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**SB-1389 Interrogation: electronic recordation.** (2015-2016)

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**Senate Bill No. 1389**

**CHAPTER 791**

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

[ Approved by Governor September 28, 2016. Filed with Secretary of State September 28, 2016. ]

**LEGISLATIVE COUNSEL'S DIGEST**

SB 1389, 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 make this electronic recording requirement applicable to the custodial interrogation of any person suspected of committing 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. The bill would expand the definition to include a video or audio recording in the case of the custodial interrogation of an 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.

## THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

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

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

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

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

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

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

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

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

(1) Electronic recording is not feasible because of exigent circumstances. An explanation of the exigent circumstances shall be documented in the police report.

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

(3) The custodial interrogation occurred in another jurisdiction and was conducted by law enforcement officers of that jurisdiction in compliance with the law of that jurisdiction, unless the interrogation was conducted with intent to avoid the requirements of this section.

(4) The interrogation occurs when no law enforcement officer conducting the interrogation has knowledge of facts and circumstances that would lead an officer to reasonably believe that the individual being interrogated may have committed murder for which this section requires that a custodial interrogation be recorded. If during a custodial interrogation, the individual reveals facts and circumstances giving a law enforcement officer conducting the interrogation reason to believe that

murder has been committed, continued custodial interrogation concerning that offense shall be electronically recorded pursuant to this section.

(5) A law enforcement officer conducting the interrogation or the officer's 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. An explanation of the circumstances shall be documented in the police report.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) (A) For the purposes of the custodial interrogation of a minor, pursuant to subdivision (a) or (b), "electronically recorded," "electronic recordation," and "electronic recording" refer to a video recording that accurately records a custodial interrogation.

(B) For the purposes of the custodial interrogation of an adult, pursuant to subdivision (a) or (b), "electronically recorded," "electronic recordation," and "electronic recording" refer to a video or audio recording that accurately records a custodial interrogation. The Legislature encourages law enforcement agencies to use video recording when available.

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

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

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