

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 287 Tampering with or Fabricating Physical Evidence

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

TIED BILLS: **IDEN./SIM. BILLS:** SB 796

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|------------------|---------|--|
| 1) Criminal Justice & Public Safety Subcommittee | 13 Y, 0 N, As CS | Padgett | Hall |
| 2) Justice Appropriations Subcommittee | 12 Y, 1 N | Smith | Keith |
| 3) Judiciary Committee | | Padgett | Kramer |

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 tampering with or fabricating physical evidence by:

- 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 287 amends s. 918.13, F.S., to increase the penalty if a person tampers with or fabricates physical evidence in a criminal trial, proceeding, or investigation relating to a capital felony from a third degree felony to a second degree felony. Examples of a capital felony include first degree murder, capital sexual battery, and specified drug trafficking offenses. The bill ranks the offense of tampering with or fabricating physical evidence relating to a capital felony as a Level 6 offense on the Criminal Punishment Code's offense severity ranking chart (OSRC).

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

The bill will likely have a positive indeterminate impact on prison beds by increasing the felony degree and penalty for tampering with or fabricating physical evidence in a criminal trial, proceeding, or investigation relating to a capital felony.

The bill provides an effective date of October 1, 2022.

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 tampering with or fabricating physical evidence by:

- 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.^{1,2} 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 physical evidence in a murder investigation is subject to the same penalty as a person that tampers with physical evidence in a case involving misdemeanor marijuana possession.

Courts have held that a person may be convicted of tampering with physical 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.³ 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 it⁴ or where a person tosses cocaine out of a moving vehicle during a police chase while continuing to flee.⁵ 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 physical 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.⁶

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.⁷ A person convicted of perjury commits a third degree

¹ 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.

² S. 918.13(2), F.S.

³ "[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).

⁴ *State v. Jennings*, 666 So.2d 131 (Fla.1995).

⁵ *Chapman v. State*, 36 So.3d 822 (Fla. 4th DCA 2010).

⁶ *Evans v. State*, 997 So.2d 1281 (Fla. 4th DCA 2009); *Thomas v. State*, 581 So.2d 993 (Fla. 2d DCA 1991).

⁷ "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.

felony.⁸ 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.^{9,10}

Capital 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.¹¹ Examples of a capital felony offense include first degree murder,¹² capital sexual battery,¹³ and specified drug trafficking offenses.¹⁴

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 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.¹⁵ 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.¹⁶ 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.¹⁷

Effect of Proposed Changes

CS/HB 287 amends s. 918.13, F.S., to increase the penalty if a person tampers with or fabricates physical evidence in a criminal trial, proceeding, or investigation relating to a capital felony from a third degree felony to a second degree felony, mirroring the penalties for the similar offense of perjury. The bill ranks the offense of tampering with or fabricating physical evidence relating to a capital felony as a Level 6 offense on the OSRC.

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

The bill provides an effective date of October 1, 2022.

B. SECTION DIRECTORY:

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

Section 2: Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 3: Provides an effective date of October 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

⁸ S. 837.02(1), F.S.

⁹ 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.

¹⁰ S. 837.02(2), F.S.

¹¹ S. 775.082(1)(a), F.S.

¹² S. 782.04(1)(a), F.S.

¹³ S. 794.011(2)(a), F.S.

¹⁴ S. 893.135, F.S.

¹⁵ S. 921.0022, F.S.

¹⁶ *Id.*

¹⁷ S. 921.0023, F.S.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference (CJIC) has not reviewed the bill, however CJIC reviewed a similar version of the bill, CS/HB 777, which was filed during the 2021 legislative session. On March 8, 2021, the CJIC determined the previous version of the bill would have a positive indeterminate impact on prison beds by increasing the felony degrees and penalties for tampering with or fabricating physical evidence in specified cases.¹⁸

The Department of Corrections reported that there were 68 new commitments to prison for tampering with evidence in Fiscal Year 2018-19, and 57 new commitments in Fiscal Year 2019-20. There were no new commitments for fabricating physical evidence in Fiscal Year 2019-20. However, current law does not distinguish between tampering with or fabricating physical evidence in a capital case and in any other criminal offense, so it is not known how many additional offenders this new penalty created by the bill could impact.¹⁹

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. The bill does not appear to affect county of municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

¹⁸ Criminal Justice Impact Conference, *CS/HB 777 – Tampering With or Fabricating Physical Evidence*, March 8, 2021, <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/CSHB777.pdf>, (last visited January 24, 2022).

¹⁹ *Id.*

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On December 2, 2021, the Criminal Justice & Public Safety Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS differs from the original bill as it:

- Deleted provisions increasing the penalty for tampering with or fabricating physical evidence in a criminal trial, investigation, or court proceeding relating to a violent felony offense described in s. 775.084(1)(b), F.S., or a criminal offense that results in a person's death.
- Ranked the offense of tampering with or fabricating physical evidence relating to a capital felony as a Level 6 offense on the OSRC.

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