



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government- HB 681 will require law enforcement agencies to record custodial interrogations in order for them to be admissible into evidence.

#### B. EFFECT OF PROPOSED CHANGES:

In order for a statement made during a custodial interrogation to be admissible into evidence, the suspect must first be read Miranda<sup>1</sup> warnings and the suspect must waive the rights described in the warning. These warnings state that a suspect “has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”<sup>2</sup>

HB 681 provides that a statement made by a person during a custodial interrogation<sup>3</sup> shall be presumed inadmissible as evidence against that person in a criminal proceeding unless:

- An electronic recording<sup>4</sup> is made of the custodial interrogation.
- The recording is substantially accurate and not intentionally altered.
- Prior to the statement, but during the electronic recording, the person is given all constitutionally required warnings and the person knowingly, intelligently, and voluntarily waives any rights set out in the warnings.
- The electronic recording device was capable of making a true, complete and accurate recording of the interrogation and the operator of such device was competent and the electronic recording has not been altered.
- Voices material to the custodial interrogation are identified on the electronic recording.
- During discovery as provided in the Florida Rules of Criminal Procedure, but no later than the 20<sup>th</sup> day before the date of the proceeding in which the prosecution intends to offer the statement, the defense is provided with a true, complete and accurate copy of all electronic recordings of the defendant made pursuant to this section

HB 681 provides that if a court finds by a preponderance of the evidence that the defendant was subject to non-recorded custodial interrogation, any statements during or following are presumed to be inadmissible in any criminal proceeding except for the purpose of impeachment.

HB 681 provides that if there is not a true, complete and accurate recording, the presumption of inadmissibility can be rebutted through clear and convincing evidence that:

- The statement was voluntary and reliable; and
- Law enforcement officers had good cause not to electronically record all or part of the interrogation.

HB 681 defines the term “good cause” as including but not limited to the following:

- The person refused to have the interrogation electronically recorded and such refusal was electronically recorded;

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<sup>1</sup> See Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>2</sup> Id at 479.

<sup>3</sup> The bill defines the term “custodial interrogation” to mean any interrogation during which a reasonable person in the subject’s position would consider himself or herself to be in custody, and a question is asked which is likely to elicit an incriminating response.

<sup>4</sup> The bill defines the term “electronic recording” to mean a true, complete and accurate reproduction of the entire custodial interrogation of an accused person. An electronic recording may be created by motion picture, videotape, audiotape, or digital or other media.

- The failure to electronically record an entire interrogation was the result of equipment failure and obtaining replacement equipment was not feasible; or
- The statement was obtained in the course of electronic eavesdropping that was being conducted pursuant to a properly obtained and issued warrant or that required no warrant.

HB 681 provides that the section does not apply to a statement made by the person:

- At the person's trial or other hearing held in open court.
- Before a grand jury.
- Which is the res gestae of the arrest or the offense.
- Which is a spontaneous statement that was not made in response to a question.
- During questioning that is routinely asked during the processing of the arrest of the person.
- Which does not arise from a custodial interrogation.
- Which was obtained in another state by investigative personnel of such state, acting independently of law enforcement personnel of this state, in compliance with the laws of such state.
- Which was obtained by a federal office in this state or another state during a lawful federal investigation and was obtained in compliance with the laws of the United States.

HB 681 requires that every electronic recording of a custodial interrogation made pursuant to this section to be preserved until the defendant's conviction for any offense relating to the interrogation is final and all direct and habeas corpus appeals are exhausted, or the prosecution of such offenses is barred by law.

#### C. SECTION DIRECTORY:

Section 1. Provides definitions; provides that statements made during custodial interrogations are presumed to be inadmissible in court unless an electronic recording is made; provides for rebutting the presumption of inadmissibility.

Section 2. Provides legislative findings.

Section 3. Provides an effective date of July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

##### 2. Expenditures:

The bill will require the expenditure of funds to purchase electronic recording equipment which will be used to record interrogations. The bill could apply to interrogations that occur at a number of different places including law enforcement facilities, correctional facilities and law enforcement

vehicles. As a result, it appears that agencies may have to purchase equipment that would be kept in an interrogation room and purchase equipment that would be portable for use in a vehicle or other secure environment. Law enforcement agencies will also be required to expend funds for tapes or other materials used in the recording devices. Further, law enforcement agencies will be required to expend funds for storage of the tapes on which interrogations are made until the case is final.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

See above.

### 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. Based on the 2003 census, a bill that would have a statewide fiscal impact on counties and municipalities in aggregate or in excess of \$1.8 million 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, 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:

B. RULE-MAKING AUTHORITY:

C. DRAFTING ISSUES OR OTHER COMMENTS:

In 2001, Texas codified identical legislation<sup>5</sup> to HB 681; while other states have judicially mandated a recording requirement for all custodial interrogations in the exercise of its supervisory powers.<sup>6</sup>

According to section two within HB 681, “the legislature finds that many innocent persons are imprisoned and later released due to false confessions; there are many reasons innocent people confess ranging from coercion to mental illness; electronic recording of interrogations protects the innocent and provides the best evidence against the guilty.” Other state courts have held that many factual disputes about the denial of a defendant’s constitutional rights would be avoided if all conversations between the police and a suspect were recorded. While HB 681 may eliminate disputes as to the words that the suspect used in the interrogation, it will potentially create other factual disputes regarding issues such as: whether the interrogation was recorded in its entirety; whether the recording equipment was capable of making a “true, complete, and accurate recording of the interrogation”; whether the operator of the device was competent and whether the electronic recording was altered. For example, if a recording is stopped in order to switch tapes or in order to allow the suspect to take a break, the suspect may later argue that the interrogation was not recorded in its entirety. Every unusual noise on the tape could be subject to scrutiny. Further, there could be factual disputes if the state attempts to admit an interrogation into evidence under one of the exceptions contained in the bill.

HB 681 requires a law enforcement agency to preserve an electronic recording of a custodial interrogation until all post conviction appeals are exhausted or the prosecution is barred by law. Courts have not consistently applied a time limit to post conviction proceedings. Therefore, a law enforcement agency may be forced to preserve the evidence for as long as the defendant is incarcerated. Also because there is no statute of limitations for a capital felony, law enforcement would be required to keep the electronic recording of an interrogation in cases that do not result in a conviction, for the duration of the suspect’s life.

HB 681 does not specify that 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, 2006. Law enforcement agencies will have a short amount of time to comply with the new requirements of HB 681.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

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<sup>5</sup> See Vernon’s Ann. Texas C.C.P. Art. 38.22

<sup>6</sup> See State v. Scales, 518 N.W.2d 587 (Minn. 1994); Stephan v. State, 711 P.2d 1156 (Alaska 1985).