

AMENDED IN ASSEMBLY AUGUST 15, 2016

AMENDED IN SENATE MAY 31, 2016

SENATE BILL

No. 1389

Introduced by Senators Glazer and Hernandez

(Coauthor: Senator Hancock)

(Coauthors: Senators Anderson, Hancock, Leno, and Stone)

(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 make this electronic recording requirement applicable to the custodial interrogation of any person suspected of committing murder, instead of just minors.~~ *murder.* By imposing new requirements on local law enforcement, this bill would impose a state-mandated local program. *The bill would exempt from the electronic recording requirement the interrogation of a person who is in custody on a charge of murder if the interrogation is not related to the commission of murder, as specified.*

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 minor.~~ *The bill would expand the definition to include a video or audio recording for in the case of the custodial interrogation of an adult.* *adult and would express the Legislature's encouragement that law enforcement agencies use video recording when available.*

This bill would make technical, nonsubstantive changes to the above provisions.

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

1 admission. Mentally ill or mentally disabled persons are
2 particularly vulnerable, and some confess to crimes because they
3 want to please authority figures or to protect another person.
4 Additionally, innocent people may come to believe that they will
5 receive a harsher sentence, or even the death penalty, unless they
6 confess to the alleged crime.

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

18 (3) Evidence of a defendant's alleged statement or confession
19 is one of the most significant pieces of evidence in any criminal
20 trial. Although confessions and admissions are the most accurate
21 evidence used to solve countless crimes, they can also lead to
22 wrongful convictions. When there is a complete recording of the
23 entire interrogation that produced such a statement or confession,
24 the factfinder can evaluate its precise contents and any alleged
25 coercive influences that may have produced it.

26 (b) For these reasons, it is the intent of the Legislature to require
27 electronic recording of custodial interrogations of both adults and
28 juveniles. Recording interrogations decreases wrongful convictions
29 based on false confessions and enhances public confidence in the
30 criminal justice process. Properly recorded interrogations provide
31 the best evidence of the communications that occurred during an
32 interrogation, prevent disputes about how an officer conducted
33 himself or herself or treated a suspect during the course of an
34 interrogation, prevent a defendant from lying about the account
35 of events he or she originally provided to law enforcement, and
36 spare judges and jurors the time necessary and the need to assess
37 which account of an interrogation to believe.

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

39 859.5. (a) Except as otherwise provided in this section, a
40 custodial interrogation of any person, including an adult or a minor,

1 who is in a fixed place of detention, and suspected of committing
2 murder, as listed in Section 187 or 189 of this code, or paragraph
3 (1) of subdivision (b) of Section 707 of the Welfare and Institutions
4 Code, shall be electronically recorded in its entirety. A statement
5 that is electronically recorded as required pursuant to this section
6 creates a rebuttable presumption that the electronically recorded
7 statement was, in fact, given and was accurately recorded by the
8 prosecution's witnesses, provided that the electronic recording
9 was made of the custodial interrogation in its entirety and the
10 statement is otherwise admissible.

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

14 (1) Electronic recording is not feasible because of exigent
15 circumstances. *The An explanation of the* exigent circumstances
16 shall be reorded documented in the police report.

17 (2) The person to be interrogated states that he or she will speak
18 to a law enforcement officer only if the interrogation is not
19 electronically recorded. If feasible, that statement shall be
20 electronically recorded. The requirement also does not apply if the
21 person being interrogated indicates during interrogation that he or
22 she will not participate in further interrogation unless electronic
23 recording ceases. If the person being interrogated refuses to record
24 any statement, the officer shall document that refusal in writing.

25 (3) The custodial interrogation ~~took placee~~ occurred in another
26 jurisdiction and was conducted by law enforcement officers of that
27 jurisdiction in compliance with the law of that jurisdiction, unless
28 the interrogation was conducted with intent to avoid the
29 requirements of this section.

30 (4) The interrogation occurs when no law enforcement officer
31 conducting the interrogation has knowledge of facts and
32 circumstances that would lead an officer to reasonably believe that
33 the individual being interrogated may have committed murder for
34 which this section requires that a custodial interrogation be
35 recorded. If during a custodial interrogation, the individual reveals
36 facts and circumstances giving a law enforcement officer
37 conducting the interrogation reason to believe that murder has
38 been committed, continued custodial interrogation concerning that
39 offense shall be electronically recorded pursuant to this section.

1 (5) A law enforcement officer conducting the interrogation or
2 the officer's superior reasonably believes that electronic recording
3 would disclose the identity of a confidential informant or jeopardize
4 the safety of an officer, the individual being interrogated, or another
5 individual. An explanation of the circumstances shall be recorded
6 *documented* in the police report.

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

11 (7) The questions presented to a person by law enforcement
12 personnel and the person's responsive statements were part of a
13 routine processing or booking of that person. Electronic recording
14 is not required for spontaneous statements made in response to
15 questions asked during the routine processing of the arrest of the
16 person.

17 *(8) The interrogation of a person who is in custody on a charge
18 of a violation of Section 187 or 189 of this code or paragraph (1)
19 of subdivision (b) of Section 707 of the Welfare and Institutions
20 Code if the interrogation is not related to any of these offenses. If,
21 during the interrogation, any information concerning one of these
22 offenses is raised or mentioned, continued custodial interrogation
23 concerning that offense shall be electronically recorded pursuant
24 to this section.*

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

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

33 (1) The statements are admissible under applicable rules of
34 evidence.

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

37 (3) Law enforcement personnel made a contemporaneous audio
38 or audio and visual recording of the reason for not making an
39 electronic recording of the statements. This provision does not

1 apply if it was not feasible for law enforcement personnel to make
2 that recording.

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

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

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

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

17 (3) If the court finds that a defendant was subject to a custodial
18 interrogation in violation of subdivision (a), the court shall provide
19 the jury with an instruction, to be developed by the Judicial
20 Council, that advises the jury to view with caution the statements
21 made in that custodial interrogation.

22 (f) The interrogating entity shall maintain the original or an
23 exact copy of an electronic recording made of a custodial
24 interrogation until a conviction for any offense relating to the
25 interrogation is final and all direct and habeas corpus appeals are
26 exhausted or the prosecution for that offense is barred by law or,
27 in a juvenile court proceeding, as otherwise provided in subdivision
28 (b) of Section 626.8 of the Welfare and Institutions Code. The
29 interrogating entity may make one or more true, accurate, and
30 complete copies of the electronic recording in a different format.

31 (g) For the purposes of this section, the following terms have
32 the following meanings:

33 (1) "Custodial interrogation" means any interrogation in a fixed
34 place of detention involving a law enforcement officer's
35 questioning that is reasonably likely to elicit incriminating
36 responses, and in which a reasonable person in the subject's
37 position would consider himself or herself to be in custody,
38 beginning when a person should have been advised of his or her
39 constitutional rights, including the right to remain silent, the right
40 to have counsel present during any interrogation, and the right to

1 have counsel appointed if the person is unable to afford counsel,
2 and ending when the questioning has completely finished.

3 (2) (A) For the purposes of the custodial interrogation of a
4 minor, pursuant to subdivision-(a), (a) or (b), “*electronically*
5 *recorded*,” “*electronic recordation*,” and “*electronic recording*”
6 ~~means refer to~~ a video recording that accurately records a custodial
7 interrogation.

8 (B) For the purposes of the custodial interrogation of an adult,
9 pursuant to subdivision-(a), (a) or (b), “*electronically recorded*,”
10 “*electronic recordation*,” and “*electronic recording*”~~means refer~~
11 to a video or audio recording that accurately records a custodial
12 interrogation. *The Legislature encourages law enforcement*
13 *agencies to use video recording when available.*

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

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

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