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# RECENT DEVELOPMENTS

## THE CONSEQUENCES OF LAW ENFORCEMENT OFFICIALS' FAILURE TO RECORD CUSTODIAL INTERVIEWS AS REQUIRED BY LAW

THOMAS P. SULLIVAN\* & ANDREW W. VAIL\*\*

### I. INTRODUCTION

In an Article published in this Journal in 2005, we advocated the enactment of state statutes requiring that interviews of suspects held in custody at police facilities be electronically recorded, and we attached a proposed model statute.<sup>1</sup> After several years of additional research and discussions with numerous law enforcement and legislative personnel, we have revised our proposed statute in one important substantive respect. We have deleted the provision that evidence of an unrecorded interview is presumed inadmissible into evidence when no statutory exception to the recording requirement applies. Instead, we now recommend that the trial judge permit the prosecution to introduce evidence of all unrecorded interviews; if the failure to record is not justified under the law, and if the case is heard by a jury, the judge must give instructions explaining the greater reliability of electronic recordings of custodial interviews as compared to witnesses' testimony about what occurred.

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<sup>1</sup> Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1141-44 (2005).

The new model statute is contained in Appendix A.<sup>2</sup> In this Article, we explain the reasons for the change.

## II. THE PROVISIONS OF OUR PRIOR MODEL STATUTE

As relevant here, our 2005 model statute contains the following provisions.

Section 2 provides that all statements made by persons suspected of designated felonies during custodial interviews must be electronically recorded.<sup>3</sup> Section 3 provides that unless recording is excused under the provisions of §§ 4 or 5, unrecorded statements “shall be presumed inadmissible as evidence against the person in any juvenile or criminal proceeding brought against the person.”<sup>4</sup> Sections 4 and 5 describe a variety of circumstances under which the recording of custodial interviews is not required. In these cases, the presumption of inadmissibility is overcome, and unrecorded statements may be admitted into evidence.<sup>5</sup>

The presumption of inadmissibility in § 3 was based upon a similar provision contained in the Illinois recording statute,<sup>6</sup> enacted in 2003, which requires, with certain exceptions, that custodial interviews of suspects in first-degree murder investigations be electronically recorded. This was the first mandatory recording law to be enacted by a state legislature.<sup>7</sup>

## III. A SUMMARY OF STATUTES AND COURT RULINGS REQUIRING RECORDED CUSTODIAL INTERVIEWS AND THE CONSEQUENCES OF FAILURE TO RECORD AS REQUIRED

The earliest requirements that custodial interviews be recorded by state law enforcement officials came in a 1985 ruling by the Supreme Court of Alaska, followed almost a decade later by a 1994 decision by the Supreme Court of Minnesota.<sup>8</sup> After the Illinois statute was enacted in 2003, the

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<sup>2</sup> We have also made several editorial changes to the model statute, which are designed to bring more clarity to its provisions, but which do not alter its substance.

<sup>3</sup> Sullivan, *supra* note 1, at 1142.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1142-44.

<sup>6</sup> 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West 2007) (relating to investigations of first degree murder suspects); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2007) (same). The statute took statewide effect in July 2005.

<sup>7</sup> Thomas P. Sullivan, Andrew W. Vail & Howard W. Anderson III, *The Case for Recording Police Interrogations*, 34 LITIGATION, Spring 2008, at 30, 35.

<sup>8</sup> See *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985) (requiring recording based upon the Alaska Constitution’s Due Process Clause); *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994) (requiring recording based on the court’s supervisory power). Many other state reviewing courts, while expressing support for recording custodial interviews, have

District of Columbia and six other states—Maine, Maryland, Nebraska, New Mexico, North Carolina, and Wisconsin—have adopted mandatory recording laws applicable to custodial interviews in a variety of felony investigations.<sup>9</sup> In addition, the New Jersey Supreme Court has by rule provided that recordings be made of custodial interviews in named felony investigations,<sup>10</sup> and an opinion of the highest court of Massachusetts<sup>11</sup> has resulted in statewide adoption of the practice of recording custodial interviews.<sup>12</sup>

These statutes and court rulings contain a variety of provisions dealing with when custodial interviews must be recorded, what circumstances excuse the need for recordings, and the consequences of unexcused failures to record. They may be roughly categorized as follows.

#### A. INADMISSIBILITY INTO EVIDENCE

The supreme courts of both Alaska and Minnesota have ruled that testimonial evidence of what occurred during a custodial interview will be excluded from evidence if the prosecution is unable to establish a valid excuse for not making an electronic recording.<sup>13</sup> Later decisions of both courts have adopted exceptions that justify non-recording,<sup>14</sup> but neither court has altered its position on inadmissibility.

#### B. PRESUMED OR POTENTIAL INADMISSIBILITY

The District of Columbia Code provides that a statement of an accused taken without the required electronic recording is subject to a rebuttable presumption that the statement was involuntary; the presumption may be

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declined to direct law enforcement officers to do so. *See* cases cited in Sullivan, *supra* note 1, at 1137 n.38.

<sup>9</sup> D.C. CODE ANN. §§ 5-116.01-03 (LexisNexis Supp. 2008); ME. REV. STAT. ANN. tit. 25, § 2803-B (2007); MD CODE ANN. CRIM. PROC. § 2-402 (LexisNexis 2008); NEB. REV. STAT. § 29-4501-4508 (effective July 18, 2008); N.M. STAT. § 29-1-16 (Supp. 2008); N.C. GEN. STAT. § 15A-211 (2007); WIS. STAT. ANN. § 972.115 (West 2007). As to the Texas statute, TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2005), *see infra* App. B, n.48.

<sup>10</sup> N.J. R. Ct. R. 3:17.

<sup>11</sup> *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004).

<sup>12</sup> A ruling of the New Hampshire Supreme Court in *State v. Barnett*, 789 A.2d 629 (N.H. 2001), is discussed in Appendix B. *See infra* App. B, n.44. The decision of the Supreme Court of Iowa in *State v. Hajtic*, 724 N.W.2d 449 (Iowa 2007), is discussed *infra* in Part IV.

<sup>13</sup> *See Stephan*, 711 P.2d at 1162; *Scales*, 518 N.W.2d at 592. The ruling in *Scales* is limited to “substantial” violations. *Scales*, 518 N.W.2d at 592.

<sup>14</sup> *See* Sullivan, *supra* note 1, at 1137 n.38 (collecting cases).

overcome if the prosecution proves by clear and convincing evidence that it was voluntary.<sup>15</sup>

In Illinois, custodial statements that are not recorded as required are presumed inadmissible, but the presumption of inadmissibility may be overcome if the prosecution establishes by a preponderance of the evidence that the statement was voluntarily given and is reliable, based upon the totality of the circumstances.<sup>16</sup>

### C. POTENTIAL INADMISSIBILITY COUPLED WITH ALTERNATIVE CAUTIONARY INSTRUCTIONS

The New Jersey Supreme Court Rule provides that an unexcused failure to record a custodial interview is a factor for the trial court to consider in determining the admissibility of testimony describing the interview. If testimony of a defendant's unrecorded statement is admitted, the trial judge is required to give the jury strongly-worded cautionary instructions.<sup>17</sup>

The North Carolina statute requires, with certain exceptions, that custodial interviews in homicide investigations shall be electronically recorded in their entirety, unless the State establishes by clear and convincing evidence that there was good cause for failing to record.<sup>18</sup> An unexcused failure to record shall be considered by the court in deciding a motion to suppress and by the court or jury in support of a claim that the defendant's statement was involuntary or is unreliable. If testimony about the unrecorded interview is admitted before a jury, the judge shall instruct the jurors that they may consider evidence of non-compliance with the

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<sup>15</sup> D.C. CODE ANN. § 5-116.03 (LexisNexis Supp. 2008).

<sup>16</sup> 705 ILL. COMP. STAT. ANN. 405/5-401.5(d)(f) (West 2007) (relating to minors); 725 ILL. COMP. STAT. ANN. 5/103-2.1(d)(f) (West 2007) (relating to adults).

<sup>17</sup> N.J. R. CT. 3:17(d), (e). The instructions state in part:

Where there is a failure to electronically record an interrogation, you have not been provided with a complete picture of all of the facts surrounding the defendant's alleged statement and the precise details of that statement. By way of example, you cannot hear the tone or inflection of the defendant's or interrogator's voices, or hear first hand the interrogation, both questions and answers, in its entirety. Instead you have been presented with a summary based upon the recollections of law enforcement personnel . . . . The absence of an electronic recording permits but does not compel you to conclude that the State has failed to prove that a statement was in fact given and if so, was accurately reported by State's witnesses.

N.J. Judiciary, Criminal Practice Div., Criminal Model Jury Charges, <http://www.judiciary.state.nj.us/criminal/juryindx.htm> (follow "Statements of Defendant—Police Failed to Electronically Record" hyperlink) (last visited Feb. 3, 2009). These instructions have formed the basis for the instructions we propose in our revised model bill.

<sup>18</sup> N.C. GEN. STAT. § 15A-211 (2007).

recording requirement in determining whether the statement was voluntary and reliable.

#### D. CAUTIONARY JURY INSTRUCTIONS

The Wisconsin statute provides that, in a jury case, when an exception to the recording requirement is not applicable, the jurors are to be instructed that it is state policy to make recordings of custodial interviews, and that they may consider the absence of a recording in evaluating the reliability of testimony as to what occurred during the unrecorded interviews. Similarly, in non-jury hearings, the judge may consider the absence of a recording in evaluating the evidence relating to the unrecorded interview.<sup>19</sup>

The Nebraska statute provides that “if a law enforcement officer fails to comply with [the recording law], a court shall instruct the jury that they may draw an adverse inference for the law enforcement officer’s failure to comply with” the law.<sup>20</sup>

In *Commonwealth v. DiGiambattista*, the Supreme Judicial Court of Massachusetts ruled that when prosecution testimony regarding a non-recorded custodial interview is admitted into evidence, the jury is to be instructed that “the State’s highest court has expressed a preference that interrogations be recorded whenever practicable.”<sup>21</sup> The court also held that if the defendant claims the statement was made involuntarily, “the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.”<sup>22</sup>

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<sup>19</sup> WIS. STAT. ANN. § 972.115(d)(2) (West 2007).

<sup>20</sup> NEB. REV. STAT. § 29-4505 (effective July 18, 2008).

<sup>21</sup> *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004).

<sup>22</sup> *Id.* Following this ruling, the state Attorney General and District Attorneys Association wrote in a September 2006 Justice Initiative Report: “Law enforcement officers shall, whenever it is practical and with the suspect’s knowledge, electronically record all custodial interrogations of suspects and interrogations of suspects conducted in places of detention.” MASS. DIST. ATTORNEYS ASS’N, REPORT OF THE JUSTICE INITIATIVE 14 (2006). The Massachusetts Chiefs of Police Association, District Attorneys Association, and State Police distributed a sample “Policy and Procedure” to law enforcement agencies throughout the state. The sample reads: “It is the policy of the department to electronically record all custodial interrogations of suspects or interrogations of suspects conducted in places of detention whenever practical.” MUN. POLICE INST., POLICY & PROCEDURE NO. 2.17, ELECTRONIC RECORDINGS OF INTERROGATIONS 1, <http://www.municipalpoliceinstitute.org/page.php?pageid=68> (follow “2.17 Electronic Recordings of Interrogations.doc” hyperlink) (last visited Feb. 3, 2009).

## E. NO ADVERSE CONSEQUENCES

The Maine, Maryland, and New Mexico statutes provide no adverse consequence for a failure to follow their statutory recording mandates.<sup>23</sup>

## IV. OUR REASONS FOR REVISING OUR MODEL STATUTE BY REMOVING THE PRESUMPTION OF INADMISSIBILITY, AND PROVIDING INSTEAD FOR CAUTIONARY JURY INSTRUCTIONS

Since drafting our original model statute, we have observed the results of these statutes and court rulings on the practices of law enforcement officials in each of the states discussed above, and we have talked with law enforcement officers, prosecutors, and defense lawyers in all fifty states.<sup>24</sup> We have also appeared before several state legislative committees, law enforcement bodies, and legal organizations to discuss why we favor electronic recordings of custodial interviews and state legislation requiring recordings.<sup>25</sup>

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<sup>23</sup> 25 ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (2007); MD CODE ANN. CRIM. PROC. § 2-402 (LexisNexis 2008); N.M. STAT. § 29-1-16 (Supp. 2008).

<sup>24</sup> We have spoken with more than 600 law enforcement officers—most of them detectives and their supervisors—from police and sheriff departments that make it a practice to record custodial interviews in varying felony investigations. Their enthusiasm and support for the practice is virtually unanimous. Our current list of these departments is attached, *infra*, as Appendix B.

<sup>25</sup> *Legislative*: State Legislative Leaders Found., Univ. of Chi. (June 2004); D.C. City Council Judiciary Comm. (Nov. 2004); Mo. General Assembly Comm. (Nov. 2005); Md. House of Delegates Comms. (Mar. 2006, Jan. 2007); Cal. Comm. on Fair Admin. of Justice (June 2006); Nat'l State Legislators' Conf. (Dec. 2006); New Eng. Legislative Comm. (Feb. 2007); Tenn. Legislative Comm. (Dec. 2007); N.Y. Assembly Comms. (Oct. 2005, Apr. 2008); Tenn. Gen. Assembly Study Comm. (Dec. 2007); Pa. Joint State Gov't Comm'n (Mar. and Aug. 2008); Mont. House Judiciary Comm. (Feb. 2009).

*Law Enforcement*: Short Course for Prosecuting Att'ys (July 2004); Nat'l Ass'n of Criminal Defense Lawyers, Conf. (July 2004); Hennepin County Att'y, Minn. Conf. (Feb. 2005); Int'l. Ass'n. of Chiefs of Police, Annual Meeting (Oct. 2006); Mich. Ass'n. of Chiefs of Police Mid-Winter Meeting (Jan. 2007).

*Other*: N.C. Leadership Summit (Mar. 2003); Am. Judicature Soc'y (Jan. 2003, Dec. 2004, Aug. 2006); Am. Acad. of Psychiatry and Law, Midwest Conf. (Apr. 2003); Midwest Sociological Soc'y, Annual Meeting (Apr. 2003); Nat'l Lawyers Ass'n., Annual Convention (July 2003); American Bar Ass'n, Midyear Meeting (Feb. 2004); Center for Policy Alternatives (Dec. 2004); State Bar of Tex. (Feb. 2005, Feb. 2006); Nat'l Ass'n of Criminal Defense Lawyers, Annual State Legislative Conf. (Aug. 2005); Nat'l Instit. of Justice (Sept. 2005); Innocence Project Confs. (Mar., 2006, Mar. and June 2007); Cal. Innocence Project, UCLA (Apr. 2006); Pa. Bar Institute, Annual Symposium (June 2006); John Jay School of Criminal Justice (Mar. 2007); Center for Am. and Int'l Law (Aug. 2008); Uniform Law Comm'rs, Drafting Comm. Meeting (Oct. 2008); Ill. Institute for Continuing Legal Educ. Conf., Defending Ill. Death Penalty Cases in 2008 (Nov. 2008).

Based upon the information we have gathered through these contacts, we have concluded that it is neither wise nor necessary to provide that testimony is inadmissible, or presumed or potentially inadmissible, when a custodial interview should have been, but was not, electronically recorded. The better approach is to allow testimony by both prosecution and defense as to what occurred during the unrecorded interviews, but require that trial judges give jury instructions about the legal requirement of electronically recording custodial interviews, and the superior reliability of recordings as compared to testimony about what was said and done.

Our reasons are these.

*First*, we have concluded that provisions that threaten admissibility of testimony about unrecorded interviews are not necessary in order to achieve compliance with recording laws. So far as we are able to determine, the differences in the consequences for failing to make electronic recordings have not had an impact upon law enforcement agency practices in the states mentioned in Part III.

This is consistent with the enthusiastic support for recording custodial interviews we have heard in our conversations with detectives and their supervisors from small, medium, and large police and sheriff departments in every state. The hundreds of law enforcement officers we have spoken with say that, having given recordings a try, they become enthusiastic supporters of the practice. They record because of the benefits derived, rather than because adverse evidentiary consequences threaten if they fail to record.

When a suspect has confessed or made damaging admissions during a properly conducted electronically recorded custodial interview, the prosecution's case is virtually unassailable. Recordings readily and conclusively refute defense claims that the detectives who conducted the interviews failed to give *Miranda* warnings, used inappropriate tactics to obtain confessions, or are misstating what was said and done during interviews.

Law enforcement personnel also obtain other advantages by recording custodial interviews. A great deal of time is saved by police, prosecutors, and trial judges. Lengthy pretrial and trial hearings about closed-door interrogations, often involving attacks on the integrity of the interviewers, are unnecessary; the tapes contain conclusive evidence as to what took place.

We have also found support for custodial recordings among members of the defense bar because the honesty and sincerity of suspects is often apparent to detectives, and their supervisors, and prosecutors, and helps to prevent unwarranted criminal charges. Another reason that both State and defense personnel support recordings is that officers who tend to abuse their



authority during custodial interviews are weeded out. This has the additional benefit of reducing the incidence of civil suits for money damages.<sup>26</sup>

Additional evidence that a statutory threat of inadmissibility is not needed is illustrated by the reaction of Iowa's chief law enforcement officials after the Iowa Supreme Court's 2007 decision in *State v. Hajtic*.<sup>27</sup> The court expressly declined to direct that custodial interviews be recorded or to order trial judges to give cautionary jury instructions about unrecorded custodial interviews. Rather, the majority opinion stated, "We believe electronic recording, particularly videotaping, of custodial interrogations should be encouraged, and we take this opportunity to do so."<sup>28</sup> This statement prompted the Iowa Attorney General to write in the Iowa State Police Association's publication, "Although the court stated that it is 'encouraging' the practice of electronic recording, the attorney general's office believes that the *Hajtic* decision should be interpreted as essentially requiring this practice."<sup>29</sup>

*Second*, the inclusion of provisions for inadmissibility has proven to be a major stumbling block in achieving enactment of mandatory recording legislation. We, and others who have supported mandatory recording legislation, have encountered strong opposition from police, sheriffs, prosecutors, and their organizations to provisions that threaten admissibility of testimony about confessions and admissions that should have been recorded. They are concerned that felons will either not be charged or will be acquitted for lack of sufficient evidence of guilt.<sup>30</sup>

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<sup>26</sup> At the 2007 mid-winter conference of the Michigan Association of Chiefs of Police, we heard their lawyer endorse recordings of custodial interviews as a way of reducing the threats of civil damage claims that impact the cost of the municipal risk pool. See Gene King, *Why Michigan Police Agencies Should Embrace a Policy to Record Certain Custodial Interrogations*, LAW ENFORCEMENT ACTION F. (Mich. Mun. League, Ann Arbor, Mich.), Oct. 2006, available at [http://www.mmlpool.org/shared/public/publications/leaf\\_newsletter/recording\\_interrogations.pdf?PHPSESSID=efac3ddef2879a36efff464d9937eaf8](http://www.mmlpool.org/shared/public/publications/leaf_newsletter/recording_interrogations.pdf?PHPSESSID=efac3ddef2879a36efff464d9937eaf8).

<sup>27</sup> See *State v. Hajtic*, 724 N.W.2d 449 (Iowa 2006).

<sup>28</sup> *Id.* at 456. The court also stated:

We are aided in our de novo review of this case by a complete videotape and audiotape of the *Miranda* proceedings and the interrogation that followed.

....

This case illustrates the value of electronic recording, particularly videotaping, of custodial interrogations.

*Id.* at 454.

<sup>29</sup> Tom Miller, *Cautions Regarding Custodial Issues*, 39 IOWA POLICE J. 15, 15 (2007).

<sup>30</sup> This calls to mind Justice Benjamin Cardozo's oft-quoted lament, "The criminal is to go free because the constable has blundered." *People v. DeFore*, 150 N.E. 585, 587 (N.Y. 1926).

We acknowledge that there is merit to their concerns, and these concerns carry considerable weight with governors and state legislators as they deliberate the wisdom of mandatory recording legislation. There is, therefore, a greater likelihood of obtaining favorable consideration of state recording statutes if the proposed bills do not contain provisions that potentially prohibit testimony of unrecorded custodial interviews.

#### V. CONCLUSION

These are the considerations that have caused us to alter our model bill by changing the provisions as to the consequences that follow when officers fail to record custodial interviews in violation of the law. Instead of presumed inadmissibility of testimony about those interviews, we have substituted the requirement that instructions be given to jurors drawing attention to the dramatic differences in the value and reliability of testimonial descriptions when compared with electronic recordings of custodial interviews.

## APPENDIX A

## MODEL BILL FOR ELECTRONIC RECORDING OF CUSTODIAL INTERVIEWS

Be it enacted by [insert name of legislating body]:

## SECTION 1: DEFINITIONS.

(a) "Custodial Interview" means an interview conducted by a law enforcement officer for the purpose of investigating violations of law, of a person who is being held in custody in a Place of Detention, when the interview is reasonably likely to elicit responses that may incriminate the person in connection with a felony under the laws of this state.<sup>31</sup>

(b) "Place of Detention" means a jail, police or sheriff's station, holding cell, correctional or detention facility, office, or other structure located in this state, where persons are held in connection with juvenile or criminal charges.<sup>32</sup>

(c) "Electronic Recording" or "Electronically Recorded" means an audio, video and/or digital electronic recording of a Custodial Interview.

(d) "Statement" means an oral, written, sign language, or other nonverbal communication.

## SECTION 2. RECORDINGS REQUIRED.

Except as provided in Section 3, all Custodial Interviews conducted by a law enforcement officer in a Place of Detention shall be Electronically Recorded. The recording shall be an authentic, accurate, uninterrupted, and unaltered record of the interview, beginning with the law enforcement officer's advice of the person's rights, and ending when the interview has completely finished. If a visual recording is made, the camera or cameras shall be simultaneously focused on both the law enforcement interviewer and the suspect.

## SECTION 3. EXCEPTIONS.

A Statement need not be Electronically Recorded if the court finds:

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<sup>31</sup> If fewer than all felonies are to be covered, this provision should be revised by inserting statutory citations to the felonies to be covered.

<sup>32</sup> If it is intended to expand the reach of this bill to include interviews of persons who are in custody outside a Place of Detention, delete § 1(b), and delete the words "in a Place of Detention" from §§ 1(a) and 2.

(a) The interview was a part of a routine processing or “booking” of the person, or routine border inquiries; or

(b) The interview occurred before a grand jury or court; or

(c) Before or during the interview, the person agreed to respond to the law enforcement officer’s questions only if his or her statements were not electronically recorded, and if feasible the person’s agreement was electronically recorded before the interview began; or

(d) After having consulted with his or her lawyer, the person agreed to participate in the interview without an electronic recording being made, and if feasible the person’s agreement was electronically recorded before the interview began; or

(e) The law enforcement officer in good faith failed to make an electronic recording of the interview because he or she inadvertently failed to operate the recording equipment properly, or without his or her knowledge the recording equipment malfunctioned or stopped operating; or

(f) The interview was conducted outside this state by officials of another state, country, or jurisdiction in compliance with the law of that place, without involvement of or connection to a law enforcement officer of this state; or

(g) The law enforcement officer who conducted the interview, or his superior, reasonably believed that the making of an electronic recording would jeopardize his safety or the safety of the person to be interviewed, or another person, or the identity of a confidential informant, and if feasible an explanation of the basis for that belief was electronically recorded before the interview began; or

(h) The interviewing law enforcement officer reasonably believed that the crime for which the person was taken into custody and being investigated or questioned was not related to a crime referred to in Section 1(a); or

(i) Exigent circumstances existed which prevented the law enforcement officer from making, or rendered it not feasible to make, an electronic recording of the interview, and if feasible an explanation of the circumstances was electronically recorded before the interview began; or

(j) The Statement is offered as evidence solely to impeach or rebut the person’s prior testimony, and not as substantive evidence.

#### SECTION 4. CAUTIONARY JURY INSTRUCTIONS.

In the event the prosecution offers an unrecorded Statement into evidence that was required to be Electronically Recorded by the provisions of Section 2, and the court finds the prosecutor has not established by a preponderance of the evidence that an Exception listed in Section 3 is

applicable, the trial judge shall, upon request of the defendant, provide the jury with the following cautionary instructions, with changes that are necessary for consistency with the evidence:

“The law of this state required that the interview of the defendant by law enforcement officers which took place on [insert date] at [insert place] was to be electronically recorded, from beginning to end. The purpose of this requirement is to ensure that you jurors will have before you a complete, unaltered, and precise record of the circumstances under which the interview was conducted, and what was said and done by each of the persons present.

“In this case, the interviewing law enforcement agents failed to comply with that law. They did not make an electronic recording of the interview of the defendant. No justification for their failure to do so has been presented to the court. Instead of an electronic recording, you have been presented with testimony as to what took place, based upon the recollections of law enforcement personnel [and the defendant].

“Accordingly, I must give you the following special instructions about your consideration of the evidence concerning that interview.

“Because the interview was not electronically recorded as required by our law, you have not been provided the most reliable evidence as to what was said and done by the participants. You cannot hear the exact words used by the participants, or the tone or inflection of their voices.

“Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that what was said and done has been accurately reported by the participants, including testimony as to statements attributed by law enforcement witnesses to the defendant.”

#### SECTION 5. HANDLING AND PRESERVATION OF ELECTRONIC RECORDINGS.

(a) Every Electronic Recording of a Custodial Interrogation shall be clearly identified and catalogued by the agency of the recording law enforcement personnel.

(b) If a juvenile or criminal proceeding is brought against a person who was the subject of an Electronically Recorded Custodial Interrogation, the recording shall be preserved by the agency of the recording law enforcement personnel until all appeals, post-conviction, and habeas corpus proceedings are final and concluded, or the time within which they must be brought has expired.

(c) If no juvenile or criminal proceeding is brought against a person who has been the subject of an Electronically Recorded Custodial Interrogation, the recording shall be preserved by the agency of the

recording law enforcement personnel until all applicable federal and state statutes of limitations bar prosecution of the person.

SECTION 6. EFFECTIVE DATE.

This Act shall take effect on [insert date].

## APPENDIX B

DEPARTMENTS THAT CURRENTLY  
RECORD A MAJORITY OF CUSTODIAL INTERROGATIONS

PD stands for Police Department, DPS for Department of Public Safety, and CS for County Sheriff.

STATE	DEPARTMENTS
Alabama	Mobile CS; Mobile PD; Prichard PD
Alaska	All departments—Supreme Court ruling <sup>33</sup>
Arizona	Casa Grande PD; Chandler PD; Coconino CS; El Mirage PD; Flagstaff PD; Gila CS; Gilbert PD; Glendale PD; Marana PD; Maricopa CS; Mesa PD; Oro Valley PD; Payson PD; Peoria PD; Phoenix PD; Pima CS; Pinal CS ; Prescott PD; Scottsdale PD; Sierra Vista PD; Somerton PD; South Tucson PD; Surprise PD; Tempe PD; Tucson PD; Yavapai CS; Yuma CS; Yuma PD
Arkansas <sup>34</sup>	AR State PD; Eureka Springs PD; Fayetteville FD; Fayetteville PD; 14th Judicial District Drug Task Force; Washington CS; Van Buren PD
California	Alameda CS; Arcadia PD; Auburn PD; Bishop PD; Butte CS ; Carlsbad PD; Contra Costa CS; El Cajon PD; El Dorado CS; Escondido PD; Folsom PD; Grass Valley PD; Hayward PD; LaMesa PD; Livermore PD; Oceanside PD; Orange CO Fire Authority; Orange CS; Placer CS ; Pleasanton PD; Rocklin PD; Roseville PD; Sacramento CS; Sacramento PD; San Bernardino CS ; San Diego PD; San Francisco PD; San Joaquin CS; San Jose PD; San Leandro PD; San Luis PD; Santa Clara CS; Santa Clara PD; Santa Cruz PD; Stockton PD; Sunnyvale DPS; Union City PD; Vallejo PD; Ventura

<sup>33</sup> *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985).

<sup>34</sup> In *Clark v. State*, the Arkansas Supreme Court rejected the defendant's argument that she had a constitutional right to have the police make a complete recording of her custodial interview. However, the court stated, "[W]e believe that the criminal-justice system will be better served if our supervisory authority is brought to bear on this issue. We therefore refer the practicability of adopting such a rule to the Committee on Criminal Practice for study and consideration." No. 07-1276, 2008 WL 4378096 (Ark. Sept. 25, 2008) (citing *State v. Cook*, 847 A.2d 530 (N.J. 2004)).

	CS; West Sacramento PD; Woodland PD; Yolo CS
<b>Colorado</b>	Arvada PD; Aurora PD; Boulder PD; Brighton PD; Broomfield PD; Colorado Springs PD; Commerce City PD; Cortez PD; Denver PD; El Paso CS; Ft. Collins PD; Lakewood PD; Larimer CS; Logan CS ; Loveland PD; Montezuma CS; Sterling PD; Thornton PD
<b>Connecticut</b> <sup>35</sup>	Bloomfield PD; Cheshire PD; CT State PD Internal Affairs Unit
<b>Delaware</b>	DE State PD; New Castle City PD; New Castle County PD
<b>District of Columbia</b>	All departments—statute <sup>36</sup>
<b>Florida</b>	Broward CS; Cape Coral PD; Collier CS; Coral Springs PD; Daytona Beach PD; Ft. Lauderdale PD; Ft. Myers PD; Hallandale Beach PD; Hialeah PD; Hollywood PD; Key West PD; Kissimmee PD; Lee CS; Manatee CS; Margate PD; Miami PD; Monroe CS; Mount Dora PD; Orange CS; Osceola CS; Palatka PD; Pembroke Pines PD; Pinellas CS; Port Orange PD; Sanibel PD; St. Petersburg PD
<b>Georgia</b>	Atlanta PD; Centerville PD; Cobb County PD; DeKalb County PD; Fulton County PD; Gwinnett County PD; Houston CS; Macon PD; Perry PD; Savannah-Chatham PD; Warner Robins PD
<b>Hawaii</b>	Honolulu PD
<b>Idaho</b>	Ada CS; Blaine CS; Boise City PD; Bonneville CS; Caldwell PD; Canyon CS; Cassia CS; Coeur d'Alene PD; Garden City PD; Gooding CS; Gooding PD; Hailey PD; ID Dept Fish & Games; ID Falls PD; ID State PD; Jerome CS; Jerome PD; Ketchum PD; Lincoln CS; Meridian PD; Nampa PD; Pocatello PD; Post Falls PD; Twin Falls PD
<b>Illinois</b>	<b>All departments:</b> homicides—statute <sup>37</sup> <b>Other felonies:</b> Bloomington PD; Cahokia PD; Caseyville PD; Dixon PD; DuPage CS; East St. Louis PD; Fairview Heights PD; Galena PD; Kankakee CS;

<sup>35</sup> In 2008, a Connecticut statute was enacted establishing a Commission on Wrongful Convictions, which is to report its findings and recommendations by July 1, 2009 to the General Assembly, including an evaluation of the implementation of “the pilot program to electronically record the interrogations of arrested persons.” 2008 Conn. Legis. Serv. P.A. 08-143 (H.B. 5933) (WEST).

<sup>36</sup> D.C. CODE ANN. §§ 5-116.01-03 (LexisNexis Supp. 2008).



	Kankakee PD; Macon CS; Naperville PD; O'Fallon PD; Rockton PD; St. Clair CS; Swansea PD; Winnebago CS
<b>Indiana</b>	Albion PD; Allen CS; Atlanta PD; Auburn PD; Carmel PD; Cicero PD; Clark CS; Clarksville PD; Columbia City PD; Dyer PD; Elkhart CS; Elkhart PD; Fishers PD; Floyd CS; Fort Wayne PD; Greensburg PD; Hamilton CS; Hancock CS; Hartford PD; IN State PD; Jeffersonville PD; Johnson CS; Kendallville PD; LaGrange CS; Lowell PD; Montpelier PD; Nappanee PD; Noble CS; Noblesville PD; Schererville PD; Sheridan PD; Shippshewana PD; Steuben CS; Tipton PD; Westfield PD
<b>Iowa</b> <sup>38</sup>	Altoona PD; Ames PD; Ankeny PD; Arnolds Park PD; Benton CS; Bettendorf PD; Cedar Rapids PD; Council Bluffs PD; Davenport PD; Des Moines PD; Fayette CS; Fayette County PD; Iowa City PD; Iowa DPS; Johnson CS; Kossuth CS; Linn CS; Marion PD; Marshalltown PD; Muscatine PD; Nevada PD; Parkersburg PD; Polk CS; Pottawattamie CS; Sioux City PD; Vinton PD; Waterloo PD; Waverly PD; Woodbury CS
<b>Kansas</b>	Kansas Univ. DPS; Liberal PD; Ottawa PD; Sedgwick CS; Wichita PD
<b>Kentucky</b>	Elizabethtown PD; Hardin CS; Jeffersontown PD; Louisville Metro PD; Louisville PD; Oldham CS; St. Matthews PD
<b>Louisiana</b>	Lafayette City PD; Lake Charles PD; Oak Grove PD; Plaquemines Parish CS; St. Tammany Parish CS
<b>Maine</b>	All departments—statute <sup>39</sup>
<b>Maryland</b>	All departments—statute <sup>40</sup>

<sup>37</sup> 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West 2007); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2007); 720 ILL. COMP. STAT. ANN. 5/14-3(k) (West Supp. 2008).

<sup>38</sup> Following the ruling of the Iowa Supreme Court in *State v. Hajtic*, 724 N.W.2d 449 (Iowa 2006), the Attorney General wrote in the State Police Association's publication: "Although the court stated that it is 'encouraging' the practice of electronic recording, the attorney general's office believes that the *Hajtic* decision should be interpreted as essentially requiring this practice." Miller, *supra* note 29, at 15.

<sup>39</sup> ME REV. STAT. ANN. title 25, § 2803-B(1)(K) (2007).

<sup>40</sup> The Maryland Code of Criminal Procedure directs that law enforcement units shall make "reasonable efforts" to create a recording of custodial interviews of suspects in connection with cases involving named felonies "whenever possible." MD CODE ANN. CRIM. PROC. § 2-401-04 (LexisNexis 2008).

<b>Massachusetts</b> <sup>41</sup>	Barnstable PD; Boston PD; Bourne PD; Brewster PD; Cambridge; Chatham PD; Dennis PD; Easton PD; Edgartown PD; Fall River PD; MA State PD; North Central Correctional Inst.; Oak Bluffs PD; Orleans PD; Pittsfield PD; Revere Fire Dept.; Somerset PD; Tewksbury PD; Troro PD; West Tisbury PD; Yarmouth PD
<b>Michigan</b>	Auburn Hills PD; Benzie CS; Big Rapids DPS; Bloomfield Hills DPS; Cass County Drug Enforcement Team; Cass County CS; Charlevoix CS; Detroit PD (homicides); Emmet CS; Farmington DPS; Gerrish Township PD; Gladwin PD; Huntington Woods DPS; Isabella CS; Kent CS; Kentwood PD; Lake CS; Ludington PD; Manistee CS; Mason CS; Mecosta CS; MI State PD; Milford PD; Mt. Pleasant PD; Novi PD; Oak Park DPS; Onaway PD; Paw Paw PD; Redford Township PD; Scottville PD; Troy PD; Waterford PD; West Branch PD
<b>Minnesota</b>	All departments—Supreme Court ruling <sup>42</sup>
<b>Mississippi</b>	Biloxi PD; Cleveland PD; Gulfport PD; Harrison CS; Jackson CS
<b>Missouri</b>	Lake Area Narcotics Enforcement Group; Platte CS; St. Louis County Major Case Squad; St. Louis County PD
<b>Montana</b>	Billings PD; Bozeman PD; Butte/Silverbow LED; Cascade CS; Flathead CS; Gallatin CS; Great Falls PD; Helena PD; Kalispell PD; Lewis & Clark CS; Missoula PD; Missoula CS
<b>Nebraska</b>	All departments—statute <sup>43</sup>
<b>Nevada</b>	Boulder City PD; Carlin PD; Douglas CS; Elko CS; Elko PD; Henderson PD; Lander CS; Las Vegas Metro

<sup>41</sup> Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533-34 (Mass. 2004). Following this ruling, the state Attorney General and District Attorneys Association wrote in a September 2006 Justice Initiative Report: “Law enforcement officers shall, whenever it is practical and with the suspect’s knowledge, electronically record all custodial interrogations of suspects and interrogations of suspects conducted in places of detention.” MASS. DIST. ATTORNEYS ASS’N, *supra* note 22, at 14. The Chiefs of Police Association, District Attorneys Association, and State Police distributed a sample “Policy and Procedure” to law enforcement agencies throughout the state, which states: “It is the policy of the department to electronically record all custodial interrogations of suspects or interrogations of suspects conducted in places of detention whenever practical.” MUN. POLICE INST., *supra* note 22, at 1.

<sup>42</sup> State v. Scales, 518 N.W.2d 587, 591-92 (Minn. 1994).

<sup>43</sup> NEB. REV. STAT. § 29-4501-4508 (effective July 18, 2008).

	PD; Nevada DPS; North Las Vegas PD; Reno PD; Sparks PD; Washoe CS; Wells PD; Yerington PD
<b>New Hampshire</b> <sup>44</sup>	Carroll CS; Concord PD; Conway PD; Enfield PD; Keene PD; Laconia PD; Lebanon PD; Nashua PD; NH State PD; Plymouth PD; Portsmouth PD; Swanzey PD
<b>New Jersey</b>	All departments—Supreme Court Rule <sup>45</sup>
<b>New Mexico</b>	All departments—statute <sup>46</sup>
<b>New York</b>	Binghamton PD; Broome CS; Cayuga Heights PD; Delaware CS; Deposit PD; Dryden PD; Endicott PD; Greece PD; Glenville PD; Irondequoit PD; NY State PD— Ithaca; NY State PD— Oneonta; NY State PD— Sidney; Rotterdam PD; Schenectady PD; Tompkins CS; Vestal PD
<b>North Carolina</b>	All departments: homicides—statute <sup>47</sup> Other felonies: Burlington PD; Concord PD; Wilmington PD
<b>North Dakota</b>	Bismarck PD; Burleigh CS; Fargo PD; Grand Forks CS; Grand Forks PD; Valley City PD
<b>Ohio</b>	Akron PD; Brown CS; Cincinnati PD; Columbus PD; Dawson CS; Dublin PD; Franklin PD; Garfield Heights PD; Grandview Heights PD; Grove City PD; Hartford PD; Hudson PD; Millersburg PD; OH Board of Pharmacy; OH State Univ. PD; Ontario PD; Reynoldsburg PD; Upper Arlington PD; Wapakoneta PD; Warren CS; Westerville PD; Westlake PD; Worthington PD
<b>Oklahoma</b>	Moore PD; Norman PD; Oklahoma CS; Tecumseh PD
<b>Oregon</b>	Bend PD; Clackamas CS; Coburg PD; Douglas CS; Eugene PD; Lincoln City PD; Medford PD; Ontario PD; OR State PD, Springfield; Portland PD; Roseburg PD; Salem PD; Warrenton PD; Yamhill CS

<sup>44</sup> In *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2001), the New Hampshire Supreme Court held that if an electronically recorded statement is offered into evidence, the recording is admissible only if the entire post-*Miranda* interrogation interview was recorded. The ruling does not require that custodial interviews be recorded either in whole or in part. *Id.* at 632. Further, if a partially recorded statement is excluded from evidence because the entire interview was not recorded, testimonial evidence is nevertheless admissible as to what occurred before, during, and after the custodial interview, including the portion that was recorded. *Id.* at 632-33.

<sup>45</sup> N.J. R. Ct. 3:17.

<sup>46</sup> N.M. STAT. § 29-1-16 (Supp. 2008).

<sup>47</sup> N.C. GEN. STAT. § 15A-211 (2007).

<b>Pennsylvania</b>	Bethlehem PD; Whitehall PD
<b>Rhode Island</b>	Woonsocket PD
<b>South Carolina</b>	Aiken CS; Aiken DPS; N. Augusta DPS; Savannah River Site Law Enf.
<b>South Dakota</b>	Aberdeen PD; Brown CS; Clay CS; Lincoln CS; Mitchell PD; Sioux Falls PD; SD State Div. of Criminal Investigations; Vermillion PD
<b>Tennessee</b>	Blount CS; Bradley CS; Brentwood PD; Chattanooga PD; Cleveland PD; Goodlettsville PD; Hamilton CS; Hendersonville PD; Loudon CS; Montgomery CS; Murfreesboro PD; Nashville PD
<b>Texas</b> <sup>48</sup>	Abilene PD; Arlington PD; Austin PD; Burleson PD; Cedar Park PD; Cleburne PD; Collin CS; Corpus Christi PD; Dallas PD; Duncanville PD; Florence PD; Frisco PD; Georgetown PD; Granger PD; Harris CS; Houston PD ; Hutto PD; Irving PD; Johnson CS; Killeen PD; Leander PD; Midland PD; Parker CS; Plano PD; Randall CS; Richardson PD; Round Rock PD; San Antonio PD; San Jacinto CS; Southlake DPS; Sugar Land PD; Taylor PD; Travis CS; Webster PD; Williamson CS
<b>Utah</b> <sup>49</sup>	Layton PD; Salt Lake City PD; Salt Lake CS; Utah CS
<b>Vermont</b>	Burlington PD; Norwich PD; Rutland PD
<b>Virginia</b>	Alexandria PD; Chesterfield County PD; Clarke CS; Loudoun CS; Richmond PD
<b>Washington</b>	Adams CS; Arlington PD; Bellevue PD; Bothell PD; Buckley PD; Columbia CS; Ellesburg PD; Federal Way PD; Kennewick PD; Kent City PD; King CS; Kirkland

<sup>48</sup> The Texas Code of Criminal Procedure provides that a defendant's oral statement is inadmissible if it is not recorded, unless the statement "contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused . . . ." TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2005); see *Moore v. State*, 999 S.W.2d 385, 400 (Tex. Crim. App. 1999). The statute requires neither recording of custodial interviews preceding recorded statements nor exclusion of suspects' unrecorded written statements. See *Rae v. State*, No. 01-98-00283-CR, 2001 WL 125977, at \*3 (Tex. App. Feb. 15, 2001); *Franks v. State*, 712 S.W.2d 858, 860 (Tex. App. 1986).

<sup>49</sup> The Utah Attorney General has adopted a Best Practices Statement, endorsed by all state law enforcement agencies, recommending that custodial interrogations in a fixed place of detention of persons suspected of committing a statutory violent felony should be electronically recorded from the *Miranda* warnings to the end in their entirety. Various exceptions to the requirement are included. OFFICE OF THE ATTORNEY GEN., STATE OF UTAH, BEST PRACTICES STATEMENT FOR LAW ENFORCEMENT (2008), available at [http://attorneygeneral.utah.gov/cmsdocuments/Electronic\\_Recording.pdf](http://attorneygeneral.utah.gov/cmsdocuments/Electronic_Recording.pdf).

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	PD; Kittitas CS; Klickitat CS; Lewis CS; Marysville PD; Mercer Island PD; Mount Vernon PD; Pierce CS; Prosser PD; Snohomish CS; Thurston CS; Univ. WA PD; Walla Walla PD; WA State Patrol; Yakima CS
<b>West Virginia</b>	Charles Town PD; Morgantown PD; Wheeling PD
<b>Wisconsin</b>	All departments—statute <sup>50</sup>
<b>Wyoming</b>	Cheyenne PD; Gillette City PD; Laramie CS; Laramie PD

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<sup>50</sup> WIS. STAT. ANN. §§ 968.073, 972.115 (West 2007).