**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING ARTICLE 11 TO CHAPTER 3, TITLE 23 SO AS TO PROVIDE THAT THIS ACT MAY BE CITED AS THE “UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT”, TO PROVIDE THE CIRCUMSTANCES IN WHICH A LAW ENFORCEMENT OFFICER OR AGENCY MUST ELECTRONICALLY RECORD A CUSTODIAL INTERROGATION, TO PROVIDE EXCEPTIONS TO THIS REQUIREMENT, TO PROVIDE THAT THE STATE MUST SERVE A DEFENDANT WRITTEN NOTICE OF ITS INTENT TO INTRODUCE IN COURT A STATEMENT MADE DURING A CUSTODIAL INTERROGATION WHICH WAS NOT RECORDED ELECTRONICALLY, TO PROVIDE THAT THE COURT SHALL CONSIDER THE FAILURE TO RECORD ELECTRONICALLY AN INTERROGATION AS A FACTOR IN DETERMINING WHETHER A STATEMENT MADE DURING THE INTERROGATION IS ADMISSIBLE, TO PROVIDE THAT SLED SHALL ESTABLISH PROCEDURES TO IMPLEMENT THE PROVISIONS CONTAINED IN THIS ARTICLE, TO PROVIDE THAT A LAW ENFORCEMENT AGENCY AND ITS OFFICERS ARE NOT SUBJECT TO CIVIL LIABILITY UNDER CERTAIN CIRCUMSTANCES, TO PROVIDE FOR THE SELF‑AUTHENTICATION OF AN ELECTRONIC RECORDING OF A CUSTODIAL INTERROGATION IN A PRETRIAL OR POST TRIAL PROCEEDING, TO PROVIDE THAT THIS ARTICLE DOES NOT CREATE A RIGHT OF AN INDIVIDUAL TO REQUIRE THE RECORDING OF A CUSTODIAL INTERROGATION OR THE PREPARATION OF A TRANSCRIPT OF AN ELECTRONIC RECORDING, AND TO PROVIDE THAT THE PROVISIONS CONTAINED IN THIS ARTICLE MODIFY, LIMIT, AND SUPERSEDE CERTAIN PROVISIONS CONTAINED IN THE ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.

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

SECTION 1. This act may be cited as the “Uniform Electronic Recordation of Custodial Interrogations Act”.

SECTION 2. Chapter 3, Title 23 of the 1976 Code is amended by adding:

“Article 11

Uniform Electronic Recordation of Custodial Interrogations Act

Section 23‑3‑910. As contained in this article:

(1) ‘Custodial interrogation’ means questioning or other conduct by a law enforcement officer which is reasonably likely to elicit an incriminating response from an individual and occurs when reasonable individuals in the same circumstances would consider themselves in custody.

(2) ‘Electronic recording’, ‘record electronically’, and ‘recorded electronically’ means an audio recording or an audio and video recording that accurately records a custodial interrogation.

(3) ‘Law enforcement agency’ means a governmental entity or person authorized by a governmental entity or state law to enforce criminal laws or investigate suspected criminal activity. The term includes a nongovernmental entity that has been delegated the authority to enforce criminal laws or investigate suspected criminal activity. The term does not include a law enforcement officer.

(4) ‘Law enforcement officer’ means:

(a) an individual employed by a law enforcement agency whose responsibilities include enforcing criminal laws or investigating criminal activity; or

(b) an individual acting at the request or direction of an individual described in subitem (a).

(5) ‘Person’ means an individual, corporation, business trust, statutory trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(6) ‘Place of detention’ means a fixed location under the control of a law enforcement agency where individuals are questioned about alleged crimes. The term includes a jail, police or sheriff’s station, holding cell, and correctional or detention facility.

(7) ‘State’ means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(8) ‘Statement’ means a communication whether oral, written, electronic, or nonverbal.

Section 23‑3‑915. (A) Except as otherwise provided in this article, a custodial interrogation at a place of detention, including the giving of any required warning, advice of the rights of the individual being questioned, and the waiver of any rights by the individual, must be recorded electronically in its entirety, by both audio and video means, if the interrogation relates to a felony or a Class A misdemeanor.

(B) If a law enforcement officer conducts a custodial interrogation to which subsection (A) applies without electronically recording it in its entirety, the officer shall prepare a written or electronic report explaining the reason for not complying with this section and summarizing the custodial interrogation process and the individual’s statements.

(C) A law enforcement officer shall prepare the report required by subsection (B) as soon as practicable after completing the interrogation.

(D) As soon as practicable, a law enforcement officer conducting a custodial interrogation outside a place of detention shall prepare a written report explaining the decision to interrogate outside a place of detention and summarizing the custodial interrogation process and the individual’s statements made outside a place of detention.

(E) This section does not apply to a spontaneous statement made outside the course of a custodial interrogation or a statement made in response to a question asked routinely during the processing of the arrest of an individual.

Section 23‑3‑920. Notwithstanding another provision of law, a law enforcement officer conducting a custodial interrogation is not required to obtain consent to electronic recording from the individual being interrogated or to inform the individual that an electronic recording is being made of the interrogation. This article does not permit a law enforcement officer or a law enforcement

agency to record a private communication between an individual and the individual’s lawyer.

Section 23‑3‑925. A custodial interrogation to which this article otherwise applies need not be recorded electronically if recording is not feasible because of exigent circumstances. The law enforcement officer conducting the interrogation shall record electronically an explanation of the exigent circumstances before conducting the interrogation, if feasible, or as soon as practicable after the interrogation is completed.

Section 23‑3‑930. (A) A custodial interrogation to which this article otherwise applies need not be recorded electronically if the individual to be interrogated indicates that he will not participate in the interrogation if it is recorded electronically. If feasible, the agreement to participate without recording must be recorded electronically.

(B) If, during a custodial interrogation to which this article otherwise applies, the individual being interrogated indicates that he will not participate in further interrogation unless electronic recording ceases, the remainder of the custodial interrogation need not be recorded electronically. If feasible, the individual’s agreement to participate without further recording must be recorded electronically.

(C) A law enforcement office, with the intent to avoid the requirement of electronic recording may not encourage an individual to request that a recording not be made.

Section 23‑3‑935. If a custodial interrogation occurs in another state in compliance with that state’s law or is conducted by a federal law enforcement agency in compliance with federal law, the interrogation need not be recorded electronically unless the interrogation is conducted with intent to avoid the requirement of electronic recording contained in this article.

Section 23‑3‑940. (A) A custodial interrogation to which this article otherwise applies need not be recorded electronically if the interrogation occurs when no law enforcement officer conducting the interrogation has knowledge of facts and circumstances that would lead an officer reasonably to believe that the individual being interrogated may have committed an act for which this article requires that a custodial interrogation be recorded electronically.

(B) If, during a custodial interrogation under subsection (A), the individual being interrogated reveals facts and circumstances giving a law enforcement officer conducting the interrogation reason to believe that an act has been committed for which this article requires that a custodial interrogation be recorded electronically, continued custodial interrogation concerning that act must be recorded electronically, if feasible.

Section 23‑3‑945. A custodial interrogation to which this article otherwise applies need not be recorded electronically if 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. If feasible and consistent with the safety of a confidential informant, an explanation of the basis for the belief that electronic recording would disclose the informant’s identity must be recorded electronically at the time of the interrogation. If contemporaneous recording of the basis for the belief is not feasible, the recording must be made as soon as practicable after the interrogation is completed.

Section 23‑3‑950. (A) All or part of a custodial interrogation to which this article otherwise applies need not be recorded electronically to the extent that recording is not feasible because the available electronic recording equipment fails, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.

(B) If both audio and video recording of a custodial interrogation are otherwise required by this article, recording may be by audio alone if a technical problem in the video recording equipment prevents video recording, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.

(C) If both audio and video recording of a custodial interrogation are otherwise required by this article, recording may be by video alone if a technical problem in the audio recording equipment prevents audio recording, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.

Section 23‑3‑955. If the State relies on an exception in this article to justify a failure to record electronically a custodial interrogation, the State must prove by a preponderance of the evidence that the exception applies.

Section 23‑3‑960. If the State intends to introduce in a judicial proceeding a statement which was not recorded electronically made during a custodial interrogation to which this article applies, the State, not more than thirty days from the date set for trial, shall serve the defendant with written notice of that intent and of any exception on which the State intends to rely.

Section 23‑3‑965. (A) Unless the court finds that an exception contained in this article applies, the court shall consider the failure to record electronically all or part of a custodial interrogation to which this article applies as a factor in determining whether a statement made during the interrogation is admissible, including whether it was voluntarily made or is reliable.

(B) If the court admits into evidence a statement made during a custodial interrogation that was not recorded electronically in compliance with this article, the court, upon request of the defendant, shall give cautionary instructions to the jury.

Section 23‑3‑970. (A) The State Law Enforcement Division (SLED) shall promulgate regulations to be implemented by all law enforcement agencies to ensure that the electronic recording of any or all of a custodial interrogation is identified, accessible and preserved, and implement the provisions contained in this article.

(B) The regulations promulgated by SLED must address the following topics:

(1) how an electronic recording of a custodial interrogation must be made;

(2) the collection and review of electronic recordings, or the absence thereof, by superiors in a law enforcement agency;

(3) the assignment of supervisory responsibilities and a chain of command to promote internal accountability;

(4) a process for explaining noncompliance with procedures and imposing administrative sanctions for a failure to comply that is not justified;

(5) a supervisory system expressly imposing on individuals in specific positions a duty to ensure adequate staffing, education, training, and material resources to implement this article; and

(6) a process for monitoring the chain of custody of an electronic recording.

(C) The regulations promulgated for video recording must contain standards for the angle, focus, and field of vision of a recording device which reasonably promote accurate recording of a custodial interrogation at a place of detention and reliable assessment of its accuracy and completeness.

(D) Each law enforcement agency shall adopt rules providing for administrative discipline of a law enforcement officer found by a court or the agency to have violated the terms of this article. The rules must provide a range of disciplinary sanctions reasonably designed to promote compliance with this article.

Section 23‑3‑975. (A) A law enforcement agency which has implemented procedures reasonably designed to enforce the regulations promulgated by SLED is not subject to civil liability for damages arising from a violation of this article.

(B) This article does not create a cause of action against a law enforcement officer.

Section 23‑3‑980. (A) In any pretrial or post‑trial proceeding, an electronic recording of a custodial interrogation is self‑authenticating if it is accompanied by a certificate of authenticity sworn under oath or affirmation by an appropriate law enforcement officer.

(B) This article does not limit the right of an individual to challenge the authenticity of an electronic recording of a custodial interrogation under law of this State other than this article.

Section 23‑3‑985. (A) This article does not create a right of an individual to require a custodial interrogation to be recorded electronically.

(B) This article does not require preparation of a transcript of a custodial interrogation.

Section 23‑3‑990. This article modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).”

SECTION 3. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 4. 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 5. This act takes effect upon approval by the Governor.

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