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Senate Bill 813 (as introduced 4-10-24)
Sponsor: Senator John Cherry
Committee: Civil Rights, Judiciary, and Public Safety

Date Completed: 9-24-24

INTRODUCTION

The bill would modify how a videorecorded witness statement from a witness who was under the age of 16 or who had a developmental disability or was considered a vulnerable adult could be used in court. Currently the statements may be admitted for impeachment purposes and cannot be introduced at a preliminary examination instead of live testimony of live witness testimony. The bill would delete those uses and allow the statement to be used as evidence at trial so long as the admission was consistent with the constitutional right of a defendant to confront a witness. The bill also would require statements to adhere to Forensic Interview Protocols under the Child Protection Law. Additionally, the bill would expand protective conditions for the distribution of videorecorded statements and increase penalties for any unauthorized release of a statement.

The bill would take effect 180 days after its enactment.

PREVIOUS LEGISLATION

(This section does not provide a comprehensive account of previous legislative efforts on this subject matter.)

The bill is a similar reintroduction to House Bill 6291 of the 2021-2022 Legislative Session. House Bill 6291 was referred to the House Committee on Judiciary but received no further action. The bill is also similar to Senate Bill 451 of the 2019-2020 Legislative Session which was referred to the Senate Committee on Judiciary and Public Safety but received no further action. The bill is a similar reintroduction of House Bill 4299 of the 2017-2018 Legislative Session which passed the House but received no further action.

FISCAL IMPACT

The proposed provisions to increase the incarceration time from a maximum of 93 days to one year and increase the maximum fine amount from \$500 to \$2,500 could have an indeterminate negative fiscal impact and an indeterminate positive fiscal impact on State and local government. The increase in the incarceration time under the bill could increase resource demands on law enforcement, court systems, community supervision, and jails; however, it is unknown how many people would be prosecuted under the bill's provisions. Local jail costs vary by jurisdiction and thus costs for local governments would vary. Local revenue to local libraries could increase under the bill as any additional revenue from imposed fines would go to local libraries.

The bill would have no fiscal impact on the Department of Health and Human Services (DHHS) or State or local courts.

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CONTENT

The bill would amend the Revised Judicature Act to do the following:

- Modify the purposes for which a videorecorded witness statement could be used in court proceedings, including allowing the use as evidence in a trial.**
- Require a court order to give the defense a copy of a videorecorded statement to specify who could view or use the videorecorded witness statement, among other protective conditions.**
- Increase the penalty for unauthorized disclosure of a videorecorded statement.**
- Require that videorecorded statements adhere to Forensic Interview Protocols under the Child Protection Law.**

General Use of Videorecording in Court

Section 2163a of the Act allows for special accommodations, such as the use of a courtroom support dog, the use of a videorecording of a witness statement, or the exclusion of the public for a 1) witness who is under 16 years old or 2) who is developmentally disabled or a vulnerable adult and is the alleged victim of certain offenses under the Act.

(Generally a witness described above must be an alleged victim of any of the following offenses: a) a home invasion; b) vulnerable adult abuse; c) a violation of the Adult Foster Care Facility Licensing Act, the Act's rules, or related provisions under the Public Health Code if the violation caused the death of a vulnerable adult; d) certain conduct by a caregiver or person with a authority of a vulnerable adult; e) embezzlement by an agent, servant or employee, trustee, bailee, or custodian; f) obtaining or using a vulnerable adult's money or property through fraud; and g) certain assaults.)

Section 2163a allows a custodian of a videorecording to take a witness's videorecorded statement before the normally scheduled date for the defendant preliminary hearing. The recorded statement must indicate the date and time the statement was taken, identify the persons present in the room, indicate whether the person was present for the entire recording or only a portion of the recording, and show a time clock that is running during the taking of that statement. The bill would delete the requirements that the statement identify the persons present in the room and indicate whether the person was present for the entire recording or only a portion of the recording.

Currently, "custodian of the videorecorded statement" means the DHHS, investigating law enforcement agency, prosecuting attorney, or Department of Attorney General or other person designated under the county protocols established under Section 8 of the Child Protection Law. The bill would delete reference to the DHHS. Additionally, the bill requires a videorecorded statement to adhere to the Forensic Interview Protocol under Section 8 of the Child Protection Law and be retained under the county protocols of the Law. The bill specifies that the DHHS would not be responsible for storing or retaining a videorecorded statement made under Section 2163a.

(Section 8 of the Child Protection Law requires the prosecuting attorney in each county and the DHHS to adopt standard child abuse and child neglect investigation and interview protocols developed by the Governor's Task Force on Children's Justice as a model.¹ The standard child abuse and child neglect investigation and interview protocols such as the forensic interview protocol were most recently updated in 2023 by the Governor's Task Force

¹ "A Model Child Abuse and Neglect Protocol Utilizing a Multidisciplinary Team Approach", State of Michigan Governor's Task Force on Child Abuse and Neglect. Retrieved 9-24-24.

on Child Abuse and Neglect in coordination with the DHHS. The Protocols specify how to conduct an interview with a child in a developmentally appropriate manner to obtain an accurate statement to be used in criminal justice and child welfare systems.)

Under the bill, failure to make a videorecording of an interview under Section 2163a, including failure to record the interview in its entirety, would not prevent a forensic interviewer or other witness present during the taking of the statement from testifying in court as to the circumstances and content of the individual's statement if the court determined that the testimony was otherwise necessary.

Additionally, Section 2163a allows a videorecorded statement to be considered in court proceedings only for at least one of the following:

- It may be admitted as evidence at all pretrial proceedings, except that it cannot be introduced as preliminary examination instead of the live testimony of the witness.
- It may be admitted for impeachment purposes.
- It may be considered by the court in determining the sentence.
- It may be used as a factual basis for a no contest plea or to support a guilty plea.

Instead, under the bill, a videorecorded statement could only be considered in a court proceeding for at least one of the following:

- It could be admitted as evidence at all pretrial proceedings.
- It could be considered by the court in determining the sentence.
- It could be used as a factual basis for a no contest plea or to support a guilty plea.
- It could be admitted as evidence at a trial, so long as the admission was consistent with any requirement of the Confrontation Clause of Amendment VI of the Constitution of the United States.

(The Sixth Amendment of the United States Constitution guarantees certain rights to individuals accused of crimes to ensure a fair trial.² This Amendment includes the Confrontation Clause, which gives a defendant in a criminal proceeding the right to face a witness testifying against him or her, to see and hear the witness making accusations, to cross examine the witness and to prevent the use of hearsay through the objection of that testimony.³)

Protective Conditions for Use of Videorecording

The Revised Judicature Act also allows a videorecorded statement to be released to certain parties, including the defense. Upon request, a prosecuting attorney must provide the defendant and his or her attorney as applicable access to the statement at a reasonable time before the defendant's pretrial or trial. The bill would specify that the prosecuting attorney would have to provide that access at least 10 days before the court proceeding.

The court may order the release of that statement to the defense in preparation for a court proceeding with certain protective conditions, including a prohibition on copying, releasing, or circulating that statement. The bill also would require protective conditions to include a prohibition on defense counsel providing a defendant with the defendant's own copy of the videorecorded statement or a prohibition on a defendant who was representing him or herself from receiving or retaining the defendant's own copy of the statement. The court's order would

² US Const, amend VI.

³ "Confrontation Clause", Cornell Law School, https://www.law.cornell.edu/wex/confrontation_clause. Retrieved 9-23-24.

have to specify who could review the videorecorded statement, indicate the time by which the statement was required to be returned, and state a reason for the release of the statement. Additionally, the order could include any other protective conditions the court determined necessary.

Unauthorized Release of Videorecorded Statement

Currently a person who intentionally releases a videorecorded statement in violation of Section 2163a is guilty of a misdemeanor punishable by up to 93 days imprisonment and a maximum fine of \$500, or both. Under the bill, a person that intentionally released a videorecorded statement in violation of Section 2163a would be guilty of a misdemeanor punishable by up to one years' imprisonment and a maximum fine of \$1,000, or both. The bill specifies that the Section 2163a's provisions would not affect the ability to investigate, arrest, prosecute, or convict an individual for any other violation of State law.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.