

**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.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: CS/CS/SB 1220

INTRODUCER: Judiciary Committee; Criminal Justice Committee; and Senator Brandes

SUBJECT: Detention Facilities

DATE: February 28, 2018

REVISED: \_\_\_\_\_

|    | ANALYST       | STAFF DIRECTOR | REFERENCE | ACTION             |
|----|---------------|----------------|-----------|--------------------|
| 1. | <u>Cellon</u> | <u>Jones</u>   | <u>CJ</u> | <u>Fav/CS</u>      |
| 2. | <u>Cibula</u> | <u>Cibula</u>  | <u>JU</u> | <u>Fav/CS</u>      |
| 3. | <u>Cellon</u> | <u>Phelps</u>  | <u>RC</u> | <u>Pre-meeting</u> |

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 1220 requires a law enforcement officer to electronically record the entirety of custodial interrogation if it:

- Takes place at a place of detention; and
- Relates to a covered offense.

A place of detention is defined to mean a police station, sheriff's office, correctional facility, prisoner holding facility, or other governmental facility where an individual may be held in connection with a criminal charge that has been or may be filed against the individual.

The covered offenses specified by the bill include 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, the unlawful throwing, placing, or discharging of a destructive device or bomb, armed burglary, aggravated battery, aggravated stalking, home invasion robbery, and carjacking.

Other provisions of the bill:

- Define terms;
- Provide exceptions to the recording requirement;
- Require a court to consider an officer's failure to record all or part of the custodial interrogation as a factor in determining the admissibility of a statement;

- Require a law enforcement officer to write a report explaining why he or she did not record the custodial interrogation;
- Require a law enforcement officer to write a report explaining why a custodial interrogation was conducted at a place *other than a place of detention*;
- Allow a defendant to request and receive a cautionary jury instruction when a non-recorded statement from a custodial interrogation is admitted into evidence;
- Make a law enforcement agency immune from civil liability for a violation of requirement to record an interrogation if the agency enforces rules that are reasonably designed to insure compliance with the requirement;
- Specify that the bill does not create a cause of action against a law enforcement officer;
- Add cellular telephones and portable communications devices to the list of articles that are declared to be contraband at a county detention facility; and
- Reduce the penalty for attempting to smuggle less serious types of contraband articles into or out of a county detention facility.

The bill is effective July 1, 2018.

## II. Present Situation:

### **Constitutional Protections and Court Decisions Interpreting and Applying Those Protections**

The Fifth Amendment of the United States Constitution states that “No person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>1</sup> Likewise, the Florida Constitution extends the same protection.<sup>2</sup> 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.

#### ***Custodial Interrogation***

Whether a person is in custody and under interrogation is the threshold question that determines the need for a law enforcement officer to advise the person of his or her *Miranda* rights.<sup>3</sup> In *Traylor v. State*, the Supreme Court of Florida found that “[T]o ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior 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 . . . .”<sup>4</sup>

The test to determine if a person is in custody for the purposes of one’s *Miranda* rights, is whether “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.”<sup>5</sup>

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<sup>1</sup> U.S. Const. amend. V.

<sup>2</sup> “No person shall be . . . compelled in any criminal matter to be a witness against himself.” FLA. CONST. article I, s. 9.

<sup>3</sup> In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court established procedural safeguards to ensure the voluntariness of statements rendered during custodial interrogation.

<sup>4</sup> 596 So. 2d 957, 965-966 (Fla. 1992).

<sup>5</sup> *Traylor*, 596 So.2d 957, 966 at n. 16.

An interrogation occurs “when a person is subjected to express questions, or other words or actions, by a state agent that a reasonable person would conclude are designed to lead to an incriminating response.”<sup>6</sup>

### ***Waiver of the Right to Remain Silent***

A person subjected to a custodial interrogation is entitled to the protections of *Miranda*.<sup>7</sup> The warning must include the right to remain silent as well as the explanation that anything a person says can be used against them in court. The warning includes both parts because it is important for a person to be aware of his or her right and the consequences of waving such a right.<sup>8</sup>

### **Admissibility of a Defendant’s Statement as Evidence**

The admissibility of a defendant’s statement is a mixed question of fact and law decided by the court during a pretrial hearing or during the trial outside the presence of the jury.<sup>9</sup> 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 where the statement was obtained by law enforcement officer during the custodial interrogation of the defendant. The court looks to the totality of the circumstances of the statement to determine if it was voluntarily given.<sup>10</sup>

The facts considered by the court come from testimony by the defendant and by the law enforcement officers involved, their reports, and any additional evidence such as audio or video recordings of the custodial interrogation.

As discussed above, the courts use a “reasonable person” standard in making the determination of whether the defendant was in custody at the time he or she made a statement.<sup>11</sup> The court considers, given the totality of the circumstances, whether a reasonable person in the defendant’s position would have believed he or she was free to terminate the encounter with law enforcement and, therefore, was not in custody.<sup>12</sup> Among the circumstances or factors the courts have considered are:

- The manner in which the police summon the suspect for questioning;
- The purpose, place, and manner of the interrogation;
- The extent to which the suspect is confronted with evidence of his or her guilt; and
- Whether the suspect is informed that he or she is free to leave the place of questioning.<sup>13</sup>

The court will also determine whether the defendant was made aware of his or her *Miranda* rights and whether he or she knowingly, voluntarily, and intelligently elected to waive those rights and give a statement.<sup>14</sup>

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<sup>6</sup> *Id.* at 966 at n. 17.

<sup>7</sup> See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>8</sup> *Sliney v. State*, 699 So. 2d 662, 669 (Fla. 1997), *cert. denied*, 522 U.S. 1129 (1998).

<sup>9</sup> *Nickels v. State*, 90 Fla. 659, 668 (1925).

<sup>10</sup> *Supra* n. 8 at 667.

<sup>11</sup> *Supra* n. 5.

<sup>12</sup> *Voorhees v. State*, 699 So. 2d 602, 608 (Fla. 1997).

<sup>13</sup> *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999).

<sup>14</sup> *Supra* n. 8 at 668.

Even if the court deems the statement admissible and the jury hears the evidence, defense counsel will be able to cross-examine any witnesses who testify and have knowledge of the circumstances surrounding the defendant's statement. Additionally, counsel may argue to the jury in closing argument that the statement was coerced in some way by a law enforcement officer.

### **Interrogation Recording in Florida**

Law enforcement agencies in Florida are not currently required to record the custodial interrogation of a crime suspect, either by audio, video, or a combination of means. Fifty-seven agencies in Florida are reported to voluntarily record custodial interrogations, at least to some extent.<sup>15</sup>

### **Other States**

Currently twenty-three states and the District of Columbia record custodial interrogations statewide.<sup>16</sup> These states have statutes, court rules, or court cases that require law enforcement officers to make the recordings or allow the court to consider the failure to record a statement in determining the admissibility of a statement.<sup>17</sup>

### **Contraband Articles at County Detention Facilities**

Existing law declares that a number of items are contraband when a person smuggles or attempts to smuggle them into or out of a county detention facility.<sup>18</sup> These articles include: written or recorded communications, currency and coins, food and clothing, tobacco products, including cigarettes and cigars, intoxicating beverages, various drugs and controlled substances, firearms and dangerous weapons, and items that may aid escape attempts. A person who smuggles or attempts to smuggle any article of contraband into or out of a county detention facility commits a third degree felony.<sup>19</sup>

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<sup>15</sup> *Compendium: Electronic Recording of Custodial Interrogations*, Thomas P. Sullivan, pp. 36-37, August 2016, National Association of Criminal Defense Lawyers, <https://www.nacdl.org/electronicrecordingproject>; see also *Electronic Recording of Suspect Interrogations*, Interim Report 2004-123, Florida Senate Committee on Criminal Justice, [http://archive.flsenate.gov/data/Publications/2004/Senate/reports/interim\\_reports/pdf/2004-123cj.pdf](http://archive.flsenate.gov/data/Publications/2004/Senate/reports/interim_reports/pdf/2004-123cj.pdf).

<sup>16</sup> *Compendium: Electronic Recording of Custodial Interrogations*, Thomas P. Sullivan, pp. 7-8, August 2016, National Association of Criminal Defense Lawyers, <https://www.nacdl.org/electronicrecordingproject>.

<sup>17</sup> 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. 54-1o (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); *Compendium: Electronic Recording of Custodial Interrogations*, Thomas P. Sullivan, August, 2016, National Association of Criminal Defense Lawyers, available at <https://www.nacdl.org/electronicrecordingproject>.

<sup>18</sup> Section 951.22, F.S.

<sup>19</sup> A person who commits a third degree felony may be imprisoned for up to 5 years and fined up to \$5,000. Sections 775.082(3)(e) and 775.083(1)(c), F.S.

### III. Effect of Proposed Changes:

#### Custodial Interrogations

The bill creates a statutory requirement, and exceptions to the requirement, that a law enforcement officer conducting a custodial interrogation must record the interrogation in its entirety.

The bill provides definitions for terms used in the bill. These are:

- “Custodial interrogation” which means questioning or other conduct by a law enforcement officer which is reasonably likely to elicit an incriminating response from an individual and which occurs under circumstances in which a reasonable individual in the same circumstances would consider himself or herself to be in the custody of a law enforcement agency;
- “Electronic recording” which means an audio recording or an audio and video recording that accurately records a custodial interrogation;
- “Covered offense” which lists the following criminal offenses:
  - 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.
  - The unlawful throwing, placing, or discharging of a destructive device or bomb.
  - Armed burglary.
  - Aggravated battery.
  - Aggravated stalking.
  - Home-invasion robbery.
  - Carjacking.
- “Place of detention” which means a police station, sheriff’s office, correctional facility, prisoner holding facility, or other governmental facility where an individual may be held in connection with a criminal charge that has been or may be filed against the individual; and
- “Statement” which means a communication that is oral, written, electronic, nonverbal, or in sign language.

The bill requires that a custodial interrogation related to a covered offense and conducted at a place of detention must be electronically recorded in its entirety. The recording must include:

- The giving of a required warning;
- The advisement of rights; and
- The waiver of rights by the individual being questioned.

If the custodial interrogation at the place of detention is not recorded by the law enforcement officer, he or she must prepare a written report explaining the reason for the noncompliance. Additionally, the report must summarize the custodial interrogation process and the individual's statements.

If a law enforcement officer conducts a custodial interrogation at a place other than a place of detention, the officer must prepare a written report as soon as practicable. The report must explain the officer's decision to conduct the interrogation in that place and the report must summarize the custodial interrogation process and the individual's statements made at that place.

The general recording requirement does not apply under the following circumstances:

- If there is an unforeseen equipment malfunction that prevents recording the custodial interrogation in its entirety;
- If a suspect refuses to participate in a custodial interrogation if his or her statements are electronically recorded;
- Due to equipment operator error;
- If the statement is made spontaneously and not in response to a custodial interrogation question;
- If a statement is made after questioning that is routinely asked during the processing of the arrest of a suspect;
- If the custodial interrogation occurs when no law enforcement officer participating in the interrogation has knowledge of facts and circumstances that would lead an officer to reasonably believe that the individual being interrogated may have committed a covered offense;
- If the law enforcement officer conducting the custodial interrogation reasonably believes that electronic recording would jeopardize the safety of the officer, individual being interrogated, or others; or
- If the custodial interrogation is conducted outside of the state.

Unless a court finds that one or more of the enumerated exceptions applies, the court must consider the officer's failure to record all or part of the custodial interrogation as a factor in determining the admissibility of a defendant's statement made during the interrogation. If the court decides to admit the statement, the defendant may request and the court must give a cautionary jury instruction regarding the officer's failure to comply with the recording requirement.

Finally, if a law enforcement agency has enforced rules that are adopted pursuant to the bill and that are reasonably designed to comply with the bill's requirements, the agency is not subject to civil liability for damages arising from a violation of the bill's requirements. The bill does not create a cause of action against a law enforcement officer.

### **Contraband Articles at County Detention Facilities**

Currently, a person who smuggles or attempts to smuggle any article of contraband into or out of a county detention facility commits a felony of the third degree. The amendment adds cellular phones and portable communications devices to the list of articles declared by statute to be contraband.

The amendment, however, reduces the penalty for smuggling or attempting to smuggle some of the less dangerous types of contraband articles to a first degree misdemeanor.<sup>20</sup> Accordingly, smuggling or attempts to smuggle the following articles is a first degree misdemeanor: written or recorded communications, currency and coins, food and clothing, tobacco products, including cigarettes and cigars, and intoxicating beverages.

#### **Effective Date**

The bill is effective July 1, 2019.

#### **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 article VII, subsection 18(d) 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.

##### **C. Government Sector Impact:**

Although local law enforcement agencies may incur costs related to the electronic recording requirement in the bill, that cost is indeterminate.

The Criminal Justice Impact Conference met on January 29, 2018, and determined that the provisions of this bill, which were then included in SB 1886, relating to contraband

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<sup>20</sup> A person who commits a first degree misdemeanor may be imprisoned for up to 1 year and fined up to \$1,000. Sections 775.082(4)(a) and 775.083(1)(d), F.S.

will result in a positive indeterminate prison bed impact (i.e. an unquantifiable increase in prison beds).

The Florida Department of Law Enforcement anticipates no fiscal impact to the department resulting from the provisions of the bill relating to custodial interrogations.<sup>21</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 900.05, Florida Statutes.

This bill substantially amends section 951.22, Florida Statutes.

**IX. Additional Information:**

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

**CS/CS by Judiciary on February 20, 2018**

The committee substitute differs from the underlying bill in that it also addresses contraband in county detention facilities. The effective date of the bill is also delayed until July 1, 2019.

**CS by Criminal Justice on January 16, 2018:**

The Committee Substitute:

- Corrects a scrivener’s error in the wording of “Home-invasion robbery” to be consistent with the way the offense is listed in s. 812.135(1), F.S.
- Changes the definition of “place of detention” by removing language about a “fixed location under the control of law enforcement” and listing the locations instead. It also eliminates the language about the definition excluding a police vehicle from the definition of “place of detention” since all places of detention are now specified.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

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<sup>21</sup> Florida Department of Law Enforcement, *2018 Legislative Bill Analysis, SB 1220* (December 14, 2017) (on file with the Senate Committee on Judiciary).