

By: Ellis

S.B. No. 123

A BILL TO BE ENTITLED

AN ACT

relating to the electronic recording and admissibility of certain
custodial interrogations.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 2, Code of Criminal Procedure, is
amended by adding Article 2.31 to read as follows:

Art. 2.31. ELECTRONIC RECORDING OF CUSTODIAL
INTERROGATIONS. (a) In this article:

(1) "Custodial interrogation" means any investigative
questioning, other than routine questions associated with booking,
by a peace officer during which:

(A) a reasonable person in the position of the
person being interrogated would consider himself or herself to be
in custody; and

(B) a question is asked that is reasonably likely
to elicit an incriminating response.

(2) "Law enforcement agency" means an agency of the
state, or of a county, municipality, or other political subdivision
of this state, that employs peace officers who, in the routine
performance of the officers' duties, conduct custodial
interrogations of individuals suspected of committing criminal
offenses.

(3) "Place of detention" means a police station or
other building that is a place of operation for a law enforcement

agency, including a municipal police department or county sheriff's department, and is owned or operated by the law enforcement agency for the purpose of detaining individuals in connection with the suspected violation of a penal law. The term does not include a courthouse.

(b) Unless good cause exists that makes electronic recording infeasible, a law enforcement agency shall make a complete, contemporaneous, audio or audiovisual electronic recording of any custodial interrogation that occurs in a place of detention and is of a person suspected of committing or charged with the commission of an offense under:

(1) Section 19.02, Penal Code (murder);

(2) Section 19.03, Penal Code (capital murder);

(3) Section 20.03, Penal Code (kidnapping);

(4) Section 20.04, Penal Code (aggravated kidnapping);

(5) Section 21.02, Penal Code (continuous sexual abuse of young child or children);

(6) Section 21.11, Penal Code (indecent with a child);

(7) Section 21.12, Penal Code (improper relationship between educator and student);

(8) Section 22.011, Penal Code (sexual assault);

(9) Section 22.021, Penal Code (aggravated sexual assault); or

(10) Section 43.25, Penal Code (sexual performance by a child).

1 (c) For purposes of Subsection (b), an electronic recording
2 of a custodial interrogation is complete only if the recording
3 begins at or before the time the person being interrogated receives
4 a warning described by Section 2(a), Article 38.22, and continues,
5 without interruption, until the time the interrogation ceases.

6 (d) For purposes of Subsection (b), good cause that makes
7 electronic recording infeasible includes the following:

8 (1) the person being interrogated refused to respond
9 or cooperate in a custodial interrogation at which an audio or
10 audiovisual recording was made, provided that:

11 (A) a contemporaneous recording of the refusal
12 was made; or

13 (B) the peace officer or agent of the law
14 enforcement agency conducting the interrogation attempted, in good
15 faith, to record the person's refusal but the person was unwilling
16 to have the refusal recorded, and the peace officer or agent
17 contemporaneously, in writing, documented the refusal;

18 (2) the statement was not made exclusively as the
19 result of a custodial interrogation, including a statement that was
20 made spontaneously by the accused and not in response to a question
21 by a peace officer;

22 (3) the peace officer or agent of the law enforcement
23 agency conducting the interrogation attempted, in good faith, to
24 record the interrogation but the recording equipment did not
25 function, the officer or agent inadvertently operated the equipment
26 incorrectly, or the equipment malfunctioned or stopped operating
27 without the knowledge of the officer or agent;

1 (4) exigent public safety concerns prevented or
2 rendered infeasible the making of an audio or audiovisual recording
3 of the statement; or

4 (5) the peace officer or agent of the law enforcement
5 agency conducting the interrogation reasonably believed at the time
6 the interrogation commenced that the person being interrogated was
7 not taken into custody for or being interrogated concerning the
8 commission of an offense listed in Subsection (b).

9 (e) A law enforcement agency shall preserve an electronic
10 recording described by Subsection (b) until the later of the date on
11 which:

12 (1) any conviction for an offense that is the subject
13 of the interrogation or that results from the interrogation is
14 final, all direct appeals of the case are exhausted, and the time to
15 file a petition for a writ of habeas corpus has expired; or

16 (2) the prosecution of the offense that is the subject
17 of the interrogation or that arises from the interrogation is
18 barred by law.

19 (f) The attorney representing the state shall provide to the
20 defendant, in a timely manner and not later than the 60th day before
21 the date the trial begins, a copy of an electronic recording
22 described by Subsection (b).

23 (g) A recording of a custodial interrogation that complies
24 with this section is exempt from public disclosure except as
25 provided by Section 552.108, Government Code.

26 SECTION 2. Chapter 38, Code of Criminal Procedure, is
27 amended by adding Article 38.24 to read as follows:

1 Art. 38.24. USE OF CERTAIN EVIDENCE CONCERNING ELECTRONIC
2 RECORDING OF CUSTODIAL INTERROGATIONS. (a) Evidence of compliance
3 or noncompliance with Article 2.31 concerning the electronic
4 recording of a custodial interrogation is relevant and admissible
5 before the trier of fact.

6 (b) Evidence of compliance with Article 2.31 concerning the
7 electronic recording of a custodial interrogation is not a
8 condition precedent to the admissibility of a defendant's statement
9 under Article 38.23, another provision of this chapter, or another
10 law.

11 (c) If the statement of a person suspected of committing or
12 charged with the commission of an offense listed in Article 2.31(b)
13 that is made by the person during a custodial interrogation
14 conducted in a place of detention is admitted in evidence during
15 trial, and if an electronic recording of the complete interrogation
16 is not available, the court:

17 (1) if the court is the trier of fact, may consider the
18 absence of an electronic recording of the interrogation in
19 evaluating the evidence relating to and resulting from the
20 interrogation; and

21 (2) if the jury is the trier of fact, shall on request
22 of the defendant instruct the jury that:

23 (A) it is the policy of this state to
24 electronically record custodial interrogations of persons
25 suspected of having committed an offense listed in Article 2.31(b);
26 and

27 (B) the jury may consider the absence of an

1 electronic recording of the interrogation in evaluating the
2 evidence relating to and resulting from the interrogation.

3 (d) The court may refuse to give the jury instruction
4 described by Subsection (c)(2) if the attorney representing the
5 state offers proof satisfactory to the court that:

6 (1) good cause, as described by Article 2.31(d),
7 existed that made electronic recording of a custodial interrogation
8 infeasible; or

9 (2) the law enforcement agency that failed to
10 electronically record the interrogation acted in good faith at the
11 time the agency failed to make the recording.

12 SECTION 3. Article 38.24, Code of Criminal Procedure, as
13 added by this Act, applies to the use of a statement resulting from
14 a custodial interrogation that occurs on or after September 1,
15 2012, regardless of whether the criminal offense giving rise to
16 that interrogation is committed before, on, or after that date.

17 SECTION 4. This Act takes effect September 1, 2011.