

STATEMENTS OF DEFENDANT
**(WHEN COURT FINDS POLICE INEXCUSABLY FAILED TO ELECTRONICALLY
RECORD STATEMENT)¹**

A. Charge to be Given When State Offers Statement as Direct Evidence of Defendant's Guilt²:

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

The State contends 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

¹ Rule 3:17-1, which mandates recollection of defendants' statements, becomes effective for all homicide offenses on January 1, 2006. It becomes effective for kidnapping, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault, aggravated arson, burglary, first or second degree crimes under Chapter 35, any crime involving the possession or use of a firearm, and conspiracies and attempts to commit any of these crimes, on January 1, 2007. Rule 3:17-1(a).

² **CAVEAT:** [IF THE STATE IS ALLEGING THAT PORTIONS OF THE STATEMENT ARE TRUE AND ARE ADMISSIONS OF GUILT WHILE OTHERS ARE FALSE AND EVIDENCE DEFENDANT'S EFFORT TO AVOID PROSECUTION AND/OR CONVICTION OR OTHERWISE EVIDENCE CONSCIOUSNESS OF GUILT, IT MAY BE NECESSARY TO GIVE PORTIONS OF BOTH CHARGES (A) AND (B).]

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defendant's alleged statement itself. Our Rules require the electronic recording of interrogations by law enforcement officers when a defendant is charged with [insert applicable offenses] so as to ensure that you will have before you a complete picture of all circumstances under which an alleged statement of a defendant was given, so that you may determine whether a statement was in fact made and, if so, whether it was accurately reported by State's witnesses and whether it was made voluntarily or is otherwise reliable or trustworthy. Where there is a failure to electronically record an interrogation, you have not been provided with a complete picture of all of the facts surrounding the defendant's alleged statement and the precise details of that statement. By way of example, you cannot hear the tone or inflection of the defendant's or interrogator's voices, or hear first hand the interrogation, both questions and responses, in its entirety. Instead you have been presented with a summary based upon the recollections of law enforcement personnel. Therefore, you should weigh the evidence of the defendant's alleged statement with great caution and care as you determine whether or not the statement was in fact made and if so, whether what was said was accurately reported by State's witnesses, and what weight, if any, it should be given in your deliberations. The absence of an electronic recording permits but does not compel you to conclude that the State has failed to prove that a statement was in fact given and if so, was 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

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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 State contends 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. Our Rules require the electronic recording of interrogations by law enforcement officers when a defendant is charged with [insert applicable offenses]. This is done to ensure that you will have before you a complete picture of the circumstances under which an alleged statement of a defendant was given, so that you may determine whether a statement was in fact made and/or was 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 the 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

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[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.