SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 1389	**Hearing Date:**	April 5, 2016
Author:	Glazer		
Version:	February 19, 2016		
Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

Subject: ***Interrogation: Electronic Recordation***

HISTORY

Source: American Civil Liberties Union; Northern California Innocence Project

Prior Legislation: SB 569 (Lieu) Chapter 799, Stats. 2013
SB 1300 (Alquist) held in Senate Appropriations 2012
SB 1590 (Alquist) held Senate Appropriations 2008
SB 511 (Alquist) – Vetoed, 2007
SB 171 (Alquist) – Vetoed, 2006
AB 161 (Dymally) As introduced 2003

Support: John K. Van de Kamp, Former California Attorney General; Ella Baker Center for Human Rights; Friends Committee on Legislation of California; Innocence Project; Judge Ladoris H. Cordell (Ret.); Lawyers' Committee for Civil Rights of the San Francisco Bay Area; Legal Services for Prisoners with Children; Major Cities Chiefs Association; A New Path; A New Way of Life Re-Entry Project; one individual

Opposition: California State Sheriffs' Association

PURPOSE

The purpose of this bill is to require the electronic recording of the interrogation of any person suspected of murder.

The Fifth Amendment of the Federal Constitution provides in pertinent part that "No person shall…be compelled in any criminal case to be a witness against himself…."

The U.S. Supreme Court in *Miranda v. Arizona* (1966) 384 U.S. 436, held that the Fifth Amendment privilege may be invoked during a custodial interrogation. To protect the privilege, when a suspect invokes the right to remain silent or the right to an attorney, all questioning must cease. The only exceptions to this rule are to allow officers to question when reasonably necessary to protect the public safety or to obtain non-incriminating booking information.

Existing law creates the Commission on Peace Officer Standards and Training (POST) and provides that the commission shall adopt, and may from time to time amend, rules establishing minimum standards relating to physical, mental, and moral fitness that shall govern the recruitment of peace officers. (Penal Code § 13510)

Existing law provides that POST shall prepare guidelines establishing standard procedures which may be followed by police agencies and prosecutors in interviewing minor witnesses. (Penal Code § 13517.5)

Existing law provides that notwithstanding provisions prohibiting eavesdropping, any district attorney, or any assistant, deputy or investigator of the Attorney General or any district attorney any officer of the California Highway Patrol, any chief of police or city and county, any sheriff, undersheriff or deputy sheriff regularly employed and paid in that capacity by a county, police officer of the County of Los Angeles, or any person acting pursuant to the direction of one of these law enforcement officers acting within the scope of his or her authority, is not prohibited from overhearing or recording any communication…(Penal Code § 633)

Existing law provides that a custodial interrogation of a minor who is suspected of committing a murder offense shall be electronically recorded in its entirety. (Penal Code § 859.5 (a))

Existing law provides that a statement that is electronically recorded as required creates a rebuttable presumption that the electronically recorded statement was, in fact, given and was accurately recorded by the prosecution's witnesses, provided the electronic recording was made of the custodial interrogation in its entirety and the statement is otherwise admissible. (Penal Code § 859.5 (a))

Existing law provides that the requirement for the electronic recordation of a custodial interrogation pursuant to this section shall not apply under any of the following circumstances:

- Electronic recording is not feasible because of exigent circumstance. The exigent circumstances shall be recorded in the police report.

- 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 interrogations that he or she will not participate in further interrogation unless electronic recording ceases. If the person refuses to record any statement, the officer shall document that refusal in writing.

- The custodial interrogation took place 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 the intent to avoid the requirements of this section.

- 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 a murder. If during a custodial interrogation, the individual reveals the facts and circumstances giving the

officer reason to believe a murder may have been committed, continued interrogation concerning that offense shall be electronically recorded.

- 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 recorded in the police report.

- 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.

- 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 of spontaneous statements made in response to questions asked during the routine processing of the arrest of the person. (Penal Code § 859.5 (b))

Existing law provides that if the prosecution relies on an exception 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. (Penal Code § 859.5 (c))

Existing law provides that the presumption of inadmissibility of statements provided in this section may be overcome, and a person's statements that were not electronically recorded may be admitted into evidence in a criminal proceeding or a in a juvenile court proceeding, as applicable if the court finds that all of the following apply:

- If the statements are admissible under applicable rules of evidence.

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

- 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.

- The prosecution has proven by clear and convincing evidence that one or more of the exceptions existed at the time of the custodial interrogation. (Penal Code § 859.5 (d))

Existing law provides that unless the court finds that an exception applies, all of the following remedies shall be granted as relief for noncompliance:

- Failure to comply with any 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.

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

- If the court admits into evidence a statement made during the custodial interrogation that was not electronically recorded in compliance with this section, the court, upon request of the defendant, shall give to the jury cautionary instructions. (Penal Code § 859.5 (e))

Existing law provides that the interrogating entity shall maintain the original or an exact copy of an electronic recording made 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, otherwise provided in WIC Section 626.8. The interrogating entity may make one or more true, accurate, and complete copies of the electronic recording in a different format. (Penal Code § 859.5 (f))

This bill would apply the requirements that an interrogation be electronically recorded to any person suspected of committing murder, not just a juvenile.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

> Unfortunately, where there has been an absence of videotaped interrogations, there's also been a rise in convictions later overturned.
>
> Wrongful convictions have become a nationwide, high-profile issue, reflected in the more than 1,730 exonerations since 1989, according to the National Registry of Exonerations, a project of the University of Michigan Law School. Many of these wrongful convictions are based on an ever-increasing number of false confessions, particularly in homicide cases.
>
> False confessions were identified as the second most frequent cause of wrongful convictions – behind false eyewitness testimony – in a national study conducted by Professor Samuel Gross of the University of Michigan.
>
> 2015 saw a record number of exonerations in the United States: 149. This record continued the rapid increase in exonerations over the past several years. Wrongfully convicted individuals exonerated in 2015 served an average of 14.5 years in prison.
>
> 2015 also set a record for exonerations resulting from false confessions: 27. Of these 27 false confessions, 22 were in cases involving homicide.
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> Because of the increased possibility of false confessions in homicide cases—cases with very high stakes for society, victims' families, and wrongfully convicted individuals—we must have policies in place that ensure accurate documentation of

> interrogations in these cases so that the best possible evidence is presented in the courtroom.
>
> The requirement in Senate Bill 1389 to videotape the custodial interrogations of any person suspected of homicide will improve criminal investigation techniques, document false confessions when they occur, reduce the likelihood of wrongful conviction, and further the cause of justice in California.

2. False Confessions

Every year many people are wrongly convicted because of false confessions. Defendants also often make motions to exclude statements made during an interrogation arguing that they were coerced, there was abuse or the statement was not made. Studies have shown that recording of interrogations puts an end to disputes regarding statements and also has additional benefits.

In March 2000, after declaring a moratorium on executions, the then Governor of Illinois George Ryan appointed a Commission to see what reforms to the death penalty would be necessary to make it fair and just in Illinois. After 24 months of study the Commission set forth 85 recommendations. Among the recommendations of Illinois Governor's Commission on Capital Punishment (Illinois Commission) was the recommendation that:

> Custodial interrogations of a suspect in a homicide case occurring at a police facility should be videotaped. Videotaping should not include merely the statement made by the suspect after interrogation, but the entire process.[1]

Illinois followed the recommendation, becoming "the first state (recently joined by Maine and the District of Columbia) to require by statute electronic recording of custodial interrogations in custodial interrogations in homicide investigations."[2]

On July 25, 2006 the California Commission on the Fair Administration of Justice (CCFAJ) issued a "Report and Recommendations Regarding False Confessions." The Commission had a public hearing on June 21, 2006 and studied the reports of the commissions and task forces assembled in other states addressing the issue of false confessions, as well as research documenting 125 cases of false confessions by suspects who were indisputably proven to be innocent. CCFAJ found that:

> Although it may seem surprising that factually innocent persons would falsely confess to the commission of serious crimes, the research provides ample evidence that this phenomenon occurs with greater frequency than widely assumed. The research of Professors Steven Drizin and Richard A. Leo identifies 125 cases which occurred between 1972 and 2002, with 31% of them occurring in the five years previous to 2003. Eight of these examples, or 6 % of the sample, occurred in California cases. (California Commission on the Fair Administration of Justice, "Report and Recommendations Regarding False Confessions" p.2 www.ccfaj.org)

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[1] Recommendation 4, *Report of the Illinois Governor's Commission on Capital Punishment* (April 2002).
[2] Sullivan, Thomas P.; "Police Experiences with Recording Custodial Interrogations" *A special report by*: *North western University School of Law Center on Wrongful Convictions*, Summer 2004, p. 2. (www.law.northwestern.edu/wrongfulconvictions/caused/custodialinterrogations.htm)

Like the Illinois Commission CCFAJ found that recording interrogations not only helps reduce false confessions but that:

> There are a number of reasons why the taping of interrogations actually benefits the police departments that require it. First, taping creates an objective, comprehensive record of the interrogation. Second, taping leads to the improved quality of interrogation, with a higher level of scrutiny that will deter police misconduct and improve the quality of interrogation practices. Third, taping provides the police protection against false claims of police misconduct. Finally, with taping, detectives, police managers, prosecutors, defense attorneys and judges are able to more easily detect false confessions and more easily prevent their admission into evidence. (*Id*. p. 4)

3. Electronic Recording of Interrogations

As of January 2014, the law requires the electronic recording of the interrogation of a juvenile suspected of murder. In addition, there are a number of jurisdictions in California that voluntarily, at least some of the time, electronically record other interrogations. This bill would extend the provision requiring the electronic recording of the interrogation of juvenile murder suspects to apply to any person suspected of murder.

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