

AMENDED IN SENATE MAY 31, 2016

SENATE BILL

No. 1389

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

February 19, 2016

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

LEGISLATIVE COUNSEL'S DIGEST

SB 1389, as amended, 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.

Existing law defines “electronic recording” for these provisions as a video recording that accurately records a custodial interrogation.

This bill would specify that the above definition applies only to the custodial interrogation of a minor and would expand the definition to include a video or audio recording for the custodial interrogation of an adult.

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

1 subjected to double the trauma: the loss of, or injury occurring to,
2 a loved one and the guilt over the conviction of an innocent person.
3 Mandating electronic recording of custodial interrogations of both
4 adults and juveniles will improve criminal investigation techniques,
5 reduce the likelihood of wrongful convictions, and further the
6 cause of justice in California.

7 (3) Evidence of a defendant's alleged statement or confession
8 is one of the most significant pieces of evidence in any criminal
9 trial. Although confessions and admissions are the most accurate
10 evidence used to solve countless crimes, they can also lead to
11 wrongful convictions. When there is a complete recording of the
12 entire interrogation that produced such a statement or confession,
13 the factfinder can evaluate its precise contents and any alleged
14 coercive influences that may have produced it.

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

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

28 859.5. (a) Except as otherwise provided in this section, a
29 custodial interrogation of any person, including *an adult or* a minor,
30 who is in a fixed place of detention, and suspected of committing
31 murder, as listed in ~~Sections 187 or 189~~, *Section 187 or 189 of this*
32 *code*, or paragraph (1) of subdivision (b) of Section 707 of the
33 Welfare and Institutions Code, shall be electronically recorded in
34 its entirety. A statement that is electronically recorded as required
35 pursuant to this section creates a rebuttable presumption that the
36 electronically recorded statement was, in fact, given and was
37 accurately recorded by the prosecution's witnesses, provided that
38 the electronic recording was made of the custodial interrogation
39 in its entirety and the statement is otherwise admissible.

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

4 (1) Electronic recording is not feasible because of exigent
5 circumstances. The exigent circumstances shall be recorded in the
6 police report.

7 (2) The person to be interrogated states that he or she will speak
8 to a law enforcement officer only if the interrogation is not
9 electronically recorded. If feasible, that statement shall be
10 electronically recorded. The requirement also does not apply if the
11 person being interrogated indicates during interrogation that he or
12 she will not participate in further interrogation unless electronic
13 recording ceases. If the person being interrogated refuses to record
14 any statement, the officer shall document that refusal in writing.

15 (3) The custodial interrogation took place in another jurisdiction
16 and was conducted by law enforcement officers of that jurisdiction
17 in compliance with the law of that jurisdiction, unless the
18 interrogation was conducted with intent to avoid the requirements
19 of this section.

20 (4) The interrogation occurs when no law enforcement officer
21 conducting the interrogation has knowledge of facts and
22 circumstances that would lead an officer to reasonably believe that
23 the individual being interrogated may have committed murder for
24 which this section requires that a custodial interrogation be
25 recorded. If during a custodial interrogation, the individual reveals
26 facts and circumstances giving a law enforcement officer
27 conducting the interrogation reason to believe that murder has
28 been committed, continued custodial interrogation concerning that
29 offense shall be electronically recorded pursuant to this section.

30 (5) A law enforcement officer conducting the interrogation or
31 the officer's superior reasonably believes that electronic recording
32 would disclose the identity of a confidential informant or jeopardize
33 the safety of an officer, the individual being interrogated, or another
34 individual. An explanation of the circumstances shall be recorded
35 in the police report.

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

1 (7) The questions presented to a person by law enforcement
2 personnel and the person's responsive statements were part of a
3 routine processing or booking of that person. Electronic recording
4 is not required for spontaneous statements made in response to
5 questions asked during the routine processing of the arrest of the
6 person.

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

11 (d) A person's statements that were not electronically recorded
12 pursuant to this section may be admitted into evidence in a criminal
13 proceeding or in a juvenile court proceeding, as applicable, if the
14 court finds that all of the following apply:

15 (1) The statements are admissible under applicable rules of
16 evidence.

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

19 (3) Law enforcement personnel made a contemporaneous audio
20 or audio and visual recording of the reason for not making an
21 electronic recording of the statements. This provision does not
22 apply if it was not feasible for law enforcement personnel to make
23 that recording.

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

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

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

34 (2) Failure to comply with any of the requirements of this section
35 shall be admissible in support of claims that a defendant's statement
36 was involuntary or is unreliable, provided the evidence is otherwise
37 admissible.

38 (3) If the court finds that a defendant was subject to a custodial
39 interrogation in violation of subdivision (a), the court shall provide
40 the jury with an instruction, to be developed by the Judicial

1 Council, that advises the jury to view with caution the statements
2 made in that custodial interrogation.

3 (f) The interrogating entity shall maintain the original or an
4 exact copy of an electronic recording made of a custodial
5 interrogation until a conviction for any offense relating to the
6 interrogation is final and all direct and habeas corpus appeals are
7 exhausted or the prosecution for that offense is barred by law or,
8 in a juvenile court proceeding, as otherwise provided in subdivision
9 (b) of Section 626.8 of the Welfare and Institutions Code. The
10 interrogating entity may make one or more true, accurate, and
11 complete copies of the electronic recording in a different format.

12 (g) For the purposes of this section, the following terms have
13 the following meanings:

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

24 (2) ~~Electronic~~—(A) *For the purposes of the custodial*
25 *interrogation of a minor, pursuant to subdivision (a), “electronic*
26 *recording” means a video recording that accurately records a*
27 *custodial interrogation.*

28 (B) *For the purposes of the custodial interrogation of an adult,*
29 *pursuant to subdivision (a), “electronic recording” means a video*
30 *or audio recording that accurately records a custodial*
31 *interrogation.*

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

38 (4) “Law enforcement officer” means a person employed by a
39 law enforcement agency whose duties include enforcing criminal

1 laws or investigating criminal activity, or any other person who is
2 acting at the request or direction of that person.

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

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