

**REPORT OF THE
SUPREME COURT SPECIAL COMMITTEE
ON
RECORDATION OF CUSTODIAL
INTERROGATIONS**



APRIL 15, 2005

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Benefits and Concerns Associated With Recordation

I. BACKGROUND

On May 10 2004, the New Jersey Supreme Court decided State v. Cook, 179 N.J. 533 (2004), a case involving the murder of a fifteen-year-old girl. The defendant, who was initially arrested on the basis of two unrelated outstanding municipal court warrants, was questioned four times over two separate days before ultimately admitting that he killed the victim. None of the interrogations were electronically recorded. At trial, over the defendant's objection, the court admitted the inculpatory statements into evidence and the defendant was convicted of purposeful and knowing murder.

On appeal, the Appellate Division affirmed the conviction, following which the Supreme Court granted certification. Before the Supreme Court the defendant argued that "... modern notions of due process require the electronic recordation of his custodial statements as a condition to their admissibility". Id. at 551.

The Supreme Court declined to hold that the due process requirement of the New Jersey Constitution required electronic recordation of custodial interrogations as a condition of admissibility of statements made during such interrogations. Nevertheless, the Court noted its longstanding concern for establishing the reliability and trustworthiness of confessions as a prerequisite to their use. It recognized that the Attorney General and County Prosecutors and several other states¹ had taken steps to either require, or express a preference for, electronic recordation. Although it noted certain concerns with recordation, the Court stated that it also perceived certain benefits

¹ See Stephan v. State, 711 P.2d 1156 (Alaska 1985); State v. Scales, 518 N.W.2d 587 (Minn.1994); Commonwealth v. DiGiambattista, 813 N.E.2d 516 (2004). See also 725 Ill. Comp. Stat. Ann. 5/103-2.1 (West 2003), Tex.Crim.Proc.Code Ann. Art. 38.22 § 3 (Vernon 1999) and 25 M.R.S.A. § 2803-B. Copies of both statutes are contained in Appendix A.

to defendants, law enforcement and the administration of justice if custodial interrogations were recorded electronically.

As a result, the Court concluded that the time had arrived for it “to evaluate fully the protections that electronic recordation affords to both the State and criminal defendants.” Id. at 562. The Court called for a careful and deliberate study that would balance the interests of law enforcement, defendants, and the justice system, securing to all the benefits of recordation without unduly hampering the legitimate needs of law enforcement. Toward that end, the Court indicated that it would “...establish a committee to study and make recommendations on the use of electronic recordation of custodial interrogations.” Ibid.

II. CHARGE TO THE COMMITTEE

On August 10, 2004, the Chief Justice appointed the *Special Committee on Recordation of Custodial Interrogations*, (hereinafter *Committee*) to conduct the study called for by the Court. The *Committee* was charged with weighing and balancing the significant public interests involved by considering the perspectives of law enforcement, defendants and the judicial system. The *Committee* was instructed to examine the policy and financial implications arising from electronic recordation, and to recommend how and when any type of proposed electronic recordation should be implemented. The *Committee* was also charged, to consider whether electronic recordation should be encouraged through the use of a presumption against the admissibility of non-recorded statements or through other formal or less formal means.

III. COMMITTEE COMPOSITION

The following persons, representing various interests in the criminal justice process, were appointed to the *Committee*.

Hon. Richard J. Williams, J.A.D., Retired, Chair
Hon. Harvey Weissbard, J.A.D., Vice-Chair
Hon. Leonard N. Arnold, J.A.D., Retired
Hon. Frederick P. DeVesa, P.J.S.C.
Hon. Albert J. Garofolo, P.J.S.C.
Hon. Betty J. Lester, J.S.C.
Vincent P. Sarubbi, Camden County Prosecutor
Thomas F. Kelaher, Ocean County Prosecutor
Paul H. Heinzl, Esq., Deputy Attorney General
Bruno Mongiardo, 1st Asst. Prosecutor, Passaic County
Marcia Blum, Esq., Asst. Dep. Public Defender
Carl D. Poplar, Esq., Association of Criminal Defense Lawyers of N. J.
Hassen I. Abdellah, Esq., New Jersey State Bar Association
Chief Douglas P. Scherzer, President, Police Chief's Association
Sergeant Robert J. Billings, New Jersey State Police

Committee Staff

Joseph J. Barraco, Esq., Assistant Director for Criminal Practice,
New Jersey Administrative Office of the Courts
Jeffrey A. Newman, Deputy Clerk, Appellate Division Administrative
Services
Vance D. Hagins, Assistant Chief, Criminal Practice Division,
New Jersey Administrative Office of the Courts

IV. STATUS OF RECORDING REQUIREMENTS

A. Committee Work Plan

The *Committee* conducted a review of case law, state statutes and scholarly articles to ascertain which jurisdictions throughout the nation presently engage in recordation of custodial interrogations. As part of its review the *Committee* examined the *Interim Policy Statement of the New Jersey Attorney General and the New Jersey County Prosecutors' Association Regarding Electronic Recordation of Stationhouse Confessions* 76 N.J.L.J. 182 (April 13, 2004) and the *Amended Policy Statement of the New Jersey Attorney General and the New Jersey County Prosecutors' Association Regarding Electronic Recordation of Stationhouse Confessions*. See http://www.state.nj.us/lps/dcj/pdfs/policy_statement_recordings.pdf. The *Committee* also reviewed the recordation policies of the Monmouth, Passaic and Ocean County Prosecutors' Offices. In addition, representatives of the *Committee* also visited, and inspected, facilities where electronic recordation was conducted by those county prosecutors' offices.

The *Committee* consulted with Paul Scoggin² from the Hennepin County (Minnesota) District Attorney's Office who met with the *Committee* to describe and to answer questions about Minnesota's experience with recordation. The *Committee* also consulted via teleconference with Captain Bill Miller³ of the Anchorage (Alaska) police department to learn about the Alaska experience and met via videoconference with

² At the suggestion of the Attorney General's Office Paul Scoggin from Minnesota was invited to address the Committee. Mr. Scoggin works for the Hennepin County District Attorney's Office and has been involved with recordation since the Minnesota Supreme Court required it ten years ago.

³ At the suggestion of the Public Defender's Office Captain Bill Miller of the Anchorage Alaska Police Department was invited to address the Committee. Captain Miller has been involved with recordation for over twenty years.

Thomas P. Sullivan⁴, who headed a national survey on the recordation of interrogations and who has published several articles on the results of his research.

B. National Experience with Recordation

Five states currently engage in the recordation of custodial interrogations in some form at a statewide level.⁵ In addition, Texas requires recordation of a statement if the prosecution seeks to admit that statement in a criminal proceeding. Additionally, the District of Columbia and more than 260 local law enforcement agencies in 41 states electronically record custodial interviews from the point Miranda warnings are given to the end of the interrogation. These practices are discussed below.

1. Alaska

Alaska has engaged in electronic recordation of interrogations since 1985. In Stephan v. State, 711 P.2d 1156 (1985) the Alaska Supreme Court held that, as a requirement of due process under the Alaska Constitution, electronic recording is required when the interrogation occurs in a place of detention and recording is feasible. The Alaska Supreme Court stated that a recording requirement provided a more accurate record of a defendant's interrogation and thus would reduce the number of disputes over the validity of Miranda warnings and the voluntariness of purported waivers. Stephan v. State, supra, 711 P.2d at 1160-1162. The Court also said:

⁴ Mr. Sullivan is a senior partner at Jenner & Block in Chicago, Illinois. He served as Co-Chair of Illinois Governor George H. Ryan's Commission on Capital Punishment. Mr. Sullivan wrote a seminal article on recordation for the Northwestern University School of Law, Center on Wrongful Convictions in 2004. See Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, Nw. U. Sch. Law, Center on Wrongful Convictions, Special Report (2004). A copy of the listing of the 238 local law enforcement agencies that electronically recorded at the time the article was published is contained in Appendix A. Mr. Sullivan currently serves as Chair of the Advisory Board of the Center on Wrongful Convictions.

⁵ New Hampshire requires that in order to admit into evidence the tape recording of an interrogation that occurred post-Miranda the recording must be complete. See State v. Barnett, 789 A.2d 629 (2001) and State v. Velez, 842 A.2d 97 (2004).

We reach this conclusion because we are convinced that recording...is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against incrimination and, ultimately his right to a fair trial.
[Id. at 1159-1160]

In Alaska, the remedy for an unexcused failure to electronically record an interrogation, when such recording is feasible, is exclusion of the evidence. Id. at 1164. An accused agreeing to answer questions only if he is not recorded, or an unavoidable power or equipment failure, are examples of acceptable excuses for not recording. Where a full recording is not made, the state is required to persuade the trial court, by a preponderance of the evidence, that recording was not feasible under the circumstances. Id. at 1162. In Alaska police are required to record suspects, victims and witnesses in all felony and domestic violence cases.⁶ Courts in Alaska have upheld the admissibility of statements where a recording was not made and the police made a good faith effort to record their conversation, see Bodnar v. Anchorage, 2001 WL 1477922 (Alaska Ct. App. 2001), or where the police did not have a functioning tape recorder, see George v. State, 836 P.2d 960 (Alaska Ct. App. 1992), or where the recording was inadvertently erased or destroyed, see Bright v. State, 826 P.2d 765 (Alaska Ct. App. 1992).

2. Minnesota

In State v. Scales, 518 N.W.2d 587 (1994), the defendant asked the Minnesota Supreme Court to find that the Minnesota Constitutional requirement of due process required the recordation of custodial interrogations. The Minnesota Supreme Court refused to so hold. However, the Court, citing Stephan v. State, supra, 711 P.2d at

⁶ Remarks of Captain Bill Miller before the *Committee*.

1150-1160, was persuaded that the recording of custodial interrogations was a reasonable and necessary safeguard essential to protecting an accused's rights. As a result, the Court held:

Rather, in the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial. The parameters of the exclusionary rule applied to evidence of statements obtained in violation of these requirements must be decided on a case-by-case basis. *Footnote omitted.* [Id. at 592]

The Court went on to say that suppression would be required if a violation of the requirement was deemed by the trial court to be substantial, after considering all relevant circumstances.⁷ Ibid. The rule announced in Scales was made prospective only. However, the decision was effective immediately. The recording requirement applies to all criminal cases, not just to felonies, and the recording is required from “stem to stern”, i.e., the entire interrogation must be recorded, rather than just the final statement.⁸ Courts in Minnesota have upheld the admissibility of statements where, because of a mistake, no recording was made, see State v. Miller, 573 N.W.2d 661 (Minn. 1998), or where the tape recorder was inoperative, see State v. Schroeder, 560 N.W.2d 739 (Minn. Ct. App. 1997).

⁷ The Minnesota Supreme Court followed the approach suggested by the drafters of the Model Penal Code of Pre-Arrestment Procedure. That Procedure also contained a definition of violations that were deemed substantial.

⁸ Remarks of Paul Scoggin before the *Committee*.

3. Illinois

In 2003, pursuant to a recommendation made by the Governor's Commission on Capital Punishment, Illinois adopted a statute⁹ providing that an oral statement made as a result of a custodial interrogation in a homicide investigation was inadmissible unless the interrogation was electronically recorded. 725 Ill. Comp. Stat. Ann. 5/103-2.1 provides:

(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 unless:

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

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

The Illinois statute becomes effective July 18, 2005.

4. Maine

In 2004, Maine adopted a requirement that law enforcement agencies adopt written policies regarding procedures to deal with the recording of interviews with suspects. 25 M.R.S.A. § 2803-B(1)¹⁰ provides, in pertinent part:

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

* * * *

K. Digital, electronic, audio, video or other recording of law enforcement interviews of suspects in serious crimes and the preservation of investigative notes and records in such cases.

⁹ A copy of the entire statute is contained in Appendix A.

¹⁰ A copy of the entire statute is contained in Appendix A.

The statute requires that the Board of Trustees of the Maine Criminal Justice Academy¹¹ develop minimum standards for law enforcement policies for recording and preservation of interviews by January 1, 2005.¹² Thereafter, by June 1, 2005, the chief administrative officer of each law enforcement agency is required to certify to the board that their agency has adopted written policies consistent with the minimum standards.¹³

The Board of Trustees of the Maine Criminal Justice Academy adopted minimum standards on January 7, 2005. Those standards call for the electronic recording of any statement obtained by a law enforcement officer from a person who is the subject of a custodial interrogation conducted at a place of detention for the crimes of murder, felony murder, manslaughter, aggravated assault, elevated aggravated assault, gross sexual assault, kidnapping, robbery, arson, or causing a catastrophe or the corresponding juvenile crimes. The minimum standards permit electronic recording by videotape, audiotape, motion picture or digital recording.¹⁴

The Maine Chiefs of Police, working with the Attorney General's Office, adopted a model policy regarding the recording of suspects in serious crimes on February 11, 2005.¹⁵ It is expected that the Chief's model policy will be used by local law enforcement agencies in developing local written policies.

5. Massachusetts

In Commonwealth v. DiGiambattista, 813 N.E.2d 516 (2004), the Massachusetts Supreme Judicial Court also addressed the issue of recording but did not adopt the

¹¹ See 25 M.R.S.A. § 2801-A(1).

¹² See 25 M.R.S.A. § 2801-A(2).

¹³ See 25 M.R.S.A. § 2801-A(3).

¹⁴ A copy of the Board of Trustees of the Maine Criminal Justice Academy minimum standards is contained in Appendix A.

¹⁵ A copy of the Chief's model policy is contained in Appendix A.

suppression of evidence approach taken by either the Alaska or Minnesota Supreme Courts. Rather, the Court required that a jury instruction be given upon request when a defendant's unrecorded statement, given in a custodial interrogation, is admitted in evidence. The Court held that:

[H]enceforth, the admission in evidence of any confession or statement of the defendant that is the product of an unrecorded custodial interrogation, or an unrecorded interrogation conducted at a place of detention, will entitle the defendant, on request, to a jury instruction concerning the need to evaluate that alleged statement or confession with particular caution.

[Id. at 425]

That instruction will inform the jury that the:

State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because 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. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.

[Id. at 448]

As of March 22, 2005, guidelines have not yet been implemented; nor has Massachusetts yet developed a "model" charge.

6. Texas

In 1981, Texas adopted a statute¹⁶ requiring that, in order to be admissible, oral statements must be recorded. Texas law enforcement officers are not required to record the entire custodial interrogation as a precondition to admissibility, only the

¹⁶ A copy of the entire statute is contained in Appendix A.

statement that the prosecution seeks to admit at trial. Tex.Crim.Proc.Code Ann. Art.

38.22 § 3 provides:

Sec. 3. (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:

(1) An electronic recording, which may include motion picture, videotape, or other visual recording, is made of the statement;

(2) Prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;

(3) The recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;

(4) All voices on the recording are identified; and

(5) Not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article.

(b) Every electronic recording of any statement made by an accused during a custodial interrogation must be preserved until such time as the defendant's conviction for any offense relating thereto is final, all direct appeals there from are exhausted, or the prosecution of such offenses is barred by law.

(c) Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.

(d) If the accused is a deaf person, the accused's statement under Section 2 or Section 3(a) of this article is not admissible against the accused unless the warning in Section 2 of this article is interpreted to the deaf person by an interpreter who is qualified and sworn as provided in Article 38.31 of this code.

(e) The courts of this state shall strictly construe Subsection (a) of this section and may not interpret Subsection (a) as making admissible a statement unless all requirements of the subsection have been satisfied by the state, except that:

(1) Only voices that are material are identified; and

(2) The accused was given the warning in Subsection (a) of Section 2 above or its fully effective equivalent.

7. Other Experience with Recordation

In 2003 the District of Columbia adopted a statute¹⁷ requiring that the Chief of Police develop and implement, within six months, a General Order establishing procedures for the electronic recording of interrogations by the Metropolitan Police Department. The statute required that the order include a requirement that the Metropolitan Police Department electronically record, in their entirety and to the greatest extent feasible, any interrogations of persons suspected of committing a dangerous crime or a crime of violence, when such interrogations are conducted in Metropolitan Police Department interview rooms equipped with electronic recording equipment.

On October 29, 2003, the Chief of Police first issued GO-SPT-304.16 (Electronic Recordation of Interrogations). In late 2004, the Metropolitan Police Department of the District of Columbia (MPDC) issued a report on electronic recording of interrogations that had taken place from January 1 through September 30, 2004. That report stated that of the 1,059 investigations conducted, 226 were required to be recorded by the directive. Of those required to be recorded, there were 42 cases where the person interrogated did not consent to having the interrogation recorded. The evaluation found that the recording requirements were not being implemented consistently throughout the department and a system to monitor compliance was never put in place. On January 31, 2005, the Chief of Police rescinded the earlier general order and issued GO-SPT-

¹⁷ A copy of the entire statute is contained in Appendix A.

304.16 (Distribution B).¹⁸ That policy required that the District of Columbia Police Department:

[E]lectronically record, in its entirety and to the greatest extent feasible, custodial interrogations of persons suspected of committing a dangerous crime or crime of violence, when the interrogation is conducted in a MPD interview room equipped with electronic recording equipment.

The stated purposes of recording custodial investigations were to:

1. Create an exact record of what occurred during the course of the investigation;
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 interrogation;
6. Reduce the time 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.

An extensive set of regulations was also contained in GO-SPT-304.16, detailing the contours of what must be taped and what must be done prior to taping, e.g., testing of equipment, how the tapes are to be labeled and handled, and record keeping responsibilities, including documentation of reasons why electronic recordation did not occur. Electronic recordation under the directive can be either audio or audio-video.

The *Committee* did not attempt to catalog all other local departments that required electronic recordation of custodial interrogations. Rather, it relied on the work done in this regard by Thomas P. Sullivan. In a recent article, Mr. Sullivan states that

¹⁸ A copy of the general order is contained in Appendix A.

he has found “ . . . more than 260 law enforcement agencies in 41 states (in addition to Alaska and Minnesota) that record complete custodial interviews of suspects in felony investigations.”¹⁹ The survey only counted departments that electronically record custodial interviews from the point of the Miranda warning to the end of the confession. It counts any department that records more than 50% of a given class of cases, e.g. homicides or sexual assaults, as a department that engages in electronic recordation. The survey included diversity in respondents ranging from large departments, such as Los Angeles and Miami, to numerous smaller departments.

As part of its research the *Committee* also noted that in 1975 the American Law Institute adopted *A Model Code of Pre-Arrest Procedure*, hereinafter *Model Code*. Section 130.4(3) of the *Model Code* required the development of regulations on sound recordings as follows:

- (3) Sound Recordings. The regulations relating to sound recordings shall establish procedures to provide a sound recording of
- (a) the warning to arrested persons pursuant to Subsection 130.1(2);
 - (b) the warning required by, and any waiver of the right to counsel pursuant to, Section 140.8; and
 - (c) any questioning of the arrested person and any statement he makes in response thereto.
- Such recording shall include an indication of the time of the beginning and ending thereof. The arrested person shall be informed that the sound recording required hereby is being made and the statement so informing him shall be included in the sound recording. The station officer shall be responsible for insuring that such a sound recording is made.

¹⁹ Thomas P. Sullivan, *Recording Custodial Interrogations: The Police Experience*, 52-JAN Fed. Law 20 (2005).

The *Model Code* provides for suppression of statements where there is a substantial violation of the requirement that the interrogation be recorded. See Section 150.3.

C. New Jersey Experience with Recordation

1. Statewide Attorney General and New Jersey County Prosecutors' Association Initiatives

a. Interim Policy Statement on Recordation

On April 13, 2004, the Attorney General and County Prosecutors' Association issued the *Interim Policy Statement of the New Jersey Attorney General and the New Jersey County Prosecutors' Association Regarding Electronic Recordation of Stationhouse Confessions*.²⁰ The *Interim Recordation Policy* required that, when feasible, the investigating officer electronically record (preferably video record) a suspect's final statements or acknowledgments when the person is suspected of committing a homicide. That policy stated as follows:

If a person who is suspected of committing a homicide is asked by a law enforcement officer to provide or acknowledge a written statement in a stationhouse custodial setting, the investigating officer should, whenever feasible, arrange to electronically record (preferably video record) the suspect's statement or acknowledgment so as to establish a permanent and objective record that the suspect had been advised of his or her constitutional rights and that any such incriminating statement or acknowledgment was actually made by the suspect. Electronic recordation of the final statement or acknowledgment may be done on notice to and with the express permission of the suspect, or may be done surreptitiously at the discretion of the investigating officer. The electronic recordation of the suspect's final statement or acknowledgment may be in addition to or in lieu of having the suspect sign a traditional written statement.

When a written statement is signed or acknowledged by a suspect in custody and no electronic recordation is

²⁰ A copy of the *Interim Recordation Policy* is contained in Appendix B.

made, the officer taking the written statement or acknowledgment shall document the reasons why the statement or acknowledgment was not electronically recorded (e.g., electronic recordation equipment was not reasonably available at the time that the written statement or acknowledgment was given; the suspect indicated a desire that the statement or acknowledgment not be electronically recorded, etc.). The documented reasons for not electronically recording the final statement or acknowledgment shall be provided to the appropriate prosecuting agency.

The *Interim Recordation Policy* was binding on all law enforcement agencies in the State. The *Interim Recordation Policy* also required that, within 180 days of its effective date, the County Prosecutors recommend to the Attorney General policies concerning the electronic recordation of other crimes, and pilot programs providing for recordation at earlier stages of custodial interrogations.

b. Amended Policy Statement on Recordation

On December 17, 2004 the Attorney General and County Prosecutors' Association issued an *Amended Policy Statement of the New Jersey Attorney General and the New Jersey County Prosecutors' Association Regarding Electronic Recordation of Stationhouse Confessions*.²¹ The *Amended Recordation Policy* requires that, when feasible, the investigating officer electronically record a suspect's final statements or acknowledgments. The policy states:

If a person who is suspected of committing any first, second or third degree crime, is asked by a law enforcement officer to provide or acknowledge a written statement in a stationhouse custodial setting, the investigating officer should, whenever feasible, arrange to electronically record the suspect's statement or acknowledgment so as to establish a permanent and objective record that the suspect had been advised of his or her constitutional rights and that any such incriminating statement or acknowledgment was

²¹ A copy of the *Amended Recordation Policy* is contained in Appendix B.

actually made by the suspect. Electronic recordation of the final statement or acknowledgment may be done on notice to and with the express permission of the suspect, or may be done without notice to the suspect. The electronic recordation of the suspect's final statement or acknowledgment may be in addition to or in lieu of having the suspect sign a traditional written statement.

When a written statement is signed or acknowledged by a suspect in custody in a stationhouse and no electronic recordation is made, the officer taking the written statement or acknowledgment shall document the reasons why the statement or acknowledgment was not electronically recorded (e.g., electronic recordation equipment was not reasonably available at the time that the written statement or acknowledgment was given; the suspect indicated a desire that the statement or acknowledgment not be electronically recorded, etc.). The documented reasons for not electronically recording the final statement or acknowledgment shall be provided to the appropriate prosecuting agency.

The above provisions shall also apply to any juvenile, age 14 or older, suspected of committing any act that would constitute one of the crimes enumerated in N.J.S.A. 2A:4A-26a(2)(a), thereby subjecting the juvenile to waiver to adult court on the prosecutor's motion.

The *Amended Recordation Policy* expanded the types of crimes covered by the policy from homicides to all first and second-degree offenses effective September 1, 2005. Effective January 1, 2006, the policy is further expanded to cover all third degree crimes, and all juvenile cases involving crimes listed in N.J.S.A. 2A:4A-26a(2)(a). Between now and January 1, 2006, the *Amended Recordation Policy* encourages county and local law enforcement entities to experiment with electronic recordation of the entire stationhouse interrogation. At least one county prosecutor has already begun to do so.

2. County Level Initiatives

a. Monmouth

i. Description of Program

Monmouth County was the first county to implement a recording requirement when, in 1997, the county prosecutor issued a policy that required that certain video recording procedures be employed to memorialize the reviewing and signing of a formal written statement by an adult or juvenile target in a homicide investigation. On May 1, 2002, that policy was expanded to include all first and second degree crimes as well.²² Effective January 2005, the policy was expanded to mandate the covert video recording of the entire interrogation of any adult or juvenile reasonably believed to be a target in a homicide investigation.²³ Recording is required, whether the interrogation is custodial or not, whenever it occurs in a police station, any office of the Monmouth County Prosecutor, or any other law enforcement office where covert recording is possible.

ii. Description of Physical Setup

An interrogation room has been equipped for covert recording of interrogations in the Asbury Park Office of the Monmouth County Prosecutor's Office. A bid has recently been placed and awarded for installation of two additional rooms and an upgrade of the current room. The Monmouth County Prosecutor also has a facility equipped for covert recording in his Freehold office. That facility was not visited by the *Committee*.

The existing interrogation room has a ceiling-mounted microphone and a concealed wall-mounted video camera. The camera is a fixed focus, wide-angle

²² A copy of the *Monmouth County Uniform Policy for Videotaped Review of Formal Written Statements* (May 1, 2002) is contained in Appendix C.

²³ A copy of the *Monmouth County Uniform Policy for Video Recorded Interrogations of Targets in Homicide Cases* (January 2005) is contained in Appendix C.

camera providing an overview of the room. The recording is made in a central control room, where the interrogation is monitored and recorded on a single VCR.

The new control rooms, when completed, will have color cameras and record on a DVD for long-term storage.

b. Passaic

i. Description of Program

Effective February 1, 2004, Passaic County instituted a recordation policy. The recording policies are to be employed once an adult or juvenile agrees²⁴ to provide a written statement. The policy requires the video recording of the following: (1) a verbal advisement to the target that video recording procedures are being employed; (2) execution of the Miranda Rights and Waiver Form in cases where only verbal warnings were provided prior to interrogation. In cases where the form was executed prior to interrogation, it shall be reviewed in its entirety on tape; (3) the taking of the formal written statement from the target, and (4) the process by which the target reviews, corrects, and signs the formal written statement. Video recording is required once the adult target of an investigation into one or more of the following offenses has agreed to provide a formal written statement. The specific crimes to which this directive applies are: all homicides, kidnapping, first degree robbery, carjacking, aggravated sexual assault and sexual assault, aggravated arson, or an attempt or conspiracy to commit any of the offenses enumerated. The video recording²⁵ procedures also cover juveniles

²⁴ Passaic personnel reported during a visit by *Committee* staff that they have never had a defendant object to videotaping.

²⁵ Passaic uses digital media (DVD) to record the interrogation.

who are targets of homicide investigations. The protocol also provides requirements for the recording process itself.²⁶

ii. Description of Physical Setup

In the Passaic County Prosecutor's Office there is one video interrogation room, which is linked to a central control room to record and monitor the activities in the room. The interrogation room contains a table, several chairs and a bench. Posted in the room are notices, in both English and Spanish, informing the participants that they are being video recorded.

Within the interrogation room, a single microphone is mounted in the ceiling and a concealed camera is mounted in a corner of the room. The camera's vantage point provides a view of the entire room with a fixed focus, wide-angle lens. The only area not visible is the area directly beneath the camera.

The monitor in the control room allows investigators or others to watch and listen to the interrogation. The interrogation is preserved simultaneously on two videotapes and on a DVD.

When the target under investigation is ready to provide a statement, a secretary is brought into the interrogation room to type the statement "live", using a laptop computer. The act of giving and typing the statement is also captured on the recording medium.

²⁶ A copy of the *Passaic County Uniform Protocol for the Video Recording of Formal Written Statements* is contained in Appendix C.

c. Ocean

i. Description of Program

Ocean County, which began videotaping in 2003, has two rooms set up for covert recording.²⁷ Ocean initially taped only child victims in physical and sex abuse cases. A second room is now utilized for traditional interrogation. Only final statements are recorded. Ocean County is in the process of developing written procedures and providing training for police officers.

ii. Description of Physical Setup

The Ocean County Prosecutor's Office utilizes a facility that was formerly a private home, which has been converted into a comfortable environment for individuals to meet with investigators. Within the building are two interrogation rooms linked to a central control room that records and monitors each room. There are no signs posted in these rooms regarding the video recording of the interrogation.

The interrogation rooms each contain a concealed wall-mounted robotic camera that can pan, tilt and zoom. The camera can either be left in a wide-angle mode to capture the entire room, or can be operated by an officer from the control room. Microphones are concealed in switch plates in the wall near where the questioning takes place. A wireless earpiece is available for the investigator to wear to receive communication from individuals monitoring the questioning.

One of the two interrogation rooms is designed to be "kid-friendly", with colorful walls and tiered seating for children to climb on. The microphone, concealed in a switch

²⁷ It cost \$14,405 to retrofit two rooms in Ocean County. Ocean County uses a zoom camera (cost \$2,300). During taping, three copies of the video and an audio copy are made. Additionally, Ocean County's system allows for two-way communication between an officer in the interrogation room and someone outside the room.

plate, is capable of picking up voices from any point in the room. The second room is a more traditional interrogation room, with a table, several chairs, and a bench.

Each interrogation room is linked to three VCRs for the primary recording and a backup analog audio recording. The audio recording is used for transcription. In addition to monitoring the interrogation in the central control room, an audio/video link connects the control room to the Supervisor's office, where he is able to monitor the interrogations.

V. COSTS ASSOCIATED WITH RECORDATION

Recordation can be accomplished in a variety of ways. It can be as simple as placing a handheld recorder on a table in the interrogation room, or as elaborate as a covert multi-camera audio-video system. For reasons set forth hereinafter, the *Committee* is recommending that the method of electronic recordation be the choice of local law enforcement. In this section, the report looks at various options local law enforcement might choose and examines the cost implication attendant thereto.

A. Audio Recordation

The costs associated with electronic recordation via a tape recorder are minimal. Although a simple hand held recorder can be purchased for under \$100, it is estimated that it would cost about \$300 to purchase a high quality audio tape recording device such as a Marantz recorder, Model #PMD201 or equivalent. The specifications for a recording device of this quality are as follows:

- Built-in condenser microphone
- Input for a separate microphone
- Vu meters to monitor recording level
- Two speed recording - 1 7/8 IPS and 15/16 IPS
- Manual level control of audio recording
- Automatic level control of audio recording
- A frequency response, plus or minus 3 dB
- Can accept normal tape, CrO₂ tape, and metal tape
- AC Adapter to power the unit on standard current
- Capability to run on batteries
- The microphone for this or other units must be an omni-directional microphone

B. Audio-Video Recordation

The cost for audio/video recordation will vary depending on whether the recording is done covertly²⁸ (hidden camera) or overtly (out in the open). The variances

²⁸ It is permissible to covertly record a defendant who has been properly given Miranda warnings. See *State v. Vandever*, 314 N.J. Super. 124 (App. Div. 1998). Such recording does not violate the *New Jersey Wiretap and Electronic Surveillance Control Act* as long as an investigative or law enforcement

in cost are also related to the method for preserving the record (analog or digital), how many simultaneous copies are made at the time of the recording, and if a central recording control room is used. For under a thousand dollars a video system can be installed recording onto VHS tape. The equipment would consist of a commercial grade video camera with a wide-angle lens to cover the interrogation room, a tabletop microphone, and audio mixer. This provides a single copy of the recording on VHS tape requiring the investigator to start and stop the recording in the interrogation room.

The highest quality installation for video recording of interrogations, whether covert or overt, is to have the interrogation room(s) wired to a central control room. Here other investigators can verify the record is being made and monitor the ongoing interrogation. According to a recent quote from a State contract vendor, the cost of installation of covert cameras and microphones, wired to a control room where the interrogation can be monitored and recorded onto a DVD is approximately \$5,000.

The entire cost to implement a covert audio-video system will largely depend on what changes need to be made to the physical plant of the interrogation room in each local law enforcement agency. It is difficult to be precise with any estimate. However, during the course of the *Committee's* work, *Committee* members visited three county prosecutor's offices that had installed a covert audio-video system. The costs ranged from \$1,000 to \$7,500 per room.

C. Training

One of the most critical needs in implementing electronic recordation is training of law enforcement personnel. Everyone who testified before the *Committee* from other

officer is a party to the communication. See N.J.S.A. 2A:156A-4(b). Nor would such recording run afoul of the Federal Wiretap Act. See 18 U.S.C.A. § 2511(2)(c).

States identified training as a key component for implementing a recordation requirement.

Estimating potential costs for training resulting **solely as a result of the Committee's recommendations** is difficult. Ascertaining a cost would depend on such variables as the number of officers to be trained, the length of the training, whether outside experts are needed to conduct the training, whether a train-the-trainer program can be utilized. Arriving at a cost is additionally compounded because the Attorney General, or the County Prosecutors, will have to provide some training in any event to implement the Attorney General's *Amended Recordation Policy* to electronically record a suspect's final statements or acknowledgments in first, second and third degree crimes. If possible, combining training on the Attorney General's *Amended Recordation Policy* with any additional training necessitated by the *Committee's* recommendations should be considered to reduce the overall cost of training.

D. Transcripts

During the course of the *Committee's* deliberations, an issue arose as to whether there would a significant increase in costs for transcripts if recordation is required from the beginning of the first custodial interview to the end of the last interview. An analysis of the applicable discovery rule indicates that requiring recordation will not necessarily lead to increased transcript costs. R. 3:13-3 does not require that a prosecutor provide a defendant with a transcript of statements or confessions. Rather, R. 3:13-3(c)(2) provides:

The prosecutor shall permit defendant to inspect and copy or photograph the following relevant material if not given as part of the discovery package under section (b):

* * * *

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded;

Case law has also held that transcripts are not required of all conversations recorded on tapes, and that prosecutors can satisfy their obligations under the rule by providing copies of tapes. See State v. Russo, 127 N.J. Super. 286 (App. Div. 1974); State v. Morton, 155 N.J. 383 (1998). Thus, under the rule, prosecutors can satisfy their discovery obligation by providing copies of disks or tapes. If, however, a prosecutor made a transcript, the defendant would be entitled to a copy of that transcript.²⁹ If a prosecutor, in his or her discretion, decides to transcribe the entire interrogation there will be additional costs.

E. Supplemental Funding

The *Committee* recognizes while that there may be substantial costs associated with electronic recordation of interrogations, the amount of those costs will vary with the implementation choices made by each respective law enforcement agency. Where a law enforcement agency chooses a more costly option, one possible source of supplemental funding could be the use of forfeiture funds. See N.J.S.A. 2C:64-1 et seq.

²⁹ In fact, the practice of providing transcripts of tapes varies across the State. In some counties partial transcripts are provided with copies of the tapes, in others complete transcripts are provided, in still others no transcript is provided unless the case goes to trial.

VI. BENEFITS AND CONCERNS ASSOCIATED WITH RECORDATION

A. Experience in Other Jurisdictions

In assessing anticipated benefits and possible problems with the process of electronic recordation the *Committee* sought input from those having actual experience with recordation in order to supplement its review of literature and court decisions on the subject.³⁰

Paul Scoggin, Chief of the Violent Crimes Unit for the Hennepin County³¹ Attorney's Office in Minnesota, addressed the *Committee* about his experience of over 10 years with electronic recordation. In 1994, the Minnesota Supreme Court mandated the electronic recordation of custodial interrogations. See State v. Scales, 518 N.W.2d 587 (Minn. 1994). Scoggin was initially opposed to a recordation requirement, and even appeared on television on the day the opinion was released to strongly criticize the court's decision. Based on his practical experience he now fully supports recordation, if it is done covertly, and estimates that if polled nine out of ten police chiefs in Minnesota would agree that recordation is a good idea.

In Minnesota, recordation is done in all criminal cases, and is typically done covertly. In addition, Minnesota is a "stem-to-stern" state – the entire interrogation must be recorded, rather than just the suspect's final statement. Mr. Scoggin also noted that although Scales only required that the interrogation be audio-recorded, in the years since, many departments have moved to audio/video recording of interrogations.

Scoggin cited the following benefits from his experience with electronic recordation:

³⁰ For a further discussion of the literature see Appendix D.

³¹ Hennepin County includes the city of Minneapolis and contains about 1.2 million people.

- The tapes tended to eliminate fights over the voluntariness of a defendant's statement and the waiver of Miranda warnings. They provide conclusive proof that the Miranda warnings were read and waived.
- The tapes also tended to resolve fights over what the defendant actually said or meant in his statement.
- Recordation was enormously helpful in showing the demeanor of the defendant at the time of the interrogation, in contrast to the way the defendant appeared in the courtroom.
- Tapes of the defendant's description and demonstration of how he committed the crime could sometimes undercut claims of self-defense, or that the defendant was too intoxicated to form the intent necessary for a particular crime.
- Even if the defendant did not confess, allowing the jury to observe his evolving story could undercut his credibility far more than hearing the officer testify that he appeared to be making it up as he went along.
- Juries were generally willing to accept necessary interrogation tactics, such as the good cop – bad cop approach or appropriate trickery or deceit, necessary to conduct a probing inquiry of the defendant.
- There have also been instances where defendants have mentioned details that appeared to be irrelevant at the time, but which were later found to tie the defendant or other people to other, unrelated crimes.

Scoggin also noted that, in his experience, recordation could have the following problems:

- Challenges to the voluntariness of a defendant's statement and the waiver of Miranda warnings have been replaced by challenges over whether the State met an exception to the recordation requirement where the statement was not recorded.
- The sight of a tape recorder could sometimes chill the taking of statements. Also, over time, defendants who have frequent contacts with the criminal justice system have become aware that they are being covertly taped. It was also noted, however, that although it was sometimes more difficult to get those defendants to provide statements, the majority seemed to view the fact that they were being taped as an inevitable part of the process.
- There had been one high-profile homicide case in which Scoggin's office had decided not to proceed because the defendant's statement had not been recorded. This had occurred even though none of the defendant's rights had been

violated, and the district attorney's office had the defendant's unrecorded statement, as well as other corroborative evidence.

- Police officers sometimes do not notice when the tape runs out, when batteries die, or when the room's acoustics are bad.
- During the interrogation, people sometimes talk over each other and use street language, and the acoustics can be a problem. Consequently, it is sometimes difficult to make out what the parties are saying when transcribing the interrogations.
- Regarding the method of recording, voice-activated tape recorders should never be used, because there is typically a one second delay between what is said and what gets recorded. That delay is enough to change "I don't want a lawyer" to "want a lawyer."
- Tapes, whether audio or video, tend to degrade over time. For that reason, digital technology is preferable.
- Covert video recording has some limitations. People often stand up and move around during interrogations, but the camera does not follow them around the room. Consequently, Scoggin had seen videos that showed only the top of someone's head.

Captain Bill Miller of the Anchorage Police Department³² had almost twenty years' experience with electronically recording custodial interrogations. He stated that his experience with recordation had been extremely positive. In fact, he knew of many officers who bought their own tape recorders, carried them at all times, and recorded even when they were not required to do so. Captain Miller felt that the objections to recordation that were commonly cited did not "hold water" in practice. In his experience, people were generally willing to talk if approached in the proper manner. His department used Reid & Associates, a Chicago-based company that taught police officers proper interviewing techniques, and consequently did not have much of a problem with people "clamming up." Nor did they have problems with juries objecting to the tactics that they used during interviews. He did note, however, that since

³² Anchorage, Alaska had a population of 260,283 as of the 2000 census.

suppression hearings had been largely eliminated in Alaska, the attorneys had found other things to argue about. Regarding cost, Captain Miller recommended the use of digital technology, which costs less and was easier to store than “regular” video.

Captain Miller noted that recording custodial interrogations allowed the police to link cases that, at first glance, did not appear to be related. He also noted that it resulted in fewer questions about police conduct. He recalled an incident in which he was bringing home a teen-age girl who had been interviewed by another officer. The girl mentioned that the other officer had made some sexually suggestive comments, so Captain Miller quietly turned on the in-car recorder and engaged her in conversation. Later, the girl contacted Captain Miller’s supervisor and claimed that the other officer had sexually assaulted her. Captain Miller’s tape recording, however, helped to disprove that allegation. He noted that accusations of police misconduct were very common, and many involving his department had been found to be baseless because the officers had recorded the exchanges with their accusers.

The discussion with Thomas Sullivan centered on the findings of his nationwide survey of police departments that electronically record custodial interrogations.³³ Sullivan found that, among the police departments that he has heard from, there was virtually unanimous support for recording custodial interrogations. Many police departments, in fact, expressed surprise that it was not a universal practice. Officers reported that recordation allowed them to focus on suspects rather than on taking notes, which tended to distract both officers and suspects. It was also noted that that recordings made it unnecessary for detectives to struggle to recall various details of the interrogation when

³³ For a fuller discussion of the findings of Mr. Sullivan’s survey, see Appendix D.

writing reports, or when testifying. In addition, subsequent review of the recordings often revealed previously overlooked inconsistencies and evasive conduct.

Although some police departments did report a certain amount of resistance to recordation, generally from some of their older detectives, it was not reported frequently enough for Sullivan to consider it a significant problem. The officers' biggest concern was that defendants would "clam up" if they knew that they were being recorded. Sullivan, however, noted that many states authorized covert taping for that very reason. He also referred to the exception under Illinois law that excused law enforcement from recording if the defendant indicated he would only talk with police if the tape recorder was turned off. He also noted that many police departments routinely informed suspects about the intent to record their statements, and that those departments typically reported that it did not make a difference in whether the suspects provided a statement or not. Another concern was that certain permissible interrogation tactics used by police, such as trickery, shouting or using foul language, might be viewed as objectionable by juries, and that some guilty defendants might be acquitted as a result. Sullivan, however, noted that juries generally had no problem with the tactics used by police, and were not letting guilty defendants go free. He added, however, that if some officers were inclined to use impermissible tactics to secure a confession, recording the interrogation would, of course, discourage that practice.

Two other concerns noted by those resistant to recording custodial interrogations were (1) the cost of the equipment; and (2) what happens if something goes wrong with the equipment? According to Sullivan, hardly any of the police departments in his survey mentioned the cost of the equipment as a problem. He noted that while there could be substantial costs in the beginning, especially with video equipment, there also

tended to be huge savings in the end. For example, motions to suppress the defendant's statement were virtually eliminated, resulting in huge savings in police overtime costs. Regarding the second concern, Sullivan noted that state courts and legislatures have generally been sympathetic to problems associated with the recording equipment. Both the Alaska and Minnesota courts, for example, have held that the inadvertent failure of the equipment, or the inadvertent failure to turn the equipment on, did not render an unrecorded statement inadmissible. In closing, Sullivan noted that recording custodial interrogations enabled the police to review the tapes and find things that they had initially overlooked. It also served as a valuable training device regarding how to, or how not to, conduct an interview.

B. Committee's Conclusions

After reviewing the literature and considering the actual experience in other jurisdictions, the *Committee* has concluded that the electronic recordation of custodial interrogations will yield a number of benefits. The *Committee* also recognizes that the practice has the potential for causing some problems. Where a possible problem has been identified the *Committee* has also identified ways to ameliorate or eliminate the problem. The following benefits from electronic recordation of custodial interrogations are anticipated:

- Recordation can provide an accurate and complete record of what transpired during the interview if the police record from the very beginning of the interview.
- Recordation can result in a reduction in Miranda admissibility motions and hearings. The voluntariness of the defendant's confession is typically apparent from viewing, or listening to, the recording.
- Recordation can serve as a valuable investigative tool, as seemingly innocuous statements may become relevant when the recording is later reviewed by the interviewers or others.

- Recordation can result in fewer trials or contested matters, as the parties become more aware of the strengths and weaknesses of their respective cases after reviewing the recording.
- Recordation can eliminate the risk of impermissible interrogation practices.
- Recordation can protect and enhance the police officers' credibility, and protect against complaints of police misconduct.
- Recordation can make the trial court's decisions more reliable, and provide a cleaner appellate record.
- Recordation can result in time savings, allowing police officers to spend less time in court for hearings.
- Recordation can allow for a more effective interrogation as the conversation flows better because the police officers conducting the interview do not have to pause to take notes.
- Even if the defendant does not provide a confession, recordation of the entire interview allows the jury to see consistencies or inconsistencies or the evolution of a defendant's responses to police questions.
- Recordation can result in a more complete evidential picture, as the jury can not only see and/or hear what the defendant said, but also can observe the defendant's demeanor as it was at the time of the interrogation.
- The recorded interviews can serve as a training aid for police officers regarding how to, or how not to, conduct an interrogation.

The *Committee* also identified the following concerns associated with recording custodial interrogations:

- There is a possibility of a "chilling effect" on suspects who may be reluctant to speak freely if they know that they are being recorded. Any chilling effect could be minimized, however, by recording covertly,³⁴ or where a defendant refused to be recorded, by creating an exception to the recording requirement allowing law enforcement officers to turn off the recorder and then conduct an unrecorded interrogation after first taping the defendant's statement that he or she did not want to be recorded.

³⁴ A recent study surveyed 800 investigators from Alaska and Minnesota that had been trained by the firm conducting the study. Although the response rate was low (14%), the survey results indicated that the perception of the investigators was that the confession rate was substantially higher when the recording device was never visible (82%) than when the recording device was somewhat (52%), usually (50%) or always (43%) visible. Brian C. Jayne and Joseph P. Buckley (John E. Reid and Associates), *Empirical Experiences of Required Electronic Recording of Interviews and Interrogations on Investigators' Practices and Case Outcomes*, Illinois Law Enforcement Executive Forum (January 2004).

- The costs of recording equipment, training and transcription could be expensive, particularly for small police departments, depending on the choice of recording method. This is especially true with certain types of high-end video equipment and with covert recording which could require retrofitting the interrogation rooms. This concern can be ameliorated by allowing law enforcement agencies to choose an electronic recording method consistent with their budget and through the use of supplemental funding sources such as forfeiture funds.
- The time frame for implementing any recordation plan was seen as another potential concern, depending on the scope of any recording requirement. This concern can be ameliorated by providing for lead time and/or phasing in of implementation of any recording requirement.
- Recordation might slow down cases pre-indictment, especially if the defendant was not provided with transcripts of the recorded statement. A transcribed statement was described as a powerful tool, because it showed the defendant exactly what he said. It was suggested that without a transcribed statement, case movement might slow down dramatically. However, that view was countered by the view that the defendant would instead receive a copy of the actual recording, which could be more powerful evidence than a transcribed statement.³⁵
- Given Captain Miller's observation that attorneys in Alaska found other things to argue about now that they no longer argue over Miranda issues, some members of the *Committee* felt that recordation might lead to more Driver³⁶ hearings, or other types of hearings.

³⁵ See discussion under Section V D supra.

³⁶ See State v. Driver, 38 N.J. 255 (1962).

VII. COMMITTEE'S RECOMMENDATIONS

As a result of the experience of members of the *Committee*, and our research and evaluation of the recordation experience in other states, the *Committee* makes the following recommendations:

RECOMMENDATION 1. The Supreme Court should exercise its supervisory authority over the administration of criminal justice to encourage electronic recordation of custodial interrogations.

The *Committee* believes that the benefits to law enforcement, individual defendants and the judicial process, from the recommendations made in this report, significantly outweigh any potential problems. Electronic recordation has been successfully implemented in numerous jurisdictions around this country at both the State and local level. With the greater comfort that comes from experience, and with advances in technology, the practice will continue to expand nationally. The *Committee* believes that the time is right for the Supreme Court to exercise its supervisory authority over the administration of criminal justice to encourage electronic recordation of custodial interrogations in New Jersey.

RECOMMENDATION 2. Electronic recordation may be accomplished through either audio or audio-visual recording. The method of recording should be left to the discretion of law enforcement.

Most states that have implemented electronic recordation, either through case law or through a statutory enactment, have not specified the method of recording, i.e. audio or audio-visual recording. The *Committee's* recommendation that the method of recordation be either audio or audio-visual is consistent with how other states have begun electronically recording statements. It recognizes that there is a great diversity in the size and resources of law enforcement agencies throughout New Jersey and in the scope of their responsibilities. This recommendation provides law enforcement

agencies with the ability to implement the recordation requirement using a simple hand-held tape recorder, or by more sophisticated recording set-ups using audio-video recording. The experience in other states has been that, over time, electronic recording has transitioned from audio recording to audio-visual recording. The *Committee* believes that many law enforcement agencies will initially opt for audio-visual. In those that do not, we believe the transition will occur naturally over time as it has in other states.

RECOMMENDATION 3. Electronic recording should occur when a custodial interrogation is being conducted in a place of detention and should begin at, and include, the point at which Miranda warnings are required to be given.

The *Committee* recommends that electronic recording occur when a custodial interrogation is conducted in a place of detention. The *Committee* further recommends that the recording be “stem-to-stern”, i.e. the entire interrogation must be recorded, rather than just the final statement. Requiring stem-to-stern recordation is consistent with what other states have done and is essential if the benefits attendant to electronic recordation are to be fully realized. Recording should begin at, and include, the point at which Miranda warnings are required to be given. The recommendation establishes a bright line that is: (1) easily understood by law enforcement officers, who already receive training on when Miranda warnings are required to be given, and (2) easier for courts to apply when reviewing issues concerning statement admissibility.

The *Committee* recommends adoption of a definition of “place of detention” as follows: 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. The term institution of involuntary confinement is intended to include, but it is not limited to, facilities that house defendants who may be mentally ill or that house persons alleged to be sexually violent predators.

In reaching its conclusions the *Committee* considered how other states have implemented electronic recordation. Alaska requires recordation when a custodial interrogation occurs in a place of detention. See Stephan v. State, *supra*, 711 P.2d at 1158 (1985). Minnesota requires recordation when questioning occurs in a place of detention but also includes recordation of interrogation outside of a place of detention if feasible. See State v. Scales, 518 N.W.2d 587, 592 (1994). Texas requires recordation of statements of an accused made as a result of custodial interrogation. See Tex.Crim.Proc.Code Ann. Art. 38.22 § 3. Illinois requires recordation of statements made by an accused in homicides as a result of a custodial interrogation at a police station or other place of detention. See 725 Ill. Comp. Stat. Ann. 5/103-2.1. Maine requires recording of law enforcement interviews of suspects in serious crimes. See 25 M.R.S.A. § 2803-B(1). The Maine Criminal Justice Academy's minimum standards require recordation when a statement is obtained by a law enforcement officer from a person who is subject to a custodial interrogation conducted at a place of detention. The District of Columbia requires recordation of custodial interrogations of persons suspected of committing a dangerous crime or crime of violence, when the interrogation is conducted in a Metropolitan Police Department interview room equipped with electronic recording equipment. See DC Code §5-133.20.

RECOMMENDATION 4. Electronic recording of custodial interrogations occurring in a place of detention should occur when the adult or juvenile being interrogated is charged with an offense requiring the use of a warrant pursuant to R. 3:3-1c.³⁷

The types of offenses for which electronic recordation must occur vary from state to state. Minnesota requires recordation for all offenses.³⁸ Alaska requires recordation of suspects, victims and witnesses in all felony and domestic violence cases, and the suspects in any in-custody interviews.³⁹ Illinois requires recordation where the defendant is charged with certain homicides. See 725 Ill. Comp. Stat. Ann. 5/103-2.1. Maine will require recordation in serious crimes. See 25 M.R.S.A. § 2803-B(1). The District of Columbia requires recordation for dangerous crimes or crimes of violence. See DC Code §5-133.20.

Consideration was given to recommending electronic recordation for all crimes. The *Committee* recognized, however, that the scope of such a recommendation would place significant practical burdens on law enforcement at this time. The *Committee* also considered recommending that recordation be required only for certain degrees of crimes, as is done in the Attorney General's *Amended Recordation Policy*. However, the *Committee* was concerned that it would be difficult to determine the degree of some crimes with precision at the time the interrogation occurs. Therefore, the Committee decided to recommend electronic recordation for a select group of crimes that law enforcement officers could easily understand and with which they are now familiar. The

³⁷ The offenses that require a warrant rather than a summons are: 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. Hereinafter in this report will refer to these crimes as "predicate crimes".

³⁸ Remarks of Paul Scoggin to the *Committee*.

³⁹ Remarks of Captain Bill Miller to the *Committee*.

crimes requiring recordation would be identical to the crimes for which a warrant, rather than a summons, must issue. See R. 3:3-1(c).

RECOMMENDATION 5. The requirement for electronic recordation of custodial interrogations occurring in a place of detention should not apply in circumstances where:

- (a) a statement made during a custodial interrogation is not recorded because electronic recording of the interrogation is not feasible,
- (b) a spontaneous statement is made outside the course of an interrogation,
- (c) a statement is made in response to questioning that is routinely asked during the processing of the arrest of the suspect,
- (d) 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,
- (e) a statement is made during a custodial interrogation that is conducted out-of-state,
- (f) 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,
- (g) 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 *Committee* recommends that the State bear the burden of proving, by a preponderance of the evidence, that an exception described in this recommendation is applicable.

States that have implemented electronic recordation generally have an “escape clause” provision that excuses a non-willful failure to record. In states such as Alaska and Minnesota, where recordation is required by case law, the exceptions to recording

have also evolved through case law. For example, courts in Alaska have upheld the admissibility of statements where the police made a good faith effort to record their conversation, see Bodnar v. Anchorage, 2001 WL 1477922 (Alaska Ct. App. 2001); or where the police did not have a functioning tape recorder, see George v. State, 836 P.2d 960 (Alaska Ct. App. 1992); or where the recording was inadvertently erased or destroyed, see Bright v. State, 826 P.2d 765 (Alaska Ct. App. 1992). Similarly, Minnesota courts have upheld the admissibility of statements where, because of a mistake, no recording was made, see State v. Miller, 573 N.W.2d 661 (Minn. 1998); or where the tape recorder was inoperative, see State v. Schroeder, 560 N.W.2d 739 (Minn. Ct. App. 1997). In states such as Texas and Illinois, which have required recordation via statute, exceptions have generally been contained in the statute. See, for example, Tex.Crim.Proc.Code Ann. Art. 38.22 § 5 (Vernon 1999) and 725 Ill. Comp. Stat. Ann. 5/103-2.1(e) (West 2003).

The *Committee* also believes that any recording requirement it proposes should include appropriate exceptions. Therefore, the *Committee* is recommending adoption of exceptions that are modeled on those contained in the Illinois statute. See 725 Ill. Comp. Stat. Ann. 5/103-2.1.

RECOMMENDATION 6. The failure to electronically record a defendant's custodial interrogation should be a factor considered by the trial court in determining the admissibility of a statement, and by the jury in determining what weight, if any, to give to the statement. The Court should adopt a court rule and model jury charge to implement this recommendation.

In its creation of this *Committee* the Chief Justice charged the *Committee* to "consider whether electronic recordation should be encouraged through the use of a presumption against admissibility of non-recorded statements or through other formal or informal means." In addressing this issue the *Committee* began by reviewing the

processes used in other states that engaged in electronic recordation. The Alaska Supreme Court found that electronic recordation was mandated as a requirement of due process under the Alaska Constitution and determined that the remedy for an unexcused failure to record should be exclusion of any statement derived therefrom. See Stephan v. State, 711 P.2d. 1156 (1985). The Minnesota Supreme Court found that electronic recordation was essential to protecting the rights of the accused and ordered it in the exercise of its supervisory power to insure the fair administration of justice. It determined that the remedy for not recording an interrogation should be suppression of any unrecorded statement made therein. See State v. Scales, 518 N.W.2d 587 (1994). In Texas, pursuant to statute, oral statements of an accused are not admissible unless an electronic recordation is made of the statement. See Tex.Crim.Proc.Code Ann. Art. 38.22 § 3 (Vernon 1999). In Illinois, statutory law states that oral statements in homicide cases are presumed to be inadmissible unless they are recorded. The presumption can be overcome by a preponderance of the evidence. See 725 Ill. Comp. Stat. Ann. 5/103-2.1. In both Maine and the District of Columbia, statutes were enacted requiring law enforcement to develop procedures for electronic recordation. Maine has just completed development of those procedures, but according to Alan Hammond of the Maine Criminal Justice Academy, the Maine statute and procedures do not address the remedy for a failure to record. A somewhat different approach was adopted in Massachusetts. In Commonwealth v. DiGiambattista, 813 N.E.2d 516 (2004), the Massachusetts Supreme Judicial Court required that when an interrogation including a statement or confession was not recorded, the defendant would be entitled, upon request, to a jury instruction concerning the need to evaluate the alleged statement with particular caution. The Court said:

Thus, when the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because 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. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt. See *Commonwealth v. Cryer*, 426 Mass. 562, 571, 689 N.E.2d 808 (1998), and cases cited (jurors must disregard defendant's statement if voluntariness not established beyond a reasonable doubt).

Nothing in this instruction alters the overarching requirement that the voluntariness of a defendant's statement be determined on the totality of the circumstances. *Commonwealth v. Selby*, 420 Mass. 656, 662-663, 651 N.E.2d 843 (1995), and cases cited. To the contrary, the instruction aptly focuses the jury's attention on the fact that the Commonwealth has failed to present them with evidence of the "totality" of the circumstances, but has instead presented them with (at best) an abbreviated summary of those circumstances and the interrogating officers' recollections of the highlights of those circumstances. Jurors should use great caution when trying to assess the "totality of the circumstances" when they have before them only a highly selective sliver of those circumstances, and they may properly decide that, in the absence of that "totality," they cannot conclude that the defendant's statement was voluntary. *Footnote omitted*.

[*Commonwealth v. DiGiambattista*, *supra*, 813 N.E.2d at 533-534]

With the exception of Minnesota, all states requiring exclusion of a statement based solely on the failure to record an interrogation have either done so where the Supreme Court found a constitutional requirement for electronic recordation or where such was legislatively mandated. Neither is the case in New Jersey. In dealing with

this issue the *Committee* felt that it was essential to keep in mind the basic purposes to be served by encouraging recordation. In that respect the *Committee* was guided by the concerns our Supreme Court expressed in State v. Cook. Those concerns related to establishing the reliability and trustworthiness of confessions as a prerequisite to their use.

With this in mind the *Committee* recommends the approach taken in Massachusetts, with modifications so that it comports to New Jersey law. The *Committee* believes that the unexcused failure to electronically record an interrogation should be a factor for consideration by both the trial judge and the jury as each is called on to make decisions concerning the reliability and trustworthiness of any statement that is the product of that interrogation. Therefore, if a statement were to be excluded from evidence by a court or discredited by a jury it would be because it was not found to be voluntary by the court or reliable and trustworthy by the jury, not simply because there was a failure to electronically record it. Where there is an unexcused failure to electronically record, the trial judge, as gatekeeper for the admissibility of evidence, may weigh that fact in determining whether the State has met its burden of establishing that the statement was voluntarily made after a knowing and intelligent waiver of constitutional rights. In addition, the unexcused failure to electronically record should also justify an instruction to the jury similar to that given in Massachusetts.

The *Committee* believes that the forgoing approach can be best accomplished through adoption of a court rule and a model jury charge on the subject. A proposed rule and charge follow:

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.

The *Committee* recommends that the following jury charge be given when required under proposed Rule 3:17.

PROPOSED 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

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 the electronic recording of interrogations by law enforcement officers 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 the electronic recording of interrogations by law enforcement officers. 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.]

RECOMMENDATION 7. The requirement that electronic recording occur when a custodial interrogation is being conducted in a place of detention should become effective January 1, 2006 for homicide offenses and January 1, 2007 for all other offenses specified in proposed R. 3:17a.

The *Committee* recognizes that implementing electronic recording as recommended herein will provide challenges to law enforcement. Therefore, the *Committee* recommends that “lead time” be built into the process. This recommendation is consistent with the advice from representatives of other states consulted by the *Committee*. Additionally, law enforcement representatives on the *Committee* expressed a strong preference for covert recording because of their concern regarding the “chilling” effect non-covert recording might have suspects. Greater use of covert recording will, of necessity, present equipment and training issues.

Because most homicide cases are investigated by prosecutors’ offices and because those offices can be equipped and trained more quickly, the *Committee* recommends a January 1, 2006 start date for recording interrogations on homicide cases. Because the *Committee* recommendations are broader than the current Attorney General and County Prosecutor’s policy and because of the necessity to equip

and train over 500 other law enforcement agencies in the State, the *Committee* recommends a January 1, 2007 start date for recording interrogations in other cases.

RECOMMENDATION 8. The electronic recordation requirement should not mandate that the defendant be notified prior to electronic recordation.

In New Jersey, it is permissible to covertly record a defendant who has been properly given Miranda warnings. See State v. Vandever, 314 N.J. Super. 124 (App. Div. 1998). Such recording does not violate the *New Jersey Wiretap and Electronic Surveillance Control Act* as long as the investigative or law enforcement officer is a party to the communication. See N.J.S.A. 2A:156A-4(b). Nor would such recording run afoul of the Federal Wiretap Act. See 18 U.S.C.A. § 2511(2)(c). Given this, the *Committee* believes that the decision whether to tell a suspect that his or her interrogation will be electronically recorded is best left to law enforcement.

RECOMMENDATION 9. The Supreme Court should periodically review the implementation of the recording requirement.

The *Committee* recommends that the Court review implementation of the electronic recordation requirement after a period of time has elapsed. The reason for this recommendation is twofold. First, successful implementation may indicate that a broader use of recordation is warranted, and second, the rapid development of technology may make more expansive use of recordation feasible. Issues such as expansion to other types of crimes, or expanding recording beyond places of detention, could be considered in context at that time.

Experience in how the recordation requirement is being implemented will be very important. The *Committee* has been advised that the Attorney General and County Prosecutors will be monitoring implementation of the recording requirement. Information on the total number of custodial interrogations that were required to be

recorded, the total of number of interrogations that were actually recorded and the number of times persons objected to recording will be useful in ascertaining how the Court's recording requirement is being implemented.

APPENDIX A

ILLINOIS

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

<Text of section added effective July 18, 2005>

§ 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] 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 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.

MAINE

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 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.

<Text of subsection 2 as amended by Laws 2003, c. 656, § 4.>

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 and policies for public notification regarding persons in the community required to register under Title 34-A, chapter 15 must be established no later than January 1, 2005.

<Text of subsection 2 as amended by Laws 2003, c. 677, § 4.>

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; and policies for the recording and preservation of interviews of suspects in serious crimes under subsection 1, paragraph J must be established no later than January 1, 2005.

<Text of subsection 3 as amended by Laws 2003, c. 656, § 4.>

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 and 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, 2005. This 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 must be made to the board no later than January 1, 2004, certification for orientation

and training with respect to policies regarding death investigations must be made to the board no later than January 1, 2005 and certification for orientation and training with respect to policies regarding public notification must be made to the board no later than January 1, 2006.

<Text of subsection 3 as amended by Laws 2003, c. 677, § 4.>

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; 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 J 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 must be made to the board no later than January 1, 2004; certification for orientation and training with respect to policies regarding death investigations must be made to the board no later than January 1, 2005; and certification for orientation and training with respect to policies regarding the recording and preservation of interviews of suspects in serious crimes under subsection 1, paragraph J must be made to the board no later than January 1, 2005.

4. Penalty. An agency that fails to comply with any provision of subsection 3 commits a civil violation for which the State Government or local government entity whose officer or employee committed the violation may be adjudged a fine not to exceed \$500.

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.

BOARD OF TRUSTEES OF THE MAINE CRIMINAL JUSTICE ACADEMY
MINIMUM STANDARDS

ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

Definitions. As used in this policy, unless the context otherwise indicates, the following terms have the following means:

“Custodial interrogation” means 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.

“Electronic recording” includes videotape, audiotape, motion picture and digital recording.

“Place of detention” means 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.

Policy. Unless exempted by this policy, an electronic recording shall be made of any statement obtained by a law enforcement officer from a person who is the subject of a custodial interrogation conducted at a place of detention relating to the Maine Criminal Code crimes of murder, felony murder, manslaughter, aggravated assault, elevated aggravated assault, gross sexual assault, kidnapping or robbery, arson, or causing a catastrophe as defined, respectively, in Title 17-A sections 201, 202, 203, 208, 208-AB, 253, 301 and 651, 802, and 803-A or the corresponding juvenile crimes, as defined in Tile 15, section 3103, subsection 1, paragraph A. The electronic recording and investigative notes and records related to such interrogations shall be preserved for a

~~period of one-year following the date of the final disposition of the direct appeal from the underlying criminal judgment or the expiration of the time for seeking the appeal until such time as the underlying matter is adjudicated and the time period for an direct appeal to the Supreme Judicial Court, sitting as the Law Court, has passed, or in a matter not adjudicated, the statute of limitations, as defined in Title 17-A section 8, has expired. In a matter not adjudicated where there is no statute of limitations, i.e., murder, or gross sexual assault with a victim under 16 years of age, the electronic recording and investigative notes and records related to an interrogation shall be preserved for 30 years or until the death of the suspect, whichever is sooner.~~

Exemptions. A statement is not subject to this policy if (1) recording the statement is not feasible, including but not limited to cases in which recording equipment is malfunctioning; (2) the statement was made spontaneously, not in response to a question custodial interrogation; (3) the custodial interrogation took place out of state, or (4) the person who is the subject of the custodial interrogation requests, in writing or in an electronic recording, that the statement not be recorded.

Investigative notes. In those situations involving serious crimes, as defined in this policy, where a statement is not electronically recorded, because it is covered by one of the exemptions or is otherwise not required to be recorded, the notes of the law enforcement officer taking the statement shall become a permanent part of the investigative file for the same period of time as set forth in this policy for electronic recording of statements.

MAINE CHIEFS OF POLICE POLICY

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:

		Class
17-A § 201	Murder	
17-A § 202	Felony Murder	A
17-A § 203	Manslaughter	A/C
17-A § 207	Assault of a child < 6 YOA	C
17-A § 208	Aggravated Assault	B
17-A § 209	Elevated Aggravated Assault	A
17-A § 210	Terrorizing	C
17-A § 210-A	Stalking	C
17-A § 213	Aggravated Reckless Conduct	B
17-A § 253	Gross Sexual Assault	A/B/C
17-A § 254	Sexual Abuse of Minors	C
17-A § 255-A	Unlawful Sexual Contact (formerly § 255)	A/B/C
17-A § 256	Visual Sexual Aggression Against Child	C
17-A § 258	Sexual Misconduct With Child < 14 YOA	C
17-A § 259	Solicitation of Child by Computer to Commit a Prohibited Act	C
17-A § 282	Sexual Exploitation of Minor	A/B
17-A § 283	Dissemination of Sexually Explicit Material	A/B/C
17-A § 284	Possession of Sexually Explicit Material	B/C
17-A § 301	Kidnapping	A/B
17-A § 302	Criminal Restraint	C
17-A § 303	Criminal Restraint by Parent	C
17-A § 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: 9

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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: 9

- 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.
- 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: 7

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.language-line.com and www.lle-inc.com.

Minimum Standard: 8

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: 10

- 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: 10

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: 11

- 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: 12

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: 12

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.

TEXAS

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CODE OF CRIMINAL PROCEDURE
TITLE 1. CODE OF CRIMINAL PROCEDURE OF 1965
TRIAL AND ITS INCIDENTS
CHAPTER THIRTY-EIGHT. EVIDENCE IN CRIMINAL ACTIONS
Art. 38.22. [727] [810] [790] When statements may be used

Sec. 1. In this article, a written statement of an accused means a statement signed by the accused or a statement made by the accused in his own handwriting or, if the accused is unable to write, a statement bearing his mark, when the mark has been witnessed by a person other than a peace officer.

Sec. 2. No written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:

(a) the accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of this code or received from the person to whom the statement is made a warning that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

(2) any statement he makes may be used as evidence against him in court;

(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview at any time; and

(b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

Sec. 3. (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:

(1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement;

(2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;

(3) the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;

(4) all voices on the recording are identified; and

(5) not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article.

(b) Every electronic recording of any statement made by an accused during a custodial interrogation must be preserved until such time as the defendant's conviction for any offense relating thereto is final, all direct appeals therefrom are exhausted, or the prosecution of such offenses is barred by law.

(c) Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.

(d) If the accused is a deaf person, the accused's statement under Section 2 or Section 3(a) of this article is not admissible against the accused unless the warning in Section 2 of this article is interpreted to the deaf person by an interpreter who is qualified and sworn as provided in Article 38.31 of this code.

(e) The courts of this state shall strictly construe Subsection (a) of this section and may not interpret Subsection (a) as making admissible a statement unless all requirements of the subsection have been satisfied by the state, except that:

(1) only voices that are material are identified; and

(2) the accused was given the warning in Subsection (a) of Section 2 above or its fully effective equivalent.

Sec. 4. When any statement, the admissibility of which is covered by this article, is sought to be used in connection with an official proceeding, any person who swears falsely to facts and circumstances which, if true, would render the statement admissible under this article is presumed to have acted with intent to deceive and with knowledge of the statement's meaning for the purpose of prosecution for aggravated perjury under Section 37.03 of the Penal Code. No person prosecuted under this subsection shall be eligible for probation.

Sec. 5. Nothing in this article precludes the admission of a statement made by the

accused in open court at his trial, before a grand jury, or at an examining trial in compliance with Articles 16.03 and 16.04 of this code, or of a statement that is the res gestae of the arrest or of the offense, or of a statement that does not stem from custodial interrogation, or of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness, or of any other statement that may be admissible under law.

Sec. 6. In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions. If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed among the papers of the cause. Such order shall not be exhibited to the jury nor the finding thereof made known to the jury in any manner. Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof. In any case where a motion to suppress the statement has been filed and evidence has been submitted to the court on this issue, the court within its discretion may reconsider such evidence in his finding that the statement was voluntarily made and the same evidence submitted to the court at the hearing on the motion to suppress shall be made a part of the record the same as if it were being presented at the time of trial. However, the state or the defendant shall be entitled to present any new evidence on the issue of the voluntariness of the statement prior to the court's final ruling and order stating its findings.

Sec. 7. When the issue is raised by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to such statement.

Sec. 8. Notwithstanding any other provision of this article, a written, oral, or sign language statement of an accused made as a result of a custodial interrogation is admissible against the accused in a criminal proceeding in this state if:

(1) the statement was obtained in another state and was obtained in compliance with the laws of that state or this state; or

(2) the statement was obtained by a federal law enforcement officer in this state or another state and was obtained in compliance with the laws of the United States.

DISTRICT OF COLUMBIA

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 XVII. MISCELLANEOUS.

§ 5-133.20. Procedures for electronic recording of interrogations.

(a) Within 180 days of April 4, 2003, the Chief of Police shall develop and implement a General Order establishing procedures for the electronic recording of interrogations by the Metropolitan Police Department.

(b) The General Order required by subsection (a) of this section shall include a requirement that the Metropolitan Police Department electronically record, in their entirety, and to the greatest extent feasible, interrogations of persons suspected of committing a dangerous crime or a crime of violence, as those terms are defined in § 23-1331(3) and (4), when the interrogation is conducted in Metropolitan Police Department interview rooms equipped with electronic recording equipment.

(c) In developing the General Order required under subsection (a) of this section, the Chief of Police should consider, but not be limited to, the following topics:

(1) The policies, informed by legal constraints, as to whether, and under what circumstances, the person being questioned must be advised that the questioning will be electronically recorded, and if the person is so advised, whether, and under what circumstances, the recording may take place without the person's express consent;

(2) The extent to which the interrogation of persons suspected of committing crimes other than those defined in subsection (b) of this section and the questioning of victims, witnesses, persons of interest, and other persons not immediately suspected of committing a criminal offense shall be electronically recorded;

(3) The procedures for insuring the maximum feasible electronic recording of interrogations conducted at locations other than interview rooms equipped with electronic recording equipment;

(4) The procedures to be followed when recording equipment fails to operate correctly, including the use of alternative recording equipment;

(5) The procedures for reporting, repairing, or replacing faulty electronic recording equipment;

(6) The procedures for storing the records of electronic recording, including the format in which the recordings shall be stored, the locations where the records shall be stored, and the manner of indexing the recordings for later retrieval;

(7) The procedures to be taken to prevent or to detect any tampering with the recordings; and

(8) How long the recordings shall be retained.

(d)(1) The Chief of Police shall keep relevant annual statistics on interrogations conducted pursuant to the General Order required under subsection (a) of this section. The statistics shall include, but not be limited to:

(A) The total number of interrogations conducted;

(B) The number of interrogations required to be recorded by the General Order that were recorded;

(C) The number of persons interrogated who did not consent to having their interrogations recorded; and

(D) The number of interrogations recorded without the consent of the person interrogated.

(2) Beginning in 2004, the Chief of Police shall issue an annual report to the Council on the electronic recording of interrogations conducted pursuant to the General Order required under subsection (a) of this section. The report shall include the statistics kept pursuant to paragraph (1) of this subsection, an evaluation of the benefits of the videotaping, and a description of any disciplinary actions taken as a result of noncompliance with the General Order. The first annual report shall be transmitted to the Council no later than September 30, 2004.

GENERAL ORDER



Title
Electronic Recording of Interrogations

Series / Number
GO-SPT-304.16

Effective Date
January 31, 2005

Distribution
B

DISTRICT OF COLUMBIA

Repeals:
GO-SPT-304.16 (Electronic Recordings of Interrogations), dated October 29, 2003

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I. BACKGROUND

The Metropolitan Police Department (MPD) is responsible for the investigation of felony and misdemeanor criminal cases occurring in the District of Columbia. In order to maintain the integrity of these investigations, the MPD electronically records interrogations of persons suspected of committing a dangerous crime as defined in D.C. Official Code § 23-1331(3), or a crime of violence as defined in D.C. Official Code § 23-1331(4), who have been arrested, or whose freedom of movement has been restrained to the degree associated with a formal arrest, **and who are being interrogated in an MPD interview room.**

The purposes of recording custodial interrogations that are conducted in 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 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 MPD is to electronically record, in their entirety and to the greatest extent feasible, custodial interrogations of persons suspected of committing a dangerous crime or crime of violence, when the interrogation is conducted in an MPD interview room 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 under formal arrest or whose freedom of movement has been restrained to the degree associated with a formal arrest.
2. Dangerous crime –
 - a. Any felony offense under Chapter 45 of Title 22 (Weapons) or Chapter 25 of Title 7 (Firearms Control);
 - b. Any felony offense under Chapter 27 of Title 22 (Prostitution, Pandering);
 - c. Any felony offense under Chapter 9 of Title 48 (Controlled Substances);
 - d. Arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business;
 - e. Burglary or attempted burglary;
 - f. Cruelty to children;
 - g. Robbery or attempted robbery; or
 - h. Sexual abuse in the first degree, or assault with intent to commit first-degree sexual abuse.
3. Crime of violence – any crime of:
 - a. Aggravated assault;

- b. An 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. Mayhem;
 - m. Malicious disfigurement;
 - n. Manufacture or possession of a weapon of mass destruction;
 - 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. All traffic fatalities;
 - u. 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.
4. Interview room – a room at the Metropolitan Police Department Headquarters or any MPD station or substation that is equipped with electronic recording equipment, including but not limited to, recorders or cameras that use audiotape, videotape, film, CDs, DVD's or digital equipment.

5. 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. All custodial interrogations of persons suspected of a dangerous crime or a crime of violence that are conducted in an interview room shall be recorded in their entirety, from the time of first contact with a subject that occurs in an MPD interview room, until the subject leaves the interview room.
 1. The recording equipment shall be turned on either when the subject first enters the interview room, or when the interviewer (or other sworn member) *first* enters the room after the subject;
 2. The recording equipment shall not be turned off unless:

- a. The subject requests that the recording equipment be turned off; or

NOTE: If the subject requests that he/she does not wish the interview to be recorded, the interviewer will record the subject making this request in order to document that the request was made. The recording shall be preserved in accordance with the provisions in this directive.

- b. Either the interviewer or the subject, or both, 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.
 3. Section IV, A, 2, (b) permits, but does not require, that the recording be turned off when the interviewer, the subject, or both are not in the interview room.

NOTE: Members of the Department are not prevented from recording the actions of a suspect in an interview room when law enforcement personnel are not in the interview room.

- B. No custodial interrogation shall be conducted in an interview room unless the subject has waived his or her Miranda rights.

1. If the subject has not previously been given his Miranda rights, the recording shall include the giving of rights to the subject, and his 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 or she was informed of, and waived, those rights.
- C. All custodial interrogations in an interview room shall be audio recorded on audiotape, CD, or digital equipment. If the equipment is available, all custodial interrogations in an interview room shall also be recorded on videotape, film, DVD, or digital equipment.
- D. 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 interrogation.
 2. The interviewer shall use his or her discretion to determine whether to inform the subject that a recording is being made of the interrogation.
 3. The interviewer shall NOT at any time explicitly or implicitly encourage a subject to request that the recording equipment be turned off.
 4. If the subject states that he/she will voluntarily speak with law enforcement personnel only if the interrogation is not electronically recorded, then the recording equipment shall be turned off.
 5. A recording shall be preserved of everything that transpired up to the point where the equipment was turned off.
- E. Interrogations shall be conducted by detectives, and members shall request that a detective be made available when a subject wants to discuss a dangerous crime or a crime of violence. If a detective is unavailable, the member shall conduct the interrogation in conformity with the provisions in this general order.
- F. At no time shall a member of any law enforcement agency be armed while conducting an interrogation in an interview room.

- G. The recording of a subject's interrogation shall be documented in the Washington Area Criminal Intelligence Information System (WACIIS).
- H. If the equipment malfunctions or is inadvertently not turned on, or for some other reasons the recording cannot be made, the circumstances shall be documented in WACIIS.
- I. This general order applies only to custodial interrogations in interview rooms. It does not apply to custodial interrogations that occur elsewhere, or to non-custodial interviews or interrogations. However, no member may intentionally avoid placing a subject in an interview room to avoid recording a custodial interrogation.
- J. Each inadvertent failure to electronically record a custodial interrogation due to equipment failure shall be explained and documented in a report to the Assistant Chief, Special Services Command.

V. PROCEDURAL GUIDELINES

A. Using MPD Recording Equipment

- 1. All recording equipment shall be tested prior to recording an interrogation to ensure it is operating properly.
 - a. If the video recording equipment fails to operate properly before or during a recorded interrogation, the individual may be transported to the nearest location equipped to handle video recordings. If no such location is available, an audio recorder may be used in place of the inoperable video recording equipment.
 - b. Any video recording equipment that is faulty, or in need of repair, shall be immediately reported to the appropriate administrative staff, who shall request, through the chain of command, that the equipment be repaired by an authorized contractor.
- 2. Only new, unused tapes, CD's, or DVD's, taken from their original wrappers, shall be used for recordings. Erased, or previously used tapes, CD's, or DVD's shall not be used.
- 3. Immediately upon completion of all recordings, the recording(s) shall be removed from the recording machine. If using a cassette, the safety tabs on the cassette shall be removed to prevent another recording on the same cassette.

4. A label shall be placed on the recording that includes the following information:
 - a. ORIGINAL;
 - b. Case number;
 - c. Date, time, and location of interrogation; and
 - d. Name of person who was recorded, and name of interviewers who conducted the interrogation (including rank and/or whether the interviewer is a detective or investigator).
5. The recording shall then be given to a supervisor, who shall be responsible for placing the recording in the storage container in the case file room.
6. The recording 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 GO-SPT-601.01 (Recording, Handling and Disposition of Property Coming into the Custody of the Department) and GO-SPT-601.02 (Preservation of Potentially Discoverable Material).
7. Should the original copy of the recording be needed for prosecution, a copy of the original shall be made and maintained in the same manner as set forth in Section V, A, 4.
 - a. Each time the original copy of a recording is removed from storage, the removing member shall note in WACIIS who removed the recording, reason for removing the recording, and who reviewed the recording if it was played.
 - b. A copy of the WACIIS report shall be maintained in the relevant case file.

B. Conducting an Audio/Visual Recorded Interrogation

1. Only one subject shall be in any interview room at any given time.
2. The subject shall be thoroughly searched prior to being placed in the interview room.
3. The subject and interviewer(s) should be seated in the interview room in a position facing the camera.

4. The interviewer shall activate the recording equipment as set forth in Section IV, A. After the equipment is activated, the interviewer shall provide the following information:
 - 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, except:
 - a. Miranda warnings need not be given where the subject is not under arrest or where the subject's freedom of movement has not been restrained to the degree associated with a formal arrest.
 - b. In instances where a subject has already been advised of his/her Miranda rights and executed a PD 47 before the recording equipment was activated, the interviewer shall inquire whether the subject has been advised of his/her rights, whether a PD 47 was executed, and affirm that the rights were waived.
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 interrogation.") The interviewer shall ask the subject whether anything occurred during the break other than the stated purpose of the break.

- C. Recording of Non-English Speaking/Hearing Impaired Persons shall be conducted as follows:

1. When an interviewer needs to record an 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 obtain a waiver from the subject of his/her right to a qualified interpreter.
2. When recording interrogations of deaf/hearing-impaired persons, interviewers shall adhere to the procedures outlined in GO-OPS-304.14 (Deaf or Hearing-Impaired Arrestees).

- D. The recording of juveniles shall be conducted in the same manner as adults.

- E. Interviews with victims, witnesses, persons of interest, 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 General Order. Nothing in this general order precludes recording under such circumstances. However, the interviewer shall consult with the United States Attorney's Office (USAO) or the Office of the Attorney General (OAG) before doing so.

- F. Each member shall be responsible for maintaining statistics on interrogations that the member conducts, including, but not limited to:

1. The total number of interrogations conducted;
2. The number of interrogations required to be recorded as outlined in this directive;
3. The number of 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.

G. Unit Responsibilities

1. Each unit shall be responsible for compiling the interrogation information collected by its members, and forwarding the preceding month's compilation to the attention of the Assistant Chief, Office of Professional Responsibility, by the 5th of each month.
2. Each unit shall be responsible for maintaining the following interrogation recording information:
 - a. An inventory of all interrogation recordings;
 - b. A record of any copies made of the recording, including the name of the person making the copy and the time and date the copy was made; and
 - c. A record of any removal of the recording from the secure location, including the name of the person removing the recording, the time and date of the removal, the name of the person returning the recording, and the time and date of the return.

H. The Assistant Chief, Office of Professional Responsibility, shall submit to the Chief of Police relevant annual statistics on interrogations conducted by MPD that shall include, but not be limited to:

1. The total number of interrogations conducted;
2. The number of interrogations required to be recorded as outlined in this directive;
3. The number of 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.

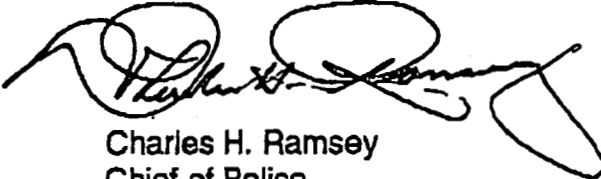
I. The Chief of Police shall issue the annual report prepared by the Assistant Chief, Office of Professional Responsibility.

VI. PENALTIES

The MPD shall administratively investigate every case where an interrogation was required to be recorded under the applicable statute, but was not recorded. Any employee who is found to have knowingly violated the law, or this General Order, shall be subject to administrative sanctions ranging from suspension to termination. The administrative sanctions will depend on the severity of the infraction, and shall be taken in accordance with GO 1202.1 (Disciplinary Procedures and Processes) and/or the adverse and corrective action procedures as provided in the District Personnel Manual.

VII. CROSS REFERENCES

- A. DC Law 14-280 (Electronic Recording Procedures Act of 2002)
- B. D.C. Official Code §23-1331(4)
- C. D.C. Official Code §23-542(b)(2)
- D. GO-SPT-601.01 (Recording, Handling and Disposition of Property Coming into the Department)
- E. GO-SPT-601.02 (Preservation of Potentially Discoverable Material)
- F. GO-OPS-304.14 (Deaf or Hearing-Impaired Arrestees)
- G. GO 1202.1 (Disciplinary Procedures and Processes)



Charles H. Ramsey
Chief of Police

CHR:MJF:NMJ:SOA:DAH:jah

**Extracted from Police Experiences with Recording Custodial Interrogations, a
Special Report of the Northwestern University School of Law, Center on
Wrongful Convictions (Summer 2004)**

APPENDIX A

**DEPARTMENTS THAT CURRENTLY
RECORD CUSTODIAL INTERROGATIONS**

PD stands for Police Department. SO stands for Sheriff's Office. The county population figures include incorporated areas, although most sheriff offices serve unincorporated areas only.

LAW ENFORCEMENT AGENCY	POPULATION (2000 CENSUS)	SWORN OFFICERS	AUDIO/VIDEO	YEARS RECORDING
Alaska				
All agencies	626,932		A/V	19
Arizona				
Casa Grande PD	25,224	60	A/V	10+
Chandler PD	176,581	304	A/V	20+
Coconino County SO	116,320	64	A/V	15+
El Mirage PD	7,609	47	A/V	1+
Flagstaff PD	52,894	95	A/V	6
Gila County SO	51,335	52	A/V	5
Gilbert PD	109,697	151	A/V	8
Glendale PD	218,812	300	A/V	10
Marana PD	13,556	65	A	9+
Maricopa County SO	3,072,149	675	A/V	10+
Mesa PD	396,375	820	A/V	12+
Oro Valley PD	29,700	75	A/V	10+
Payson PD	13,620	28	A/V	11+
Peoria PD	108,364	155	A/V	5
Phoenix PD	1,321,045	2,400	A/V	2+
Pima County SO	843,746	450	A/V	12
Pinal County SO	179,727	150	A/V	
Prescott PD	33,938	63	A/V	12
Scottsdale PD	202,705	300	A/V	10
Somerton PD	7,266	16	A/V	8
South Tucson PD	5,490	27	A	10

LAW ENFORCEMENT AGENCY	POPULATION (2000 CENSUS)	SWORN OFFICERS	AUDIO/VIDEO	YEARS RECORDING
Somerton PD	7,266	16	A/V	8
South Tucson PD	5,490	27	A	10
Surprise PD	30,848	85	A/V	20+
Tempe PD	158,625	380	A/V	5
Tucson PD	486,699	943	A/V	30+
Yavapai County SO	167,517	123	A/V	10+
Yuma County SO	160,026	80	A	5
Yuma PD	77,515	144	A/V	4
Arkansas				
14 th Judicial District Drug Task Force		4	A/V	10+
Fayetteville PD	58,047	140	A/V	5
State Police	2,673,400	490	A	
Van Buren PD	18,986	46	A/V	8+
California				
Alameda County SO	1,443,741	1,000	A/V	10+
Auburn PD	12,462	25	A/V	15
Butte County SO	203,171	110	A/V	15
Carlsbad PD	78,247	107	A/V	20
Contra Costa County SO	948,816	850	A/V	10
El Cajon PD	94,869	155	A	25
El Dorado County SO	156,299	160	A/V	10
Escondido PD	133,559	168	A/V	20+
Folsom PD	51,884	73	A/V	10
Grass Valley PD	10,922	29	A/V	5
Hayward PD	140,030	225	A/V	14
La Mesa PD	54,749	66	A/V	9+
Livermore PD	73,345	97	A/V	20
Los Angeles PD	3,694,820	7,000	A	23

LAW ENFORCEMENT AGENCY	POPULATION (2000 CENSUS)	SWORN OFFICERS	AUDIO/VIDEO	YEARS RECORDING
Oceanside PD	161,029	200	A/V	15
Orange County SO	2,846,289	1,600	A/V	15+
Placer County SO	248,399	250	A/V	10
Rocklin PD	36,330	45	A/V	12+
Roseville PD	79,921	110	A/V	10+
Sacramento County SO	1,223,499	1,700	A/V	25
Sacramento PD	407,018	675	A/V	22+
San Bernardino SO	1,709,434	1,550	A/V	25
San Diego PD	1,223,400	2,100	A/V	15+
San Francisco PD	776,733	2,500	A/V	
San Joaquin County SO	563,598	250	A/V	20+
San Jose PD	894,943	1,400	A/V	25+
San Leandro PD	79,452	94	A/V	15
San Luis PD	44,174	32	A	8
Santa Clara County SO	1,682,585	635	A/V	
Santa Clara PD	102,361	140	A/V	20+
Santa Cruz PD	54,593	95	A/V	4+
Stockton PD	243,771	372	A/V	8+
Union City PD	66,869	72	A/V	16
Ventura County SO	753,197	850	A/V	30
West Sacramento PD	31,615	62	A/V	5
Woodland PD	49,151	600	A/V	5
Yolo County SO	168,660	100	A/V	15
Colorado				
Arvada PD	102,153	140	A/V	17
Aurora PD	276,283	570	A/V	8+
Boulder PD	94,673	163	A/V	10
Brighton PD	20,905	53	A/V	2
Broomfield PD	38,272	130	A/V	9
Colorado Springs PD	360,890	686	A/V	7+

LAW ENFORCEMENT AGENCY	POPULATION (2000 CENSUS)	SWORN OFFICERS	AUDIO/VIDEO	YEARS RECORDING
Commerce City PD	20,991	75	A/V	15
Denver PD	554,636	1,300	A/V	22
El Paso County SO	516,929	386	A/V	17
Ft. Collins PD	118,652	156	A/V	20
Lakewood PD	144,126	270	A/V	10
Larimer County SO	251,494	237	A/V	25+
Loveland PD	50,608	79	A/V	9+
Sterling PD	11,360	22	A	5+
Thornton PD	82,384	147	A/V	8
Connecticut				
Bloomfield PD	19,587	52	A/V	2
Cheshire PD	28,543	48	A/V	20
District of Columbia				
Metropolitan PD	572,059	3,700	A/V	1
Florida				
Broward County SO	1,623,018	2,000	A/V	1
Collier County SO	251,377	800	A/V	6
Coral Springs PD	117,549	200	A/V	7
Daytona Beach PD	64,112	245	A/V	25
Ft. Lauderdale PD	152,397	500	A/V	1
Hallandale Beach PD	34,282	95	A/V	6 months
Hialeah PD	226,419	300	A	20+
Hollywood PD	139,357	340	A/V	1
Kissimmee PD	47,814	140	A/V	8+
Manatee County SO	264,002	650	A/V	20
Miami PD	362,470	1,100	A/V	1+
Mount Dora PD	9,418	36	A/V	18
Orange County SO	896,344	1,500	A/V	22
Osceola County SO	172,493	400	A/V	15
Palatka PD	10,033	35	A/V	6+
Pembroke Pines PD	137,427	225	A/V	2+

LAW ENFORCEMENT AGENCY	POPULATION (2000 CENSUS)	SWORN OFFICERS	AUDIO/VIDEO	YEARS RECORDING
Pinellas County SO	921,482	900	A/V	20
Port Orange PD	45,823	82	A/V	20
St. Petersburg PD	248,232	539	A/V	5+
Georgia				
Atlanta PD	416,474	1,500	A/V	
Cobb County PD	607,751	558	A/V	20+
DeKalb County PD	665,865	1,000	A/V	2
Fulton County PD	816,006	350	A/V	8+
Gwinnett County PD	588,448	515	A/V	15
Macon PD	97,255	305	A/V	15+
Savannah-Chatham PD	232,048	600	A/V	10
Hawaii				
Honolulu PD	371,657	1,200	A	18+
Idaho				
Coeur d'Alene PD	34,514	63	A/V	16+
Dep't. of Fish & Games	1,341,131	100	A	10+
Jerome PD	7,780	20	A/V	6
Nampa PD	51,867	95	A/V	4+
Illinois¹				
DuPage County SO	904,161	439	A/V	4
East St. Louis PD	31,542	65	A/V	
Kankakee County SO	103,833	63	A/V	10
Kankakee PD	27,491	71	A/V	10
Naperville PD	128,358	182	A/V	8
O'Fallon PD	21,910	43	A/V	1
Indiana				
Auburn PD	12,074	22	A/V	7
Carmel PD	37,733	90	A/V	15+

¹ Departments that recorded before the statute (see Appendix C) takes effect.

LAW ENFORCEMENT AGENCY	POPULATION (2000 CENSUS)	SWORN OFFICERS	AUDIO/VIDEO	YEARS RECORDING
Cicero PD	4,303	7	A/V	3
Elkhart PD	51,874	118	A/V	15
Fishers PD	37,835	69	A/V	8
Ft. Wayne PD	205,727	400	A/V	20+
Greensburg PD	10,260	18	A/V	20
Hamilton County SO	182,740	60	A/V	12+
Hancock County SO	55,391	40	A/V	7
Johnson County SO	115,209	60	A/V	4
Noblesville PD	28,590	67	A/V	5
Sheridan PD	2,520	5	A/V	16
Steuben County SO	33,214	21	A/V	5
Westfield PD	9,293	30	A/V	10+
Iowa				
Sioux City PD	85,013	127	A/V	15
Kansas				
Sedgwick County SO	452,869	172	A/V	20+
Wichita PD	344,284	650	A/V	5
Kentucky				
Elizabethtown PD	22,542	42	A/V	5+
Hardin County SO	94,174	20	A/V	2
Oldham County SO	46,178	30	A/V	4
Louisiana				
Lafayette City PD	110,257	240	A/V	15
Lake Charles PD	71,757	175	A/V	10
Plaquemines Parish SO	26,757	216	A	19
St. Tammany Parish SO	191,268	600	A/V	7+
Maine				
Lewiston PD	35,690	80	A/V	15
Portland PD	64,249	160	A/V	2
State Police	1,274,923	320	A/V	15
Maryland				

LAW ENFORCEMENT AGENCY	POPULATION (2000 CENSUS)	SWORN OFFICERS	AUDIO/VIDEO	YEARS RECORDING
Harford County SO	218,590	685	A/V	15
Prince George's County PD	801,515	1,420	A/V	2
Massachusetts				
Yarmouth PD	24,807	52	A/V	2+
Michigan				
Kentwood PD	45,255	72	A/V	10
Ludington PD	8,357	14	A/V	3
Waterford PD	73,150	90	A/V	5+
Minnesota				
All agencies	4,919,479		A/V	10
Mississippi				
Biloxi PD	50,644	145	A/V	25
Cleveland	13,841	40	A	20
Gulfport PD	71,127	200	A/V	15
Harrison County SO	189,601	250	A/V	5
Jackson County SO	131,420	150	A/V	19
Missouri				
St. Louis County Major Case Squad	1,016,315		A/V	
St. Louis County PD	1,016,315	730	A/V	
Montana				
Billings PD	89,847	128	A/V	20
Bozeman PD	27,509	42	A	18
Butte/Silverbow LED	34,606	40	A/V	10+
Cascade County SO	80,357	40	A/V	10+
Flathead County SO	74,471	45	A/V	10+
Gallatin County SO	67,831	40	A	10+
Great Falls PD	56,690	80	A/V	8
Helena PD	25,780	49	A/V	10

LAW ENFORCEMENT AGENCY	POPULATION (2000 CENSUS)	SWORN OFFICERS	AUDIO/VIDEO	YEARS RECORDING
Kalispell PD	14,223	45	A/V	10+
Lewis & Clark County SO	55,716	40	A/V	15
Missoula PD	57,053	89	A/V	3
Missoula County SO	95,802	58	A/V	14
Nebraska				
Douglas County SO	463,585	120	A/V	20
Lancaster County SO	250,291	73	A/V	3
Lincoln PD	225,581	315	A/V	28
Madison County SO	35,226	23	A/V	2
Norfolk PD	23,816	43	A/V	6
North Platte PD	23,878	42	A/V	1
Omaha PD	390,007	750	A/V	8+
O'Neill PD	3,733	7	A/V	12
Sarpy County SO	122,595	123	A/V	20
State Patrol	1,711,263	509	A/V	10
Nevada				
Boulder City PD	14,966	28	A/V	4
Carlin PD	2,161	6	A/V	10+
Dep't. Public Safety	1,998,257	49	A	16
Douglas County SO	41,259	97	A/V	12
Elko County SO	45,291	75	A/V	12
Elko PD	16,708	35	A/V	12
Henderson PD	175,381	280	A/V	10
Lander County SO	5,794	23	A/V	3
Las Vegas Metro PD	488,111	1,988	A/V	26
North Las Vegas PD	115,488	215	A/V	7+
Reno PD	180,480	300	A/V	25
Sparks PD	66,346	102	A/V	15+
Washoe County SO	339,486	400	A/V	20
Wells PD	1,346	52	A/V	8

LAW ENFORCEMENT AGENCY	POPULATION (2000 CENSUS)	SWORN OFFICERS	AUDIO/VIDEO	YEARS RECORDING
Yerington PD	2,883	7	A/V	30
New Mexico				
Carlsbad PD	25,625	50	A	5+
Doña Ana County SO	174,682	150	A	18
Hobbs PD	28,657	81	A/V	4
Las Cruces PD	74,267	150	A/V	18
Santa Fe PD	62,203	143	A/V	6
New York				
Broome County SO	200,536	52	A/V	2+
Ohio				
Akron PD	217,074	480	A	15
Garfield Heights PD	30,734	61	A/V	2
Millersburg PD	3,326	9	A/V	11
Wapakoneta PD	9,474	14	A/V	2
Westlake PD	31,719	40	A/V	10
Oklahoma				
Moore PD	41,138	62	A/V	20
Norman PD	95,694	130	A/V	10
Oklahoma County SO	660,448	350	A/V	1
Tecumsch PD	6,098	10	A/V	5
Oregon				
Clackamas County SO	338,391	300	A	5+
Eugene PD	137,893	175	A/V	26
Medford PD	63,154	97	A/V	16
Portland PD	529,121	1,048	A/V	15+
Springfield Office, State Police		25	A/V	
Warrenton PD	4,096	8	A/V	6 months
Yamhill County SO	84,992	40	A/V	6
South Dakota				

LAW ENFORCEMENT AGENCY	POPULATION (2000 CENSUS)	SWORN OFFICERS	AUDIO/VIDEO	YEARS RECORDING
Aberdeen PD	24,658	40	A/V	3+
Brown County SO	35,460	14	A/V	20
Tennessee				
Blount County SO	105,823	300	A/V	20
Chattanooga PD	155,554	480	A	2
Loudon County SO	4,476	35	A	2
Texas				
Austin PD	656,562	1,431	A/V	5+
Cleburne PD	26,005	50	A/V	5
Corpus Christi PD	277,454	400	V	1
Houston PD	1,953,631	5,300	A/V	12
Randall County SO	104,312	78	A/V	10
Utah				
Salt Lake County SO	898,387	350	A/V	5
Salt Lake City PD	181,743	460	A/V	3
Utah County SO	368,536	256	A/V	7+
Vermont				
Norwich PD	3,544	7	A	
Washington				
Marysville PD	25,315	40	A/V	8
State Patrol	5,894,121	800	A	17

APPENDIX B

**INTERIM POLICY STATEMENT OF THE NEW JERSEY ATTORNEY GENERAL
AND THE NEW JERSEY COUNTY PROSECUTORS' ASSOCIATION REGARDING
ELECTRONIC RECORDATION OF STATIONHOUSE CONFESSIONS**

(Effective Date: April 13, 2004)

The courts in New Jersey have imposed and strictly enforce standards governing the interrogation of suspects who are in police custody. The judiciary, however, is by no means the sole guardian of the criminal justice system. As the chief law enforcement officers in their jurisdictions, the Attorney General and the County Prosecutors are also responsible for ensuring that custodial interrogations are properly and effectively conducted.

Confessions and statements are critical, time-honored investigatory tools used by police to solve crimes and to protect public safety. Interviewing a suspect is often the most direct and efficient way – and sometimes, the only way – to pursue a criminal investigation and to see that justice is ultimately done. It has been a common practice for decades for detectives to ask a suspect to sign a final written statement memorializing the suspect's assertions and admissions.

In recent years, some citizens across the nation have expressed concern about so-called "false confessions" – incriminating statements made or claimed to have been made by persons who are actually innocent. These false confessions are exceedingly rare, and we are aware of no case in New Jersey where an innocent person has confessed to a crime as a result of police misconduct. It is nonetheless appropriate for the Attorney General and the County Prosecutors to establish policies and procedures to enhance public confidence in the integrity of the criminal justice system by using modern technology as appropriate to objectively document stationhouse confessions. Such recordings would serve, for example, to rebut any subsequent claim that a defendant did not actually make incriminating statements that were attributed to him or her.

Several county prosecutors have already promulgated policies concerning the electronic recordation of final statements provided by suspects in certain situations. To gain insight into the practical aspects of these programs and policies, the Attorney General recently convened an Advisory Committee comprised of some of the State's most experienced county investigators and assistant prosecutors. It was the consensus opinion of this group of experienced professionals that the New Jersey law enforcement community should embrace a general policy to electronically record final statements in cases involving the most serious crimes, such as homicides. The Advisory Committee has recommended that the New Jersey law enforcement community identify and periodically refine the "best practices" concerning the electronic recordation of stationhouse confessions.

The Attorney General and the County Prosecutors are mindful that several issues regarding electronic recordation are currently being considered by the New Jersey Supreme Court in the pending case of State v. Thomahl Cook. The Attorney General and County Prosecutors firmly believe that neither the Constitution of the United States nor the Constitution of the State of New Jersey should be construed to compel electronic recordation. In the circumstances, it is neither necessary nor appropriate for the Attorney General to impose a single, inflexible protocol governing the electronic recordation of stationhouse confessions. Rather, it would be more appropriate for local and county jurisdictions to be afforded the flexibility to experiment with different protocols with a view toward assessing costs and benefits and toward identifying best practices. This experimental approach is consistent with pending legislation that is designed to address these policy issues in a thoughtful manner. See, e.g., Senate Bill No. 287, discussed infra.

For the foregoing reasons, and pending a further analysis of pilot programs in this State and in other jurisdictions, the Attorney General, the Director of the Division of Criminal Justice and the County Prosecutors hereby jointly adopt the following interim policy statement:

If a person who is suspected of committing a homicide is asked by a law enforcement officer to provide or acknowledge a written statement in a stationhouse custodial setting, the investigating officer should, whenever feasible, arrange to electronically record (preferably video record) the suspect's statement or acknowledgment so as to establish a permanent and objective record that the suspect had been advised of his or her constitutional rights and that any such incriminating statement or acknowledgment was actually made by the suspect. Electronic recordation of the final statement or acknowledgment may be done on notice to and with the express permission of the suspect, or may be done surreptitiously at the discretion of the investigating officer. The electronic recordation of the suspect's final statement or acknowledgment may be in addition to or in lieu of having the suspect sign a traditional written statement.

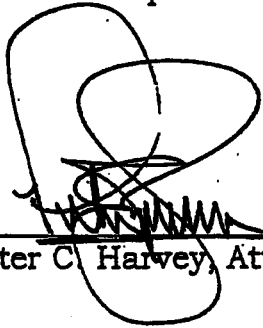
When a written statement is signed or acknowledged by a suspect in custody and no electronic recordation is made, the officer taking the written statement or acknowledgment shall document the reasons why the statement or acknowledgment was not electronically recorded (e.g., electronic recordation equipment was not reasonably available at the time that the written statement or acknowledgment was given; the suspect indicated a desire that the statement or acknowledgment not be electronically recorded, etc.). The documented reasons for not electronically recording the final statement or acknowledgment shall be provided to the appropriate prosecuting agency.

The foregoing official interim policy statement shall be binding on all law enforcement agencies in this State, and shall remain in effect until rescinded or superseded by Order of the Attorney General. The Division of Criminal Justice and the County Prosecutors shall institute the necessary procedures to ensure that this interim policy is effectively implemented and that the documentation requirements of the policy are enforced. For example, if a Prosecutor's Office is provided by police with a defendant's written statement but not an electronic recordation of the statement, it shall be the responsibility of the assistant prosecutor reviewing the matter to ascertain why the statement was not electronically recorded, and, if no satisfactory explanation is given, notification must be made to the County Prosecutor and/or the Director of the Division of Criminal Justice, who shall take appropriate actions to implement and enforce this interim policy statement.

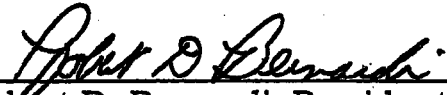
The Division of Criminal Justice and the County Prosecutors will continue to work with all law enforcement agencies operating within their jurisdictions to develop the capacity to electronically record stationhouse confessions. Within 180 days of the effective date of this Interim Policy, County Prosecutors, in coordination with state and local law enforcement agencies, shall recommend to the Attorney General and the Director of the Division of Criminal Justice policies and protocols concerning: (1) the electronic recordation of confessions with respect to violent crimes other than homicide (i.e., e.g., kidnaping, aggravated sexual assault, etc.), and (2) pilot or demonstration programs that provide for the electronic recordation of earlier stages of custodial interrogations, such as stationhouse interrogations.

As noted above, pending legislation (Senate Bill No. 287) would establish in the Department of Law and Public Safety a pilot program requiring the electronic recording of custodial interrogations concerning certain violent crimes. The

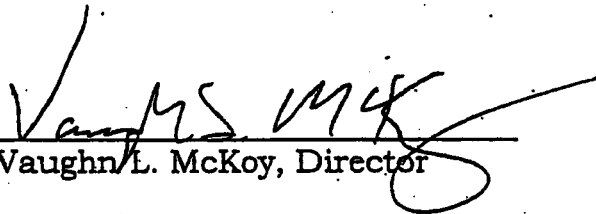
legislation would require the Attorney General to prepare and submit a report within two years, evaluating the effectiveness of the program and discussing the feasibility of expanding the program throughout the State. Consistent with that approach, the Division of Criminal Justice and the County Prosecutors will institute procedures to assess the costs and benefits of various electronic recordation policies and programs. The Division of Criminal Justice will periodically convene meetings of the Advisory Committee and other groups of law enforcement officials to share information, and will invite experts from other jurisdictions outside New Jersey to share their experiences with various electronic recordation protocols.



Peter C. Harvey, Attorney General



Robert D. Bernardi, President
New Jersey County Prosecutors'
Association



Vaughn L. McKoy, Director

Dated: April 13, 2004

**AMENDED POLICY STATEMENT OF THE NEW JERSEY ATTORNEY GENERAL
AND THE NEW JERSEY COUNTY PROSECUTORS' ASSOCIATION REGARDING
ELECTRONIC RECORDATION OF STATIONHOUSE CONFESSIONS**

(December 17, 2004)

The April 13, 2004 "Interim Policy Statement" of the Attorney General and the County Prosecutors' Association requires that when a confession is obtained following a stationhouse interrogation in homicide cases, the law enforcement entity involved either video or audio record the suspect's final statement, or his acknowledgment of the content of a written statement. In addition, the Interim Policy Statement contemplates further, on-going examination of the issues surrounding electronic recordation of suspects' statements, with an eye toward determining whether expansion of electronic recording in this context is warranted as a matter of law enforcement policy, and to what degree any expansion of the practice of recording is practical or feasible.

The Attorney General and the County Prosecutors' Association have determined that expansion of the policy of electronic recordation of final statements is indeed warranted as a matter of policy. Accordingly, the Attorney General, the Director of the Division of Criminal Justice and the County Prosecutors hereby jointly adopt the following amendments to the Interim Policy Statement:

If a person who is suspected of committing any first, second or third degree crime, is asked by a law enforcement officer to provide or acknowledge a written statement in a stationhouse custodial setting, the investigating officer should, whenever feasible, arrange to electronically record the suspect's statement or acknowledgment so as to establish a permanent and objective record that the suspect had been advised of his or her constitutional rights and that any such incriminating statement or acknowledgment was actually made by the suspect. Electronic recordation of the final statement or acknowledgment may be done on notice to and with the express permission of the suspect, or may be done without notice to the suspect. The electronic recordation of the suspect's final statement or acknowledgment may be in addition to or in lieu of having the suspect sign a traditional written statement.

When a written statement is signed or acknowledged by a suspect in custody in a stationhouse and no electronic recordation is made, the officer taking the written statement or acknowledgment shall document the reasons why the statement or acknowledgment was not electronically recorded (e.g., electronic recordation equipment was not reasonably available at the time that the written statement or acknowledgment was given; the suspect indicated a desire that the statement or acknowledgment not be electronically recorded, etc.). The documented reasons for not electronically recording the final statement or acknowledgment shall be provided to the appropriate prosecuting agency.

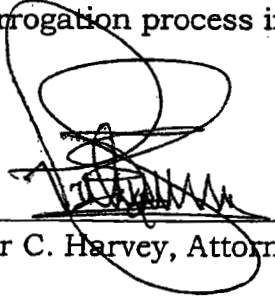
The above provisions shall also apply to any juvenile, age 14 or older, suspected of committing any act that would constitute one of the crimes enumerated in N.J.S.A. 2A:4A-26a(2)(a), thereby subjecting the juvenile to waiver to adult court on the prosecutor's motion.

Given the concerns relating to feasibility in the implementation of these changes to the Interim Policy Statement, the amendments shall be phased in over time. Thus, expansion of the policy from homicides so as to now cover all first and second degree crimes shall take effect on September 1, 2005. The further expansion of the policy to then cover all third degree crimes shall take effect on January 1, 2006. Likewise, expanding the policy to cover all juvenile cases involving the crimes listed in N.J.S.A. 2A:4A-26a(2)(a) shall take effect January 1, 2006.

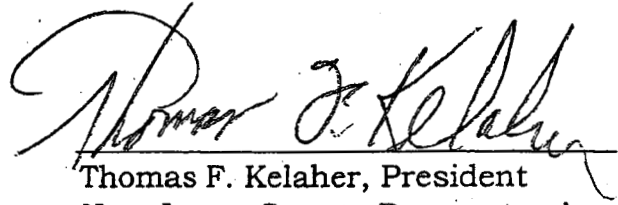
The Interim Policy Statement further called for the commencement and review of pilot programs designed to study whether expansion of an electronic recording policy should in any way encompass the interrogation process itself. The Attorney General and the County Prosecutors' Association strongly encourage county and local law enforcement entities to volunteer for such pilot studies and to thereby experiment in this area in as broad or as narrow a manner as the pilot entity wishes, so long as the pilot program calls for electronic recording of the entire stationhouse interrogation.

By January 1, 2006, the Attorney General in consultation with the County Prosecutors' Association, shall make a final determination as to whether to issue a law enforcement directive requiring expansion of the

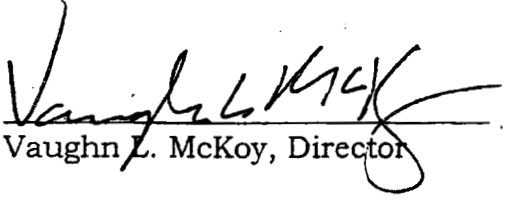
electronic recordation policy so as to cover the entire stationhouse
interrogation process in certain cases.



Peter C. Harvey, Attorney General



Thomas F. Kelaher, President
New Jersey County Prosecutors'
Association



Vaughn L. McKoy, Director

Dated: December 17, 2004

APPENDIX C

**MONMOUTH COUNTY
UNIFORM POLICY
FOR VIDEO TAPE
REVIEW OF FORMAL
WRITTEN STATEMENTS**

Approved: September 2001

Effective: May 1, 2002

INTRODUCTION

In recent years, video technology has been routinely utilized to further criminal investigations. For example, in Monmouth County, videotaping has been employed to:

1. document crime scenes;
2. conduct surveillances and otherwise memorialize undercover activities;
3. record sobriety tests of suspects in driving while intoxicated cases;
4. document forensic interviews of children who disclose sexual or physical abuse;
5. monitor prisoners; and
6. record in-progress events via mobile video recording devices.

The issue of whether to videotape interviews, interrogations, statements or any portion thereof has been considered by the Monmouth County Prosecutor and the Monmouth County Police Chiefs Association for the last decade. Substantial discussion has been had as to the benefits and detriments of videotaping.

In 1997, a policy was promulgated mandating that certain videotaping procedures were to be employed subsequent to a formal written statement being given by a target in a homicide case. This policy has been successfully implemented.

The purpose of this new policy is to expand the type of investigation subject to videotaping to include all first and second degree crimes. It is intended to augment formal written statements, not replace them. The rationale for this policy is to create a record which will help establish the following:

1. that Miranda warnings were properly administered and voluntarily waived;
2. that the words in the statement are in fact the words used by the target; and
3. that the statement was not the product of any police misconduct (i.e., threats, inappropriate promises, coercion, physical force or intimidation).

The ultimate goals of the policy are to enhance the reliability of confessions, protect police officers against unfounded misconduct allegations and increase the public's confidence in the validity of confession evidence.

It is recognized that facts and circumstances specific to a particular investigation may, on occasion, preclude a police officer from following some particular directive delineated herein. Officers are expected to use their best judgment at all times.

I. WHEN TO VIDEOTAPE

- A. Videotaping procedures are to be employed only to memorialize the reviewing and signing of a formal written statement by an adult or juvenile target in an investigation regarding a first or second degree crime.
 - 1. The interview/interrogation is not to be videotaped.
 - 2. The actual taking of the statement is not to be videotaped. This means that the question and answer portion of the statement as typed by a police officer or a secretary is not to be videotaped.
 - 3. The process by which the target reviews and signs the formal written statement is to be videotaped.

- B. The videotaping requirement applies to all first and second degree crimes including but not limited to the following:
 - 1. All homicides (Murder, Aggravated Manslaughter, Manslaughter, Vehicular Homicide and Strict Liability for Drug Induced Death);
 - 2. All second degree Aggravated Assault or second degree Assault By Auto;
 - 3. Kidnapping and second degree Interference With Custody;
 - 4. Aggravated Sexual Assault and Sexual Assault;
 - 5. Armed Robbery and Robbery;
 - 6. Carjacking;
 - 7. Aggravated Arson;

8. Second degree Burglary (Burglary is a second degree crime if in the course of committing the offense, the actor purposely, knowingly or recklessly inflicts, attempts to inflict or threatens to inflict bodily injury on anyone, or the actor is armed with or displays what appears to be explosives or a deadly weapon.);
9. Any theft offense where the value of the loss exceeds \$75,000.00;
10. Extortion;
11. Second degree Endangering the Welfare of a Child;
12. Bribery;
13. Second degree Tampering with Witnesses or Informants;
14. Second degree Eluding;
15. Second degree Escape;
16. Official Misconduct;
17. All first and second degree drug charges (Leader of Narcotics Trafficking Network, Maintaining or Operating a Controlled Dangerous Substance Production Facility, first and second degree Distribution and Possession with Intent to Distribute, Employing a Juvenile in a Drug Distribution Scheme, Fortified Premises);
 - a. The videotaping requirements shall be waived in narcotics cases if to do so would compromise the identity of an officer working in an undercover capacity. However, care should be taken to avoid such a situation.

18. Possession of a Weapon for an Unlawful Purpose when the weapon is any type of firearm, any type of explosive or any destructive device;
 19. Possession of a weapon while committing certain CDS Crimes contrary to N.J.S.A. 2C:39-4.1; and
 20. Racketeering.
- C. The videotaping requirement applies to any other first or second degree crimes even those not listed in Sections I.B(1) through (20).
- D. The videotaping requirement does not apply to the following formal written statements:
1. Victim statements other than the current practice of video-documenting forensic interviews of children who disclose sexual or physical abuse;
 2. Witness statements;
 3. Target statements in investigations regarding third and/or fourth degree crimes; and
 4. Target statements in investigations regarding non-indictable and motor vehicle matters.

II. SUBSTANTIVE PROCEDURES TO BE FOLLOWED WHEN VIDEOTAPING

- A. Videotape equipment, whether stationary or portable, covert or overt, is to be activated to memorialize the reviewing and signing of a formal written statement as described above.
1. Each police department is given the discretion to determine whether to establish within the police department a videotaping room equipped with stationary equipment or to use portable equipment. A police department is free to have both stationary and portable equipment.
 2. The preference is for overt videotaping. That is, the target should be expressly advised that he/she is being videotaped or a camera and/or microphone should be visible during the session.
 - a. There is no prohibition against covert videotaping because it is recognized that some targets who are willing to cooperate might be reluctant to speak on video and may even invoke constitutional rights to avoid doing so.
 - b. When stationary equipment is used overtly, distractions must still be kept to a minimum. For that reason, items such as pinhole lenses and subminiature microphones are advisable.
 3. A new virgin tape should always be used. Do not recycle tapes.
 4. Only one videotaped statement review is to be on each tape.

5. The videotape equipment must always be properly maintained. The video and audio components must be tested before each use. This testing should be conducted by the officer who will be recording the statement review.
- B. Prior to commencing the review of the statement, the police officer who is operating the video equipment should indicate for the record the following:
1. The name of the officer operating the equipment;
 2. The name of the other officer(s) in the room;
 3. The presence of the target is to be noted as well as any other individuals present (i.e., a parent if the target is a juvenile, interpreters);
 4. The time should be noted and, if possible, a clock should be visible in the tape;
 5. The location should be described (i.e., a conference room in the Detective Bureau of the _____ Police Department);
 6. The purpose of the taping (i.e., the purpose of this is to review the formal written statement given by John Doe earlier this evening in connection with the death of John Smith).
 7. The operator of the videotape equipment should make sure that all people in the room are shown at least at the beginning and the end of the tape.

- a. The practice of an officer or person entering or leaving the room subsequent to the commencement of the videotaped review is strongly discouraged. However, it is recognized that it might occur (i.e., if the target's attorney calls headquarters, the target will have to be advised). Any person who enters or leaves must be videotaped and it must be verbally explained on the videotape.
- C. The police officer or officers who took the statement from the target should, whenever possible, participate in the videotaped review.
 1. A minimum of two officers must be present for the videotaped review, one to review the statement with the target and one to operate the equipment. The other officer who witnessed the statement should be present as well.
- D. Immediately after the introductory preamble, the officer should first show the statement to the target and have him verify that it is in fact his statement.
- E. The officer should review all pedigree information with the target for accuracy and should establish the location where the statement was taken and the persons who participated in the taking of the statement for the record. The date and the times should be verified with the target to the extent that he knew them. The date and time of the videotaped review should be again noted.

- F. The target's Miranda rights and his Miranda waiver should be reviewed, emphasizing that the defendant understood these rights and voluntarily waived them before the formal written statement commenced. In instances where there is an interview prior to the taking of the formal written statement, any waiver which occurred then should be addressed on the videotape as well. The target should be asked questions relating to the exact words of the Miranda warning given and the exact words used by the target to waive his rights.
1. Make sure that the target acknowledges having been advised of his constitutional rights, having understood same and having voluntarily waived them. Do not blur these distinctions or move through them too quickly. Do this for each waiver.
- G. The officer should review the target's age, employment status, educational background and marital status with the target for accuracy.
- H. The officer should review with the target whether he can read, write and understand the English language. If the target has difficulty with the language and police assistance was required for the target to review the statement, that should be documented on the videotape as well.
1. If an interpreter is present for the statement, that person should be present for the videotaped review as well and should participate to the same extent.

- I. The substantive portion of the statement should be reviewed with the target. If the target is capable of reading the statement to himself, he should be permitted to do so again on the videotape. A police officer should read the questions and the target should read the answers out loud. If the target needs assistance, that assistance should be videotaped, for example, if the target cannot read, the detective should read the statement to him while the videotape is running. The target should be asked specific questions about whether he had in fact read the statement and if the words contained there are his words. The target should be explicitly directed to make any changes, additions, deletions he/she wants.
- J. Once the target has completed his review of the substance of the statement, his certification at the end of the statement should be reviewed, particularly the portion where he certified that the facts contained in the statement were true. The target should also indicate his understanding that he had the opportunity to add anything to the statement or make any changes to the statement. If the target made changes in the statement, they should be noted on tape as well.
- K. The target should initial the bottom of each page on videotape.
- L. The target should sign the last page of the statement on videotape.
- M. The time that the statement was completed should be reviewed with the target to the extent that he was aware of the time.

- N. It should be established that the target was not made any promises in exchange for his statement. It should be established that the statement was not the product of any threats or coercion. Establish that the statement was voluntarily given by the target.
- O. The target should be asked if he has anything to add. The target must be permitted to say whatever he/she wants.

III. GENERAL GUIDELINES

- A. If the target is shown evidence in the statement (i.e., a gun), it should be shown to him on the videotape as well.
- B. If, during the course of the videotaped review, the target makes an allegation regarding promises made, threats communicated, physical violence or some other form of coercion or improper police conduct, the target must be permitted to say whatever he wants. The target should be instructed to provide details and advised that the matter will be referred to the officer's supervisor. Once the supervisor is advised, he/she should ensure that if appropriate, an investigation into the allegations is commenced.
 - 1) If the target does allege some form of inappropriate police conduct, he should still be asked whether the admissions he made are nevertheless true.
- C. Once the videotape procedure begins, the tape is ordinarily never to be turned off. If the target requests a break (i.e., bathroom, cigarette) the tape is to remain activated while the break is occurring, even if an empty room is being filmed. An officer should explain the nature and length of the break on the tape. The target should acknowledge the facts surrounding the break. However, if the target meets with and speaks to his attorney

privately, the tape must be turned off to avoid breaching the attorney client privilege.

- D. When, to the knowledge of police, an attorney is present or available and the attorney has communicated a desire to confer with the target, the police must make that information known to the target even if the information is first obtained during the videotaped review. The tape should be kept activated and running when the target is advised. The target's response should also be taped. However, if the target meets with or speaks to his attorney privately, the tape must be turned off to avoid breaching the attorney/client privilege.
- E. Once the taping procedure starts, no one is to enter or leave the room unless absolutely necessary.
- F. If the target refuses to submit to a videotaped review of the formal written statement, the officer should at least get the target to indicate his refusal on tape. (If the target is invoking his constitutional rights, no effort should be made to get him to appear on video. However, if the target is still speaking to police officers but does not want to be taped, it is appropriate to ask him to memorialize this refusal on tape.)
- G. The videotaping requirement applies to investigations involving juvenile targets. The parent or legal guardian should be in the room when the videotaped review occurs and their presence should be noted. If the parent or legal guardian is present in the police department when the videotaped

review is to occur, but chooses to remain outside the room during the review, the parent/guardian should be asked to waive his/her presence on tape. If the parent or legal guardian is absent, the reasons why should be noted on the tape along with the juvenile's acknowledgement of same.

- H. If the target has visible injuries, he should be asked to explain how they were obtained.
- I. The officers reviewing the statement with the target are to avoid sarcasm, jokes and the like at all times.
- J. The officers reviewing the statement with the target should wear their guns in ankle holsters or secure them elsewhere. No guns should be visible.
- K. If the target was provided with food, beverages, bathroom breaks, cigarette breaks or any other amenity, the target should be asked to acknowledge same during the videotaped review. If the target declines such an offer, (i.e., turns down a meal) he should be asked to acknowledge that as well.

IV. EVIDENCE CONTROL AND DISCOVERY

- A. The evidential value of a videotaped confession cannot be overstated. It is imperative that this key evidence be adequately preserved. Indeed, it should be treated with the same level of security as, for example, a murder weapon.
- B. The following procedure is to be followed with the original videotape:
 - 1. The tab on the tape housing is to be broken immediately to prevent the tape from being accidentally recorded over.
 - 2. The original tape is to be securely labeled in indelible ink with the following information:
 - a. Agency case number
 - b. Date tape made
 - c. Type of crime
 - d. Target's name
 - e. Victim's name
 - f. Location of crime scene
 - g. Initials and badge number of person who secured tape
 - 3. After these steps are completed, duplicates must be made. Each department must have duplication equipment.
 - 4. The original tape is to be signed into the Evidence Vault where it is to be securely maintained either with the case evidence or in an area

specially designated for videotape storage. The tapes must be stored in a room with temperature and humidity controls.

- C. The tapes are discoverable. A copy of the tape should be forwarded to the Intake Section of the Monmouth County Prosecutor's Office with the complaints, police reports and other case documents. Never send an original tape in the mail. That should be handled within a strict chain of custody as described herein.

**MONMOUTH COUNTY
UNIFORM POLICY
FOR VIDEO RECORDED
INTERROGATIONS
OF TARGETS IN
HOMICIDE CASES**

Approved : December 2004

Effective: January 2005

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INTRODUCTION

For many years, video technology has been routinely utilized to further criminal investigations. For example, in Monmouth County, video recording has been employed to:

1. document crime scenes;
2. conduct surveillances and otherwise memorialize undercover activities;
3. record sobriety tests of suspects in driving while intoxicated cases;
4. document forensic interviews of children who disclose sexual or physical abuse;
5. monitor prisoners;
6. record in-progress events via mobile video recording devices; and
7. memorialize the reviewing and signing of a formal written statement by an adult or juvenile target in an investigation regarding a first or second degree crime.

The issue of whether to video record interviews has been considered by the Monmouth County Prosecutor and the Monmouth County Police Chiefs Association for more than a decade with substantial discussion as to the benefits and detriments of video recording .

In 1997, a policy was promulgated mandating that certain video recording procedures were to be employed to memorialize the reviewing and signing of a formal written statement by an adult or juvenile target in a homicide investigation. After

successful implementation of this policy, the video recording requirement was expanded on May 1, 2002 to include all first and second degree crimes as well.

On April 13, 2004, the "Interim Policy Statement of the New Jersey Attorney General and the New Jersey County Prosecutor's Association Regarding Electronic Recordation of Stationhouse Confessions" became effective. This policy stated as follows:

If a person who is suspected of committing a homicide is asked by a law enforcement officer to provide or acknowledge a written statement in a stationhouse custodial setting, the investigating officer should, whenever feasible, arrange to electronically record (preferably video record) the suspect's statement or acknowledgment so as to establish a permanent and objective record that the suspect had been advised of his or her constitutional rights and that any such incriminating statement or acknowledgment was actually made by the suspect. Electronic recordation of the final statement or acknowledgment may be done on notice to and with the express permission of the suspect, or may be done surreptitiously at the discretion of the investigating officer. The electronic recordation of the suspect's final statement or acknowledgment may be in addition to or in lieu of having the suspect sign a traditional written statement.

When a written statement is signed or acknowledged by a suspect in custody and no electronic recordation is made, the officer taking the written statement or acknowledgment shall document the reasons why the statement or acknowledgment was not electronically recorded (e.g., electronic recordation equipment was not reasonably available at the time that the written statement or acknowledgment was given; the suspect indicated a desire that the statement or acknowledgment not be electronically recorded, etc.). The documented reasons for not electronically recording the final statement or acknowledgment shall be provided to the appropriate prosecuting agency.

The Monmouth County Prosecutor, after consultation with the Monmouth County Police Chiefs Association, has determined that it is now appropriate to expand upon this policy and mandate the covert video recording of the

interrogation of any adult or juvenile reasonably believed to be a target in a homicide investigation. The rationale for this policy is to create a record which will help establish:

1. that Miranda warnings were properly administered and knowingly, intelligently and voluntarily waived;
2. that the statement was not the product of any police misconduct (i.e., threats, inappropriate promises, coercion, physical force or intimidation);
3. the demeanor and affect of the target at the time of the interrogation; and
4. a permanent record of exactly what the target said, when it was said and how it was said.

It is believed that a contemporaneous video record of a target interrogation will create an unimpeachable piece of physical evidence. This will ultimately benefit police, prosecutors, judges, jurors, the target and all others involved in the criminal justice system.

This policy is intended to serve as a guide for law enforcement officers in the nature of a "best practices" statement. This policy does not establish, recognize or create any substantive or procedural rights for the target/defendant if said policy is for some reason not followed in some aspect(s). Indeed, it is expressly recognized that facts and circumstances specific to a particular investigation may, on occasion, preclude a law enforcement officer from following some particular directive delineated herein. Officers are expected to use their best judgment at all times. The Monmouth County Prosecutor or his designee have authority to authorize non-compliance with any or all aspects of this policy if deemed appropriate.

This policy is effective on January 1, 2005.

The "Monmouth County Uniform Policy For Video Recorded Review of Formal Written Statements" remains in effect for all first and second degree crimes not covered by this policy.

I. WHEN TO VIDEO RECORD

A. The requirement of video recording the interrogation of an adult or juvenile target applies to death investigations regarding the following crimes:

1. Murder (N.J.S.A. 2C:11-3)
2. Aggravated Manslaughter (N.J.S.A. 2C:11-4a)
3. Manslaughter (N.J.S.A. 2C:11-4b)
4. Any attempted murder (N.J.S.A. 2C:5-1/N.J.S.A. 2C:11-3) or aggravated assault (N.J.S.A. 2C:12-1b(1)) investigation where the death of the victim appears to be reasonably possible based upon information known to the investigating police officers.

B. The requirement of video recording the interrogation of an adult or juvenile target does not apply to death investigations regarding the following crimes:

1. Vehicular Homicide (N.J.S.A. 2C:11-5)
2. Strict Liability for drug induced deaths (N.J.S.A. 2C:35-9)
3. Conspiracy to commit murder investigations (N.J.S.A. 2C:5-2/N.J.S.A. 2C:11-3) where there is no injury to the victim (i.e., cases where the target tries to hire a "hit man" who is actually an undercover police officer)

C. Video recording is to be accomplished covertly. In *State v. Vandever*, 314 N.J. Super. 124 (App. Div. 1998), the Appellate Division of the New Jersey Superior Court held that a target who has properly been given Miranda warnings need not be told that he is being video recorded. Furthermore, the undisclosed video recording of the interrogation does not violate the "New Jersey Wiretapping and Electronic Surveillance Control Act" (See N.J.S.A. 2A:156A-4b).

D. The video recording requirement applies to all interrogations of adult or juvenile targets in the category of investigations made reference to in Section I A above. Interrogation is generally recognized as any express questioning and any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the target.

1. The concept of interrogation is intended to be broader than the concept of custodial interrogation (questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way). Custodial interrogations will always be accompanied by a Miranda warning whereas non-custodial interrogation might not be. This policy is applicable to any interrogation whether custodial or not.

E. The video recording requirement is only applicable if the interrogation takes place in a police station, any office of the Monmouth County Prosecutor or any other law enforcement office where covert video recording is possible.

1. This policy recognizes that video recording may not be possible in certain situations such as field interrogations which can not be delayed and in other places such as hospitals, jails or locations outside of Monmouth County where policy or circumstances may preclude video recording. The target may also speak spontaneously thereby precluding video recording.
2. If possible, police vehicles equipped with mobile video recording equipment should be utilized to preserve field interrogations.
 - a. If a target is transported to the place of interrogation in a police vehicle with a mobile video recording system,

the camera should be focused on the target and the sound should be on to preserve any statements the target makes.

II. SUBSTANTIVE PROCEDURES TO BE FOLLOWED WHEN VIDEO RECORDING

- A. Prior to the commencement of a recorded interrogation, the video and audio components of the recording equipment must be tested. This should be done each and every time the equipment is used and should be done by the police officer responsible for operating the recording equipment. Any backup equipment should be tested as well.
- B. Once the video recording equipment is activated and prior to the commencement of the interrogation, a police officer involved in the interrogation or the operation of the equipment should indicate for the record the following:
1. The name of the officer operating the equipment;
 2. The name of the officers in the room who will be conducting the interrogation;
 3. The identity of the target as well as any other individuals who are present or expected to be present (i.e., a parent/guardian if the target is a juvenile, interpreters);
 4. The date and the start time or approximate start time should be noted and, if possible, a clock should be visible in the room;
 5. The location where the recorded interrogation is taking place should be described (i.e., a conference room in the Detective Bureau of the _____ Police Department); and
 6. The purpose of the recording (i.e., to interview _____ in connection with the shooting of John Smith).

This information should all be preserved prior to the commencement of the interrogation in a manner not known to the target. If it is not possible to

make the information a matter of record before starting the interrogation, it should be done after the interrogation is finished and also addressed in police reports.

- C. The video recorded interrogation should generally be conducted by two police officers. Usually there will be one detective from the Monmouth County Prosecutor's Office and one detective from the local police department. The manner in which the interrogation is conducted is not dictated by this policy. Rather, to maximize effectiveness, the detectives conducting the investigation are specifically accorded the latitude to exercise their best professional judgment as to how to conduct the interrogation and which interrogation techniques to employ. This policy explicitly authorizes police to use any legitimate established interrogation technique deemed appropriate in the context of a specific investigation. The Monmouth County Prosecutor continues to support aggressive interrogation techniques.
- D. Miranda warnings should be given at the commencement of a custodial interrogation. The exact language of the Miranda warning should be utilized. Even though the Miranda warning, acknowledgement and waiver are being video recorded, the standard form may still be utilized and executed depending upon the circumstances and in the discretion of the interrogating officers. Remember that Miranda warnings must still be

given to the most experienced criminal and must be given even if the target attempts to decline the warning.

1. Do not rush through the Miranda warning process. Make sure the target is given sufficient time to understand the Miranda warning and to acknowledge and understand same as well to waive the rights. Do not blur the distinctions between acknowledgement of rights, understanding of rights and waiver of rights and do not move through the process too quickly.
2. If there was any sort of Miranda warning or waiver which occurred prior to the video recorded interrogation, the target should be asked to confirm this at the commencement of the video recorded interrogation. For example, if a uniformed police officer transported the target to headquarters and advised him/her of the Miranda rights, the target should be asked to acknowledge this advisement even if no waiver of rights was sought. Additionally, if a non-video recorded interrogation was conducted prior to the video recorded interrogation and Miranda rights were waived, said advisement and waiver need to be acknowledged by the target at the commencement of the video recorded interrogation. This review is not a substitute for the advisement and waiver which should precede any video recorded interrogation. If the target made admissions, review same and have the target acknowledge them.
3. For more discussion regarding special Miranda issues see Section III herein.

E. Generally speaking, the video recorded custodial interrogation should commence with the obtaining of the target's pedigree information and the introduction of the persons conducting the interrogation. This should include a review of the target's age, date of birth, employment status, educational background and marital status as well as any other background information deemed relevant. The police officers conducting the interrogation are free to engage in general conversation unrelated to the

investigation for as long as they deem appropriate. In some instances, conversation of this nature will precede the Miranda warnings.

- F. The police officers conducting the interrogation should also make inquiry as to whether the target can read, write and understand the English language. Use an interpreter if necessary. The interpreter should be a sworn police officer whenever practical.
- G. The general rule is that once the interrogation begins the video recording device is never to be turned off. If the target requests a break (i.e., bathroom, cigarette) the equipment is to remain activated even if an empty room is being filmed. The nature and length of the break should be discussed. If the target makes any sort of admission or relevant statement during the break it needs to be reviewed with and acknowledged by the target once the interrogation continues. If there is a significant or substantial break in the interrogation, it may be necessary to re-administer the Miranda warning and secure a new waiver.
 - 1. However, if the target meets with and speaks to his attorney privately, video recording must cease to avoid breaching the attorney/client privilege.
 - 2. Police are authorized to move the target and the attorney to a different room where video recording is not possible. If this is done, keep the equipment activated in the interrogation room.
 - 3. Additionally, under certain circumstances, a juvenile target may wish to communicate privately with his/her parent or guardian or the parent/guardian may wish to communicate privately with the juvenile. In either case, video recording must cease the moment the law enforcement officers leave the interrogation room. Police are

authorized to move the juvenile and the parent/guardian to a different room where video recording is not possible. If this is done, keep the equipment activated in the interrogation room.

- H. When, to the knowledge of police, an attorney is present or available and the attorney has communicated a desire to confer with the target, the police must make that information known to the target immediately even if the information is first learned while the video recorded interrogation is in progress. See *State v. Reed*, 133 N.J. 237 (1993). Remember that this rule applies even if someone other than the target (i.e., family or friend) has retained the attorney. The video recording device should be kept activated and running when the target is advised and when the target responds. However, it is emphasized that if the target meets with or speaks to his/her attorney privately, the device must be turned off.
- I. This policy recognizes that it may be necessary for police officers to enter or leave the interrogation room during the course of the video recorded interrogation. This practice is specifically authorized consistent with the needs of the investigation. Such needs may include switching interrogators.

III. SPECIAL ISSUES REGARDING "MIRANDA" AND THE LAW PERTAINING TO CUSTODIAL INTERROGATION

A. At a pre-trial hearing regarding the admissibility into evidence of the video recorded interrogation, the State will be required to prove beyond a reasonable doubt that there was technical compliance with the Miranda requirement and that the target's statements were voluntarily made. The State bears the legal burden of establishing that a target knowingly, intelligently and voluntarily waived his/her rights. Generally, this waiver determination involves a "totality of the circumstances" analysis.

1. If police are interrogating a target of limited intelligence, I.Q. or educational background, extra care must be taken in the administration, acknowledgement and waiver of the Miranda rights.
2. If the target is intoxicated or otherwise under the influence of street or prescription drugs to the extent that he/she can not comprehend constitutional rights, the validity of any waiver is subject to challenge. However, the fact that a target has been drinking or using drugs does not preclude police from conducting an interrogation. Police must make a case by case assessment as to whether a target is capable of understanding and waiving Miranda rights. The target should be asked specific questions regarding his/her alcohol/drug use to facilitate the police officer's determinations.
3. If there is evidence of mental disease, police must take special care in explaining the rights and securing the waiver.
4. Juveniles
 - a. State v. Presha, 163 N.J. 304 (2000) is a major New Jersey Supreme Court decision regarding the custodial

interrogations of juveniles. This case established the following law:

1. As regards juveniles 14 years of age or over, a parent or legal guardian should be in the interrogation room whenever possible unless said adult is unwilling to be present or truly unavailable.
 2. Police must always use best efforts to locate the parent or guardian.
 3. The absence of an adult presence on behalf of the juvenile will be given great weight when the validity of a juvenile's waiver of rights is considered.
 4. If the juvenile is under the age of 14, the absence of a parent or legal guardian will make a statement inadmissible as a matter of law unless the adult was unwilling to be present or truly unavailable.
 5. Courts considering the admissibility of a juvenile's statement will also consider the totality of the circumstances including: (1) the juvenile's age; (2) the juvenile's desire to speak to police outside the presence of a parent/guardian; (3) whether the parent/guardian has voluntarily agreed to be absent during questioning; (4) the juvenile's prior record of police involvement; and (5) the overall fairness of the juvenile's treatment.
- b. If police are unable to locate a parent or guardian and commence interrogation of a juvenile target, continuing efforts to locate a responsible adult should be made by police officers not involved in the interrogation. All such efforts should be documented.
- c. On occasion, a juvenile target may feel uncomfortable discussing certain aspects of a crime in front of a parent/guardian. The idea of having the adult depart

from the interrogation room should originate with the parent/guardian and not the police. See State ex rel Q.N., 179 N.J. 165 (2004).

1. If the parent/guardian leaves the interrogation room and it is possible for them to view the interrogation on a monitor, this should be permitted. The parent/guardian retains the ability to stop the interrogation even from outside the interrogation room.
 5. A target must be advised if a criminal complaint or arrest warrant has been issued against the target prior to seeking a Miranda rights waiver. See State v. A. G. D., 178 N.J. 56 (2003). The New Jersey Supreme Court has held that a target must be advised of his/her true status so that he/she can exercise an informed waiver of rights.
- B. Police must always "scrupulously honor" a target's invocation of Miranda rights. State v. Hartley, 103 N.J. 252 (1986). An invocation may be express or ambiguous. If ambiguous or equivocal, police have a duty and obligation to seek clarification as to what the target means.
- C. A target's invocation or waiver of rights may be limited in scope.

For example, a target may say:

1. I will talk to you about A but not B;
2. I will talk to you but not him;
3. I will talk to you but I don't want to sign anything;
4. I want to rest for a while before I talk to you

The interrogating police officer must meticulously clarify and honor the scope of the target's waiver.

D. A target may invoke his constitutional rights and then change his/her mind. Police have not failed to "scrupulously honor" the target's invocation if he/she re-initiates communications. See State v. Fuller, 118 N.J. 75 (1990). The re-initiation must be clear and without police encouragement and must involve the subject matter of the pending criminal investigation. State v. Chew, 150 N.J. 30, 64 (1997). Any re-initiation will likely occur outside the presence of the video recording device. Accordingly, if interrogation is to be started again case specific questions similar to the following should be asked and preserved on video.

1. Earlier tonight did you invoke your right to remain silent?
2. Were you then placed in a cell?
3. Did you later call me over to the cell?
4. What did you tell me?
5. Why did you do that?

The target should then be given Miranda rights again and a new waiver secured. If the target has made admissions not preserved by the video recording device, those admissions should be reviewed as well.

IV. TRICKERY AND DECEIT

A. In New Jersey and in many other jurisdictions in the United States police have long engaged in case specific trickery and deceit during the course of a custodial interrogation. This is a recognized, valid interrogation technique which courts throughout the country have deemed to be an appropriate way of encouraging the guilty to confess. Examples include police telling the target that he/she has been implicated by a codefendant, identified by an eyewitness or by forensic evidence (fingerprint, DNA). This policy specifically authorizes police to continue to use this interrogation technique when participating in a video recorded interrogation. Police may lie to a target about the quantum or availability of evidence against him/her.

1. However, police are not permitted to fabricate fake physical evidence and represent to a target that it is real evidence. See State v. Patton 362 N.J. Super. 16 (App. Div.) certif. den. 178 N.J. 35 (2003). Thus, while police may tell a target that he has been identified in a photographic lineup they may not show him a fabricated lineup booklet bearing a fabricated witness signature by his photograph.

B. Remember that trickery and deceit may not be utilized to obtain a waiver of Miranda rights. Any evidence that a target was threatened, tricked or cajoled into a waiver will tend to show that the target did not voluntarily waive the privilege against self-incrimination.

C. This policy anticipates the covert video recording of interrogations and, as discussed at various points herein, police are not obligated to affirmatively disclose to the target that the interrogation will be video recorded. Police may not, however, at any time lie to the target about whether the interrogation is being video recorded. If the target at the outset of the interrogation or at any time during the course of the interrogation makes inquiry as to whether the interrogation is being video or audio recorded, police must answer the question(s) truthfully. Thereafter, police should make inquiry as to whether the target objects to such recordation and advise the target that the purpose of the recordation is to create the most accurate record possible as to exactly what the target said, when it was said and how it was said. If the target at any time demands that the interrogation not be recorded or otherwise indicates that his/her waiver of Miranda rights is conditioned on the interrogation not being recorded, such demand must be "scrupulously honored." The target should be asked to memorialize his/her request that the interrogation not be video recorded. Once the request is memorialized, the video recording equipment is to be de-activated. The interrogation should then be continued and, if the target so agrees, a formal written statement should be taken at the appropriate time.

V. THE IMPACT OF THE "NEW JERSEY WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT"

- A. As noted in Section IC herein, the process of covertly video recording an interrogation does not violate the "New Jersey Wiretapping and Electronic Surveillance Control Act." A police officer will always be a party to the conversation and will have consented to the recording.

- B. A situation may present wherein 2 non-police officers are in an interrogation room by themselves with no police officer present (i.e., a juvenile target and his father). Always deactivate the video recording equipment during this time.

VI. GENERAL GUIDELINES

- A. To the extent possible there should be no gratuitous discussion regarding the target's prior criminal convictions or arrest history. Interrogation of this nature will almost always have to be redacted from the video recorded interrogation prior to same being shown to a jury.
1. If there is a legitimate case related reason to discuss a target's "priors," police are free to do so.
 2. A juvenile target's familiarity with the Miranda warning and waiver process from previous experience may be a relevant factor for a court to consider. As such, in certain cases, it may be appropriate to explore with the juvenile his prior history of Miranda advisement, acknowledgment and waiver. If this avenue of discussion is pursued, it must be in conjunction with or in addition to a complete Miranda warning at the commencement of the interrogation.
- B. This policy authorizes the display of physical evidence relevant to the investigation to the target during the course of the video recorded interrogation. Such a display of physical evidence must be authorized by the supervising detective from the Forensic Unit of the Monmouth County Prosecutor's Office after an evaluation of the risk of evidence contamination. The target should generally not be permitted to handle the physical evidence.
- C. If the target has visible injuries, he/she should be asked how they were obtained. Still photographs of the injuries should be taken before or after the interrogation.

- D. The target may consent to a search or some other procedure. To the extent possible, any consents obtained should be executed using the appropriate form while the video recording equipment is activated. These potential consents include but are not limited to the following:
1. Consent to search
 2. Consent to provide physical exemplars
 3. Consent to be photographed
- After consent, physical exemplars such as buccal swabs may be obtained during the video recorded interrogation process whereas some exemplars such as pubic hair should be privately obtained.
- E. If the target is to be shown a photographic lineup during the course of the interrogation, the process should be video recorded. Ensure that there is compliance with the Monmouth County Policy on Photographic Lineups.
- F. Encourage the target to demonstrate any actions or conduct which will help clarify his/her statements. This can be particularly helpful regarding the positions of people, distances involved, the manner in which a weapon was displayed or held, movements of individuals and tone of voice used. Demonstrations will tend to increase a target's ownership of the statements he/she makes.
- G. The target is not to be promised leniency or any other consideration in exchange for cooperating in the interrogation. The target may be advised that anything said by the target will be brought to the

attention of the Assistant Monmouth County Prosecutor who handles the case.

- H. Detectives conducting a video recorded interrogation are to establish a dialogue with the target using language that the target is comfortable with and accustomed to. As such, derogatory or profane language may be used as part of the interrogation strategy. It will be the interrogating police officer's responsibility to articulate that strategy in any court proceedings where the use of such language may later be questioned. The interrogating police officer should refrain from personally attacking the target using derogatory or profane language.
- I. The target may be provided with food and beverages during the course of the video recorded interrogations.
- J. Police officers interrogating the target should wear guns in ankle holsters or secure them outside of the interrogation room. No guns should be visible.
- K. A large easel should be present in the interrogation room for purposes of diagram preparation as appropriate.
- L. A target may be asked to take a polygraph examination. If possible, the interview which precedes the administration of the polygraph examination should be video recorded as should any interrogation

which occurs after the examination is complete. The polygraph examination itself should not be video recorded.

M. At the conclusion of the interrogation, the target should be asked questions relating to the following areas:

1. whether any promises or threats were made or any consideration offered in exchange for cooperation;
2. whether the interrogation was participated in voluntarily of the target's own free will;
3. whether the target has anything to add which he/she neglected to state

VII. TRANSCRIPTION OF VIDEO RECORDED INTERROGATIONS

- A. All interrogations of charged targets in connection with solved homicides are to be transcribed. The manner of transcription to be utilized in a specific case will be determined by the Monmouth County Prosecutor's Office. The issue of transcription of interrogations in unsolved cases will be decided on a case-by-base basis by the Monmouth County Prosecutor's Office.
1. The assistance of the police officers who conducted the interrogation will most likely be required to ensure accurate transcription. The police officers should be available as necessary.

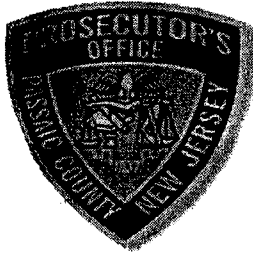
VIII. EVIDENCE CONTROL AND DISCOVERY

- A. The evidential value of a video recorded interrogation can not be overstated. It is imperative that this key evidence be adequately preserved. Indeed, it should be treated with the same level of security as, for example, a murder weapon.
- B. Representatives of the Monmouth County Prosecutor's Office Forensic Unit will take custody of the original video recording which will then be maintained either with the case evidence or in an area specifically designated for video recording storage. Duplicates will be provided to serve as work copies.
- C. The original is to be securely labeled in indelible ink with the following information:
1. agency case number
 2. date video recording made
 3. type of crime
 4. target's name
 5. victim's name
 6. location of crime scene
 7. initials and badge number of person who secures video recording
- D. The video recorded interrogation is discoverable. This will be handled by the Monmouth County Prosecutor's Office. No police department has authority to release a copy of the video recorded interrogation to anyone unless specifically authorized by the

Monmouth County Prosecutor, the First Assistant Prosecutor or their designee

- E. In every case where a defendant is convicted of murder, all video recordings shall be preserved. In all other cases, any video recording required by this policy must be preserved until such time as a target's conviction for any offense related to the interrogation is final and all direct and Habeas Corpus appeals and any post-conviction relief motions are exhausted.
 - 1. This is true even if the interrogation is of a target who is ultimately exonerated or not charged in connection with the offense.

- F. Since a prosecution for a violation of N.J.S.A. 2C:11-3 or 2C:11-4 may be commenced at any time, every video recording made in connection with an unsolved homicide shall be preserved.
 - 1. In the case of an unsolved attempted murder or an unsolved aggravated assault, the video recordings may be destroyed after approval from the Monmouth County Prosecutor's Office after the expiration of the statute of limitations.



PASSAIC COUNTY UNIFORM
PROTOCOL FOR THE VIDEO RECORDING OF
FORMAL WRITTEN STATEMENTS

I.) **APPLICATION**

The following protocol shall be adhered to by all Law Enforcement Agencies within Passaic County and shall take effect on February 1, 2004.

II.) **WHEN VIDEO RECORDING IS REQUIRED**

A) Video recording procedures are to be employed once the **ADULT** target of an investigation regarding one or more of the following offenses has agreed to provide a formal written statement. The specific crimes to which this directive shall apply are:

- 1) All Homicides (Murder, Aggravated Manslaughter, Manslaughter, Death By Auto or Vessel, and Strict Liability for Drug Induced Death)
- 2) Kidnapping
- 3) First Degree Robbery

- 4) Carjacking
- 5) Aggravated Sexual Assault and Sexual Assault
- 6) Aggravated Arson
- 7) An attempt or conspiracy to commit any of the offenses enumerated in lines one through six above.

B) Video recording procedures are to be employed once the JUVENILE target of a **Homicide investigation** has agreed to provide a formal written statement.

III.) WHAT IS TO BE VIDEO RECORDED

A) One of the purposes of the video recording procedure is to eliminate any claim that the target did not knowingly, intelligently, and voluntarily waive his Constitutional Rights and/or that the contents of the sworn written statement were not actually provided by the target. Consequently, the procedure requires the video recording of the following:

- 1) **A verbal advisement to the target that video recording procedures are being employed.**
- 2) **Execution of the Miranda Rights and Waiver Form in cases where only verbal warnings were provided prior to interrogation. In cases where the form was executed prior to interrogation, it shall be reviewed in its entirety on tape.**
- 3) **The taking of the formal written statement from the target, and**

- 4) **The process by which the target reviews, corrects, and signs the formal written statement.**

IV.) SUBSTANTIVE REQUIREMENTS OF THE VIDEO RECORDING PROCESS

- A) Each police agency shall establish within their department a video recording room equipped with a stationary camera and microphone.
- B) The video recording equipment must always be properly maintained. The video and audio components must be tested before each use.
- C) **A new videotape or D.V.D. must be used for each recorded statement.** Do not recycle tapes/D.V.D.'s.
- D) The camera must be equipped with a date and time feature which is displayed on the videotape or D.V.D.
- E) **The original tape or D.V.D. is to be logged into evidence and handled within a strict chain of custody.** A copy of the tape/D.V.D. should be forwarded to the Passaic County Prosecutor's Office along with the police reports and other case documents.

V.) GENERAL GUIDELINES FOR VIDEO RECORDING

- A) The video recording procedure should be as comprehensive as possible in terms of what is seen and heard on tape. In order to accomplish this, and to best minimize claims of off-camera influences, the following shall be strictly adhered to:

- 1) **The target shall be positioned so as to maximize the camera view of his or her face.**
- 2) **All parties present in the interview room must be visible on the tape, and identified prior to commencing with the written statement.**
- 3) **Officers and/or other persons should not enter or exit the room during video recording absent a legitimate need to do so.**
- 4) **If a break is taken, it should be done within the interview room if practicable. Even if the target needs to leave the room (e.g., to use the restroom), the camera should remain on during such break(s).**
- 5) **If a break was taken out of the interview room and food, beverages, or cigarettes were offered and/or provided to the target, he or she should be asked to acknowledge same on camera subsequent to returning to the interview room. Similarly, if the procedure is legitimately interrupted for any other reason, this should be explained on camera upon returning to the interview room.**
- 6) **If the target has visible injuries, he or she should be asked to explain how they were obtained. If medical treatment was provided or refused, the target should be asked to acknowledge same. Any such injuries should be displayed on video and/or via still photographs.**

- B) In the event that the target is unwilling to provide a video recorded statement, the camera shall thereafter be turned off. If possible, the target's refusal should be captured on tape. If a target is nonetheless willing to provide a non-video recorded statement, such a statement shall be taken. The target should be asked during such statement to acknowledge his refusal to provide a video recorded statement.**
- C) Once the statement review has been concluded, but prior to terminating the procedure, the videotape/D.V.D. should be briefly reviewed to determine if a camera or audio malfunction occurred during the taking of the statement. If such a malfunction did occur, every attempt should be made to at least obtain a video recorded review of the statement.
- D) If during the course of the video recording procedure the target makes an allegation regarding promises made, threats communicated, physical violence, or other form of police misconduct, the target must be permitted to fully explain himself/herself. The target should be asked to provide the details of any such claims, and should still be asked whether any admissions made by him or her are true nonetheless.**

E) Questions may periodically arise regarding the interpretation of certain provisions of the protocol or the proper manner of handling a situation not specifically covered by it. In the event that such questions present themselves, assistance should be sought from Deputy First Assistant Prosecutor Dante P. Mongiardo. Mr. Mongiardo can be reached at (973) 881-4888. If unavailable, or after normal working hours, Chief Assistant Prosecutor John Latoracca can be reached at (862) 849- 6031, and/or Det. Lieut. James Wood at (862) 849- 6305.

APPENDIX D

BENEFITS AND CONCERNS ASSOCIATED WITH RECORDATION

Various courts throughout the United States have discussed the benefits of electronically recording custodial interrogations. When discussing those benefits, the courts have typically focused on those relating to the admissibility and voluntariness of the defendant's confession, and the validity of the Miranda warnings. For example, in Stephan v. State, supra, 711 P.2d at 1161, the Alaska Supreme Court noted that electronic recordation protects against infringements upon the defendant's constitutional rights to remain silent and to have counsel present during the interrogation "by providing an objective means for him to corroborate his testimony concerning the circumstances of the confession." In State v. Scales, supra, 518 N.W.2d at 591, the Minnesota Supreme Court, in following Stephan's lead, stated that recordation "provides a more accurate record of a defendant's interrogation and thus will reduce the number of disputes over the validity of Miranda warnings and the voluntariness of purported waivers."

Other courts, while declining to follow Stephan and Scales in requiring that custodial interrogations be electronically recorded, have nevertheless acknowledged similar benefits. In People v. Holt, 15 Cal. 4th 619, 664 (1997), the California Supreme Court acknowledged that requiring recordation might enhance a confession's reliability. In People v. Raibon, 843 P.2d 46, 49 (Colo.Ct.App. 1992), the Colorado Court of Appeals recognized that because it might remove some questions that could later arise regarding the contents of the interview, the better investigative practice might be to electronically record the statements of a suspect or witness. Similarly, in State v. (Anthony) James, 237 Conn. 390, 432-433 (1996), the Connecticut Supreme Court

noted that because electronic recording would be helpful in evaluating the voluntariness of confessions, it "might be a desirable investigative practice, which is to be encouraged." In Williams v. State, 522 So.2d 201, 208 (Miss. 1988), the Mississippi Supreme Court allowed that recordation "will often help to demonstrate the voluntariness of the confession, the context in which a particular statement was made, and of course, the actual content of the statement." The Massachusetts Supreme Court, the Supreme Court of Hawaii, and the Utah Court of Appeals, in Commonwealth v. Fryar, 414 Mass. 732, 742 n.8 (1993), State v. Kekona, 77 Hawaii 403, 408 (1994), and State v. (Edward) James, 858 P.2d 1012, 1018 (Utah Ct.App. 1993) respectively, have also acknowledged that recordation would be helpful in determining the voluntariness of confessions.

Several courts have also recognized that it is not only the defendant who benefits from electronically recording custodial interrogations; recordation can also benefit the courts, the prosecution, the police, and the public. In Stephan v. State, supra, 711 P.2d at 1161, the Alaska Supreme Court stated the following:

The recording of custodial interrogations is not, however, a measure intended to protect only the accused: a recording also protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics. A recording, in many cases, will aid law enforcement efforts, by confirming the content and the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated. In any case, a recording will help trial and appellate courts to ascertain the truth.

The Alaska Supreme Court also noted that electronic recordation could benefit the judiciary by enhancing the appearance of impartiality:

The integrity of our judicial system is subject to question whenever a court rules on the admissibility of a questionable confession, based solely upon the court's acceptance of the testimony of an interested party, whether it be the interrogating officer or the defendant. This is especially true when objective evidence of the circumstances surrounding the confession could have been preserved by the mere flip of a switch. Routine and systematic recording of custodial interrogations will provide such evidence, and avoid any suggestion that the court is biased in favor of either party. [Id. at 1164.]

In Commonwealth v. DiGiambattista, 442 Mass. 423, 442 (2004), the Massachusetts Supreme Court echoed some of the sentiments expressed in Stephan:

Other jurisdictions . . . have acknowledged that recording of interrogations would act as a deterrent to police misconduct, reduce the number and length of contested motions to suppress, allow for more accurate resolution of the issues raised in motions to suppress, and at trial . . . provide the fact finder a complete version of precisely what the defendant did (or did not) say in any statement or confession.

Also, in State v. Scales, supra, 518 N.W.2d at 591, the Minnesota Supreme Court recognized that recordation allows the defendant to more easily challenge false or misleading testimony, protects the state against meritless claims, and, by discouraging unfair and psychologically coercive police tactics, results in more professional law enforcement. Other courts have noted that recordation also protects the police by alleviating credibility questions regarding what the defendant said and by discouraging unwarranted claims of coercion. See Jimenez v. State, 105 Nev. 337, 341 (1989) and State v. (Edward) James, supra, 858 P.2d at 1018. In addition, the Supreme Court of Tennessee, in noting that "sound policy considerations" supported the adoption of recordation as a law enforcement practice, also acknowledged that "[t]here can be little

doubt that electronically recording custodial interrogations would reduce the amount of time spent in court resolving disputes over what occurred during the interrogation. As a result, the judiciary would be relieved of much of the burden of resolving these disputes." State v. Godsey, 60 S.W.3d 759, 772 (Tenn. 2001). The Massachusetts Supreme Court expressed similar sentiments in Commonwealth v. Fryar, *supra*, 414 Mass. at 742 n.8, recognizing that "[d]efendants, prosecutors, and courts spend an enormous amount of time and effort trying to determine precisely what transpires during custodial interrogations, and all would be benefited in some way by a complete electronic recording."

At least one other court has stressed the importance of recording the *entire* interrogation. In State v. Jones, 203 Ariz. 1 (2002), the defendant was suspected of kidnapping, sexually assaulting and killing a twelve-year-old girl. The police informed the defendant that he was in custody, read him the Miranda warnings, and conducted a videotaped interview for approximately two hours, until the defendant asserted his right to counsel. A short while later, the defendant was brought downstairs, to a room without video equipment, to provide a blood sample. According to the detective who accompanied the defendant downstairs, the defendant then initiated a conversation in which he admitted that he had been present when the victim was killed. After the defendant insisted that he wanted to speak to the detective, he was brought back to the interrogation room. He then provided a videotaped statement in which he claimed that a friend had kidnapped, sexually assaulted, and killed the victim, and had made him have sex with her dead body the following day. At trial, the defendant was convicted of capital murder and sentenced to death.

In considering the defendant's appeal, the Arizona Supreme Court stated the following:

We are, however, troubled by the fact that this reinitiated conversation was not recorded, while the interrogation that preceded it and the confession that followed were. The fact that the initial waiver was not taped subjected the state to unnecessary problems because it gives rise to suspicion. It would be a better practice to videotape the *entire* interrogation process, including advice of rights, waiver of rights, questioning, and confessions. Recording the entire interrogation process provides the best evidence available and benefits all parties involved because, on the one hand, it protects against the admission of involuntary or invalid confessions, and on the other, it enables law enforcement agencies to establish that their tactics were proper. [Id. at 7.]

A number of commentators have also addressed the benefits of electronically recording custodial interrogations. Perhaps the foremost writer in this area is Thomas P. Sullivan, who has conducted an ongoing survey of hundreds of law enforcement officers throughout the country regarding their experiences with electronic recordation of custodial interrogations, and has summarized their responses in several articles. See Thomas P. Sullivan, Recording Custodial Interrogations: the Police Experience, 52-JAN Fed. Law. 20 (2005). See also Thomas P. Sullivan, The Police Experience Recording Custodial Interrogations, 28-DEC Champion 24 (2004); Thomas P. Sullivan, Police Experiences with Recording Custodial Interrogations, 88 Judicature 32 (2004); and Thomas P. Sullivan, Police Experiences with Recording Custodial Interrogations, Nw. U. Sch. Law, Center on Wrongful Convictions, Special Report (2004). Sullivan describes contemporaneous electronic recordation as "law enforcement's version of incontestable instant replay," and reports that recordation "has proven to be an efficient and powerful

law enforcement tool.” Sullivan, Recording Custodial Interrogations, *supra*, 52-JAN Fed. Law. at 20. He also notes the following:

Recording creates a permanent account of exactly what occurred and prevents disputes about the treatment of suspects and about what was said and done during the session. When recordings are available, police do not need to paraphrase statements or later try to describe suspects' words, actions and attitudes. [*ibid.*]

Sullivan reports that police officers who have experience with recordation are nearly unanimous in their approval. Quoting officers from throughout the United States, he lists the following benefits of electronic recordation:

- Motions to suppress statements and confessions are drastically reduced after defense lawyers evaluate the tapes, and officers are spared hostile cross-examinations accusing them of coercion and perjury.
- Recordings allow detectives to focus on suspects rather than on taking notes, which tends to distract both officers and suspects.
- Subsequent review of the recordings often reveals previously overlooked inconsistencies and evasive conduct.
- Recordings make it unnecessary for detectives to struggle to recall various details of the interrogation when writing reports, or when testifying.
- Recordings deter officers who might engage in improper tactics or misstate what the suspect said or did.
- Recordings increase public confidence and approval of police practices.
- Recordings are useful in teaching interrogation techniques.
- Recordings reinforce the prosecution's case, resulting in more guilty pleas and enhancing the prosecution's bargaining power at sentencing. Also, at trial, judges and juries readily accept the recordings.

See Sullivan, Recording Custodial Interrogations, *supra*, 52-JAN Fed. Law. at 20-22.

It is worth noting that Sullivan's survey includes only those police departments that electronically record the *entire* interview, beginning with the Miranda warnings.

Sullivan states that recording the entire interview is superior to recording only the suspect's final statement, for several reasons:

First, detectives remain subject to challenges regarding what was said and done during the initial unrecorded interview, which usually lasts far longer than the final session in which a statement is recorded. Second, the judge and jury may draw negative inferences from a tape of only part of the interview if the entire session could have been recorded by the flick of a nearby switch, leading to the question: Why did the officers choose to record only the final statement? Third, when detectives review recordings, they often discover significant issues that they overlooked during the sessions. Fourth, recordings have proven to be of great benefit for training and self-evaluation. [Sullivan, Recording Custodial Interrogations, *supra*, 52-JAN Fed. Law. at 22.]

Other commentators have similarly acknowledged the benefits of electronically recording custodial interrogations. See Daniel Donovan and John Rhodes, The Case for Recording Interrogations, 26-DEC Champion 12, 13-14 (2002); Daniel Donovan and John Rhodes, Comes a Time: The Case for Recording Interrogations, 61 Mont. L. Rev. 223, 227-229 (2000) (recording facilitates truth-finding, fairness, accountability, and consequently, the law's integrity; greatly facilitates the Miranda and voluntariness analysis; curbs improper police tactics; discourages defendants from raising frivolous pretrial challenges to confessions; and minimizes the swearing match between law enforcement and the accused over what actually happened); Wayne T. Westling, Something Is Rotten in the Interrogation Room: Let's Try Video Oversight, 34 J. Marshall L. Rev. 537, 547 (2001) (electronically recording police interrogations would remove most of the factors that contribute to unreliability); Richard A. Leo, The Impact of Miranda Revisited, 86 J. Crim. L. & Criminology 621, 682 (1996) ("audio or videotaping inside the interrogation room creates an objective record of police

questioning to which all interested and potentially interested parties may appeal – police, suspects, prosecutors, defense attorneys, and juries – in the determination of truth and in judgments of justice and fairness”).

Some commentators, in recognizing the benefits of recordation, have expressed a preference for *video* recording. See Daniel Donovan and John Rhodes, *The Case for Recording Interrogations*, supra, 26-DEC *Champion* at 12 (stating that “audio recording should be required; video is even better”); Westling, *Something Is Rotten in the Interrogation Room*, supra, 34 *J. Marshall L. Rev.* at 549-551 (arguing that video recording promotes reliability in fact-finding, accuracy in reporting, accuracy in meaning, open government, improvement in police interrogation techniques and cost effectiveness); and Heath S. Berger, *Let’s Go to the Videotape: A Proposal to Legislate Videotaping of Confessions*, 3 *Alb. L.J. Sci & Tech.* 165, 173-174 (1993) (noting that videotaping the interrogation can help to eliminate the problem of innocent people giving false confessions and being convicted based on those confessions; can enhance a judge or juror’s assessment of credibility; and can help in deciding whether the confession was voluntary). See also Leo, *The Impact of Miranda Revisited*, supra, 86 *J. Crim. L. & Criminology* at 683-684 (videotaping interrogations creates an objective, reviewable record that protects police against false accusations; lends credibility to police work in areas where police are likely to be distrusted by large segments of the population; contributes to more professional and effective interrogation practices; can be used in training courses to educate police about effective interrogation techniques; improves the ability of the police to assess the guilt or innocence of a suspect; provides prosecutors with a more complete record with which to better assess the state’s case

and to make more informed charging decisions; and allows judges and juries to more accurately determine a defendant's state of mind and the sincerity of any remorse).

At least one other commentator has echoed Thomas P. Sullivan's belief that the *entire* interrogation should be recorded, noting that

To be of maximum value, the entire interrogation session must be recorded. Entire means entire, beginning with the first, "Hello, my name is X." It is vitally important that all the preliminaries be recorded . . . These preliminaries are the breeding ground for claims of physical and psychological pressure. [Westling, Something Is Rotten in the Interrogation Room, supra, 34 J. Marshall L. Rev. at 553.]

Westling disapproves of the practice of taping only the final statement, noting that "[s]ome departments . . . have taken the shortcut of recording only the end result of the interrogation. This practice undermines the value of a videotape program." Ibid.

The courts and commentators have also acknowledged several concerns regarding the electronic recordation of custodial interrogations. Perhaps the most commonly cited concern is that the sight of the recording equipment, and the knowledge that he or she will be recorded, will render the suspect unwilling to speak to law enforcement officers, resulting in lost confessions and guilty suspects being set free. See Stephan v. State, supra, 711 P.2d at 1162; State v. Cook, 179 N.J. 533, 557-558 (2004); Commonwealth v. DiGiambattista, supra, 442 Mass. at 443; State v. (Anthony) James, supra, 237 Conn. at 433-434. See also Sullivan, Recording Custodial Interrogations, supra, 52-JAN Fed. Law. at 24; Sullivan, The Police Experience Recording Custodial Interrogations, supra, 28-DEC Champion at 27; Sullivan, Police Experiences with Recording Custodial Interrogations, supra, 88 Judicature 32; Sullivan, Police Experiences with Recording Custodial Interrogations, supra, Nw. U. Sch. Law.

Center on Wrongful Convictions, Special Report at 19-20; Joshua E. Kastenberg, A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses before the Trier of Fact, 26 Seattle U. L. Rev. 783, 812 (2003); Leo, The Impact of *Miranda* Revisited, supra, 86 J. Crim. L. & Criminology at 685-686; and Berger, Let's Go to the Videotape, supra, 3 Alb. L.J. Sci & Tech. at 180. As noted by the Massachusetts Supreme Court, however, "[b]ased on experience to date in other jurisdictions, those fears appear exaggerated." Commonwealth v. DiGiambattista, supra, 442 Mass. at 443. First, many states, including New Jersey, allow for surreptitious taping.¹ As noted by Thomas P. Sullivan, "[s]uspects who do not think they are being recorded will not be affected" by the sight of the recording equipment. Sullivan, Recording Custodial Interrogations, supra, 52-JAN Fed. Law. at 24. Also, even if the suspect knows that he or she is being recorded, most officers have found that it does not negatively affect the interrogation, because once the questioning begins "any initial hesitation fades and suspects focus on the subject under discussion." Ibid. See also Leo, The Impact of *Miranda* Revisited, supra, 86 J. Crim. L. & Criminology at 686. Furthermore, in instances where a suspect steadfastly refuses to speak unless the recording equipment is turned off, nothing would prevent the officers from recording the refusal and taking the statement in the traditional manner.

Another commonly cited concern regarding electronic recordation of custodial interrogations is that the costs - including costs for purchasing and maintaining the equipment, remodeling the interview rooms, training personnel in equipment use and interrogation techniques, tape and disk storage, transcribing, and making copies of the

¹ See State v. Vandever, 314 N.J. Super. 124 (App. Div. 1998), holding held that a target who has properly been given Miranda warnings need not be told that he is being video recorded. See also the "New Jersey Wiretapping and Electronic Surveillance Control Act," N.J.S.A. 2A:156A-4b.

tapes - can be prohibitive. See Commonwealth v. DiGiambattista, supra, 442 Mass. at 443; State v. Cook, supra, 179 N.J. at 557; State v. (Anthony) James, supra, 237 Conn. at 433. See also Sullivan, Recording Custodial Interrogations, supra, 52-JAN Fed. Law. at 25; Leo, The Impact of *Miranda* Revisited, supra, 86 J. Crim. L. & Criminology at 685-686; and Berger, Let's Go to the Videotape, supra, 3 Alb. L.J. Sci & Tech. at 179. It has been noted, however, that while the initial costs associated with recordation may appear to be high, those costs are "dwarfed by comparison" to the long-term savings resulting from judges, attorneys, court personnel and police officers no longer having to spend "countless" hours attempting to reconstruct what was said during unrecorded interrogations. Commonwealth v. DiGiambattista, supra, 442 Mass. at 444 n. 21. See also Leo, The Impact of *Miranda* Revisited, supra, 86 J. Crim. L. & Criminology at 685. It has also been noted that the cost of the equipment itself is "minimal." Commonwealth v. DiGiambattista, supra, 442 Mass. at 444 n. 21.

Some law enforcement officers have expressed opposition to recording custodial interrogations because they believe that judges and juries might not agree with their sometimes harsh or deceitful, but legally permissible, interrogation techniques, such as shouting at suspects, using profanity or "street talk," or using trickery or deceit. Sullivan, Recording Custodial Interrogations, supra, 52-JAN Fed. Law. at 24. Their fear is that, as a result, guilty defendants would be set free. Experience shows, however, that this concern is not borne out by the evidence, as judges and juries generally seem to understand that such tactics are occasionally necessary to induce suspects to confess. Ibid.

The courts and commentators have also noted other concerns relating to recordation. The Connecticut Supreme Court, for example, in State v. (Anthony) James, supra, 237 Conn. at 434, noted that the cost of noncompliance with a recordation requirement, due to negligence or for other reasons, would be “the loss of otherwise admissible, probative evidence of guilt.” Similarly, Thomas P. Sullivan, in Recording Custodial Interrogations, supra, 52-JAN Fed. Law. at 25, notes that “[g]litches may occur when taping interviews. The operator may forget to turn the machine on, it may not operate properly, the tape may run out, and so forth.” The solution, according to Sullivan, is to allow for exceptions admitting the unrecorded statements in cases where “the failure to record was attributable to inadvertent error or oversight.” Ibid.

A related, more sinister concern is the potential for abuse. It has been noted, for example, that the recording equipment can be shut off for a time, during which the suspect can be coerced (and presumably beaten) into confessing on tape. See Berger, Let's Go to the Videotape, supra, 3 Alb. L.J. Sci & Tech. at 179. It has also been noted, however, that most recorders are now equipped with a time and date stamp, which would make it extremely difficult to hide any breaks in the recording. Ibid.

Paul Scoggin, Chief of the Violent Crimes Unit for the Hennepin County Attorney's Office in Minnesota, addressed the *Special Committee* about his experience with electronic recordation. He noted that roughly ten years earlier, the Minnesota Supreme Court decided State v. Scales, 518 N.W.2d 587 (Minn. 1994), which mandated the electronic recording of all custodial interrogations. Scoggin was initially opposed to a recordation requirement, and even appeared on television on the day the

opinion was released to strongly criticize the court's decision. Now, however, he fully supported recordation. He stated that recordation provided more information about a case, which in the end, was beneficial to the parties and the courts. He also estimated that, if polled, nine out of ten police chiefs in Minnesota would agree that recordation was a good idea.

Scoggin stated that, in Minnesota, recordation was done in all criminal cases, and was typically done surreptitiously. In addition, Minnesota was a "stem-to-stern" state – the entire interrogation must be recorded, rather than just the suspect's final statement.

Scoggin noted that, in his experience, electronic recordation had the following benefits:

- The tapes tended to eliminate fights over the voluntariness of a defendant's statement and the waiver of Miranda warnings. They provide conclusive proof that the Miranda warnings were read and waived.
- The tapes also tended to resolve fights over what the defendant actually said or meant in his statement.
- Recordation was enormously helpful in showing how the defendant was at the time of the offense, in contrast to the polite, neatly dressed defendant in the courtroom.
- Tapes of the defendant's description and demonstration of how he committed the crime tend to undercut claims of self-defense, or that the defendant was too intoxicated to form the intent necessary for a particular crime.
- Even if the defendant does not confess, allowing the jury to watch his evolving story tends to undercut his credibility far more than hearing the officer testify that he appeared to be making it up as he went along.
- Juries, more so than judges, were generally willing to accept trickery or deceit, or the "grilling" of suspects.
- Over the years, suspects who did not realize that they were being recorded have been caught rehearsing their stories, wiping blood off their shoes, eating the

victim's wallet, trying to hide things in the air vents, and reading after claiming to be blind.

- There have also been instances where defendants have mentioned details that appeared to be irrelevant at first, but which were later found to tie the defendant or other people to other, unrelated crimes.
- Recordation can save an interrogation that was not properly translated, and in Minnesota, has practically ended what were once routine battles over whether the defendant ambiguously invoked his or her rights.

Scoggin also noted that, in his experience, recordation had the following disadvantages:

- Fights over the voluntariness of a defendant's statement and the waiver of Miranda warnings have been replaced by fights over whether it was "feasible" for law enforcement to record in cases where the statement was not recorded.
- The sight of a tape recorder tended to chill the taking of statements. Also, over time, defendants who have frequent contacts with the criminal justice system have become aware that they are being surreptitiously taped. It was also noted, however, that although it was sometimes more difficult to get those defendants to provide statements, the majority seemed to view the fact that they were being taped as an inevitable part of the process.
- There had been high-profile homicide cases in which Scoggin's office had decided not to proceed because the defendant's statement had not been recorded. This had occurred even in cases where none of the defendant's rights had been violated, and his office had the defendant's unrecorded statement, as well as other corroborative evidence.
- Police officers are not as technically savvy as one might think. They often do not notice when the tape runs out, when batteries die, or when the room's acoustics are bad.
- During the interrogation, people often talk over each other and use street language, and the acoustics are often terrible. Consequently, it is often extremely difficult to make out what the parties are saying when transcribing the interrogations.
- Regarding the method of recording, voice-activated tape recorders should never be used, because there's typically a one second delay between what is said and what gets recorded. That delay is enough to change "I don't want a lawyer" to "want a lawyer."

- Tapes, whether audio or video, tend to degrade over time. For that reason, digital technology is preferable.
- Surreptitious video recording had its limitations. People often stand up and move around during interrogations, but the camera does not follow them around the room. Consequently, Scoggin had seen many videos that showed only the top of someone's head.

Two additional speakers, attorney and legal scholar Thomas P. Sullivan, and Captain Bill Miller of the Anchorage, Alaska Police Department, also addressed the *Special Committee*. Mr. Sullivan's discussion centered on the findings of his nationwide survey of police departments that engage in the electronic recordation of custodial interrogations, which have appeared in several legal publications.² Captain Miller had almost twenty years' experience with electronically recording custodial interrogations. He stated that his experience with recordation had been extremely positive. In fact, he knew of many officers who bought their own tape recorders, carried them at all times, and recorded even when they were not required to do so.

Captain Miller felt that the objections to recordation that were commonly cited did not "hold water" in practice. In his experience, people were generally willing to talk if approached in the proper manner. His department used Reed & Associates, a Chicago-based company that taught police officers proper interviewing techniques, and consequently did not have much of a problem with people "clamming up." Nor did they have problems with juries objecting to the tactics that they used during interviews. He did note, however, that since suppression hearings had been largely eliminated in Alaska, the attorneys had found other things to argue about. Regarding cost, Captain

² For a fuller discussion of the findings of Mr. Sullivan's survey see pages D-1 to D-4, supra.

Miller recommended the use of digital technology, which cost less and was easier to store than "regular" video.

Captain Miller noted that recording custodial interrogations allowed the police to link cases that, at first glance, did not appear to be related. He also noted that it resulted in fewer questions about police conduct. He recalled an incident in which he was bringing home a teen-age girl who had been interviewed by another officer. The girl mentioned that the other officer had made some sexually suggestive comments, so Captain Miller quietly turned on the in-car recorder and engaged her in conversation. Later, the girl contacted Captain Miller's supervisor and claimed that the other officer had sexually assaulted her. Captain Miller's tape recording, however, helped to disprove that allegation. He noted that accusations of police misconduct were very common, and many involving his department have been found to be baseless because the officers had recorded the exchanges with their accusers.

The *Special Committee* also discussed the benefits and concerns of recordation.

In that discussion, the *Special Committee* identified the following benefits:

- Recordation provides an accurate and complete record of what transpired during the interview. Several members of the *Special Committee*, however, felt that this benefit was fully realized only if the police recorded from the very beginning of the interview.
- Recordation results in a reduction in Miranda admissibility motions and hearings. The voluntariness of the defendant's confession is typically apparent from viewing, or listening to, the tape
- Recordation can serve as an investigative tool, as seemingly innocuous statements may become relevant when the tape is later reviewed by the interviewers or others.
- Recordation can result in fewer trials or contested matters, as the parties become more aware of the strengths and weaknesses of their respective cases after reviewing the tape.

- Recordation can protect and enhance the police officers' credibility, and protects against complaints of police misconduct.
- Recordation can make the trial court's decisions more reliable, and provides a cleaner Appellate record.
- Recordation can result in time savings, as police officers spend less time in court for admissibility hearings.
- Recordation allows for a more effective interrogation. The conversation flows better because the police officers conducting the interview do not have to pause to take notes.
- Even if the defendant does not provide a complete confession, recordation allows the jury to see his or her fantastic or evolving explanation.
- Recordation results in stronger evidence, as the jury not only sees and hears what the defendant said, but also sees the defendant as he or she was at the time of the offense - in contrast to the well-dressed, polite defendant who appears in court.
- The recorded interviews can serve as a training aid for police officers regarding how to, or how not to, conduct an interrogation.

The *Special Committee* also identified the following concerns or problems associated with recording custodial interrogations:

- The "chilling effect" on suspects who may be reluctant to speak freely if they know that they are being recorded. Several members of the *Special Committee* felt that this was one of the biggest drawbacks of recordation, with the end result being that serious cases would go unsolved or would not be prosecuted. They felt that suspects tended to choose their words more carefully when they knew that they were being recorded. Even when only the final statement was recorded, defendants still often provided an "A" version and a somewhat sanitized "B" version. Furthermore, the *Special Committee* had been provided with a survey that showed that 80% of police officers in Minnesota believed that a defendant was inhibited by the knowledge that he was being recorded. In response, several other members of the *Special Committee* stated that the chilling effect could be minimized by recording surreptitiously.³ Another alternative would be to turn off the machine (after taping the refusal) when the defendant stated that he did not want to be recorded, and then taking the

³ See Note 1 *supra*.

statement in the "traditional" manner. In addition, Thomas Sullivan's survey of police departments tended to show that statements were not greatly affected. If they were, then there would not be such widespread support among police departments. It was also noted that Passaic County had been recording for almost a year, and that the effect was reportedly minimal.

- The costs of recording equipment, training and transcription could be expensive. This was especially true with covert recording, which could require retrofitting the interrogation rooms, and with certain kinds of high-end video equipment.
- The time frame for implementing any recordation plan was seen as another potential concern, depending on the authorized manner of recording, and the types of offenses for which recording was required.
- Recordation could greatly slow down cases pre-indictment, especially if the defendant was not provided with transcripts of the recorded statement. A transcribed statement was described as a powerful tool, because it showed the defendant exactly what he said. It was suggested that without a transcribed statement, case movement would slow down dramatically. Other members of the *Special Committee* disagreed, however, noting that the defendant would instead receive a copy of the tape or video, which would be more powerful evidence than a transcribed statement. The majority of the *Special Committee* seemed to feel that this was more of a training or equipment issue, and that with today's technology, it was not an insurmountable obstacle.
- Given Captain Miller's observation that attorneys in Alaska found other things to argue about now that they no longer argue over Miranda issues, some members of the *Special Committee* felt that recordation could lead to more Driver hearings, or other types of hearings.
- Law enforcement personnel tended to be instinctively resistant to the idea of recordation.