**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 23‑1‑240 SO AS TO DEFINE CERTAIN TERMS, RELATING TO THE RECORDING OF STATEMENTS OBTAINED DURING THE QUESTIONING OR INTERROGATION CONDUCTED PURSUANT TO A CRIMINAL INVESTIGATION, TO PROVIDE THAT CERTAIN STATEMENTS MADE DURING QUESTIONING OR INTERROGATION MUST BE AUDIO OR 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 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 RECORDING DOES NOT RENDER IT INADMISSIBLE.

Whereas, the General Assembly finds that to record the entirety of statements made during an investigation or questioning 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 questioning or interrogation in places of detention as defined herein and any waiver of constitutional rights will reduce speculation and claims that may arise as to the accuracy of 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) ‘Interrogation’ means any questioning or interrogation involving a law enforcement officer’s questioning in a place of detention as defined hereafter that is reasonably likely and intended to elicit incriminating responses, including circumstances in which a reasonable person in the subject’s or officer’s position would consider himself to be a suspect or in custody, and when in custody, recording must begin when a person should have been advised of his Miranda rights and end when the questioning has completely finished.

(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 an 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 or county jail, a building under the permanent control of a law enforcement agency at which a person is subjected to questioning or is in custody pursuant to the authority of a law enforcement officer, or in a police vehicle which is equipped with electronic recording equipment. This preference for recording means to encourage the initiation of questioning if practicable, until the recording is available.

(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, so as to ensure the interrogating officer’s good faith adherence to this act to the extent possible under the circumstances. The law enforcement officer conducting the questioning or 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 audio or video record the statement could not be reasonably obtained;

(c) a law enforcement officer who obtained the statement reasonably believed that the person being questioned or interrogated was not a suspect or the subject matter of questioning was not a crime;

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

(e) the law enforcement officer who obtained the statement reasonably believed that the circumstances for which the person was being questioned and/or taken into custody was not a crime, but if during questioning or an 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 further questioning or custodial interrogation electronic recording, recording must be initiated immediately, if feasible;

(f) if a law enforcement officer conducting the questioning or 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 questioning or 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 questioning or an interrogation or custodial interrogation of a criminal offense designated as a felony or a Class A misdemeanor shall be subject to the requirements contained in this section and shall make an electronic recording of the questioning or interrogation in its entirety as practical, to include an explanation of constitutional rights and a waiver of those rights.

(C) All statements made by a person during a questioning or 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 of the State’s preference for recording in these circumstances and that it may draw an adverse inference for the law enforcement officer’s failure to comply with subsection (B).

(E) If a defendant testifies contrary in a court proceeding to his statement made during a questioning or interrogation or a custodial interrogation at a place of detention which was not electronically recorded, or both, and in a circumstance of unexcused compliance with this section, the statement may be used for the purpose of impeachment as long as 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 questioning or interrogation or 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), but this subsection shall not override the court’s discretion to admit or bar admission of such video recording for any other grounds.”

SECTION 2. This act takes effect upon approval by the Governor.

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