

SUMMARIES AND TEXT OF STATUTES AND CASES

Following are summaries of the currently enacted statutes and supreme court rulings relating to electronic recording of custodial interrogations. Appendices 1 through 8 contain the full text of the statutes that require custodial recordings.

ALASKA

In *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985), the Supreme Court held that the Alaska Constitution's Due Process Clause requires law enforcement officers to record custodial interrogations that occur at a police station whenever recording is feasible. The unexcused failure to record a statement will result in its exclusion as evidence. Later cases have fleshed out various aspects of this rule.

I am told that the Alaska police have complied with the Supreme Court's rulings.

DISTRICT OF COLUMBIA (Appendix 1)

In 2005, the City Council enacted a law requiring the Metropolitan Police Department to electronically record in their entirety, and to the greatest extent feasible, custodial interrogations of persons suspected of committing a crime of violence as defined in the District of Columbia Code, when the interrogation takes place in the Metropolitan Police Department interview rooms equipped with electronic recording equipment. D.C. Code Ann. §§ 5-116.01 to 5-116.03 (West 2007). An exception is provided if the suspect announces he will speak with the officer only if the interrogation is not recorded. A statement obtained from an accused in violation of the law is subject to a rebuttable presumption that it is involuntary, which may be overcome only if the prosecution proves by clear and convincing evidence that the statement was voluntarily given.

As authorized by the law, the Chief of Police issued a General Order in February 2006, which contains detailed provisions for the conduct of recorded interviews, including a requirement that recordings be by both audio and video, and specifying the crimes for which recordings are required. The police are not required to inform the suspect that a recording is being made. However, if a suspect requests that the interview not be recorded, the request must be recorded, and then the recording may be ended. Provisions are included regarding the handling of persons who are deaf or non-English speakers.

ILLINOIS (Appendix 2)

In 2003, the Illinois General Assembly enacted statutes requiring “electronic recordings” (defined) of “custodial interrogations” (defined) in “places of detention” (defined) of both minors and adults (two separate statutes). 705 Ill. Comp. Stat. Ann. § 405/5-401.5 (West 2007); 725 Ill. Comp. Stat. Ann.

§ 5/103-2.1 (2007). The statutes provide that an unrecorded statement made as a result of a custodial interrogation at a place of detention shall be presumed inadmissible against the accused in prosecutions under named sections of the Illinois Criminal Codes relating to homicides. In 2005, the statutes were amended to include homicides covered in the Illinois Vehicle Code.

If the trial judge finds by a preponderance of the evidence that the defendant was subjected to a custodial interrogation in violation of the applicable statute, any statements made by the defendant during or following the non-recorded interrogation are presumed inadmissible, except for purposes of impeachment. There are nine exceptions to the recording requirement, which the State has the burden of proving by a preponderance of the evidence, including an exception for statements made by suspects who request on a recording that no recording be made.

The presumption of inadmissibility may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances.

The Illinois Eavesdropping Act was amended to provide that officers need not notify suspects that statutorily required electronic recordings will be made. *See* 720 Ill. Comp. Stat. Ann. § 5/14-3(k) (West 2007). Provisions were also made in separate statutes for training and funding. *See* 20 Ill. Comp. Stat. Ann. § 3930/7.5 (West 2007); 50 Ill. Comp. Stat. Ann. § 705/10.3 (West 2007).

IOWA

In *State v. Hajtic*, 724 N.W.2d 449 (Iowa 2007), the Supreme Court of Iowa upheld felony convictions based in large part upon a stationhouse confession that was videotaped from beginning to end. In dicta, the Court explained the helpfulness of the videotape to its review, and went on to say, “In the post-

DNA age...police officers may have to start recording interrogations as a matter of self-preservation. Their failure to do so will...breed distrust and cause a strain in their relations with the public....We believe electronic recording, particularly videotaping, of custodial interrogations should be encouraged, and we take this opportunity to do so.”

Soon after the opinion was released, the Attorney General of Iowa wrote 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.”

MAINE (Appendix 3)

In 2005, the Maine legislature enacted a statute requiring all law enforcement agencies to adopt written policies regarding procedures governing digital, electronic, audio, video or other

recording of law enforcement interviews of suspects in “serious crime.” Me. Rev. Stat. Ann. tit. 25, § 2803-B (West 2007). The statute required the Board of Trustees of the Maine Criminal Justice Academy to establish, by January 1, 2005, minimum standards for law enforcement agencies relating to electronic recording. By January 1, 2006, the chief administrative officer of each law enforcement agency was to certify to the Board that the agency had adopted written policies consistent with the minimum standards established by the Board for officer orientation and training with respect to policies regarding the recording and preservation of interview of suspects in serious crimes. The Board must annually review the minimum standards, to determine whether changes are necessary to incorporate improved procedures identified by critiquing known, actual events and new enforcement practices that have been

demonstrated to reduce crime, or increase officer or public safety.

In February 2005, the Board adopted a General Order establishing guidelines and procedures for recording custodial interrogations. The guidelines defined “custodial interrogation,” “recording,” and “place of detention,” and specified which were considered “serious crimes.” The guidelines provide that a recording shall be made of any custodial interrogation conducted by an officer at a place of detention relating to any of the listed “serious crimes,” and provide five exceptions to the recording requirement, as well as procedures in the event the suspect is not fluent in English.

The Director of the Board has advised me that all Maine police departments have submitted their written policies, a majority of which are taken verbatim from the Board’s model policy, and that most departments have submitted reports (due

January 31, 2007) that their officers have received the requisite training, and that the agencies have complied with the Board's other mandated policies.

MASSACHUSETTS (Appendix 4)

In *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004), the Supreme Judicial Court held that when statements from unrecorded custodial interrogations are admitted into evidence, the trial judge must instruct the jury that “the State’s highest court has expressed a preference that [custodial] interrogations be recorded whenever practicable.” *Id.* at 533. If the defendant claims that the statement was made involuntarily, the instruction must also state that the jury may (but need not) conclude from the police’s failure to record the interrogation that the State has not met its burden of proof that the statement was made voluntarily.

Following this ruling, the MA Attorney General and District Attorneys Association wrote in a Sept. 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.” Sample regulations concerning electronic recording of custodial interrogations have been distributed to local law enforcement agencies by the Massachusetts Association of Chiefs of Police and the Massachusetts Municipal Police Institute.

MINNESOTA

In *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994), the Supreme Court, exercising its “supervisory power to insure the fair administration of justice,” held that, where feasible, all custodial interviews shall be electronically recorded, and “must be recorded where questioning occurs at a place of detention,”

beginning with the *Miranda* warnings. The Court ruled that unrecorded statements will be excluded from evidence if the violation of the recording requirement is “substantial.” *Id.* at 592. In a number of cases, the Supreme Court has been called upon to expand upon and explain the *Scales* holding.

I am informed that Minnesota law enforcement agencies have complied with the court’s rulings.

NEW HAMPSHIRE

In *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2001), the Supreme Court held that an electronically recorded final statement offered into evidence by the State is admissible only if the entire post-*Miranda* interrogation session was recorded.

This is a very limited ruling: it does not require that all custodial interrogations be recorded, nor that final statements be recorded at all, to be admissible.

NEW JERSEY (Appendix 5)

Following its decision in *State v. Cook*, 847 A.2d 530 (N.J. 2004), the Supreme Court appointed a committee to study and make recommendations on rules for recording custodial interviews. In 2005, pursuant to the Committee's recommendations, the Court adopted Rule 3:17, which became effective January 1, 2006 as to homicides, and January 1, 2007 as to other specified offenses.

The rule provides that all custodial interrogations conducted in a "place of detention" (defined) must be electronically recorded when the suspect is charged with named crimes, unless a stated exception applies. There are seven exceptions that excuse recording. If the State intends to offer an unrecorded statement into evidence under an exception, a pretrial hearing is to be held, at which the State has the burden

of proving, by a preponderance of the evidence, that an exception is applicable.

The failure to record is a factor for consideration by the trial court in determining the admissibility of an unrecorded statement, and for the jury in determining both whether the statement was made, and what weight to give to it. In jury trials, if the trial judge admits a statement into evidence that has not been recorded as required by the rule, upon the defendant's request the judge must provide the jury with certain cautionary instructions, attached to the rule, which contain strong language concerning the benefits of recordings, compared to testimony about unrecorded statements.

NEW MEXICO (Appendix 6)

In 2005, the legislature enacted a statute (effective January 1, 2006), which provides that a state or local law enforcement officer who is conducting a “custodial interrogation” (defined),

when reasonably able to do so, shall make an “electronic recording” (defined) of the interrogation in its entirety, if, at the time of the interrogation, the person is suspected of committing a felony. N.M. Stat. Ann. § 29-1-16 (West 2007). If the interrogation is conducted in a police station, it shall be recorded by a method that includes audio or video or both. The recording shall include the advice of constitutional rights required by law. The recording requirement is excused if the officer has good cause not to electronically record the entire interrogation and makes a contemporaneous written record of the reasons; examples of “good cause” are given. The requirements do not apply to statements that are spontaneously volunteered, or to statements used for impeachment, or to custodial interrogations conducted outside New Mexico, or within a correctional facility.

The statute provides that it shall not be construed to exclude otherwise admissible evidence in any judicial

proceeding. I have been told that this provision was inserted because of rulings by the New Mexico Supreme Court that only the judiciary may determine the admissibility of evidence. I am also advised that although the Supreme Court has not adopted a rule with respect to the consequences of a failure to record as required by the statute, law enforcement agencies in New Mexico are complying with the statutory requirements.

NORTH CAROLINA (Appendix 7)

In 2007, North Carolina adopted a statute, effective March 1, 2008, requiring that, as to “custodial interrogations in homicide investigations conducted at any place of detention,” the officers “shall make an electronic recording of the interrogation in its entirety.” N. C. Stat. § 15A--211. Provisions are made for good cause failures to record, including that the suspect refused to have the interview recorded, and unforeseeable equipment failure and obtaining replacement

equipment was not feasible. If there is a failure to comply with the statute, the trial judge is directed to consider the failure in ruling on motions to suppress statements made during or after the custodial interrogation; failure to comply with the statute “shall be admissible in support of claims that the statement was involuntary or is unreliable”; and the jury shall be instructed that it may consider credible evidence of noncompliance in determining whether the defendant’s statement was voluntary and reliable. The statute provides various circumstances in which the recording requirement is inapplicable, and contains provisions for preservation of recordings until one year after all post-conviction proceedings have ended.

TEXAS

The Texas Code of Criminal Procedure provides that no statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a

criminal proceeding unless an electronic recording is made of the statement, including the so-called *Miranda* warnings. *See* Tex. Code Crim. Pro. Art. 38.22 (West 2007). The statute does not apply to any statement that contains assertions of facts of circumstances that are found to be true, and which conduce to establish the guilt of the accused, and to five other specified circumstances. Those circumstances include statements that were obtained in compliance with the laws of another state where the statement was made, or that were obtained by a federal law enforcement officer in Texas in compliance with the laws of the United States.

The Texas Court of Criminal Appeals has limited the reach of this statute, by holding that it does not require recordings to be made of suspects' statements other than the statements offered into evidence. Thus, unrecorded statements made

preceding or following a recorded statement do not affect the admissibility of the recorded statement.

WISCONSIN (Appendix 8)

Following the decision of the Supreme Court in *In re Jerrell C. J.*, 699 N.W.2d 110 (Wis. 2005), the legislature enacted a statute, effective January 1, 2006, which provides that if an unrecorded statement made by a defendant during a “custodial interrogation” (defined) is admitted into evidence in a felony jury trial, the court shall instruct the jury that it is the policy of the state to make an audio or video recording of custodial interrogations of persons suspected of committing a felony. Wis. Stat. Ann. § 972.115 (West 2007). The jury must also be told that it may consider the absence of the recording in evaluating the evidence relating to the interrogation and the statement. There are six exceptions to the recording requirement, including that exigent public safety circumstances

existed that prevented the making of a recording or rendered the making of a recording infeasible. A separate statute provides that the officer conducting a custodial interrogation is not required to inform the suspect that a recording is being made.

Wis. Stat. Ann. § 968.073 (West 2007).

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Appendix 1

District of Columbia

D.C. Code § 5-116.01

D.C. Code § 5-116.02

D.C. Code § 5-116.03

General Order SPT-304-16

DC ST § 5-116.01

C

DISTRICT OF COLUMBIA OFFICIAL CODE 2001 EDITION

DIVISION I. GOVERNMENT OF DISTRICT.

TITLE 5. POLICE, FIREFIGHTERS, AND CHIEF MEDICAL EXAMINER.

CHAPTER 1. METROPOLITAN POLICE.

SUBCHAPTER VIII-A. ELECTRONIC RECORDING PROCEDURES.

→§ 5-116.01. Procedures for electronic recording of interrogations.

(a)(1) The Metropolitan Police Department shall electronically record, in their entirety, and to the greatest extent feasible, custodial interrogations of persons suspected of committing a crime of violence, as that term is defined in § 23-1331(4), when the interrogation takes place in Metropolitan Police Department interview rooms equipped with electronic recording equipment.

(2) The recording required by paragraph (1) of this subsection shall commence with the first contact between the suspect and law enforcement personnel once the suspect has been placed in the interview room and shall include all subsequent contacts between the suspect and law enforcement personnel in the interview room.

(3) Nothing in this subsection shall prevent the Metropolitan Police Department from recording the actions of the suspect while law enforcement personnel are not in the interview room.

(b) The recording required by subsection (a) of this section shall include the giving of any warnings as to rights required by law, the response of the suspect to such warnings, and the consent, if any, of the suspect to the interrogation. If the required warnings have been given prior to placing the suspect in the interview room, the suspect shall be asked to affirm that he was informed of and waived those rights.

(c)(1) If, after a suspect has been given the warnings as to rights required by law and voluntarily waived such rights, the suspect announces that the suspect will voluntarily speak with law enforcement personnel only on the express condition that the interrogation not be further recorded, the remainder of the interrogation need not be recorded. In such a case, the giving of any warnings, the suspect's response, the suspect's conditional consent, and all events preceding the conditional consent shall be recorded.

(2) Law enforcement personnel shall not expressly or implicitly encourage the suspect to give such conditional consent in lieu of a completely recorded interrogation.

Current through December 3 , 2006

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DC ST § 5-116.02

DISTRICT OF COLUMBIA OFFICIAL CODE 2001 EDITION
DIVISION I. GOVERNMENT OF DISTRICT.
TITLE 5. POLICE, FIREFIGHTERS, AND CHIEF MEDICAL EXAMINER.
CHAPTER 1. METROPOLITAN POLICE.
SUBCHAPTER VIII-A. ELECTRONIC RECORDING PROCEDURES.

→§ 5-116.02. Authority to establish additional procedures.

The Chief of Police may issue a General Order establishing additional procedures, not inconsistent with those prescribed in § 5-116.01, for the electronic recording of interrogations by the Metropolitan Police Department.

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DC ST § 5-116.03

C

DISTRICT OF COLUMBIA OFFICIAL CODE 2001 EDITION
DIVISION I. GOVERNMENT OF DISTRICT.
TITLE 5. POLICE, FIREFIGHTERS, AND CHIEF MEDICAL EXAMINER.
CHAPTER 1. METROPOLITAN POLICE.
SUBCHAPTER VIII-A. ELECTRONIC RECORDING PROCEDURES.

→ § 5-116.03. Evidentiary presumption.

Any statement of a person accused of a criminal offence in the Superior Court of the District of Columbia that is obtained in violation of § 5-116.01 shall be subject to the rebuttable presumption that it is involuntary. This presumption may be overcome if the prosecution proves by clear and convincing evidence that the statement was voluntarily given.

Current through December 3 , 2006

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GENERAL ORDER



DISTRICT OF COLUMBIA

Subject

Electronic Recording of Custodial Interrogations

Topic	Series	Number
SPT	304	16

Effective Date

February 2, 2006

Replaces

GO-SPT-304.16 (Electronic Recording of Custodial interrogations), dated January 31, 2005

Rescinds

TT #02-007-05, dated February 2, 2005

TT #02-009-05, dated February 1, 2005

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I. BACKGROUND

The Metropolitan Police Department (MPD) is responsible for the investigation of felony and misdemeanor criminal offenses occurring in the District of Columbia. This includes the responsibility to electronically record interrogations for all crimes described in this directive for those who have been arrested, or whose freedom of movement has been restrained to the degree associated with a formal arrest.

The purposes of recording custodial interrogations that are conducted in MPD interview rooms equipped with electronic recording equipment are to:

1. Create an exact record of what occurred during the course of a custodial interrogation;
2. Provide evidence of criminal culpability;
3. Document the subject's physical condition and demeanor;
4. Refute allegations of police distortion, coercion, misconduct, or misrepresentations;
5. Reduce the time required to memorialize the custodial interrogation;
6. Reduce the time required to litigate suppression motions;
7. Enable the interviewer to focus completely on his/her questions and the subject's answers without the necessity of taking notes; and
8. Enable the investigator/detective to more effectively use the information obtained to advance other investigative efforts.

II. POLICY

The policy of the Metropolitan Police Department is to electronically record, in their entirety, and to the greatest extent feasible, custodial interrogations of persons suspected of committing a crime of violence, as that term is defined in D.C. Official Code § 23-1331(4), and other crimes as listed in this directive, and as determined by the Chief of Police, when the interrogation takes place in Metropolitan Police Department interview rooms equipped with electronic recording equipment.

III. DEFINITIONS

When used in this directive, the following terms shall have the meanings designated:

1. Custodial interrogation – Words or actions that the police should know are reasonably likely to elicit an incriminating response from a person who is suspected to have committed a crime of violence, and other crimes as listed in Section IV of this directive, or other crime as determined by the Chief of Police, and who is under formal arrest, or whose freedom of movement has been restrained to the degree associated with a formal arrest.
2. Crime of Violence per D.C. Official Code § 23-1331(4) –
 - a. Aggravated assault;
 - b. Act of terrorism;
 - c. Arson;
 - d. Assault with a dangerous weapon;
 - e. Assault with intent to commit any offense;
 - f. Burglary or attempted burglary;
 - g. Carjacking;
 - h. Child sexual abuse;
 - i. Cruelty to children in the first degree;
 - j. Extortion or blackmail accompanied by threats of violence;
 - k. Kidnapping;
 - l. Malicious disfigurement;
 - m. Manufacture or possession of weapons of mass destruction;
 - n. Mayhem;

- o. Murder;
 - p. Robbery;
 - q. Sexual abuse in the first, second, and third degrees;
 - r. Use, dissemination, or detonation of a weapon of mass destruction;
 - s. Voluntary manslaughter;
 - t. An attempt or conspiracy to commit any of the foregoing offenses, as defined by any Act of Congress, or any State law, if the offense is punishable by imprisonment for more than one year.
- 3. Interview room – A room at a Metropolitan Police Department facility that is equipped with electronic recording equipment, including, but not limited to, recorders or cameras that use audiotape, videotape, film, CDs, DVDs, or digital equipment.
- 4. Subject – A person who has been arrested, or whose freedom of movement has been restrained to the degree associated with an arrest.

IV. REGULATIONS

- A. Custodial interrogations of persons suspected of committing a crime of violence, or other offense as determined by the Chief of Police, shall be recorded in their entirety, from the time the subject first enters the MPD interview room, until the subject leaves the interview room, except as provided for in Section IV, I, 1 (a-b).
- B. Additional offenses that require electronic recording:
 - 1. Assault on a police officer;
 - 2. Assault with intent to kill, commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse;
 - 3. Theft, or Attempted Theft of a Motor Vehicle;
 - 4. Any offense resulting in a Traffic fatality;
 - 5. Unauthorized Use of a Vehicle.
- C. Electronic recordings are also required for the suspected activities of gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation.

- D. The Watch Commander may determine to electronically record interrogations for other offenses, which will be conducted in accordance with the rules, regulations, policies, and procedures in this directive.
- E. **ALL** custodial interrogations shall be conducted by detectives/investigators. Members who are not detectives or investigators shall request that a detective/investigator be made available when a subject is to be interrogated in accordance with the provisions in this directive. If a detective/investigator is unavailable, members shall contact the Superintendent of Detectives Division Watch Commander, who will arrange to have a detective/investigator conduct the custodial interrogation.
- F. No detective/investigator shall avoid placing a subject in an interview room.
- G. At no time shall a member of any law enforcement agency be armed while conducting a custodial interrogation in an MPD interview room. All firearms shall be secured in a gun-lock box.
- H. Custodial interrogations shall not be conducted unless the subject has waived his/her Miranda rights.
 - 1. If the subject has not previously been given his/her Miranda rights, the recording shall include the giving of rights to the subject, and his/her or her waiver of those rights, if any.
 - 2. If Miranda rights have been waived before the subject enters the interview room, the interviewer (or another law enforcement officer) shall review the rights card with the subject, and ask the subject to affirm that he/she was informed of, and waived, those rights.
 - 3. The subject shall be recorded in both instances.
- I. Except for spontaneous utterances, all custodial interrogations, as required in this directive, are to be conducted in an MPD interview room equipped with electronic recording equipment, and shall be **video AND audio recorded**.

The recording equipment shall not be turned off unless:

- 1. The subject states that he/she does not want the interview to be recorded.
 - a) If the subject requests that he/she does not want the interview to be recorded, the interviewer will record the subject making this request.
 - b) The recording shall be preserved in accordance with the provisions in this directive, and shall include everything that was recorded in the interview room up to, and including, the subject's request that the interview not be recorded, and the giving of the Miranda Warning or an affirmation that the Miranda Warning was

given and the Miranda Rights were waived in accordance with Section IV, H, (1-2) of this directive.

2. The subject, or both subject and interviewer, leave the interview room. The purpose for which a subject leaves the interview room shall be included on the recording before it is turned off. When the recording is turned back on, the interviewer shall state the length of the break, and what transpired during the period of time that the recording was turned off, if anything other than the stated purpose transpired.
- J. The recording of a subject's custodial interrogation shall be documented in the Washington Area Criminal Intelligence Information System (WACIIS).
- K. If the video/audio recording equipment is not working, the detective/investigator responsible for conducting the custodial interrogation shall conduct the interrogation at another interview room, or in an interview room at another MPD facility equipped with electronic recording equipment.
1. If the interrogation is conducted at another MPD facility, the detective/investigator must obtain permission from his/her supervisor at the Detective Unit;
 2. The detective/investigator shall note this in the Electronic Recording logbook of the element at which the recording took place, and the Electronic Recording logbook of his/her assigned element.
 3. In each instance when it is only possible to make an audio recording of the interrogation, the detective/investigator will obtain permission, through the chain of command, from the SDD Commander.
- L. If the equipment malfunctions or is inadvertently not turned on, or for some other reasons the recording cannot be made, the circumstances shall immediately be reported to the SDD Watch Commander, and documented in WACIIS.
- M. Each failure to electronically record a custodial interrogation due to equipment failure shall be explained and documented in a report to the Assistant Chief, Operational Support Command.
- N. The element detective supervisor (Lieutenant or above) shall review the previous day's arrests to ensure that interrogations are being electronically recorded, as required, for the crimes described in this directive.
- O. Pursuant to D.C. Official Code §23-542(b)(2), it is lawful for the police to record a conversation if one of the parties (including the interviewer) has given prior consent to the recording.
1. The police are not required to inform a subject that a recording is being made of the custodial interrogation.

2. The interviewer shall NOT, at any time, explicitly or implicitly, encourage a subject to request that the recording equipment be turned off.
3. If the subject states that he/she will voluntarily speak with law enforcement personnel only if the custodial interrogation is not electronically recorded, then the recording equipment shall be turned off. The interviewer will record the subject making this request in order to document that the request was made.
4. A recording of everything that transpired up to the point where the equipment was turned off shall be preserved.

V. PROCEDURAL GUIDELINES

A. Processing Offenses Requiring Electronic Recording of Interrogations

1. When the offense requires an electronic recording as described in this directive, arresting officers shall notify the District Watch Commander and the supervisor at the Detective Unit, upon arrival at the element.
2. The SDD and District Watch Commanders shall review the arresting officer's completed paperwork to ensure interrogations are being electronically recorded for offenses as required in this directive.

B. Using MPD Recording Equipment

1. The detective/investigator conducting the interrogation shall test the recording equipment prior to recording a custodial interrogation to ensure it is operating properly. A short video and audio test recording can be made and played back prior to the interrogation.
 - a. If the video/audio recording equipment fails to operate properly before, or during, a recorded custodial interrogation, the individual may be transported to the nearest location equipped to handle video/audio recordings as described in Section IV, K.
 - b. Any video/audio recording equipment that is faulty, or in need of repair, shall be immediately be reported to Facilities Branch, the appropriate administrative staff, and the SDD Watch Commander.
 - c. The Facilities Branch shall request that the equipment be repaired by an authorized contractor.
2. Only new, unused recording media shall be used for electronic recordings.
3. A minimum of three copies shall be made from the original video/audio recording of the interrogation. Immediately upon completion of all recordings, the recording(s) shall be removed from the recording

machine. If using a tape cassette, the safety tabs on the tape cassette shall be removed to prevent another recording on the same cassette.

4. Labels shall be placed on all original recordings and the three copies, and include the following information:
 - a. The original recording shall be labeled: "ORIGINAL RECORDING;"
 - b. The first copy shall be labeled "MASTER COPY OF ORIGINAL RECORDING." Subsequent copies shall be labeled "COPY ONE," "COPY TWO," etc.
5. All labels on the original recording, the master copy, and subsequent copies shall contain:
 - a. Case number;
 - b. Date and time the interview began and ended, and location of the custodial interrogation; and
 - c. Name of person who was recorded, and name of interviewers who conducted the custodial interrogation (including the rank of the investigator/detective);
 - d. Name(s) of any other person present in the interview room during the custodial interrogation.
6. The detective who conducted the interview shall retain one copy for the case file, and provide the original and all other copies to a supervisor. The recording(s) shall be considered evidence, and shall be subject to all MPD policies, directives, and regulations pertaining to the storage and handling of evidence as outlined in General Order 601.1 (Recording, Handling and Disposition of Property Coming into the Custody of the Department), GO-SPT-601.02 (Preservation of Potentially Discoverable Material), and any other applicable publications.
7. The supervisor shall:
 - a. Provide the original recording to the Property Clerk at the District to log into the District Property book;
 - b. Place the master copy and all other copies in the storage container in the case file room;
 - c. Log in the Electronic Recording logbook the Property Book entry number, the date and time of the entry, and the subject's full name.

8. Each time a copy is removed from storage, the removing member shall note in WACIIS who removed the copy, the reason for removing, and who reviewed the copy if it was played. A copy of the WACIIS report shall be maintained in the relevant case file.
 9. The original video/audio recording shall not be removed from MPD, unless the prosecuting attorney handling the case requests the original. In this instance, it shall be made available.
 - a. The detective/investigator shall ensure there is at least one copy archived before providing the original to the prosecuting attorney. If not, a copy of the original shall be made and maintained as set forth in Section V, B, 1-6 of this directive.
 - b. The prosecuting attorney shall be required to sign for the original, and print his/her name, and the date and time the original was removed from the MPD facility.
- C. Conducting An Electronically Recorded Custodial interrogation
1. Only one subject/arrestee shall be in any interview room at any given time.
 2. The subject/arrestee shall be thoroughly searched prior to being placed in the interview room.
 3. The subject/arrestee shall be seated in the interview room so that his/her face is visible on camera. If possible, the interviewer's face should be visible as well.
 4. The interviewer shall activate the recording equipment as set forth in Section V, A. After the equipment is activated, the interviewer shall write down AND verbally state:
 - a. Date, time and location of the interview;
 - b. Identity of all persons present;
 - c. Case number; and
 - d. Subject matter of the investigation.
 5. The subject shall be read his/her Miranda rights, using a PD 47 (Warning as to Your Rights) and shall be asked to sign the card acknowledging those rights. If the subject indicates he/she previously waived his/her Miranda rights prior to the electronic recording of the custodial interrogation, the interviewer shall inquire whether the subject has been advised of his/her rights, whether a PD 47 was executed, and affirm that the subject waived his/her Miranda rights.

6. The interviewer shall ask the subject whether any promises have been made, and whether the subject has been threatened or mistreated in any manner.
 7. If a subject refers to any injuries or marks on his/her body during the recorded session, or if the interviewer observes any injuries or marks, the interviewer shall ask the subject how he/she received the injuries, and request that they be displayed (if practicable) so they may be recorded.
 - a. In instances where the subject suggests that he/she may have acted in self-defense, the interviewer should request that the subject demonstrate what the respective parties allegedly did, including the manner in which the subject used a weapon, when applicable.
 - b. In all interviews, the subject/defendant shall be given an opportunity to explain, in his/her own words, what occurred during the commission of the offense.
 8. The recording should run without interruption, unless extenuating circumstances require a break. In the event that an interruption occurs, the interviewer shall state the time and reason for the interruption (Example: "The time is now 10:23 a.m. and we are going to take a short break so that_____.")

After recording is resumed, the interviewer shall again state the time. (Example: "The time is now 10:30 a.m.; we have completed our break, and will now resume the custodial interrogation.") The interviewer shall ask the subject whether anything occurred during the break other than the stated purpose of the break.
- D. Recording of Non-English Speaking/Hearing Impaired Persons shall be conducted as follows:
1. When an interviewer needs to record a custodial interrogation of a non-English speaking/hearing-impaired person, he/she shall obtain and utilize a qualified interpreter (as defined by the Interpreter Act, D.C. Official Code § 2-1901), or provide the subject with the USAO form that permits the subject to waive his/her right to a qualified interpreter.
 - a. The waiver shall be made available in the language in which the subject is fluent.
 - b. If the waiver is not available in the appropriate language, a qualified interpreter shall read the waiver to the subject.
 2. When recording custodial interrogations of deaf/hearing-impaired persons, interviewers shall adhere to the procedures outlined in GO-OPS-304.14 (Deaf or Hearing-Impaired Arrestees).

- E. Juveniles who are subject to custodial interrogations shall be transported to the Youth Investigations Branch to be electronically recorded. The electronic recording shall be conducted prior to the juvenile's transportation to the Juvenile Processing Center. (CALEA 44.2.3, a-c)
 - 1. Juveniles shall be handled in accordance with General Order 305.1 (Handling Juveniles).
 - 2. The electronic recording of juvenile interrogations shall be conducted in accordance with the provisions in this directive, and consistent with all law, rules, regulations, and policies pertaining to the interrogation of juveniles.
- F. Interviews with victims, witnesses, and other persons who are not under arrest, or whose freedom of movement has not been restrained to the degree associated with a formal arrest, are not required to be recorded under this directive.
- G. District Commanders shall ensure Watch Commanders for each tour of duty are reconciling the arrests that require electronically recorded interrogations as described in Section V, A, (1-2).
- H. Commander, Superintendent of Detectives Division shall:
 - 1. Ensure that detectives/investigators are made available to conduct custodial interrogations in accordance with the provisions in this directive;
 - 2. Approve all requests to conduct audio recordings only;
 - 3. Ensure that the video/audio equipment and recording media are maintained/replaced as applicable;
 - 4. Ensure that requests for original recordings from prosecuting attorneys are satisfied in a timely manner, and that backup copies are made of all original recordings before they are provided to the prosecution;
 - 5. Compile statistics on custodial interrogations that include, but are not limited to:
 - a. The total number of custodial interrogations conducted;
 - b. The number of custodial interrogations required to be recorded as outlined in this directive;
 - c. The number of custodial interrogations that were not recorded as required;
 - d. The reasons given for not recording as required; and

- e. The sanctions imposed for failing to record as required.
- 6. Forward the compiled statistics to the attention of the Assistant Chief, Office of Professional Responsibility, by the 5th of each month.
- 7. Ensure Detective Units maintain an Electronic Recordings logbook that contains, at minimum:
 - a. An inventory of all custodial interrogation recordings;
 - b. A record of all copies that are made, including the name of the person making the copy, the time and date the copy was made; and the name(s) of any persons to whom the copy was provided;
 - c. A record of any removal of the original recording from the Property Section, to include the name of the person removing the original recording, the time and date of the removal, the name of the prosecuting attorney requesting the original recording (as applicable), the name of the person returning the original recording, and the time and date of the return.
- 8. Ensure that members are made aware of, and act in accordance with, the provisions in this directive.
- I. The Assistant Chief, Office of Professional Responsibility, shall submit to the Chief of Police relevant annual statistics on custodial interrogations conducted by MPD that shall include, but not be limited to:
 - 1. The total number of custodial interrogations conducted;
 - 2. The number of custodial interrogations required to be recorded as outlined in this directive;
 - 3. The number of custodial interrogations that were not recorded as required;
 - 4. The reasons given for not recording as required; and
 - 5. The sanctions imposed for failing to record as required.

VI. CROSS REFERENCES

- A. DC Law/Official Code
 - 1. DC Law 15-351 (Electronic Recording Procedures Act of 2004)
 - 2. D.C. Official Code §23-1331(4) (Definitions)

3. D.C. Official Code §23-542(b)(2) (Interception, disclosure, and use of wire or oral communications prohibited)
- B. General Orders
 1. General Order 601.01 (Recording, Handling and Disposition of Property Coming into the Department)
 2. GO-SPT-601.02 (Preservation of Potentially Discoverable Material)
 3. GO-OPS-304.14 (Deaf or Hearing-Impaired Arrestees)
 4. General Order 1202.1 (Disciplinary Procedures and Processes)
- C. SDD Standard Operating Procedures for Maintaining the Electronic Recording Logbook, and the Storage and Labeling of Recording Media

VII. PROVISION

In **ALL** cases where the provisions of this order are in conflict with orders previously issued, the provisions of this order shall prevail.

//SIGNED//
Charles H. Ramsey
Chief of Police

CHR:MJF:NMJ:SOA:DAH:jah

Appendix 2

Illinois

20 Il. Comp. Stat. § 3930/7.5

50 Il. Comp. Stat. § 705/10.3

705 Il. Comp. Stat. § 405/5 - 401.5

720 Il. Comp. Stat. § 5/14 - 3

725 Il. Comp. Stat. § 5/103 - 2.1

20 ILCS 3930/7.5

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Effective: August 06, 2003

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 20. EXECUTIVE BRANCH
BOARDS AND COMMISSIONS
ACT 3930. ILLINOIS CRIMINAL JUSTICE INFORMATION ACT
→**3930/7.5. Grants for electronic recording equipment**

§ 7.5. Grants for electronic recording equipment.

(a) The Authority, from appropriations made to it for that purpose, shall make grants to local law enforcement agencies for the purpose of purchasing equipment for electronic recording of interrogations.

(b) The Authority shall promulgate rules to implement this Section.

Current through P.A. 94-1076 of the 2006 Reg. Sess.

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50 ILCS 705/10.3

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Effective: August 06, 2003

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 50. LOCAL GOVERNMENT
POLICE, FIRE, AND EMERGENCY SERVICES
ACT 705. ILLINOIS POLICE TRAINING ACT

→ 705/10.3. Training of police officers to conduct electronic interrogations

§ 10.3. Training of police officers to conduct electronic interrogations. From appropriations made to it for that purpose, the Board shall initiate, administer, and conduct training programs for permanent police officers, part-time police officers, and recruits on the methods and technical aspects of conducting electronic recordings of interrogations.

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705 ILCS 405/5-401.5

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Effective: August 06, 2005

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 705. COURTS
JUVENILE COURTS
ACT 405. JUVENILE COURT ACT OF 1987
ARTICLE V. DELINQUENT MINORS
PART 4. ARREST AND CUSTODY

→405/5-401.5. When statements by minor may be used

§ 5-401.5. When statements by minor may be used.

(a) In this Section, "custodial interrogation" means any interrogation (i) during which a reasonable person in the subject's position would consider himself or herself to be in custody and (ii) during which a question is asked that is reasonably likely to elicit an incriminating response.

In this Section, "electronic recording" includes motion picture, audiotape, videotape, or digital recording.

In this Section, "place of detention" means a building or a police station that is a place of operation for a municipal police department or county sheriff department or other law enforcement agency at which persons are or may be held in detention in connection with criminal charges against those persons or allegations that those persons are delinquent minors.

(b) An oral, written, or sign language statement of a minor who, at the time of the commission of the offense was under the age of 17 years, made as a result of a custodial interrogation conducted at a police station or other place of detention on or after the effective date of this amendatory Act of the 93rd General Assembly shall be presumed to be inadmissible as evidence against the minor in any criminal proceeding or juvenile court proceeding, for an act that if committed by an adult would be brought under Section 9-1, 9-1.2, 9-2, 9-2.1, 9-3, 9-3.2, or 9-3.3, of the Criminal Code of 1961 [FN1] or under clause (d)(1)(F) of Section 11-501 of the Illinois Vehicle Code unless:

(1) an electronic recording is made of the custodial interrogation; and

(2) the recording is substantially accurate and not intentionally altered.

(c) Every electronic recording required under this Section must be preserved until such time as the minor's adjudication for any offense relating to the statement is final and all direct and habeas corpus appeals are exhausted, or the prosecution of such offenses is barred by law.

(d) If the court finds, by a preponderance of the evidence, that the minor was subjected to a custodial interrogation in violation of this Section, then any statements made by the minor during or following that non-recorded custodial interrogation, even if otherwise in compliance with this Section, are presumed to be inadmissible in any criminal proceeding or juvenile court proceeding against the minor except for the purposes of impeachment.

(e) Nothing in this Section precludes the admission (i) of a statement made by the minor in open court in any criminal proceeding or juvenile court proceeding, before a grand jury, or at a preliminary hearing, (ii) of a

705 ILCS 405/5-401.5

statement made during a custodial interrogation that was not recorded as required by this Section because electronic recording was not feasible, (iii) of a voluntary statement, whether or not the result of a custodial interrogation, that has a bearing on the credibility of the accused as a witness, (iv) of a spontaneous statement that is not made in response to a question, (v) of a statement made after questioning that is routinely asked during the processing of the arrest of the suspect, (vi) of a statement made during a custodial interrogation by a suspect who requests, prior to making the statement, to respond to the interrogator's questions only if an electronic recording is not made of the statement, provided that an electronic recording is made of the statement of agreeing to respond to the interrogator's question, only if a recording is not made of the statement, (vii) of a statement made during a custodial interrogation that is conducted out-of-state, (viii) of a statement given at a time when the interrogators are unaware that a death has in fact occurred, or (ix) of any other statement that may be admissible under law. The State shall bear the burden of proving, by a preponderance of the evidence, that one of the exceptions described in this subsection (e) is applicable. Nothing in this Section precludes the admission of a statement, otherwise inadmissible under this Section, that is used only for impeachment and not as substantive evidence.

(f) The presumption of inadmissibility of a statement made by a suspect at a custodial interrogation at a police station or other place of detention may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances.

(g) Any electronic recording of any statement made by a minor during a custodial interrogation that is compiled by any law enforcement agency as required by this Section for the purposes of fulfilling the requirements of this Section shall be confidential and exempt from public inspection and copying, as provided under Section 7 of the Freedom of Information Act, [FN2] and the information shall not be transmitted to anyone except as needed to comply with this Section.

[FN1] 720 ILCS 5/9-1, 5/9-1.2, 5/9-2, 5/9-2.1, 5/9-3, 5/9-3.2, or 5/9-3.3.

[FN2] 5 ILCS 140/7.

DATE EFFECTIVE

<Section 99 of both P.A. 93-206 and P.A. 93-517 provided:>

<"Effective date. Sections 5, 10, 20, and 95 of this Act and this Section 99 take effect upon becoming law. Sections 15 and 25 of this Act take effect 2 years after becoming law.">

<P.A. 93-206 became effective July 18, 2003, and P.A. 93-517 became effective August 6, 2003.>

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720 ILCS 5/14-3

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Formerly cited as IL ST CH 38 ¶ 14-3

Effective: September 11, 2005

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 720. CRIMINAL OFFENSES
CRIMINAL CODE
ACT 5. CRIMINAL CODE OF 1961
TITLE III. SPECIFIC OFFENSES
PART B. OFFENSES DIRECTED AGAINST THE PERSON
ARTICLE 14. EAVESDROPPING
→ 5/14-3. Exemptions

§ 14-3. Exemptions. The following activities shall be exempt from the provisions of this Article:

- (a) Listening to radio, wireless and television communications of any sort where the same are publicly made;
- (b) Hearing conversation when heard by employees of any common carrier by wire incidental to the normal course of their employment in the operation, maintenance or repair of the equipment of such common carrier by wire so long as no information obtained thereby is used or divulged by the hearer;
- (c) Any broadcast by radio, television or otherwise whether it be a broadcast or recorded for the purpose of later broadcasts of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made;
- (d) Recording or listening with the aid of any device to any emergency communication made in the normal course of operations by any federal, state or local law enforcement agency or institutions dealing in emergency services, including, but not limited to, hospitals, clinics, ambulance services, fire fighting agencies, any public utility, emergency repair facility, civilian defense establishment or military installation;
- (e) Recording the proceedings of any meeting required to be open by the Open Meetings Act, as amended; [FN1]
- (f) Recording or listening with the aid of any device to incoming telephone calls of phone lines publicly listed or advertised as consumer "hotlines" by manufacturers or retailers of food and drug products. Such recordings must be destroyed, erased or turned over to local law enforcement authorities within 24 hours from the time of such recording and shall not be otherwise disseminated. Failure on the part of the individual or business operating any such recording or listening device to comply with the requirements of this subsection shall eliminate any civil or criminal immunity conferred upon that individual or business by the operation of this Section;
- (g) With prior notification to the State's Attorney of the county in which it is to occur, recording or listening with the aid of any device to any conversation where a law enforcement officer, or any person acting at the direction of law enforcement, is a party to the conversation and has consented to it being intercepted or recorded under circumstances where the use of the device is necessary for the protection of the law enforcement officer or any person acting at the direction of law enforcement, in the course of an investigation of a forcible felony, a felony violation of the Illinois Controlled Substances Act, [FN2] a felony violation of the Cannabis Control Act, [FN3] a

720 ILCS 5/14-3

felony violation of the Methamphetamine Control and Community Protection Act, or any "streetgang related" or "gang-related" felony as those terms are defined in the Illinois Streetgang Terrorism Omnibus Prevention Act. [FN4] Any recording or evidence derived as the result of this exemption shall be inadmissible in any proceeding, criminal, civil or administrative, except (i) where a party to the conversation suffers great bodily injury or is killed during such conversation, or (ii) when used as direct impeachment of a witness concerning matters contained in the interception or recording. The Director of the Department of State Police shall issue regulations as are necessary concerning the use of devices, retention of tape recordings, and reports regarding their use;

(g-5) With approval of the State's Attorney of the county in which it is to occur, recording or listening with the aid of any device to any conversation where a law enforcement officer, or any person acting at the direction of law enforcement, is a party to the conversation and has consented to it being intercepted or recorded in the course of an investigation of any offense defined in Article 29D of this Code. In all such cases, an application for an order approving the previous or continuing use of an eavesdropping device must be made within 48 hours of the commencement of such use. In the absence of such an order, or upon its denial, any continuing use shall immediately terminate. The Director of State Police shall issue rules as are necessary concerning the use of devices, retention of tape recordings, and reports regarding their use.

Any recording or evidence obtained or derived in the course of an investigation of any offense defined in Article 29D of this Code shall, upon motion of the State's Attorney or Attorney General prosecuting any violation of Article 29D, be reviewed in camera with notice to all parties present by the court presiding over the criminal case, and, if ruled by the court to be relevant and otherwise admissible, it shall be admissible at the trial of the criminal case.

This subsection (g-5) is inoperative on and after January 1, 2005. No conversations recorded or monitored pursuant to this subsection (g-5) shall be inadmissible in a court of law by virtue of the repeal of this subsection (g-5) on January 1, 2005;

(h) Recordings made simultaneously with a video recording of an oral conversation between a peace officer, who has identified his or her office, and a person stopped for an investigation of an offense under the Illinois Vehicle Code; [FN5]

(i) Recording of a conversation made by or at the request of a person, not a law enforcement officer or agent of a law enforcement officer, who is a party to the conversation, under reasonable suspicion that another party to the conversation is committing, is about to commit, or has committed a criminal offense against the person or a member of his or her immediate household, and there is reason to believe that evidence of the criminal offense may be obtained by the recording;

(j) The use of a telephone monitoring device by either (1) a corporation or other business entity engaged in marketing or opinion research or (2) a corporation or other business entity engaged in telephone solicitation, as defined in this subsection, to record or listen to oral telephone solicitation conversations or marketing or opinion research conversations by an employee of the corporation or other business entity when:

(i) the monitoring is used for the purpose of service quality control of marketing or opinion research or telephone solicitation, the education or training of employees or contractors engaged in marketing or opinion research or telephone solicitation, or internal research related to marketing or opinion research or telephone solicitation; and

(ii) the monitoring is used with the consent of at least one person who is an active party to the marketing or opinion research conversation or telephone solicitation conversation being monitored.

No communication or conversation or any part, portion, or aspect of the communication or conversation made, acquired, or obtained, directly or indirectly, under this exemption (j), may be, directly or indirectly, furnished to

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any law enforcement officer, agency, or official for any purpose or used in any inquiry or investigation, or used, directly or indirectly, in any administrative, judicial, or other proceeding, or divulged to any third party.

When recording or listening authorized by this subsection (j) on telephone lines used for marketing or opinion research or telephone solicitation purposes results in recording or listening to a conversation that does not relate to marketing or opinion research or telephone solicitation; the person recording or listening shall, immediately upon determining that the conversation does not relate to marketing or opinion research or telephone solicitation, terminate the recording or listening and destroy any such recording as soon as is practicable.

Business entities that use a telephone monitoring or telephone recording system pursuant to this exemption (j) shall provide current and prospective employees with notice that the monitoring or recordings may occur during the course of their employment. The notice shall include prominent signage notification within the workplace.

Business entities that use a telephone monitoring or telephone recording system pursuant to this exemption (j) shall provide their employees or agents with access to personal-only telephone lines which may be pay telephones, that are not subject to telephone monitoring or telephone recording.

For the purposes of this subsection (j), "telephone solicitation" means a communication through the use of a telephone by live operators:

- (i) soliciting the sale of goods or services;
- (ii) receiving orders for the sale of goods or services;
- (iii) assisting in the use of goods or services; or
- (iv) engaging in the solicitation, administration, or collection of bank or retail credit accounts.

For the purposes of this subsection (j), "marketing or opinion research" means a marketing or opinion research interview conducted by a live telephone interviewer engaged by a corporation or other business entity whose principal business is the design, conduct, and analysis of polls and surveys measuring the opinions, attitudes, and responses of respondents toward products and services, or social or political issues, or both;

(k) Electronic recordings, including but not limited to, a motion picture, videotape, digital, or other visual or audio recording, made of a custodial interrogation of an individual at a police station or other place of detention by a law enforcement officer under Section 5-401.5 of the Juvenile Court Act of 1987 [FN6] or Section 103-2.1 of the Code of Criminal Procedure of 1963; and

(l) Recording the interview or statement of any person when the person knows that the interview is being conducted by a law enforcement officer or prosecutor and the interview takes place at a police station that is currently participating in the Custodial Interview Pilot Program established under the Illinois Criminal Justice Information Act.

[FN1] 5 ILCS 120/1 et seq.

[FN2] 720 ILCS 570/100 et seq.

[FN3] 720 ILCS 550/1 et seq.

[FN4] 740 ILCS 147/1 et seq.

720 ILCS 5/14-3

[FN5] 625 ILCS 5/1-100 et seq.

[FN6] 705 ILCS 405/5-401.5.

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725 ILCS 5/103-2.1

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Effective: August 06, 2005

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 725. CRIMINAL PROCEDURE
ACT 5. CODE OF CRIMINAL PROCEDURE OF 1963
TITLE I. GENERAL PROVISIONS
ARTICLE 103. RIGHTS OF ACCUSED

→ 5/103-2.1. When statements by accused may be used

§ 103-2.1. When statements by accused may be used.

(a) In this Section, "custodial interrogation" means any interrogation during which (i) a reasonable person in the subject's position would consider himself or herself to be in custody and (ii) during which a question is asked that is reasonably likely to elicit an incriminating response.

In this Section, "place of detention" means a building or a police station that is a place of operation for a municipal police department or county sheriff department or other law enforcement agency, not a courthouse, that is owned or operated by a law enforcement agency at which persons are or may be held in detention in connection with criminal charges against those persons.

In this Section, "electronic recording" includes motion picture, audiotape, or videotape, or digital recording.

(b) An oral, written, or sign language statement of an accused made as a result of a custodial interrogation at a police station or other place of detention shall be presumed to be inadmissible as evidence against the accused in any criminal proceeding brought under Section 9-1, 9-1.2, 9-2, 9-2.1, 9-3, 9-3.2, or 9-3.3 of the Criminal Code of 1961 [FN1] or under clause (d)(1)(F) of Section 11-501 of the Illinois Vehicle Code unless:

(1) an electronic recording is made of the custodial interrogation; and

(2) the recording is substantially accurate and not intentionally altered.

(c) Every electronic recording required under this Section must be preserved until such time as the defendant's conviction for any offense relating to the statement is final and all direct and habeas corpus appeals are exhausted, or the prosecution of such offenses is barred by law.

(d) If the court finds, by a preponderance of the evidence, that the defendant was subjected to a custodial interrogation in violation of this Section, then any statements made by the defendant during or following that non-recorded custodial interrogation, even if otherwise in compliance with this Section, are presumed to be inadmissible in any criminal proceeding against the defendant except for the purposes of impeachment.

(e) Nothing in this Section precludes the admission (i) of a statement made by the accused in open court at his or her trial, before a grand jury, or at a preliminary hearing, (ii) of a statement made during a custodial interrogation that was not recorded as required by this Section, because electronic recording was not feasible, (iii) of a voluntary statement, whether or not the result of a custodial interrogation, that has a bearing on the credibility of the accused as a witness, (iv) of a spontaneous statement that is not made in response to a question, (v) of a statement made

725 ILCS 5/103-2.1

after questioning that is routinely asked during the processing of the arrest of the suspect, (vi) of a statement made during a custodial interrogation by a suspect who requests, prior to making the statement, to respond to the interrogator's questions only if an electronic recording is not made of the statement, provided that an electronic recording is made of the statement of agreeing to respond to the interrogator's question, only if a recording is not made of the statement, (vii) of a statement made during a custodial interrogation that is conducted out-of-state, (viii) of a statement given at a time when the interrogators are unaware that a death has in fact occurred, or (ix) of any other statement that may be admissible under law. The State shall bear the burden of proving, by a preponderance of the evidence, that one of the exceptions described in this subsection (e) is applicable. Nothing in this Section precludes the admission of a statement, otherwise inadmissible under this Section, that is used only for impeachment and not as substantive evidence.

(f) The presumption of inadmissibility of a statement made by a suspect at a custodial interrogation at a police station or other place of detention may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances.

(g) Any electronic recording of any statement made by an accused during a custodial interrogation that is compiled by any law enforcement agency as required by this Section for the purposes of fulfilling the requirements of this Section shall be confidential and exempt from public inspection and copying, as provided under Section 7 of the Freedom of Information Act, [FN2] and the information shall not be transmitted to anyone except as needed to comply with this Section.

[FN1] 720 ILCS 5/9-1, 5/9-1.2, 5/9-2, 5/9-2.1, 5/9-3, 5/9-3.2, or 5/9-3.3

[FN2] 5 ILCS 140/7

DATE EFFECTIVE

<Section 99 of both P.A. 93-206 and P.A. 93-517 provided:>

<"Effective date. Sections 5, 10, 20, and 95 of this Act and this Section 99 take effect upon becoming law. Sections 15 and 25 of this Act take effect 2 years after becoming law.">

<P.A. 93-206 became effective July 18, 2003, and P.A. 93-517 became effective August 6, 2003.>

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Appendix 3

Maine

Me. Rev. Stat. tit. 25, § 2803-B

Model General Order

Police Department Certification

25 M.R.S.A. § 2803-B**C**

MAINE REVISED STATUTES ANNOTATED
TITLE 25. **INTERNAL SECURITY AND PUBLIC SAFETY**
PART 8. **PUBLIC SAFETY MISCELLANEOUS PROVISIONS**
CHAPTER 341. **THE MAINE CRIMINAL JUSTICE ACADEMY**
→ § 2803-B. **Requirements of law enforcement agencies**

1. Law enforcement policies. All law enforcement agencies shall adopt written policies regarding procedures to deal with the following:

- A. Use of force;
- B. Barricaded persons and hostage situations;
- C. Persons exhibiting deviant behavior;
- D. Domestic violence, which must include, at a minimum, the following:
 - (1) A process to ensure that a victim receives notification of the defendant's release from jail;
 - (2) A process for the collection of information regarding the defendant that includes the defendant's previous history, the parties' relationship, the name of the victim and a process to relay this information to a bail commissioner before a bail determination is made; and
 - (3) A process for the safe retrieval of personal property belonging to the victim or the defendant that includes identification of a possible neutral location for retrieval, the presence of at least one law enforcement officer during the retrieval and giving the victim the option of at least 24 hours notice to each party prior to the retrieval;
- E. Hate or bias crimes;
- F. Police pursuits;
- G. Citizen complaints of police misconduct;
- H. Criminal conduct engaged in by law enforcement officers;
- I. Death investigations, including at a minimum the protocol of the Department of the Attorney General regarding such investigations;
- J. Public notification regarding persons in the community required to register under Title 34-A, chapter 15; [FN1] and
- K. Digital, electronic, audio, video or other recording of law enforcement interviews of suspects in serious

25 M.R.S.A. § 2803-B

crimes and the preservation of investigative notes and records in such cases.

The chief administrative officer of each agency shall certify to the board that attempts were made to obtain public comment during the formulation of policies.

2. Minimum policy standards. The board shall establish minimum standards for each law enforcement policy no later than June 1, 1995, except that policies for expanded requirements for domestic violence under subsection 1, paragraph D, subparagraphs (1) to (3) must be established no later than January 1, 2003; policies for death investigations under subsection 1, paragraph I must be established no later than January 1, 2004; policies for public notification regarding persons in the community required to register under Title 34-A, chapter 15 under subsection 1, paragraph J must be established no later than January 1, 2006; and policies for the recording and preservation of interviews of suspects in serious crimes under subsection 1, paragraph K must be established no later than January 1, 2005.

3. Agency compliance. The chief administrative officer of each law enforcement agency shall certify to the board no later than January 1, 1996 that the agency has adopted written policies consistent with the minimum standards established by the board pursuant to subsection 2, except that certification to the board for expanded policies for domestic violence under subsection 1, paragraph D, subparagraphs (1) to (3) must be made to the board no later than June 1, 2003; certification to the board for adoption of a death investigation policy under subsection 1, paragraph I must be made to the board no later than June 1, 2004; certification to the board for adoption of a public notification policy under subsection 1, paragraph J must be made to the board no later than June 1, 2006; and certification to the board for adoption of a policy for the recording and preservation of interviews of suspects in serious crimes under subsection 1, paragraph K must be made to the board no later than June 1, 2005. The certification must be accompanied by copies of the agency policies. The chief administrative officer of each agency shall certify to the board no later than June 1, 1996 that the agency has provided orientation and training for its members with respect to the policies, except that certification for orientation and training with respect to expanded policies for domestic violence under subsection 1, paragraph D, subparagraphs (1) and (3) must be made to the board no later than January 1, 2004; certification for orientation and training with respect to policies regarding death investigations under subsection 1, paragraph I must be made to the board no later than January 1, 2005; certification for orientation and training with respect to policies regarding public notification under subsection 1, paragraph J must be made to the board no later than January 1, 2007; and certification for orientation and training with respect to policies regarding the recording and preservation of interview of suspects in serious crimes under subsection 1, paragraph K must be made to the board no later than January 1, 2006.

4. Repealed. Laws 2005, c. 331, § 17.

5. Annual standards review. The board shall review annually the minimum standards for each policy to determine whether changes in any of the standards are necessary to incorporate improved procedures identified by critiquing known actual events or by reviewing new enforcement practices demonstrated to reduce crime, increase officer safety or increase public safety.

6. Freedom of access. The chief administrative officer of a municipal, county or state law enforcement agency shall certify to the board annually beginning on January 1, 2004 that the agency has adopted a written policy regarding procedures to deal with a freedom of access request and that the chief administrative officer has designated a person who is trained to respond to a request received by the agency pursuant to Title 1, chapter 13.

[FN1] 34-A M.R.S.A. 11201 et seq.

Current through the 2006 Second Regular Session of the
122nd Legislature

25 M.R.S.A. § 2803-B

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END OF DOCUMENT

adopted: 02/11/2005

GENERAL ORDER

SUBJECT: RECORDING OF SUSPECTS IN SERIOUS CRIMES Number: 2-23A
& THE PRESERVATION OF NOTES & RECORDS

EFFECTIVE DATE: 00/00/0000

REVIEW DATE: 00/00/0000

AMENDS/SUPERSEDES: 00/00/0000

APPROVED: _____
Chief Law Enforcement Officer

I. POLICY

This agency recognizes the importance of recording custodial interrogations related to serious crimes when they are conducted in a place of detention. A recorded custodial interrogation creates compelling evidence. A recording aids law enforcement efforts by confirming the content and the voluntariness of a confession, particularly when a person changes his testimony or claims falsely that his or her constitutional rights were violated. Confessions are important in that they often lead to convictions in cases that would otherwise be difficult to prosecute. Recording custodial interrogations is an important safeguard, and helps to protect the person's right to counsel, the right against self-incrimination and, ultimately, the right to a fair trial. Finally, a recording of a custodial interrogation undeniably assists the trier of fact in ascertaining the truth.

Minimum Standard: 1

II. PURPOSE

To establish guidelines and procedures for officers of this agency regarding the recording of certain custodial interrogations of persons and to preservation of these recordings and the notes and other records related to the recordings.

III. DEFINITIONS

A. Custodial Interrogation: An interrogation during which (1) a reasonable person would consider that person to be in custody in view of the circumstances, and (2) the person is asked a question by a law enforcement officer that is likely to elicit an incriminating response.

Minimum Standard: 3

B. Recording: Includes digital, electronic, audio, video or other recording.

Minimum Standard: 2

C. Place of Detention: A building owned or operated by a law enforcement agency, including a police station, at which persons may be held in detention in connection with criminal charges.

Minimum Standard: 4

D. Serious Crimes: Murder and all Class A, B and C offenses listed in Chapters 9, 11, 12, 13 and 27 of the Maine Criminal Code and the corresponding juvenile offense. Specifically they are:

17-A §	Crime	Class
201	Murder	
202	Felony Murder	A
203	Manslaughter	A/C
207	Assault of a child < 6 YOA	C
208	Aggravated Assault	B
209	Elevated Aggravated Assault	A
210	Terrorizing	C
210-A	Stalking	C
213	Aggravated Reckless Conduct	B
253	Gross Sexual Assault	A/B/C
254	Sexual Abuse of Minors	C
255-A	Unlawful Sexual Contact (formerly § 255)	A/B/C
256	Visual Sexual Aggression Against Child	C
258	Sexual Misconduct With Child < 14 YOA	C
259	Solicitation of Child by Computer to Commit a Prohibited Act	C
282	Sexual Exploitation of Minor	A/B
283	Dissemination of Sexually Explicit Material	A/B/C
284	Possession of Sexually Explicit Material	B/C
301	Kidnapping	A/B
302	Criminal Restraint	C
303	Criminal Restraint by Parent	C
651	Robbery	A/B

E. Excluded are Class D and E crimes in the applicable chapters that is increased to a felony crime by virtue of 17-A MRSA § 1252.

Minimum Standard: 5

IV. PROCEDURE - Law Enforcement Officers

A. Officers of this agency are responsible for knowing when custodial interrogations must be recorded, as well as

this agency's procedures for the recording of such interrogations.

Minimum Standard: 10

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B. Officers of this agency are responsible for knowing how to operate any recording device that may be used when custodial interrogations must be recorded.

C. Officers of this agency are responsible for being familiar with relevant case law regarding custodial interrogations. Two (2) references are the Maine Law Enforcement Officers Manual and the Maine Law Officer's Bulletin. The Bulletin is available online at www.state.me.us/ag/investigations/Bulletin

Minimum Standard: 10

D. Unless exempted by this policy, a recording shall be made of any custodial interrogation conducted by an officer of this agency at a place of detention when the interrogation relates to any of the serious crimes listed in this policy.

Minimum Standard: 7

E. Preservation of Recording and Notes: The officer conducting the custodial interrogation or the case officer is responsible for preserving the recording and investigative notes and records specifically related to the recording as part of the investigative file until such time as the defendant plead guilty, is convicted, sentenced, direct appeal is exhausted, waived or procedurally defaulted; federal habeas corpus and appeal therefrom is exhausted, waived or procedurally defaulted, and; any writ of certiorari to the Supreme Court of the United States is exhausted, waived or procedurally defaulted. In those situations of custodial interrogation where there is no recording, the investigative notes and records specifically related to the interrogation shall likewise be preserved as part of the investigative file for the same period of time as set forth in this policy for the recording of interrogations.

F. All investigative notes kept or retained must be filed with the case. These notes are generally discoverable.

Minimum Standard: 6

G. Exemptions to the Recording of Custodial Interrogations:

The requirement for a member of this agency to record a custodial interrogation does not apply to:

1. A situation when the recording is not feasible, including, but not limited to, when recording equipment malfunctions.
2. Spontaneous statements that are not made in response to interrogation.
3. Statements made in response to questions that are routinely asked during the processing of the arrest of a person.
4. Statements given in response to custodial interrogations at a time when the interrogator is unaware that a serious crime has occurred.
5. A situation when the person who is the subject of a custodial interrogation, refuses in writing or in a recording, to have the interrogation recorded.

Minimum Standard: 8

H. Officers must be aware that some persons with whom they come in contact and who will be the subject of a custodial interrogation may not understand or be fluent in the English language. If there are any questions about a person's ability to understand English, the officer must explore the need for an interpreter, including a sign language interpreter for the hearing impaired.

I. To determine the language in which a person is fluent for the purpose of seeking an interpreter, the officer should consider the agency's list of local interpreters available to provide services and any such lists maintained by the court, local colleges or universities. Fee-based telephone interpretation services can be researched over the Internet. Two such services may be found at www.languageline.com and www.lle-inc.com.

Minimum Standard: 9

V. PROCEDURE - Availability and Maintenance of Equipment

A. **Availability:** The acquisition and installation of any recording device shall be at the direction of the Chief Law Enforcement Officer of this agency. All officers

will have available through a supervisor a device for the purpose of recording a custodial interrogation. The agency shall supply the recording media.

Minimum Standard: 11

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B. Maintenance and Repair: An employee will be assigned to maintain all agency recording devices and that employee will:

1. Maintain and routinely clean the equipment according to the manufacturer's guidelines.
2. Make arrangements for the servicing or repair of equipment by a qualified repair service.
3. Notify the Chief Law Enforcement Officer when the equipment is beyond repair and needs to be replaced.

Minimum Standard: 11

VI. PROCEDURE - Control/Disposition of Recording and Notes Related to Custodial Interrogations

A. Reporting: When an officer of this agency is required by this policy to record a custodial interrogation, the officer will note in the incident report that a recording was made and whether notes relating to the recording were also made. Likewise, the officer will note in the incident report if a custodial interrogation is not recorded and the reason for not recording the interrogation.

B. Control of Tapes and Notes Containing Evidence:

1. All recordings and notes shall be labeled with the law enforcement officer's name, tape number (if known), incident number, and date of incident.
2. All recordings and notes shall be stored with the case file or in a manner consistent with all other evidence.
3. No person shall in any manner or for any purpose alter a recording of a custodial interrogation.

Minimum Standard: 12 and 13

C. Discovery Requests for Copies of Recordings:

1. If the prosecuting attorney requests to view or listen to a recording, the recording will be made available to the prosecutor for that purpose. The same opportunity will be afforded the defense, but only by instruction of the prosecuting attorney.

2. The original recording of a custodial interrogation shall be retained by the agency.
3. All investigative notes kept or retained must be filed with the case. These notes are generally discoverable.

Minimum Standard: 13

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D. Public Requests for Copies of Recordings:

1. Any person who requests a copy of a particular recorded custodial interrogation should forward a written request to the Chief Law Enforcement Officer.
2. The request should be reviewed by the Chief Law Enforcement Officer to determine if it constitutes a public document to which the public has legitimate access.
3. Copies of recordings thus provided to the public (including insurance carriers) will be the subject of a reasonable charge for the purpose of recovering the cost to the agency of providing the copy.

Minimum Standard: 13

MAINE CHIEFS OF POLICE ASSOCIATION - ADVISORY

This Maine Chiefs of Police Association model policy is a generic policy provided to assist your agency in the development of your own policies. All policies mandated by statute contained herein meet the standards as prescribed by the Board of Trustees of the Maine Criminal Justice Academy. The Chief Law Enforcement Officer is highly encouraged to use and/or modify this model policy in whatever way it would best accomplish the individual mission of the agency.

DISCLAIMER

This model policy should not be construed as a creation of a higher legal standard of safety or care in an evidentiary sense with respect to third party claims. Violations of this policy will only form the basis for administrative sanctions by the individual Law Enforcement Agency and/or the Board of Trustees of the Maine Criminal Justice Academy. This policy does not hold the Maine Chiefs of Police Association, its employees or its members liable for any third party claims and is not intended for use in any civil actions.

DEPARTMENT OF PUBLIC SAFETY
Maine Criminal Justice Academy
Board of Trustees Minimum Standards

**RECORDING OF LAW ENFORCEMENT
INTERVIEWS OF SUSPECTS IN SERIOUS CRIMES
AND THE PRESERVATION OF INVESTIGATIVE
NOTES AND RECORDS IN SUCH CASES POLICY**

Date Board Adopted: 03/03/2006

Effective date: 03/03/2006

The agency must have a written policy to address the Recording of Law Enforcement Interviews of Suspects in Serious Crimes and the Preservation of Investigative Notes and Records in Such Cases by a Law Enforcement Officer, to include, at a minimum, provisions for the following:



1. A policy statement that recognizes the importance of recording custodial interrogations of persons involved in serious crimes when such interrogations are conducted in a place of detention.
2. Definition of recording that, at a minimum, encompasses digital, electronic, audio, video or other recording.
3. Definition of custodial interrogation that, at a minimum, encompasses an interrogation during which (1) a reasonable person would consider that person to be in custody in view of the circumstances, and (2) the person is asked a question by a law enforcement officer that is likely to elicit an incriminating response.
4. Definition of place of detention that, at a minimum, encompasses a building owned or operated by a law enforcement agency, including a police station, at which persons may be held in detention in connection with criminal charges.
5. Definition of serious crimes that, at a minimum, includes murder and all Class A, B, and C crimes contained in Chapters 9, 11, 12, 13 and 27 of the Maine Criminal Code, and the corresponding juvenile offenses.
6. Procedure regarding the preservation of notes, records, and recordings specifically related to such interrogations until such time as the defendant's conviction is final, appeals are exhausted, or the statute of limitations has expired.

7. A requirement that an officer of the agency record a custodial interrogation when conducted at a place of detention when the interrogation relates to a serious crime.
8. The requirement to record a custodial interrogation does not apply to (a) a situation when recording is not feasible, including, but not limited to, cases in which recording equipment is malfunctioning; (b) spontaneous statements that are not made in response to interrogation; (c) statements made in response to questions that are routinely asked during the processing of the arrest of a person; (d) statements given in response to a custodial interrogation at a time when the interrogator is unaware that a serious crime has occurred, and ; (e) a situation when the person who is the subject of a custodial interrogation refuses, preferably in writing or in a recording, to have the interrogation recorded.
9. Procedure for the use of interpreters during a custodial interrogation when circumstances indicate a need for an interpreter.
10. Officers are responsible for being familiar with when interrogations must be recorded, their agency's procedures for recording interrogations, the operation of their agency's recording equipment, and any relevant case law regarding interrogations.
11. Statement as to the availability and maintenance of recording devices and equipment.
12. Procedure as to the control and disposition of recordings of custodial interrogations.
13. Procedures for the law enforcement agency when dealing with discovery requests as they relate to the recordings and the notes or records related to such recordings.

Appendix 4

Massachusetts

Municipal Police Institute Model Policy

Chapter 2 - Sample Policy & Procedure

The following sample Policy & Procedure is based on one developed jointly by the Massachusetts Chiefs of Police Association, the District Attorneys Association and the Massachusetts State Police. Slight variations in wording have been made by both the State Police and in the following, but the essentials are in tack. The goal was to have all law enforcement departments "on the same page" while waiting for clarification from the courts on many issues left unanswered in *DiGiambattista*.

ELECTRONIC RECORDING OF INTERROGATIONS

POLICY & PROCEDURE NO. 2.17	ISSUE DATE:
	EFFECTIVE DATE:
MASSACHUSETTS POLICE ACCREDITATION STANDARDS REFERENCED: none	REVISION DATE:

GENERAL CONSIDERATIONS AND GUIDELINES

In *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004), the Supreme Judicial Court held that if the prosecution introduces a confession or statement that the police obtained during an interrogation of a defendant who was either in custody or at a "place of detention," and the police did not electronically record the statement, the defendant is entitled to a cautionary jury instruction. Upon the defendant's request, the judge must instruct the jury that "the State's highest court has expressed a

preference that such interrogations be recorded whenever practicable and . . . that, in light of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care." This jury instruction is required regardless of the reason that the police did not record the interrogation.

POLICY

It is the policy of the department, whenever it is practical, to electronically record all custodial interrogations of suspects or interrogations of suspects conducted in places of detention.

DEFINITIONS

For the purpose of this policy, the following words and phrases are defined as follows:

- "custody" means circumstances in which a reasonable person would believe that his or her freedom of action has been curtailed such that he or she is not free to leave;
- "electronic recording" means preservation by analog (audio and/or VHS videotape) or digital (digital audio tape, CD and/or DVD non-rewritable discs) means through the use of audio or audio/video recording equipment;
- "interrogation" means questions, actions or words (other than those normally attendant to arrest and custody) by a law enforcement officer that are reasonably likely to elicit an incriminating response from a suspect;
- "place of detention" means a police station, state police barracks, prison, jail, house of correction, or a department of youth services secure facility where persons may be held in detention in relation to a criminal charge(s); and,
- "suspect" means a person who has either been charged with a crime or a person whom a law enforcement officer has a reasonable basis to believe may in the future be charged with a crime. Witnesses, victims and other persons who provide information to a law enforcement officer are not considered suspects unless and until there develops a reasonable basis to change their status.

PROCEDURES

A. Applicability. These guidelines require officers to record, whenever it is practical, two types of interrogations: (1) custodial interrogations of suspects, and (2) interrogations of suspects occurring at places of detention.

B. Wiretap Issues. The Massachusetts wiretap statute, G.L. c. 272, §99, generally prohibits anyone from secretly recording another person's oral statements. Accordingly, unless one of the narrow exceptions in the wiretap statute applies, a law enforcement officer who electronically records a suspect's interrogation must do either of the following:

- notify a suspect that his or her statements are being recorded, or
- conduct the interrogation in such a way that it is obvious to the suspect that his or her statements are being recorded.

Once the suspect knows or reasonably should know that he or she is being recorded, the law enforcement officer may record the interrogation without asking for or receiving explicit consent to do so.

C. Creating a Clear and Complete Record. To the extent it is practical, the officer should electronically record the entire interrogation of a suspect. To assist in the creation of the record, officers should do the following:

- Start the recording device.
- Inform the suspect that he or she is being recorded.
- State the date, time, location and names of persons present. If a video recording device is used which imprints the time on the tape or disk, verify that the correct time is displayed.
- State the full name of the suspect.
- Execute appropriate departmental forms including but not limited to Miranda warning and waiver, and waiver of prompt arraignment (if applicable).

- If the officer must suspend the recording for any reason, he or she should record the reasons for stopping (e.g., taking a break or a malfunction), the time the recording device is turned off, the time it is turned back on, and what transpired while the recording device was turned off.
- If the officer uses or refers to documents or other items during the interrogation, the officer should describe those documents or items on the record and mark them with a unique number (similar to an exhibit number at trial) and the officer's initials. If the officer is unable to write on the actual document or item, the officer may write on a bag, envelope or case in which the document or item is placed or on a piece of tape or other form of label attached to the document or item.
- Conclude the recording by stating the date and the time the interrogation is completed.

D. Suspect Refuses to be Recorded. If a suspect refuses to make a recorded statement, the officer should record the refusal (if it is practical) and document it on a refusal form. (A refusal form is attached hereto).

1. Suspect refuses before the recording device is turned on. If the suspect refuses to be recorded before the recording device is turned on, the officer should, if it is practical, turn on the recording device to record the refusal.

- The officer should identify himself or herself and the suspect, state the date, time and location, inform the suspect of any applicable rights (such as Miranda), and inform the suspect that there are potential benefits to recording the interrogation, including the fact that a recording will create a clear and complete record of what was said to the suspect, and what the suspect said during the interrogation.
- The officer should then ask the suspect on the record if he or she is willing to make an electronically recorded statement.

- The officer should advise the suspect that if at any time he or she changes his or her mind and decides that he or she does want the interview to be recorded, he or she should let the officer know and the officer will turn on the recording device.
- If the suspect still refuses, the officer should turn off the device, complete and ask the suspect to execute a refusal form, and proceed with the interview.

2. Suspect refuses to have his or her refusal recorded.

- If the suspect objects to having his or her refusal electronically recorded, the officer may proceed without recording the refusal or the interrogation.
- The officer should advise the suspects of the benefits of recording, complete and ask the suspect to execute a refusal form, and proceed with the interview.

3. Suspect refuses after the recording device has been turned on.

- If, during the course of a recorded interrogation, a suspect decides that he or she will no longer answer questions unless the recording device is turned off, the officer should again advise the suspect of the benefits of recording the interrogation.
- If the suspect still refuses, the officer should turn off the recording device, complete and ask the suspect to execute a refusal form, and proceed with the interview.

E. Discretionary Decision not to Record. An officer may decide not to record an interrogation even where it is practical to do so if that officer reasonably believes that recording the interrogation will jeopardize the safety of an officer, the suspect, or any other person. The officer should document in his or her interview or case report the reason(s) why the interrogation was not recorded.

F. Recording Devices. Officers should choose a recording device that has a removable storage tape or disk that can be easily duplicated.

G. Recording Device Malfunctions. If the recording device malfunctions, the officer conducting the interrogation must make a decision whether and how to continue the interrogation, and he or she must document what occurred.

- If the recording device can be restarted, the officer should state on the record that the device malfunctioned, how long the device was not working, and whether or not the suspect made any statements that were not recorded.
- If the recording device cannot be restarted, the officer should include in his or her interview or case report the fact that the device malfunctioned and whether or not the suspect made any statements that were not recorded.
- If the recording device cannot be restarted, the officer should ask the suspect whether he or she wishes to continue the interrogation without a recording device, or whether he or she wishes to suspend the interrogation until an operable recording device is available.
- If the suspect consents to continuing the interrogation without a recording device, that consent and the interrogation should be documented in some manner, such as in a signed statement by the suspect or in the officer's interview or case report.

H. Inoperable or Unavailable Recording Device. If there is no recording device available or the recording device is inoperable, the officer should defer the interrogation until an operable recording device can be obtained.

- If it is impractical to defer the interrogation, and the suspect consents to continuing the interrogation without a recording device, that consent and the interrogation should be documented in some manner, such as in a signed statement by the suspect or in the officer's interview or case report.

I. Preservation and Copying of Original Recordings. The officer who conducted the interrogation must take steps to preserve the original recording. The storage medium should be removed from the recording device, clearly labeled, and appropriately stored. If the

interrogation is recorded digitally, the officer should preserve at least one whole copy which must be clearly labeled and appropriately stored.

- To the extent it is practical, statements from multiple suspects should not be recorded on the same tape or disk.
- As soon as it is practical, an officer who records the statements of a suspect should create at least one exact copy of the original recording. The copy should be clearly labeled as a copy and appropriately stored.
- Once the copy has been made, the copy, and not the original, should be used to make additional copies. Additionally, copies, and not the original, should be used to prepare a written transcript, to comply with discovery obligations, and for all other purposes.

J. Storage. The officer that conducted the interrogation shall preserve all written forms and notes or records of all statements by a suspect that were not electronically recorded in the original case file.

All electronically recorded interrogations shall be preserved according to the state records retention law and department policy as criminal evidence. The original storage device shall be labeled as such and any copies labeled as such. Each original and copy shall be authenticated by the interrogator with the following information:

- Date and time of recording;
- Location of the interrogation;
- Name of person interrogated;
- Name of person(s) conducting the interrogation; and
- Departmental assigned case number or incident report number.

[Department Name or Letterhead]

ELECTRONIC RECORDING - REFUSAL FORM

Name: _____

Date of Birth: ____ / ____ / ____ Type of Recording Device: _____

Person(s) Present: _____

Date: _____ Time: _____ Location: _____

_____ I have requested that this interview **not** be recorded.

_____ I have requested that this interview **no longer** be recorded.

To be read to suspect: There are potential benefits to the electronic recording of interviews. For example, the electronic recording of this interview will create a complete record of what was said to you today and what you said in return.

As you know, we have a recording device available for the purpose of electronically recording this interview and are ready and willing to electronically record this interview.

At your request, we will conduct this interview without electronically recording (or any further recording) of your statements. If, at any time, you change your mind and decide that you do want to electronically record this interview, please let me know and we will turn on the recording device. I am going to ask you to initial and sign this form:

Do you understand the information that I have read to you?

YES NO

Do you still request that this interview **not** be recorded?

YES NO

Signature: _____ Date: _____

Witness: _____

Appendix 5

New Jersey

New Jersey Supreme Court Rule 3:17

New Jersey Model Jury Instruction

SUPREME COURT OF NEW JERSEY

IT IS ORDERED that the attached Rule 3:17, Electronic Recordation, is adopted, to take effect January 1, 2006, in respect of all homicide offenses and January 1, 2007, for all other offenses specified in paragraph (a) of the Rule.

For the Court:

/s/ Deborah T. Poritz

C.J.

Dated: October 14, 2005

Rule 3:17 Electronic Recordation

(a) Unless one of the exceptions set forth in paragraph (b) are present, all custodial interrogations conducted in a place of detention must be electronically recorded when the person being interrogated is charged with murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault, aggravated arson, burglary, violations of Chapter 35 of Title 2C that constitute first or second degree crimes, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes. For purposes of this rule, a “place of detention” means a building or a police station or barracks that is a place of operation for a municipal or state police department, county prosecutor, sheriff or other law enforcement agency, that is owned or operated by a law enforcement agency at which persons are or may be detained in connection with criminal charges against those persons. Place of detention shall also include a county jail, county workhouse, county penitentiary, state prison or institution of involuntary confinement where a custodial interrogation may occur.

(b) Electronic recordation pursuant to paragraph (a) must occur unless: (i) a statement made during a custodial interrogation is not recorded because electronic recording of the interrogation is not feasible, (ii) a spontaneous statement is made outside the course of an interrogation, (iii) a statement is made in response to questioning that is routinely asked during the processing of the arrest of the suspect, (iv) a statement is made during a custodial interrogation by a suspect who indicated, prior to making the statement, that he/she would participate in the interrogation only if it were not recorded; provided

however, that the agreement to participate under that condition is itself recorded, (v) a statement is made during a custodial interrogation that is conducted out-of-state, (vi) a statement is given at a time when the accused is not a suspect for the crime to which that statement relates while the accused is being interrogated for a different crime that does not require recordation, (vii) the interrogation during which the statement is given occurs at a time when the interrogators have no knowledge that a crime for which recording is required has been committed. The State shall bear the burden of proving, by a preponderance of the evidence, that one of the exceptions is applicable.

(c) If the State intends to rely on any of the exceptions set forth in paragraph (b) in offering a defendant's unrecorded statement into evidence, the State shall furnish a notice of intent to rely on the unrecorded statement, stating the specific place and time at which the defendant made the statement and the specific exception or exceptions upon which the State intends to rely. The prosecutor shall, on written demand, furnish the defendant or defendant's attorney with the names and addresses of the witnesses upon whom the State intends to rely to establish one of the exceptions set forth in paragraph (b). The trial court shall then hold a hearing to determine whether one of the exceptions apply.

(d) The failure to electronically record a defendant's custodial interrogation in a place of detention shall be a factor for consideration by the trial court in determining the admissibility of a statement, and by the jury in determining whether the statement was made, and if so, what weight, if any, to give to the statement.

(e) In the absence of an electronic recordation required under paragraph (a), the court shall, upon request of the defendant, provide the jury with a cautionary instruction.

Note: Adopted October 14, 2005, to be effective in respect of all homicide offenses as of January 1, 2006, and as of January 1, 2007, in respect of the other offenses specified in paragraph (a) of the Rule.

MODEL JURY CHARGES

JURY CHARGE TO BE GIVEN WHEN STATEMENT OF DEFENDANT HAS BEEN ADMITTED AFTER FINDING BY COURT THAT POLICE INEXCUSABLY FAILED TO ELECTRONICALLY RECORD STATEMENT

[N.B., Material deleted from the report of the Special Committee is indicated by a ~~strikeout~~. New material is underscored. The changes made by the Court to the proposed Charges are solely to make them consistent with the language of Rule 3:17(a). Note further that the offenses to which the Rule requirement applies are being phased in. Until January 1, 2007, only homicide offenses will require the use of the appropriate version of the Model Jury Charge.]

A. Charge to be Given When State Offers Statement as Direct Evidence of Defendant's Guilt:

There is for your consideration in this case a [written or oral] statement allegedly made by the defendant.

The prosecutor asserts that the defendant made the statement and that the information contained in it is credible. **[HERE STATE DEFENDANT'S ASSERTIONS, IF ANY.]**

It is your function to determine (1) whether the statement was actually made, and (2) whether it, or any portion of it, is credible.

To make that decision, you should take into consideration the circumstances and facts as to how the statement was made.

[HERE DISCUSS EVIDENCE ADDUCED BEFORE THE JURY RELATING TO SUCH FACTS AND CIRCUMSTANCES WHICH MAY INCLUDE BUT NEED NOT BE LIMITED TO RENDITION OF MIRANDA WARNINGS AND WAIVER; TIME AND PLACE OF INTERROGATION; TREATMENT OF DEFENDANT BY LAW ENFORCEMENT OFFICIALS; DEFENDANT'S MENTAL AND PHYSICAL CONDITION; AND WHETHER THE STATEMENT IS DEEMED VOLUNTARY UNDER ALL OF THE FACTS AND CIRCUMSTANCES.]

Among the factors you may consider in deciding whether or not the defendant actually gave the alleged statement and if so, whether any or all of the statement is

credible, is the failure of law enforcement officials to make an electronic recording of the interrogation conducted and the defendant's alleged statement itself. ~~New Jersey law favors~~ Our Rules require the electronic recording of interrogations by law enforcement officers when a defendant is charged with [insert applicable offenses] so as to ensure that you will have before you a complete picture of all circumstances under which an alleged statement of a defendant was given, so that you may determine whether a statement was in fact made and if so, whether it was accurately reported by State's witnesses and whether it was made voluntarily or is otherwise reliable or trustworthy. 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 responses, in its entirety. Instead you have been presented with a summary based upon the recollections of law enforcement personnel. Therefore, you should weigh the evidence of the defendant's alleged statement with great caution and care as you determine whether or not the statement was in fact made and if so, whether what was said was accurately reported by State's witnesses, and what weight, if any, it should be given in your deliberations. 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, accurately reported by State's witnesses.

[IF ORAL STATEMENT, CHARGE THE FOLLOWING PARAGRAPH]

Furthermore, in considering whether or not an oral statement was actually made by the defendant, and if made, whether it is credible, you should receive, weigh, and

consider this evidence with caution as well, based on the generally recognized risk of misunderstanding by the hearer, or the ability of the hearer to recall accurately the words used by the defendant. The specific words used and the ability to remember them are important to the correct understanding of any oral communication because the presence, or absence, or change of a single word may substantially change the true meaning of even the shortest sentence.

If, after consideration of all these factors, you determine that the statement was not actually made, then you must disregard the statement completely.

If you find that the statement was made, you may give it what weight you think appropriate.

B. Charge to be Given When Statement of Defendant is Introduced by the State for the Purpose of Inferring the Defendant's Effort to Avoid Arrest and/or Prosecution Due to Consciousness of Guilt:

There is for your consideration in this case a [written or oral] statement allegedly made by the defendant.

The prosecutor asserts that the statement was made by the defendant, that it was knowingly false when it was made, and that you may draw inferences from this as to the defendant's state of mind at that time. **[HERE STATE DEFENDANT'S POSITION, IF ANY.]**

It is your function to determine whether the statement was actually made. In considering whether or not the statement was made by the defendant, you may take into consideration the circumstances and facts surrounding the giving of the statement.

[HERE DISCUSS FACTS AND CIRCUMSTANCES SURROUNDING THE GIVING OF THE STATEMENT.]

Among the factors you may consider in deciding whether or not the defendant actually gave the alleged statement is the failure of law enforcement officials to make an electronic recording of the interrogation conducted and the alleged statement itself. ~~New Jersey law favors~~ Our Rules require the electronic recording of interrogations by law enforcement officers when a defendant is charged with [insert applicable offenses]. This is done to ensure that you will have before you a complete picture of the circumstances under which an alleged statement of a defendant was given, so that you may determine whether a statement was in fact made and accurately recorded. Where there is failure to electronically record an interrogation, you have not been provided with a complete picture of all 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 responses, in its entirety. Instead you have been presented with a summary based upon the recollections of law enforcement personnel. Therefore, you should weigh the evidence of the defendant's alleged statement with great caution and care as you determine whether or not the statement was in fact made and if so whether it was accurately reported by State's witnesses, and what, if any, weight it should be given in your deliberations. 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, accurately reported by State's witnesses.

[IF ORAL STATEMENT—CHARGE THE FOLLOWING PARAGRAPH]

Furthermore, in considering whether or not an oral statement was actually made by the defendant, and, if made, accurately reported by State's witnesses, you should

receive, weigh, and consider this evidence with caution based on the generally recognized risk of misunderstanding by the hearer, or the ability of the hearer to recall accurately the words used by the defendant. The specific words used and the ability to remember them are important to the correct understanding of any oral communication because the presence, or absence, or change of a single word may substantially change the true meaning of even the shortest sentence.

If after consideration of all of the evidence you determine that the statement was not made, then you should disregard it completely. If you find that the statement was made, you must determine what inferences you can draw from it and what weight, if any, to give to it.

CAVEAT

[IF THE STATE IS ALLEGING THAT PORTIONS OF THE STATEMENT ARE TRUE AND ARE ADMISSIONS OF GUILT WHILE OTHERS ARE FALSE AND EVIDENCE HIS EFFORT TO AVOID PROSECUTION AND/OR CONVICTION OR OTHERWISE EVIDENCE CONSCIOUSNESS OF GUILT, IT MAY BE NECESSARY TO GIVE PORTIONS OF BOTH A & B CHARGES.]

Appendix 6

New Mexico

N.M. Stat. § 29-1-16

C

WEST'S NEW MEXICO STATUTES ANNOTATED

CHAPTER 29. LAW ENFORCEMENT

ARTICLE 1. GENERAL PROVISIONS

→ § 29-1-16. Electronic recordings of custodial interrogations

A. A state or local law enforcement officer shall comply when reasonably able to do so with the following procedures when conducting a custodial interrogation:

- (1) the custodial interrogation shall be electronically recorded in its entirety;
- (2) if conducted in a police station, the custodial interrogation shall be electronically recorded by a method that includes audio or visual or both, if available; and
- (3) the electronic recording shall include the advice of constitutional rights required by law.

B. A law enforcement officer shall comply with the provisions of this section unless the law enforcement officer has good cause not to electronically record the entire custodial interrogation and makes a contemporaneous written or electronic record of the reasons for not doing so. Good cause includes:

- (1) the electronic recording equipment was not reasonably available;
- (2) the electronic recording equipment failed and obtaining replacement equipment was not feasible;
- (3) the individual refused to be recorded; or
- (4) the statement was made in a court proceeding or a grand jury proceeding.

C. Statements that are spontaneously volunteered and not the result of custodial interrogation are not subject to the provisions of this section.

D. The provisions of this section shall apply only to custodial interrogations when, at the time of the interrogation, the person is suspected of committing a felony offense.

E. The provisions of this section do not apply to custodial interrogations conducted outside the state of New Mexico.

F. The provisions of this section do not apply to statements used for impeachment purposes.

G. The provisions of this section do not apply within a correctional facility.

H. As used in this section:

- (1) "custodial interrogation" means questioning by law enforcement officers that requires the advice of constitutional rights; and

N. M. S. A. 1978, § 29-1-16

(2) "electronic recording" means a complete and authentic electronic recording created by visual or audio media, including by motion picture, videotape, audio tape or digital media.

I. This section shall not be construed to exclude otherwise admissible evidence in any judicial proceeding.

Current through the Second Regular Session of the 47th Legislature
(2006)

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Appendix 7

North Carolina

N. C. Gen. Stat. § 15A-211

N.C.G.S.A. § 15A-211

WEST'S NORTH CAROLINA GENERAL STATUTES ANNOTATED
CHAPTER 15A. CRIMINAL PROCEDURE ACT
SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES
ARTICLE 8. ELECTRONIC RECORDING OF INTERROGATIONS

→ § 15A-211. Electronic recording of interrogations

- (a) Purpose.--The purpose of this Article is to require the creation of an electronic record of an entire custodial interrogation in order to eliminate disputes about interrogations, thereby improving prosecution of the guilty while affording protection to the innocent and increasing court efficiency.
- (b) Application.--The provisions of this Article shall only apply to custodial interrogations in homicide investigations conducted at any place of detention.
- (c) Definitions.--The following definitions apply in this Article:
- (1) Electronic recording.--An audio recording that is an authentic, accurate, unaltered record; or a visual recording that is an authentic, accurate, unaltered record.
 - (2) In its entirety.--An uninterrupted record that begins with and includes a law enforcement officer's advice to the person in custody of that person's constitutional rights, ends when the interview has completely finished, and clearly shows both the interrogator and the person in custody throughout. If the record is a visual recording, the camera recording the custodial interrogation must be placed so that the camera films both the interrogator and the suspect. Brief periods of recess, upon request by the person in custody or the law enforcement officer, do not constitute an "interruption" of the record. The record will reflect the starting time of the recess and the resumption of the interrogation.
 - (3) Place of detention.--A jail, police or sheriff's station, correctional or detention facility, holding facility for prisoners, or other facility where persons are held in custody in connection with criminal charges.
- (d) Electronic Recording of Interrogations Required.--Any law enforcement officer conducting a custodial interrogation in a homicide investigation shall make an electronic recording of the interrogation in its entirety.
- (e) Admissibility of Electronic Recordings.--During the prosecution of any homicide, an oral, written, non-verbal, or sign language statement of a defendant made in the course of a custodial interrogation may be presented as evidence against the defendant if an electronic recording was made of the custodial interrogation in its entirety and the statement is otherwise admissible. If the court finds that the defendant was subjected to a custodial interrogation that was not electronically recorded in its entirety, any statements made by the defendant after that non-electronically recorded custodial interrogation, even if made during an interrogation that is otherwise in compliance with this section, may be questioned with regard to the voluntariness and reliability of the statement. The State may establish through clear and convincing evidence that the statement was both voluntary and reliable and that law enforcement officers had good cause for failing to electronically record the interrogation in its entirety. Good cause shall include, but not be limited to, the following:
- (1) The accused refused to have the interrogation electronically recorded, and the refusal itself was electronically recorded.

(2) The failure to electronically record an interrogation in its entirety was the result of unforeseeable equipment failure, and obtaining replacement equipment was not feasible.

(f) Remedies for Compliance or Noncompliance.--All of the following remedies shall be granted as relief for compliance or noncompliance with the requirements of this section:

- (1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress a statement of the defendant made during or after a custodial interrogation.
- (2) Failure to comply with any of the requirements of this section shall be admissible in support of claims that the defendant's statement was involuntary or is unreliable, provided the evidence is otherwise admissible.
- (3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine whether the defendant's statement was voluntary and reliable.

(g) Article Does Not Preclude Admission of Certain Statements.--Nothing in this Article precludes the admission of any of the following:

- (1) A statement made by the accused in open court during trial, before a grand jury, or at a preliminary hearing.
- (2) A spontaneous statement that is not made in response to a question.
- (3) A statement made during arrest processing in response to a routine question.
- (4) A statement made during a custodial interrogation that is conducted in another state by law enforcement officers of that state.
- (5) A statement obtained by a federal law enforcement officer.
- (6) A statement given at a time when the interrogators are unaware that the person is suspected of a homicide.
- (7) A statement used only for impeachment purposes and not as substantive evidence.

(h) Destruction or Modification of Recording After Appeals Exhausted.--The State shall not destroy or alter any electronic recording of a custodial interrogation of a defendant convicted of any offense related to the interrogation until one year after the completion of all State and federal appeals of the conviction, including the exhaustion of any appeal of any motion for appropriate relief or habeas corpus proceedings. Every electronic recording should be clearly identified and catalogued by law enforcement personnel.

Current through S.L. 2007-552 (End) of the 2007 Regular and Extra Sessions.

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Appendix 8

Wisconsin

Wis. Stat. § 972.115

Wis. Stat. § 968.073

W.S.A. 972.115

C

WEST'S WISCONSIN STATUTES ANNOTATED

CRIMINAL PROCEDURE

CHAPTER 972. CRIMINAL TRIALS

→ 972.115. Admissibility of defendant's statement

(1) In this section:

- (a) "Custodial interrogation" has the meaning given in s. 968.073(1)(a).
- (b) "Law enforcement agency" has the meaning given in s. 165.83(1)(b).
- (c) "Law enforcement officer" has the meaning given in s. 165.85(2)(c).
- (d) "Statement" means an oral, written, sign language, or nonverbal communication.

(2)(a) If a statement made by a defendant during a custodial interrogation is admitted into evidence in a trial for a felony before a jury and if an audio or audio and visual recording of the interrogation is not available, upon a request made by the defendant as provided in s. 972.10(5) and unless the state asserts and the court finds that one of the following conditions applies or that good cause exists for not providing an instruction, the court shall instruct the jury that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case:

1. The person refused to respond or cooperate in the interrogation if an audio or audio and visual recording was made of the interrogation so long as a law enforcement officer or agent of a law enforcement agency made a contemporaneous audio or audio and visual recording or written record of the subject's refusal.
2. The statement was made in response to a question asked as part of the routine processing of the person.
3. The law enforcement officer or agent of a law enforcement agency conducting the interrogation in good faith failed to make an audio or audio and visual recording of the interrogation because the recording equipment did not function, the officer or agent inadvertently failed to operate the equipment properly, or, without the officer's or agent's knowledge, the equipment malfunctioned or stopped operating.
4. The statement was made spontaneously and not in response to a question by a law enforcement officer or agent of a law enforcement agency.
5. Exigent public safety circumstances existed that prevented the making of an audio or audio and visual recording or rendered the making of such a recording infeasible.
6. The law enforcement officer conducting the interrogation or the law enforcement officer responsible for observing an interrogation conducted by an agent of a law enforcement agency reasonably believed at the commencement of the interrogation that the offense for which the person was taken into custody or for which the person was being investigated, was not a felony.

W.S.A. 972.115

(b) If a statement made by a defendant during a custodial interrogation is admitted into evidence in a proceeding heard by the court without a jury in a felony case and if an audio or audio and visual recording of the interrogation is not available, the court may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement unless the court determines that one of the conditions under par. (a)1. to 6 applies.

(4) Notwithstanding ss. 968.28 to 968.37, a defendant's lack of consent to having an audio or audio and visual recording made of a custodial interrogation does not affect the admissibility in evidence of an audio or audio and visual recording of a statement made by the defendant during the interrogation.

(5) An audio or audio and visual recording of a custodial interrogation shall not be open to public inspection under ss. 19.31 to 19.39 before one of the following occurs:

(a) The person interrogated is convicted or acquitted of an offense that is a subject of the interrogation.

(b) All criminal investigations and prosecutions to which the interrogation relates are concluded.

Current through 2005 Act 491, published 07/21/06

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W.S.A. 968.073

C

WEST'S WISCONSIN STATUTES ANNOTATED

CRIMINAL PROCEDURE

CHAPTER 968. COMMENCEMENT OF CRIMINAL PROCEEDINGS

→ 968.073. Recording custodial interrogations

(1) In this section:

(a) "Custodial interrogation" means an interrogation by a law enforcement officer or an agent of a law enforcement agency of a person suspected of committing a crime from the time the suspect is or should be informed of his or her rights to counsel and to remain silent until the questioning ends, during which the officer or agent asks a question that is reasonably likely to elicit an incriminating response and during which a reasonable person in the suspect's position would believe that he or she is in custody or otherwise deprived of his or her freedom of action in any significant way.

(b) "Law enforcement agency" has the meaning given in s. 165.83(1)(b).

(c) "Law enforcement officer" has the meaning given in s. 165.85(2)(c).

(2) It is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony unless a condition under s. 972.115(2)(a)1. to 6. applies or good cause is shown for not making an audio or audio and visual recording of the interrogation.

(3) A law enforcement officer or agent of a law enforcement agency conducting a custodial interrogation is not required to inform the subject of the interrogation that the officer or agent is making an audio or audio and visual recording of the interrogation.

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