

**Introduced by Senators Glazer and Hernandez**  
**(Coauthor: Senator Hancock)**  
(Coauthor: Assembly Member Weber)

February 19, 2016

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An act to amend Section 859.5 of the Penal Code, relating to interrogation.

LEGISLATIVE COUNSEL'S DIGEST

SB 1389, as introduced, Glazer. Interrogation: electronic recordation.

Existing law requires the electronic recording of the entire custodial interrogation of a minor who is in a fixed place of detention, as defined, and who, at the time of the interrogation, is suspected of committing or accused of committing murder. Existing law sets forth various exceptions from this requirement, including if the law enforcement officer conducting the interrogation or his or her superior reasonably believes that electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer, the individual being interrogated, or another individual. Existing law requires the prosecution to show by clear and convincing evidence that an exception applies to justify the failure to make that electronic recording. Existing law requires the interrogating entity to maintain the original or an exact copy of an electronic recording made of the interrogation until the final conclusion of the proceedings, as specified. Existing law additionally requires the court to provide jury instructions developed by the Judicial Council if the court finds that a defendant was subjected to a custodial interrogation in violation of the above-mentioned provisions.

This bill would expand these provisions to apply to any person suspected of committing murder, instead of just minors. By imposing

new requirements on local law enforcement, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
 State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. (a) The Legislature finds and declares the  
 2 following:

3 (1) According to a national study, false confessions extracted  
 4 during police questioning of suspects have been identified as a  
 5 leading cause of a wrongful conviction. Although threats and  
 6 coercion sometimes lead innocent people to confess, even the most  
 7 standardized interrogations can result in a false confession or  
 8 admission. Mentally ill or mentally disabled persons are  
 9 particularly vulnerable, and some confess to crimes because they  
 10 want to please authority figures or to protect another person.  
 11 Additionally, innocent people may come to believe that they will  
 12 receive a harsher sentence, or even the death penalty, unless they  
 13 confess to the alleged crime.

14 (2) Three injustices result from false confessions. First, a false  
 15 confession can result in an innocent person being incarcerated.  
 16 Second, when an innocent person is incarcerated, the criminal  
 17 investigations end and the real perpetrator remains free to commit  
 18 similar or potentially worse crimes. Third, victims' families are  
 19 subjected to double the trauma: the loss of, or injury occurring to,  
 20 a loved one and the guilt over the conviction of an innocent person.  
 21 Mandating electronic recording of custodial interrogations of both  
 22 adults and juveniles will improve criminal investigation techniques,  
 23 reduce the likelihood of wrongful convictions, and further the  
 24 cause of justice in California.

25 (3) Evidence of a defendant's alleged statement or confession  
 26 is one of the most significant pieces of evidence in any criminal

1 trial. Although confessions and admissions are the most accurate  
2 evidence used to solve countless crimes, they can also lead to  
3 wrongful convictions. When there is a complete recording of the  
4 entire interrogation that produced such a statement or confession,  
5 the factfinder can evaluate its precise contents and any alleged  
6 coercive influences that may have produced it.

7 (b) For these reasons, it is the intent of the Legislature to require  
8 electronic recording of custodial interrogations of both adults and  
9 juveniles. Recording interrogations decreases wrongful convictions  
10 based on false confessions and enhances public confidence in the  
11 criminal justice process. Properly recorded interrogations provide  
12 the best evidence of the communications that occurred during an  
13 interrogation, prevent disputes about how an officer conducted  
14 himself or herself or treated a suspect during the course of an  
15 interrogation, prevent a defendant from lying about the account  
16 of events he or she originally provided to law enforcement, and  
17 spare judges and jurors the time necessary and the need to assess  
18 which account of an interrogation to believe.

19 SEC. 2. Section 859.5 of the Penal Code is amended to read:

20 859.5. (a) Except as otherwise provided in this section, a  
21 custodial interrogation of *any person, including* a minor, who is  
22 in a fixed place of detention, and suspected of committing murder,  
23 as listed in *Sections 187 or 189, or* paragraph (1) of subdivision  
24 (b) of Section 707 of the Welfare and Institutions Code, shall be  
25 electronically recorded in its entirety. A statement that is  
26 electronically recorded as required pursuant to this section creates  
27 a rebuttable presumption that the electronically recorded statement  
28 was, in fact, given and was accurately recorded by the prosecution's  
29 witnesses, provided that the electronic recording was made of the  
30 custodial interrogation in its entirety and the statement is otherwise  
31 admissible.

32 (b) The requirement for the electronic recordation of a custodial  
33 interrogation pursuant to this section shall not apply under any of  
34 the following circumstances:

35 (1) Electronic recording is not feasible because of exigent  
36 circumstances. The exigent circumstances shall be recorded in the  
37 police report.

38 (2) The person to be interrogated states that he or she will speak  
39 to a law enforcement officer only if the interrogation is not  
40 electronically recorded. If feasible, that statement shall be

1 electronically recorded. The requirement also does not apply if the  
2 person being interrogated indicates during interrogation that he or  
3 she will not participate in further interrogation unless electronic  
4 recording ceases. If the person being interrogated refuses to record  
5 any statement, the officer shall document that refusal in writing.

6 (3) The custodial interrogation took place in another jurisdiction  
7 and was conducted by law enforcement officers of that jurisdiction  
8 in compliance with the law of that jurisdiction, unless the  
9 interrogation was conducted with intent to avoid the requirements  
10 of this section.

11 (4) The interrogation occurs when no law enforcement officer  
12 conducting the interrogation has knowledge of facts and  
13 circumstances that would lead an officer to reasonably believe that  
14 the individual being interrogated may have committed murder for  
15 which this section requires that a custodial interrogation be  
16 recorded. If during a custodial interrogation, the individual reveals  
17 facts and circumstances giving a law enforcement officer  
18 conducting the interrogation reason to believe that murder has  
19 been committed, continued custodial interrogation concerning that  
20 offense shall be electronically recorded pursuant to this section.

21 (5) A law enforcement officer conducting the interrogation or  
22 the officer's superior reasonably believes that electronic recording  
23 would disclose the identity of a confidential informant or jeopardize  
24 the safety of an officer, the individual being interrogated, or another  
25 individual. An explanation of the circumstances shall be recorded  
26 in the police report.

27 (6) The failure to create an electronic recording of the entire  
28 custodial interrogation was the result of a malfunction of the  
29 recording device, despite reasonable maintenance of the equipment,  
30 and timely repair or replacement was not feasible.

31 (7) The questions presented to a person by law enforcement  
32 personnel and the person's responsive statements were part of a  
33 routine processing or booking of that person. Electronic recording  
34 is not required for spontaneous statements made in response to  
35 questions asked during the routine processing of the arrest of the  
36 person.

37 (c) If the prosecution relies on an exception in subdivision (b)  
38 to justify a failure to make an electronic recording of a custodial  
39 interrogation, the prosecution shall show by clear and convincing  
40 evidence that the exception applies.

1 (d) A person’s statements that were not electronically recorded  
2 pursuant to this section may be admitted into evidence in a criminal  
3 proceeding or in a juvenile court proceeding, as applicable, if the  
4 court finds that all of the following apply:

5 (1) The statements are admissible under applicable rules of  
6 evidence.

7 (2) The prosecution has proven by clear and convincing evidence  
8 that the statements were made voluntarily.

9 (3) Law enforcement personnel made a contemporaneous audio  
10 or audio and visual recording of the reason for not making an  
11 electronic recording of the statements. This provision does not  
12 apply if it was not feasible for law enforcement personnel to make  
13 that recording.

14 (4) The prosecution has proven by clear and convincing evidence  
15 that one or more of the circumstances described in subdivision (b)  
16 existed at the time of the custodial interrogation.

17 (e) Unless the court finds that an exception in subdivision (b)  
18 applies, all of the following remedies shall be granted as relief for  
19 noncompliance:

20 (1) Failure to comply with any of the requirements of this section  
21 shall be considered by the court in adjudicating motions to suppress  
22 a statement of a defendant made during or after a custodial  
23 interrogation.

24 (2) Failure to comply with any of the requirements of this section  
25 shall be admissible in support of claims that a defendant’s statement  
26 was involuntary or is unreliable, provided the evidence is otherwise  
27 admissible.

28 (3) If the court finds that a defendant was subject to a custodial  
29 interrogation in violation of subdivision (a), the court shall provide  
30 the jury with an instruction, to be developed by the Judicial  
31 Council, that advises the jury to view with caution the statements  
32 made in that custodial interrogation.

33 (f) The interrogating entity shall maintain the original or an  
34 exact copy of an electronic recording made of a custodial  
35 interrogation until a conviction for any offense relating to the  
36 interrogation is final and all direct and habeas corpus appeals are  
37 exhausted or the prosecution for that offense is barred by law or,  
38 in a juvenile court proceeding, as otherwise provided in subdivision  
39 (b) of Section 626.8 of the Welfare and Institutions Code. The

1 interrogating entity may make one or more true, accurate, and  
2 complete copies of the electronic recording in a different format.

3 (g) For the purposes of this section, the following terms have  
4 the following meanings:

5 (1) “Custodial interrogation” means any interrogation in a fixed  
6 place of detention involving a law enforcement officer’s  
7 questioning that is reasonably likely to elicit incriminating  
8 responses, and in which a reasonable person in the subject’s  
9 position would consider himself or herself to be in custody,  
10 beginning when a person should have been advised of his or her  
11 constitutional rights, including the right to remain silent, the right  
12 to have counsel present during any interrogation, and the right to  
13 have counsel appointed if the person is unable to afford counsel,  
14 and ending when the questioning has completely finished.

15 (2) “Electronic recording” means a video recording that  
16 accurately records a custodial interrogation.

17 (3) “Fixed place of detention” means a fixed location under the  
18 control of a law enforcement agency where an individual is held  
19 in detention in connection with a criminal offense that has been,  
20 or may be, filed against that person, including a jail, police or  
21 sheriff’s station, holding cell, correctional or detention facility,  
22 juvenile hall, or a facility of the Division of Juvenile Facilities.

23 (4) “Law enforcement officer” means a person employed by a  
24 law enforcement agency whose duties include enforcing criminal  
25 laws or investigating criminal activity, or any other person who is  
26 acting at the request or direction of that person.

27 SEC. 3. If the Commission on State Mandates determines that  
28 this act contains costs mandated by the state, reimbursement to  
29 local agencies and school districts for those costs shall be made  
30 pursuant to Part 7 (commencing with Section 17500) of Division  
31 4 of Title 2 of the Government Code.