**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 23‑1‑240 SO AS TO DEFINE NECESSARY TERMS, TO PROVIDE THAT CERTAIN STATEMENTS MADE DURING A CUSTODIAL INTERROGATION MUST BE VIDEO RECORDED, TO PROVIDE THAT A COURT MUST INSTRUCT A JURY THAT IT MAY DRAW AN ADVERSE INFERENCE FOR A LAW ENFORCEMENT OFFICER WHO FAILS TO VIDEO RECORD A STATEMENT AS REQUIRED, TO PROVIDE THE CIRCUMSTANCES IN WHICH A PERSON’S STATEMENT MAY BE USED FOR IMPEACHMENT PURPOSES, TO PROVIDE THE CIRCUMSTANCES WHEN A STATEMENT OBTAINED IN ANOTHER STATE OR BY THE FEDERAL GOVERNMENT IS ADMISSIBLE IN THIS STATE, AND TO PROVIDE THAT AN INAUDIBLE PORTION OF A VIDEO RECORDING DOES NOT RENDER IT INADMISSIBLE.

Whereas, the General Assembly finds that to video record statements made during a custodial interrogation is an effective way to document a free, knowing, voluntary, and intelligent waiver of a person’s right to remain silent, to agree to answer questions, to decide to have an attorney present during questioning, and to decide to have an attorney provided to a person if he cannot afford an attorney, as provided by the Constitution of the United States and the Constitution of South Carolina; and

Whereas, providing a record of the statement made during a custodial interrogation and any waiver of constitutional rights will reduce speculation and claims that may arise as to the content of the statement, will enhance judicial economy in the reduction of defense motions arising from unrecorded interrogations, and importantly will heighten juror confidence in statements and confessions offered in court proceedings; and

Whereas, a record of the content of the statement will aid law enforcement officers in analyzing and rejecting untruthful statements and will aid the fact finder in determining whether a statement was freely, knowingly, voluntarily, and intelligently made. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Chapter 1, Title 23 of the 1976 Code is amended by adding:

“Section 23‑1‑240. (A) As contained in this section:

(1) ‘Custodial interrogation’ has the meaning prescribed to it pursuant to the Fourth and Fifth Amendments to the Constitution of the United States.

(2) ‘Electronic recording’ means a video or audio recording, with a preference for video recording, where practicable, that is a complete and uninterrupted accurate and unaltered record of the interrogation.

(3) ‘Place of detention’ means a police station, sheriff’s office, courthouse, solicitor’s office, juvenile or adult correctional or holding facility, regional correctional center, a building under the permanent control of a law enforcement agency at which a person is in custody pursuant to the authority of a law enforcement officer, or in a police vehicle which is equipped with electronic recording equipment.

(4) ‘Reasonable exception’ means circumstances in which:

(a) a sworn affidavit was made which provides an explanation of why it was not practicable to electronically record the statement or why recording was not feasible because of exigent circumstances. The law enforcement officer conducting the interrogation shall electronically, or in a sworn written affidavit, record an explanation of the exigent or impracticable circumstances before conducting the interrogation, if feasible, or as soon as practicable thereafter;

(b) the equipment to video record the statement could not be reasonably obtained;

(c) the person in custody refused to have the statement video recorded, if the person is advised of the recording, and:

(i) if feasible, the agreement to participate without recording must be electronically recorded;

(ii) if, during a custodial interrogation, the individual being interrogated indicates that the individual will not participate in further interrogation unless electronic recording ceases, the remainder of the custodial interrogation need not be electronically recorded. If feasible, the individual’s agreement to participate without further recording must be electronically recorded; or

(iii) a law enforcement officer who obtained the statement reasonably believed that the crime for which the person was taken into custody was not a crime;

(d) the equipment used to video record the statement malfunctioned, despite reasonable maintenance of the equipment, and timely repair or replacement was not feasible;

(e) the law enforcement officer who obtained the statement reasonably believed that the circumstances for which the person was taken into custody was not a crime. If, during a custodial interrogation, the individual reveals facts and circumstances giving a law enforcement officer conducting the interrogation reason to believe that a crime has been committed which requires custodial interrogation electronic recording, recording must be initiated immediately, if feasible;

(f) if a law enforcement officer conducting the interrogation or the officer’s superior or prosecutor subsequently and reasonably believes that the electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer or other individual, the prosecuting agency may move for an order of redaction or an order excusing the prosecution from the requirements of this section, and no jury instruction in that event is required; or

(g) the custodial interrogation necessarily took place in a jurisdiction not subject to the laws of South Carolina or the statement was taken by law enforcement officers under circumstances when it was not reasonably likely that the statements would be used in a prosecution for violations of the criminal laws of the State.

(B) Any law enforcement officer conducting a custodial interrogation of a criminal offense designated as a Felony or a Class A Misdemeanor under the laws of South Carolina shall make an electronic recording of the interrogation in its entirety as practical, and to include an explanation of constitutional rights and a waiver of those rights.

(C) All statements made by a person during a custodial interrogation must be presumed to fall within the electronic recording requirements of this section and the burden is upon the State to establish a reasonable explanation for noncompliance and to demonstrate the applicability of the enumerated exceptions or exigent circumstances.

(D) Except as provided in subsections (E), (F), and (G), if a law enforcement officer fails to comply with subsection (B), a court shall instruct the jury that it may draw an adverse inference for the law enforcement officer’s failure to comply with subsection (B), except no instruction is required if the prosecution proves by a preponderance that one or more of the enumerated exceptions or exigent exceptions excuse noncompliance. This section and this instruction does not supplant or supersede the remedies permitted by law for failure to give required advisements of rights or in the event of a sharing or involuntariness.

(E) If a defendant testifies contrary in a court proceeding to his statement made during a custodial interrogation at a place of detention which was not electronically recorded and in a circumstance of unexcused compliance with this section, the statement may be used for the purpose of impeachment if it is shown that the statement was freely, knowingly, voluntarily, and intelligently made.

(F) If a law enforcement officer fails to comply with the provisions contained in subsection (B), this failure does not bar the use of any evidence derived from a statement if the court determines that the evidence is otherwise admissible.

(G) Any statement made during a custodial interrogation is admissible against a person in a criminal proceeding in this State if:

(1) the statement was obtained in another state and was obtained in compliance with the laws of that state; or

(2) the statement was obtained by a federal law enforcement officer in this State or another state, was obtained in compliance with the laws of the United States, and was not taken by a federal law enforcement officer in an attempt to circumvent this section.

(H) The existence of inaudible portions of a video recording, which are not the result of bad faith by a law enforcement officer to produce an inaudible result, standing alone, shall not render a statement out of compliance with subsection (B).”

SECTION 2. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 3. This act takes effect upon approval by the Governor.

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