward, currently require that their law enforcement agencies have policies for electronic recording.

Policies on Electronic Recording in Other States

Currently, four states require electronic recording of suspects' interrogations or confessions. Two of those states, Illinois and Texas, have enacted legislation, and two state courts have found it to be constitutionally required under their respective state constitutions (Alaska and Minnesota). Two additional states, Maryland and Maine, are considering legislation during the 2004 legislative sessions that begin in January.

A brief synopsis of current law follows:

Alaska

In *Stephan v. State*,² the Supreme Court of Alaska required that in order to comport with state constitutional due process, custodial interrogations are required to be electronically recorded from the beginning, including the giving of the suspect's Miranda rights. The Court also announced a general rule of exclusion. The statement is suppressed whenever the recording is not done and the validity of the statement is contested, unless the State can show, through a preponderance of the evidence, that recording was not feasible under the circumstances.

Minnesota

The Supreme Court of Minnesota reached a similar conclusion in its consideration of the issue, but not based on a Due Process right, but rather "in the exercise of our supervisory power to insure the fair administration of justice."³ All custodial interrogations, including the Miranda warnings, must be recorded, or the statement is subject to suppression.

State courts that have considered the issue, and not found a constitutional right to electronic recording in their states, include Indiana, Michigan, Massachusetts, Pennsylvania, Hawaii, West Virginia, Utah, Maine, Colorado, Idaho, Illinois, Georgia, Vermont and Mississippi.

² 711 P.2d 1156 (1985)

³ See *State v. Scales*, 518 N.W.2d 587 (1994)

Texas

Under the Texas Code of Criminal Procedure, the Texas Legislature has made statements generally inadmissible unless they are recorded, the suspect waived his Miranda rights during the recording, or some fact that flowed from the statement is independently corroborated (i.e. the weapon is found where the suspect said it would be found).⁴

III. Effect of Proposed Changes:

Legislative intent provides that the purpose of this bill is to create a true, complete and accurate record of the entire custodial interrogation. This bill specifies application to custodial interrogations involving an accused suspected of involvement in a capital felony.

The following definitions apply:

- **Accused Person:** one who is suspected of involvement in a capital felony;
- **Custodial Interrogation:** questioning that takes place in a law enforcement facility, correctional facility, community correctional center, detention facility, law enforcement vehicle, courthouse or other secure environment, by law enforcement personnel, or others acting with or on behalf of law enforcement personnel;
- **Electronic Recording:** a true, complete and accurate reproduction of the entire custodial interrogation of an accused, by motion picture, videotape, audiotape or digital media.

This bill creates a presumption that oral, written or sign language statements made during custodial interrogations are inadmissible in criminal court proceedings, unless:

- The electronically recorded interrogation is introduced in its entirety, and includes a proper Miranda warning and waiver;
- The electronic recording equipment was capable of recording a true, accurate and complete interrogation, the operator was competent, and the electronic recording has not been altered;
- All voices on the recording are identified; and,
- The defense attorney is provided a copy pursuant to discovery rules, and no later than the 20th day before the introduction of the statement.

This bill makes the presumption rebuttable through a clear and convincing showing that the statement was voluntary and reliable and that the officers had good cause not to create a complete recording, such as that the location was not conducive to recording or that the accused person refused to be recorded.

Certain statements are exempted under this bill, such as those obtained in other states, in accordance with those states' laws, or statements secured by federal law enforcement. Other

⁴ See Art. 38.22, Section 3, Texas Code of Criminal Procedure

exceptions apply for statements made that are otherwise admissible as hearsay exceptions, such as excited utterances or present sense impressions.

This bill requires electronic recordings to be preserved until the defendant's conviction is final and all direct and habeus corpus appeals are exhausted, or the prosecution is otherwise barred by law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

To the extent that political subdivisions, including cities and counties (through 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:

No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the Legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989 ... and the law requiring such expenditure is approved by two-thirds of the membership of each house of the Legislature...

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. Based on the 2000 census, a bill that would have a statewide fiscal impact on counties and municipalities in aggregate or in excess of \$1,598,238 would be characterized as a mandate.

It is unknown at this time how much counties and cities would be required to spend to implement an electronic recording program, although the examples provided above indicate a broad range of \$1,500 to \$75,000 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 not 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.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

It is uncertain whether the section of the bill excepting certain statements requires them to be res gestae statements.

VII. Related Issues:

Recording the entire interrogation may protect both the suspect and the interrogating officer.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
