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H.B. 8
134th General Assembly

Bill Analysis

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Version: As Passed by the House

Primary Sponsors: Reps. West and Plummer

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SUMMARY

Electronic recording of custodial interrogation

- Except in limited circumstances it enacts, requires the recording of all statements made by a suspect of one of several specified criminal offenses during a custodial interrogation in a place of confinement.
- Eliminates a ban against penalizing a law enforcement agency that employs a law enforcement officer who fails to electronically record statements, when required.
- Replaces a provision that specifies that a failure to electronically record a statement, when required, does not provide the basis to exclude or suppress a statement in any legal proceeding with provisions specifying that if a law enforcement agency fails to record a custodial interrogation, when required by the bill:
 - If the prosecution establishes by a preponderance of the evidence that one or more of the bill's limited exceptions applies, the court must admit the evidence without a cautionary instruction;
 - If the prosecution does not meet that burden of proof, the court must provide a cautionary instruction to the jury that it may consider the failure in determining the reliability of the evidence.
- Replaces a provision that specifies that a law enforcement officer's failure to electronically record a custodial interrogation does not create a private cause of action against the officer with a provision specifying that a failure to electronically record such an interrogation does not create a private cause of action against any person or agency.

Restraining or confining of pregnant inmates

- Modifies existing provisions that prohibit under specified circumstances the restraining or confining of charged or convicted criminal offenders and charged or adjudicated

delinquent children who are, or were, pregnant, with respect to the types of restraint or confinement covered, the onset of the prohibition, and an exception to the prohibition.

DETAILED ANALYSIS

Electronic recording of custodial interrogation

Required for certain suspects

Unless contained in one of the bill's exceptions (see "**Exceptions**," below), the bill requires every oral statement made during a custodial interrogation in a place of detention to be electronically recorded if the statement is made by a person who is suspected of committing any of the following offenses:

- Aggravated murder, murder, or voluntary manslaughter;
- A first or second degree felony violation of involuntary manslaughter or aggravated vehicular homicide;
- Rape, attempted rape, or sexual battery.

The bill's provision described above replaces a provision of current law that does not require electronic recording of those statements by persons in those circumstances *per se*, but appears to treat electronic recordings of statements by persons in those circumstances favorably by specifying that they are presumed to be voluntary and placing the burden on the person making the statements to prove that the statements were not voluntary. The bill also eliminates a ban against penalizing a law enforcement agency that employs a law enforcement officer who fails to electronically record statements made in a custodial interrogation in a place of detention by a person who is suspected of one of the above offenses.¹

Exceptions

Electronic recording under the bill's provision described above is not required in any of the following circumstances:²

1. The person subject to interrogation requests that the interrogation not be recorded, as long as this request is preserved by electronic recording or in writing.
2. The recording equipment malfunctions.
3. There are exigent circumstances related to public safety.
4. The interrogation occurs outside Ohio.
5. The statements are made during routine processing or booking.
6. The statements are made spontaneously and not in response to interrogation.

¹ R.C. 2933.81(B).

² R.C. 2933.81(C).

7. The interrogation occurs when no law enforcement officer conducting the interrogation has reason to believe that the individual attempted to commit, conspired to commit, was complicit in committing, or committed an offense specified above.

Consequences of failure to record

The bill eliminates a provision of current law that specifies that a failure to electronically record a statement, when required, does not provide the basis to exclude or suppress a statement in a criminal proceeding, delinquent child proceeding, or other legal proceeding.³ But it specifies that if a law enforcement agency fails to record a custodial interrogation as required by the bill and the prosecution establishes, by a preponderance of the evidence, that one or more of the circumstances described in “**Exceptions**,” above applies, the court must admit the evidence without a cautionary instruction. And if an agency fails to record a custodial interrogation as required by the bill and the prosecution *does not* meet that burden of proof, the court must provide a cautionary instruction to the jury that it may consider the failure to record the custodial interrogation in determining the reliability of the evidence.⁴

A failure to electronically record a custodial interrogation does not create a private cause of action against any person or agency. This provision expands the current law private liability exclusion that applies only to actions against a law enforcement officer who fails to electronically record a custodial interrogation.⁵

Restraining or confining of pregnant inmates

General prohibition

Preexisting law, unchanged by the bill except as described below, prohibits the restraint or confinement by a law enforcement, court, or corrections official, under specified circumstances, of charged or convicted criminal offenders and charged or adjudicated delinquent children who are, or were, pregnant. The bill modifies the prohibition (and related provisions) by specifying that it:⁶

- Does not apply with respect to an offender or child unless the person is in custody of a law enforcement, court, or corrections official following arrest, transportation, and routine processing and booking (current law does not include the arrest, transportation, or processing and booking criterion);
- Applies with respect to the use of shackles, handcuffs, or “other similar appliances or devices that restrict the normal use of a person’s arms or legs” (instead of “other physical restraints” under current law);

³ R.C. 2933.81(C), repealed.

⁴ R.C. 2933.81(D).

⁵ R.C. 2933.81(B).

⁶ R.C. 2152.75(A) and (B) and 2901.10(A) and (B).

- Applies with respect to the placement of a person “in restrictive housing or disciplinary isolation for more than 24 hours” (instead of “in solitary confinement in an enclosed space” under current law);
- Applies “beginning on the date on which pregnancy is confirmed to law enforcement by a health care professional” and the law enforcement, court, or corrections official has knowledge that the person is pregnant or was pregnant (instead of applying, under current law, based on knowledge of the pregnancy whether or not the pregnancy was confirmed by a professional).

Exception to general prohibition

Currently, a law enforcement, court, or corrections official may restrain or confine a charged or convicted criminal offender or charged or adjudicated delinquent child during a period of time covered by the general prohibition described above, if: (1) the official determines that the person presents a serious threat of physical harm to herself, to the official, to other law enforcement or court personnel, or to any other person, presents a serious threat of physical harm to property, presents a substantial security risk, or presents a substantial flight risk, and (2) subject to an exception for emergency circumstances, prior to restraining or confining the person, the official contacts a health care professional who is treating the person and identifies the type and expected duration of restraint or the expected duration of the confinement, and the professional does not object to the specified type of restraint and its expected duration or to the expected duration of the confinement. The official may not use any leg, ankle, or waist restraint to restrain the person.

The bill eliminates the second criterion described in the preceding paragraph. Under the bill, the notice to a health care professional and the lack of the professional’s objection are not required as prerequisites for the law enforcement, court, or corrections official to restrain or confine a charged or convicted offender or charged or adjudicated delinquent child during a period of time covered by the general prohibition, if the official makes the determination described in the first criterion described in that paragraph.⁷

Definitions

Custodial interrogation provisions

The following existing terms, unchanged by the bill except as expressly indicated, are used in the parts of the bill pertaining to the electronic recording of custodial interrogations:⁸

A **custodial interrogation** is any interrogation involving a law enforcement officer’s questioning that is reasonably likely to elicit incriminating responses and in which a reasonable person in the subject’s position would consider self to be in custody, beginning when a person should have been advised of the person’s right to counsel and right to remain silent and of the

⁷ R.C. 2152.45(C) and 2901.10(C).

⁸ R.C. 2933.81(A).

fact that anything the person says could be used against the person, as specified in the landmark *Miranda v. Arizona*⁹ Supreme Court case and subsequent decisions, and ending when the questioning has completely finished.

A **detention facility** is a public or private place used for the confinement of a person charged with or convicted of any crime in this state or another state or under the laws of the United States or alleged or found to be a delinquent child or unruly child in Ohio or another state or under federal law.¹⁰

Electronic recording or electronically recorded means an audio or audiovisual recording that is an authentic, accurate, unaltered record of a custodial interrogation. The bill modifies the definition to apply to “audio or audiovisual” recordings, rather than to only “audio and visual” recordings under current law.

A **law enforcement agency** is a police department, the office of a sheriff, the state highway patrol, a county prosecuting attorney, or a federal, state, or local governmental body that enforces criminal laws and that has employees who have a statutory power of arrest.¹¹

A **place of detention** is a jail, police or sheriff’s station, holding cell, state correctional institution, local correctional facility, detention facility, or Department of Youth Services facility, but a law enforcement vehicle is not a place of detention.

A **statement** is an oral, written, sign language, or nonverbal communication.

Restraint or confinement of pregnant inmate provisions

The following terms are defined by the bill and are used in the parts of the bill pertaining to the restraining or confining of pregnant inmates:¹²

Restrictive housing means housing that separates an inmate from the general population and restricts an inmate to the inmate’s cell for at least 22 hours per day.

Disciplinary isolation means the act of confining an inmate to an individual housing cell that physically separates the inmate from the general inmate population as a penalty, thereby prohibiting physical contact between the inmate and other inmates.

⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁰ By reference to R.C. 2921.01, not in the bill.

¹¹ By reference to R.C. 109.573, not in the bill.

¹² R.C. 2152.75(A)(8) and (9) and 2901.10(A)(8) and (9).

HISTORY

Action	Date
Introduced	02-03-21
Reported, H. Criminal Justice	04-15-21
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