

**MEMORANDUM IN SUPPORT OF SB 2125,
THE ELECTRONIC RECORDING OF CUSTODIAL
INTERROGATIONS ACT**

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MEMORANDUM IN SUPPORT OF SB 2125, THE ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS ACT

This memorandum contains responses to arguments that have been made to the enactment of SB 2125, and reasons why SB 2125 should be approved by the North Dakota Legislative Assembly. The claims made in opposition to SB 2125 are in direct conflict with discussions my staff and I have had with many members of the North Dakota law enforcement community, and with hundreds of officers in every state of the union. To put it into a single sentence, the proposed statute will help to obtain convictions of criminals, protect against frivolous claims against law enforcement officers, and greatly reduce the costs of criminal prosecutions.

1. Introduction: The national trend to use electronic recordings during custodial interrogations.

Enactment of SB 2125 will make North Dakota the sixteenth state (plus the District of Columbia) to require law enforcement officers to record custodial interrogations. Eleven states require recording by statute (Connecticut, Illinois, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oregon, Wisconsin), and five in compliance with supreme court rulings (Alaska, Arkansas, Indiana, Minnesota, New Jersey). Other state legislatures are considering similar legislation, for example, Florida, Michigan, New York, Pennsylvania, Rhode Island and Vermont. In addition, we have identified hundreds of police and sheriff departments in every other state that make it a practice to record custodial interviews, listed in Appendix 2 to this memorandum. Officers from those departments universally endorse the practice as beneficial to law enforcement. Many prestigious national organizations, listed in Appendix 3, support electronic recording.

2. A brief summary of SB 2125.

SB 2125 is based upon a statute drafted and approved in July 2010 by the National Conference of Commissioners on Uniform State Laws (ULC), with alterations designed to tailor the act to North Dakota law and practice. For more than a century, ULC commissioners, appointed by the state governors, have drafted and sponsored non-partisan, carefully drafted legislation in order to bring clarity and consistency among the states' legislation in important areas of law.

The most significant provisions of the bill require that law enforcement officials make audio/video recordings of interrogations in detention facilities of arrested persons who are suspected of committing a felony, or a delinquent act as defined in Section 27-20-2 which relates to offenses against children. Exceptions include: the suspect declines to participate if recorded; the officer believes the crime did not require recording; officer believes recording would disclose identity of or endanger a confidential informant, or safety of an officer or the suspect; video or audio recording was not feasible because equipment malfunctioned; recording was made in another state pursuant to the state's law; and recording was not feasible because of exigent circumstances. Suspects need not be informed of or consent to recording. The trial judge shall consider an unexcused failure to record in determining whether an unrecorded statement is admissible, and if admitted the judge shall give cautionary jury instructions.

3. Enactment of SB 2125 will assist in convicting guilty suspects, protect innocent suspects, negate false claims against detectives, and dramatically reduce costs to the state and local communities.

During the past decade, more 1,000 police and sheriff departments in every state have explained, orally and in writing, the benefits of electronic recording of custodial interviews:

- Unlike electronic recordings, handwritten notes and memories are incapable of obtaining an accurate and complete record of what was said and done during custodial interrogations. Errors, omissions, exaggerations, and inflections of the participants are apparent from both oral and video recordings. Electronic tapes are not subject to cross examination.
- Recordings enhance detectives' ability to concentrate on the suspect and content of the interview, to later review recordings in order to observe the suspect's responses and attitudes, to notice missed clues, and indicia of truthfulness and deception. They are also an aide in self evaluation of interrogation methods and teaching of others.
- Recordings protect detectives against suspects' claims that the *Miranda* warnings were not given, that coercive techniques were used, that they fed incriminating facts for insertion into confessions, that promises of

leniency were made, or that other improper techniques were engaged in that might support motions to suppress, or arguments that the judge or jury should disregard the confession.

- Recordings usually foreclose motions to suppress, and engender pleas of guilty, which in turn save immense amounts of time and expense otherwise required of police, prosecutors, defense lawyers (often public defenders), trial and reviewing court judges, and courtroom personnel.

- Recordings save the time and cost of requiring that the trial and appellate judiciary hear and/or read contesting testimonial versions of what occurred behind closed doors in detention facilities, and make credibility determinations without the aid of easily accessible, incontestable evidence of what was said and done.

- Claims for civil damage awards brought by allegedly abused suspects and exonerated defendants are avoided. At a meeting of the Michigan Association of Chiefs of Police several years ago, the Association's lawyer urged recording as a way to reduce the cost of liability insurance to cover potential civil damage claims.

- On the flip side of the coin, innocent or mistreated suspects are able to demonstrate if detectives failed to give *Miranda* warnings, engaged in misconduct, supplied details for confessions, or are testifying incompletely or inaccurately about their own and the suspects' statements and actions during the interrogations.

- Overall, recordings provide a substantial measure of assurance that it is the guilty, and not the innocent, who are charged and convicted, thus helping to ensure accuracy in the criminal process, and to heighten the confidence of the judiciary, the bar, the media and the public in our system of criminal justice.

4. All seventeen North Dakota law enforcement departments we have spoken with report excellent experiences with electronic recordings of custodial interviews.

Appendix 1 to this memorandum contains summaries of conversations my staff and I have had with members of seventeen North Dakota law enforcement departments regarding their experiences with electronic recording of custodial interrogations; we have not spoken with any others. The responses we received are unanimous: all have been positive and enthusiastic in support of electronically recording interrogations of arrested felony suspects who are questioned in police and sheriff detention facilities.

The departments are listed alphabetically below, showing what we were told regarding the number of the departments' sworn officers, the methods used to record, and the approximate number of years recording equipment has been used:

<u>Department</u>	<u>Year contacted</u>	<u>Officers</u>	<u>Method</u>	<u>Years</u>
Bismarck PD	2006, 2012	100+	audio/video	20 +
Burleigh CS	2006	35	audio/video	15 +
Cass CS	2012	70	audio	6 +
Devils Lake PD	2012	17	audio/video	15 +
Dickinson PD	2011, 2012	42	audio/video	20 +
Fargo PD	2006	129	audio/video	10 +
Grand Forks CS	2006	25	audio/video	20 +
Grand Forks PD	2006	79	audio/video	25 +
Hazen PD	2011	4	audio/video	10
Jamestown PD	2012	29	audio	20
Minot PD	2012	65	audio/video	15 +

<u>Department</u>	<u>Year contacted</u>	<u>Officers</u>	<u>Method</u>	<u>Years</u>
ND Bureau of C. I.	2012	35 - 40	audio	6 +
ND Highway Patrol	2012	150	audio/video	12 +
Richland CS	2012	12	audio	8 +
Valley City PD	2007	13	audio/video	10
Ward CS	2011	22	audio	15
W. Fargo PD	2012	38	audio/video	10

It will be seen that this list includes some of the largest departments in North Dakota, as well as medium sized and small departments, and that electronic recording has been the practice for many years past. Our discussions with officers from these departments lead us to believe that many others in the state also record custodial interviews, and have been doing so for many years past.

It appears from our conversations that each of these seventeen departments follows its own unwritten recording policy/procedure. There is no uniformity or consistency among them as to the crimes under investigations which trigger their recording requirements; few have written policies; none impose consequences for unexcused failures to record. The serious negative consequences of this disparity is explained in Part 5 (5) below.

5. Responses to arguments made in opposition to enactment of SB 2125.

(1) The costs of recording are not prohibitive.

- The Bismarck Police Chief is reported to have told the Committee in 2011 that the bill would have “a potential fiscal impact of up to \$14,000 for the additional equipment in addition to the storage requirements for the recordings.” Cost objections were also raised before the Committee on January 10, 2011 by the Deputy Attorney General and the representative of the Association of Counties.

In 2006 and 2012, we were told by detectives who have then been with the Bismarck PD for many years (one for over two decades), that during the entire term of their employment the department has recorded custodial interrogations by both audio and video. Thus, recording equipment has long been in use in the Bismarck PD, which means the department has paid for the equipment and preparation of interview rooms, transcript, and storage of the CDs and DVDs in evidence rooms.

- Not a single officer from any of the North Dakota departments with whom we spoke mentioned cost as a problem. This is consistent with our calls to over a thousand police and sheriff departments throughout the country: we have not heard complaints from departments that record about costs as a reason not to record.

- The Fiscal Note greatly exaggerates anticipated costs. A quick review of the “Price Estimates” contained on page 8 of the Fiscal Note presented to the Committee suggests that the anticipated cost for equipment and storage if SB 2125 becomes law will be over \$7.5 million. These estimates do not fairly reflect the actual, much lower cost of compliance with SB 2125.

- The numbers contained in the Fiscal Note (page 8, ¶ 1 and 2) include costs for purchasing “Lapel Video and Audio for all ND officers” at a cost of \$1,528,853, and “In-Car Video Systems for all ND vehicles” at a cost of \$4,882,827, for a total of \$6,411,681, or 85% of the estimated costs in the Fiscal Note. *None of that equipment is required by SB 2125.* The bill requires recording only at detention facilities, not on the street or in police cars.

- This leaves estimates of \$881,920 for “Jail Booking/Interview Room” and \$249,571 for “Server for preservation of digital data,” a total of \$1,131,491 (Note, page 8). As to the Booking/Interview Room anticipated cost of \$881,520: This estimate is predicated upon the assumption that all 126 agencies in North Dakota would have to be equipped with LegalTek’s “LX Stereo System Package,” at a cost of \$6,890 per unit, or a total state-wide cost of \$881,920. There is no reason to assume that complying with SB 2125 would require every agency in North Dakota to purchase “gold standard” audio/video recording equipment. Departments across the country have been and continue to audio and video record custodial interviews with portable or tri-pod mounted video recording devices (camcorders and the like) that can be purchased at electronic stores for

under \$100. (See <http://www.bestbuy.com/site/Electronics/Cameras-Camcorders/abcat0400000.c?id=abcat0400000> as of 8/16/12, listing 104 different camcorders priced under \$99.99.) Several of the North Dakota departments we spoke with use that kind of low-cost equipment.

- The Fiscal Note identifies (page 3) the fourteen “top agencies based upon 600 arrests or more per year.” Of those, we have spoken to ten that record by audio and video, and one by audio; hence they already have and are regularly using the recording equipment, interview rooms, storage facilities, etc.

- In our calls to North Dakota departments, we were told that many other departments in North Dakota make it a practice to electronically record custodial interviews in felony investigations. In light of the relatively few North Dakota departments we have contacted, it is likely that other police and sheriff departments now have recording equipment which they are using during their custodial interrogations, and have interview rooms and storage arrangements in place. Indeed, the Fiscal Note reports (page 7) that of the 28 “correctional facilities” located within North Dakota, 17 are already equipped with both audio and video equipment, and one with audio.

- As to estimated cost of \$2,572 for 97 departments, totaling \$250,000, for “Server for preservation of digital data.” This is based on a projected cost of \$2,572 for each of 97 departments. But we have been told, for example, that the Bismarck PD stores the CDs and DVDs in an evidence room, and we believe many if not most of the others that now record do likewise. In any event, the projected server cost is relatively modest when compared to the cost savings that will inevitably result from electronic recordings.

- All of the officers in North Dakota departments that had both audio and video equipment told us that they prefer to record using both methods, because video yields far greater accuracy as to what occurred. How suspects appeared and conducted themselves affords greater protection to the officers involved, and is more persuasive in contested court hearings. In 2006, we were told by an officer from the Grand Forks Sheriff Department that a temporary lack of video capability owing to water damage had a negative effect on their investigations.

Thus, for obvious reasons, audio/video recordings are far superior to audio. The cost of video equipment is now small, well within the budgets of North Dakota law enforcement agencies, as discussed above. Nevertheless, if budgetary reasons make video equipment more appropriate for the smallest North Dakota departments, SB 2125 may be amended to restrict the requirement for video recordings to departments that serve communities having fewer than a specified number of persons.

(2) *Recordings will reduce, not foment, additional legal challenges.*

The Judiciary Committee was reportedly told that the bill “would lead to additional legal challenges concerning statements made by the person who is interrogated which in turn would make it more difficult and time consuming for law enforcement officers to do their jobs.” This claim is not verified; it is hypothetical, without foundation in fact or experience. The experiences of many police, sheriffs, prosecutors and judges throughout the country – including members of the North Dakota departments we interviewed – demonstrate the very opposite: recordings put an end to disputes about what was said and done during custodial interviews, so that criminal litigation is drastically *reduced*. Motions to suppress are diminished, and pleas of guilty are increased. This leaves police free to conduct normal law enforcement activities rather than testifying in court, and relieves prosecutors, judges and court personnel from the time and expense involved in protracted pretrial hearings, trials and appeals. This reduces the cost of the criminal justice system, and decreases the risk of civil damage awards.

(3) *SB 2125 does not “address a problem that does not exist” in North Dakota.*

While it may be correct that there have not been instances in which North Dakota law enforcement have been accused of trenching upon the rights of persons questioned while in custody, that is not a necessary predicate for enactment of a statutory requirement of recording. *This is a law enforcement reform!* While recordings occasionally capture improper police conduct, the vast majority of custodial interrogations in North Dakota and elsewhere are conducted by honorable detectives who do their very best to honor suspects’ rights. Detectives and supervisors from throughout the country have experienced the benefits of recordings, including the protections they receive from false accusations of misconduct.

Prosecutors enthusiastically support recordings once they learn the value the electronic recordings have in their dealings with defense lawyers, and presentations to judges and juries. This support does not reflect suspicion of detectives, but rather recognition that detectives deserve and may readily obtain protection from unwarranted claims by suspects that they were mistreated during the interview process.

(4) *SB 2125 does not “call into question the honesty, integrity, and ethics” of North Dakota law enforcement officers.*

This is an unwarranted objection to a procedure which protects detectives from false claims of improper conduct and of giving inaccurate testimony about what suspects said and did during custodial interviews. In *Stephan v. State*, 711 P.2d 1156, 1161 (1985), the Alaska Supreme Court became the first state in the country to impose a recording requirement upon state law enforcement. The Court wrote:

“It is not because a police officer is more dishonest that the rest of us that we ... demand an objective recordation of the critical events. Rather, it is because we are entitled to assume that he is no less human – no less inclined to reconstruct and interpret past events in a light most favorable to himself – that we should not permit him to be a ‘judge of his own cause.’”

Detectives in departments that electronically record custodial interrogations realize the superiority of that method of proving what occurred during custodial questioning, compared to the preparation of handwritten notes, followed by typed reports. Testimony based upon these reports and testimonial recollection are subject to cross examination and challenge, which routinely result in lengthy courtroom disputes about what occurred behind the closed doors of interrogation rooms. Thousands of hours are consumed each year in trial courts by judges and juries listening to testimony, and reviewing court judges reading transcripts of testimony, in which the events are described orally by the participants, often presenting starkly different versions. None of this is necessary when there is an electronic recording of the events; the recording tells the story, and in virtually every case is not subject to dispute. Video is especially conclusive and persuasive, because it allows judges and juries to both hear and see what occurred.

Recordings also aid prosecutors in complying with the ethical requirement that they present the most trustworthy, verifiable evidence available. North Dakota prosecutors, like those of every other state and the federal government, are duty bound to see that justice is done, to permit judges and jurors to see and hear first hand exactly what occurred, and the manner in which all participants conducted themselves. It is self-evident that electronic recordings provide the best evidence about what occurred during custodial interviews. When interrogations occur in rooms set aside for custodial interviews in North Dakota law enforcement buildings, it is a simple, inexpensive matter to have recording equipment available, just as many people do for their families' special occasions and celebrations.

- (5) *Allowing each department to decide whether to use electronic recording, and to adopt its own policies, is not designed to secure the benefits of recording across the state.*

According to the Fiscal Note (page 3), there are 126 law enforcement agencies in North Dakota.

One of the primary benefits of statewide recording legislation is that it will bring uniformity, consistency and predictability throughout the state. This is especially important in law enforcement. We do not allow each county sheriff, police chief or prosecutor to decide what conduct constitutes a felony in his/her jurisdiction. And many procedures to be followed during investigations and prosecutions of crimes are required by legislation and court rulings that are applicable statewide, no matter where the person may be when the act occurs, or where the law enforcement officer is stationed.

It is advisable to have uniform, statewide rules applicable to police conduct when conducting custodial interrogations, regardless of where in North Dakota the interrogation takes place. The notion that each county sheriff and local police chief should be able to decide whether or not to require electronic recording, and if required, what offenses should be covered, and what exceptions should apply, etc., will leave North Dakota where it is now – without any recording requirement at all. The current situation will yield as many different sets of rules, or no rules at all, in each of the 126 police and sheriff departments, as to whether recordings shall be made, if so, under what circumstances, what equipment to use, what exceptions to apply to the requirement, and all the other details that are contained in SB 2125. There will be no uniformity in practice throughout

the state, or sanctions for unexcused failures to record that will provide impetus to officers to comply.

As a practical matter, despite the best efforts of state and local officials, it is unlikely that in the foreseeable future all police and sheriff departments in the state will adopt regulations requiring electronic recordings of custodial interrogations, and those that are adopted will not be consistent. There is evidence to support this conclusion: despite the obvious and well documented benefits that law enforcement agencies realize from the practice, experience shows that unless and until there is a statutory or supreme court mandate, most departments will not make recording a standard, required practice, and without statewide rules the policies that are adopted will vary widely, and will be unenforceable.

The futility of attempting to obtain voluntary statewide compliance is shown by the situations in Iowa, Massachusetts, New York and Utah. In these states, the top law enforcement officials have urged all local departments to record custodial interrogations. Despite these urgings for adoption of guidelines or “best practices,” the intended result has not – and as a practical matter will not – be attained. We have learned that those who made the recommendations have no knowledge as to which departments have followed the suggestions, or what written policies, if any, have been adopted. And, of course, without an applicable sanction for unexcused non-compliance, however mild, voluntary guidelines lack the force of law. Unless and until an enforceable mandate is put into effect, with consequences for failure to comply, the recommendations are the equivalent of what is known as “soft law” – a statutory encouragement that is without legal effect.

In order to achieve statewide compliance, it has proven sufficient to provide for a sanction as lenient as a cautionary jury instruction to be given when an interrogation was supposed to be recorded but was not and no exception to the mandate is applicable, as provided by statutes in Montana, (Mont. Code Ann. §46-4-410), Nebraska (Neb. Stat. Ann. §4504), Oregon (Or. Rev. Stat. §133.4000(3)(a)), and Wisconsin (Wisc. Stat. Ann. §972.115 2(a) (b)).

Conclusion

Years ago, Senior District Court Judge Van Pelt summarized the superiority of recordings over recollection, in *Hendricks v. Swenson*, 456 F.2d 503, 507 (8th Cir. 1972):

“We must recognize that the capacity of persons to observe, remember and relate varies as does their ability and desire to relate truly. For jurors to see as well as hear the events surrounding an alleged confession or incriminating statement is a forward step in the search for the truth. And, after all, the end for which we strive in all trials is ‘that the truth may be ascertained and the proceedings justly determined.’”

Enactment of SB 2125 is the best and surest route to having electronic recording of custodial interrogations of felony suspects become the policy of North Dakota.

Respectfully submitted,


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APPENDIX 1

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Following are summaries of conversations my staff and I have had with members of law enforcement departments in North Dakota regarding their experiences with electronic recording of custodial interrogations, and the years of our conversations. Recordings begin with the *Miranda* warnings and continue until the questioning ends. Departments are listed alphabetically, with the number of officers reported to us at the time we spoke to the officers.

- *Bismarck Police Department, 2006, 2012*: 100 plus sworn officers. For more than twenty years, recordings have been made of custodial interviews of felony suspects. Four interview rooms are equipped with audio and video, which is not hidden. Suspects' knowledge of recording usually does not affect their cooperation level. In 2006 we spoke with a detective who was very enthusiastic about recording: "We have nothing to hide. There is no reason not to put the interrogation on tape. It is great to use in court." This year we spoke with another veteran detective who said recording is very positive for law enforcement and beneficial to the interrogation process; taking extensive notes is unnecessary because the transcript is available for review; accurate details are available so that those involved are accountable for what they say and do; recordings protect officers from allegations of misconduct, and are also used for training purposes conducted by more senior officers and detectives.

- *Burleigh County Sheriff, 2006*: 35 sworn officers. For 10 years prior to 2006 detectives have recorded by audio and video custodial questioning of felony and misdemeanor suspects. The equipment is hidden, but suspects' knowledge of recording usually does not affect cooperation level. A captain stated that recording is a great tool for law enforcement; videotape is better than a written statement because it captures the suspect's behavior and body language; having everything on tape protects officers from accusations of misconduct and speeds court processes.

- *Cass County Sheriff, 2012*: 70 sworn officers. For the past six years most detectives have made audio recordings of their custodial interrogations. A detective stated that recordings have proven extremely helpful, not only by capturing suspects' exact words, but also by enabling detectives to fully concentrate on suspects, and allowing an uninterrupted flow of interviews without the distraction of making notes; although the

recorder is placed in front of suspects, seldom has an objection been made to recording; virtually all the detectives' recorded interviews resulting in prosecutions have been resolved by guilty pleas.

- *Devils Lake PD, 2012*: 17 sworn officers. They have recorded custodial interviews since the mid-1990s, when a county judge requested the use of electronic recordings to strengthen prosecution evidence. Two interview rooms have hidden audio equipment, and an off-site law enforcement center has video. Audio recordings are standard; video is used in high profile and "key" interrogations. A detective said that most suspects realize they are being recorded, and that recordings are a key to proper performance of interviewing suspects.

- *Dickinson Police Department, 2011 and 2012*: 42 sworn officers. For the past 20-plus years detectives have recorded custodial questioning of suspects in felony and misdemeanor investigations by audio and video. Three interview rooms are equipped with hidden recording equipment. A sergeant stated that recordings are very beneficial in court cases. Another sergeant stated that recording is integral to the interrogation process, and helpful to interrogating detectives, because they are freed to more effectively interact with suspects, observe subtleties that may have previously been overlooked, and play prior recordings to improve their interviewing techniques.

- *Fargo Police Department, 2006*: 129 sworn officers. For at least fifteen years before 2006 detectives have made audio recordings of custodial interviews of suspects in major felony investigations. In 2006 the department was obtaining updated audio/visual recording equipment, funded by cash from drug seizures. The sergeant to whom we spoke is a strong advocate of recording: "Nothing goes on in the interviewing room that the public cannot see. There is no reason not to record"; recordings help preserve evidence, absolve officers from claims of misconduct, and provide more efficiency in the investigative process.

- *Grand Forks County Sheriff, 2006*: 25 sworn officers. For 15 years prior to 2006 detectives have recorded custodial questioning of felony suspects by audio and video. For six months during 2006, owing to roof water leakage, detectives were able to use audio only, and they found that lack of video had a negative impact on their investigations. The detective to whom we spoke is an advocate for electronic recording because it holds officers to a high level of professionalism.

- *Grand Forks Police Department, 2006:* 79 sworn officers. Since the 1970s the department has recorded custodial questioning of felony suspects; video is used primarily in high profile cases. Two interview rooms contain both audio and video equipment, which is not hidden. A lieutenant stated that recording is a great tool for law enforcement if handled carefully and professionally; “As long as the courts are realistic and allow effective interrogation techniques, I don’t mind if the entire Supreme Court watches me in an interrogation.”

- *Hazen Police Department, 2011:* 4 sworn officers. For ten years, detectives have recorded by audio and video custodial questioning of felony suspects from *Miranda* on. Recording is done at the Mercer County Sheriff Office, because the department does not have its own recording equipment. A chief stated that recording is a good evidentiary tool, beneficial for both law enforcement officials and suspects alike.

- *Jamestown Police Department, 2012:* 29 sworn officers. Detectives have electronically recorded custodial interrogations by audio for at least 20 years. A detective stated that recording is regarded as a necessary tool for law enforcement officers.

- *Minot Police Department, 2012:* 65 sworn officers. For over 15 years, detectives have made recordings of custodial interrogations, in three interview rooms, all of which have audio, and two both audio and video equipment, in plain sight. A lieutenant stated that recording is positive for law enforcement and helpful to the interviewing process, because not having to take complete notes allows detectives to interact more effectively with suspects, observe subtle discrepancies and leads, and pursue lines of questioning. The lieutenant is not opposed to legislation making audio recording mandatory for all custodial interrogations.

- *ND Bureau of Criminal Investigation, 2012:* 35 to 40 Special Agents located in 13 branch offices throughout the state. The Bureau has statewide jurisdiction, devoted primarily to assisting local police and sheriff departments and federal agencies when additional help or expertise is requested in criminal investigations, prosecutions and appeals. The Bureau conducts extensive training programs for local departments throughout the state. The Fargo office has an interview room with audio equipment. The Special Agent to whom we spoke has a digital recorder used to make audio recordings of interrogations in the Fargo facility; when interrogating suspects in other places of detention, the equipment installed

there is used, including video if available; the agent is confident that all or virtually all of the Bureau's special agents make audio recordings of their custodial interrogations in detention facilities; the agent favors electronic recordings because they eliminate debates about what was said during interviews; video is superior to audio, because it also shows the appearance and actions of the participants.

- *N D Highway Patrol, 2012*: 150 sworn officers. Since the mid-1990s, highway patrol officers have recorded by audio and video all custodial interactions with suspects, whether a routine traffic stop or an arrest, usually for DUI, which usually occur "on the street." All vehicles are equipped with multiple audio and video recording devices, which are updated regularly. A field operating commander stated that recordings are an absolute necessity, protecting both suspects and officers by holding them accountable for their conduct; they also serve a regulatory and educational practice – each week the commander reviews video recordings with subordinate officers to observe their interactions with suspects.

- *Richland County Sheriff, 2012*: 12 sworn officers. For the past eight-plus years recordings have been made of custodial interrogations on portable digital recorders in the department's one interview room. A detective stated electronic recordings are positive for law enforcement; they hold those interviewed accountable for what they say, and provide accurate details of what was said, which are available after the interviews are ended; recording "locks them into their story."

- *Valley City Police Department, 2007*: 13 sworn officers. For five years prior to 2007 officers have recorded most custodial interrogations during investigations of serious felonies. One interview room contains audio equipment, and another has both audio and visual, in plain sight. A detective stated that recordings, especially videos, provide invaluable support to prosecutors in court, because the jury is able to see first-hand what the suspect's demeanor was during the interrogation; the jury is "put inside the interrogation room" with the officers, which is important because the appearance and behavior of a suspect during an interrogation often appears completely different from the defendant in court.

- *Ward County Sheriff, 2011*: 22 sworn officers. For the past 15 years officers have electronically recorded 90% of interviews of suspects, whether or not in custody. The decision to record is left to the discretion of the interviewing officer. Digital equipment is used during interviews in the

station, and suspects are informed they are being recorded. A sergeant stated that the department's overall experience with recording has been very good.

- *West Fargo Police Department, 2012*: 38 sworn officers. For about ten years detectives have electronically recorded custodial interrogations of all suspects, in three interview rooms, which are now equipped for audio, which is visible, and video, which is covert. Audio recording is standard, video is used in high profile cases and when the video room is available. A sergeant stated that recordings are a great tool for law enforcement, integral to the investigative process, with both practical and educational advantages; by not having to make notes, officers are able to more effectively interact with suspects; recordings protect officers from dishonest and accusatory suspects; use of the equipment is demonstrated to all new detectives, and they receive regular "pointers" from more senior officers. A detective stated that recording is a great tool for law enforcement.

APPENDIX 2

**DEPARTMENTS THAT CURRENTLY
RECORD A MAJORITY OF CUSTODIAL INTERROGATIONS¹**

*Those named are police departments unless otherwise indicated.
CS refers to county sheriff departments, DPS for Department of Public Safety,
and FD for Fire Department.*

Alabama	Yavapai CS	Orange CO Fire Authority
Baldwin CS	Yuma CS	Orange CS
Daphne	Yuma	Placer CS
Mobile	Arkansas³	Pleasanton
Mobile CS	Ashley CS	Rocklin
Prichard	Boone CS	Roseville
Alaska	Carroll CS	Sacramento
All departments – Supreme	Crossett	Sacramento CS
Court ruling ²	Eureka Springs	San Bernardino CS
Arizona	Fayetteville FD	San Diego
Casa Grande	Fayetteville	San Francisco
Chandler	14th Judicial District	San Joaquin CS
Coconino CS	Drug Task Force	San Jose
El Mirage	Harrison	San Leandro
Flagstaff	Sebastian CS	San Luis
Gila CS	State Police	Santa Clara
Gilbert	Van Buren	Clara CS
Glendale	Washington CS	Santa Cruz
Marana	California	Stockton
Maricopa CS	Alameda CS	Sunnyvale DPS
Mesa	Arcadia	Union City
Oro Valley	Auburn	Vallejo
Payson	Bishop	Ventura CS
Peoria	Butte CS	West Sacramento
Phoenix	Carlsbad	Woodland
Pima CS	Contra Costa CS	Yolo CS
Pinal CS	El Cajon	Colorado
Prescott	El Dorado CS	Arvada
Scottsdale	Escondido	Aurora
Sierra Vista	Folsom	Boulder
Somerton	Grass Valley	Brighton
South Tucson	Hayward	Broomfield
State Dept of Corrections	LaMesa	Colorado Springs
Surprise	Livermore	Commerce City
Tempe	Milpitas	Cortez
Tucson	Oceanside	Denver

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El Paso CS
Ft. Collins
Lakewood
Larimer CS
Logan CS
Loveland
Montezuma CS
South Ute Gaming Div.
Sterling
Thornton

Connecticut

All departments as of
Jan. 1, 2014 – statute⁴
Currently –
Bloomfield
Bridgeport
Cheshire
Southington
State Internal
Affairs Unit
Waterford

Delaware

New Castle City
New Castle County
State Police Dept

District of Columbia

All departments – statute⁵

Florida

Attorney General
Broward CS
Cape Coral
Clay CS
Collier CS
Coral Springs
Davie
Daytona Beach
Delray Beach
Ft. Lauderdale
Ft. Myers
Gainesville
Hallandale Beach
Hialeah
Hollywood
Key West
Kissimmee
Lee CS
Manatee CS

Margate
Miami
Monroe CS
Mount Dora
Okaloosa CS
Orange CS
Orlando
Osceola CS
Palatka
Palm Beach
Palm Beach CS
Pembroke Pines
Pinellas CS
Port Orange
St. Lucie CS
St. Petersburg
Sanibel
Seminole CS
Sunrise
Tallahassee
Valparaiso

Georgia

Atlanta
Centerville
Cobb County
DeKalb County
Fulton County
Gwinnett County
Houston CS
Macon
Perry
Savannah-Chatham
Warner Robins

Hawaii

Hawaii County
Honolulu

Idaho

Ada CS
Blaine CS
Boise City
Boise CS
Bonneville CS
Caldwell
Canyon CS
Cassia CS
Coeur d' Alene
Dept of Corrections

Dept of Fish & Games
Garden City
Gooding
Gooding CS
Hailey
ID Falls
Jerome
Jerome CS
Ketchum
Lincoln CS
Meridian
Nampa
Pocatello
Post Falls
State Police
Twin Falls

Illinois

All departments –
homicides – statute⁶
Other felonies –
Bethalto
Bloomington
Brown CS
Cahokia
Canton
Carlinville
Caseyville
Charleston
Chatham
Dixon
DuPage CS
East Moline
East St. Louis
Edwardsville
Fairview Heights
Galena
Greene CS
IL Gaming Board
Kankakee
Kankakee CS
Kansas
Knox CS
Lenzburg
Lincoln
Litchfield
Macon CS
Montgomery CS

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Morgan CS	Parkersburg	Anne Arundel County
Naperville	Polk CS	Anne Arundel CS
O'Fallon	Pottawattamie CS	Baltimore
Olney	Rock Valley	Baltimore County
Riverton	Sioux City	Bladensburg
Rockton	Storm Lake	Bowie
Roxana	Vinton	Cambridge
St. Clair CS	Washington CS	Carroll CS
Shiloh	Waterloo	Cecil CS
Springfield	Waverly	Charles County Gov't
Swansea	West Burlington	Cumberland
Trenton	Woodbury CS	Delmar
Troy	Kansas	Denton
Winnebago CS	Derby	Elkton
Waterloo	Junction City	Frederick
Indiana	Kansas Univ. DPS	Garrett CS
All departments – Supreme	Liberal	Greenbelt
Court rule ⁷	Newton	Greensboro
Iowa ⁸	Olathe	Hagerstown
Altoona	Ottawa	Hampstead
Ames	Riley County	Harford CS
Ankeny	Saline CS	Havre de Grace
Arnolds Park	Sedgwick	Howard County
Benton CS	Sedgwick CS	Hyattsville
Bettendorf	Shawnee CS	Laurel
Burlington	Topeka	Montgomery
Cedar Rapids	Wichita	Montgomery County
Clarion	Kentucky	Montgomery County –
Colfax	Elizabethtown	Silver Spring
Council Bluffs	Hardin CS	Prince George's County
Davenport	Jeffersontown	Princess Anne
Des Moines	Louisville Metro	Queen Anne's CS
Des Moines CS	Louisville	Riverdale Park
Fayette CS	Oldham CS	Rockville
Hancock CS	St. Matthews	St. Mary's CS
Iowa City	Louisiana	Salisbury
Iowa DPS	Lafayette City	Washington CS
Johnson CS	Lake Charles	Westminster
Kossuth CS	Oak Grove	Wheaton
Linn CS	Plaquemines Parish CS	Wicomico CS
Marion	St. Tammany Parish CS	Massachusetts ¹¹
Marshalltown	Maine	Amherst
Mason City	All departments – statute ⁹	Assumption College
Merrill	Maryland	Campus
Missouri Valley	All departments – statute ¹⁰	Auburn
Muscatine	Aberdeen	Ayer
Nevada	Annapolis	Barnstable

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Boston
Bourne
Brewster
Cambridge
Chatham
Dalton
Dartmouth
Dennis
Easton
Edgartown
Fall River
Great Barrington
Holyoke
Hudson
Lenox
Longmeadow
Nantucket
North Central Correctional
Inst.
Northeastern Univ.
Oak Bluffs
Orleans
Pittsfield
Quinsigamond College
Revere FD
Sheffield
Somerset
Somerville
State Police
Tewksbury
Truro
West Brookfield
West Tisbury
Westfield
Yarmouth
Michigan¹²
Auburn Hills
Bath Township
Big Rapids DPS
Birmingham
Cadillac
Cass CS
Cass County Drug
Enforcement Team
Charlevoix CS
Detroit (homicides)
East Lansing

Emmet CS
Farmington DPS
Genesee CS
Gerrish Township
Gladwin
Gladwin CS
Grand Rapids
Huntington Woods DPS
Isabella CS
Jackson
Kent CS
Kentwood
Lake CS
Ludington
Macomb CS
Madison Heights
Manistee CS
Mason CS
Mecosta CS
Meridian Township
Milford
Montcalm CS
Mt. Pleasant
Niles City
Novi
Oak Park DPS
Onaway
Paw Paw
Redford Township
Roseville
Scottville
State Police
State Univ.
Troy
Waterford
West Branch
Wolverine Lake
Wyoming
Minnesota
All departments – Supreme
Court ruling¹³
Mississippi
Biloxi
Cleveland
Gulfport
Harrison CS
Jackson CS

Missouri
All departments – statute¹⁴
Blue Springs
Chillicothe
Clay CS
Kansas City
Lake Area Narcotics
Enforcement Group
Lincoln CS
Overland
Raymore
Platte CS
St. Louis County
St. Louis County Major
Case Squad
Springfield
State Hwy. Patrol
Sugar Creek
Montana
All departments – statute¹⁵
Nebraska
All departments – statute¹⁶
Nevada
Boulder City
Carlin
Douglas CS
Elko
Elko CS
Henderson
Lander CS
Las Vegas Metro
Nevada DPS
North Las Vegas
Reno
Sparks
Washoe CS
Wells
Yerington
New Hampshire¹⁷
Carroll CS
Concord
Conway
Enfield
Keene
Laconia
Lebanon
Nashua

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Plymouth
Portsmouth
State Police
Swanzy
New Jersey
All departments – Supreme
Court rule¹⁸
New Mexico
All departments – statute¹⁹
New York
Binghamton
Brockport
Broome CS
Cayuga Heights
Chenango
Chautauqua
Clinton
Columbia
Deposit
Dryden
Dutchess
Endicott
Franklin
Fulton
Genesee
Glenville
Greece
Greene
Herkimer
Irondequoit
Jefferson
Madison
Niagara
Oneida
Ontario
Orange
Otsego
NY State – Ithaca
NY State – Oneonta
NY State – Sidney
Rensselaer
Rotterdam
Schenectady
Sullivan
Tioga
Tompkins CS
Troy

Ulster
Vestal
Washington
Wyoming
North Carolina
All departments –
homicides – statute²⁰
Other felonies –
Burlington
Concord
Raleigh
Wilmington
North Dakota²¹
Bismarck
Burleigh CS
Cass CS
Devils Lake
Dickinson
Fargo
Grand Forks
Grand Forks CS
Hazen
Jamestown
Minot PD
ND Bureau of C. I.
ND Highway Patrol
Richland CS
Valley City
Ward CS
West Fargo
Ohio²²
Akron
Cincinnati
Columbus
Darke CS
Dublin
Dept of Natural Resources
Franklin
Garfield Heights
Grandview Heights
Grove City
Hartford
Hudson
Millersburg
OH Pharmacy Board
Ontario
Reynoldsburg

Springboro
State Highway Patrol
State Univ.
Troy
Upper Arlington
Wapakoneta
Warren CS
Westerville
Westlake
Worthington
Oklahoma
Moore
Norman
Oklahoma CS
Tecumseh
Oregon
All departments – statute²³
Pennsylvania
Bethlehem
Tredyffrin Township
Whitehall
Rhode Island²⁴
RI Dept of Public Safety
(capital offenses)
Woonsocket
South Carolina
Aiken CS
Aiken DPS
City of Charleston
N. Augusta DPS
N. Charleston
Savannah River
Site Law Enf.
South Dakota
Aberdeen
Belle Fourche
Brandon
Brookings
Brown CS
Clay CS
Lincoln CS
Minnehaha CS
Mitchell
Pierre
Rapid City
Sioux Falls

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State Div. of Criminal
Investigations
State Univ.
Vermillion
Yankton

Tennessee

Bell Meade
Benton CS
Blount CS
Bradley CS
Brentwood
Bristol
Chattanooga
Cleveland
Franklin
Goodlettsville
Hamilton CS
Hendersonville
Highway Patrol
Knox CS
Knoxville
Loudon CS
Montgomery CS
Murfreesboro
Nashville
Shelby CS
White CS

Texas²⁵

Abilene
Alamo Heights
Andrews
Austin
Cedar Hill
Cedar Park
Cleburne
Collin CS
Corpus Christi
Dallas
Duncanville
Florence
Frisco
Georgetown
Hutto
Irving
Johnson CS
Killeen
Knox CS

Leander
Midland
Parker CS
Plano
Randall CS
Richardson
Round Rock
San Antonio FD
San Jacinto CS
Southlake DPS
Sugar Land
Taylor
Travis CS
Webster
Williamson CS

Utah²⁶

Layton
Salt Lake City
Salt Lake CS
Utah CS
West Jordan

Vermont²⁷

Norwich
Rutland CS
Rutland

Virginia

Alexandria
Chesterfield County
Clarke CS
Fairfax
Fairfax County
Loudoun CS
Norfolk
Radford City
Richmond
South Boston
Stafford CS
Virginia Beach

Washington

Adams CS
Arlington
Bellevue
Bothell
Buckley
Columbia CS
Ellesburg
Federal Way

Kennewick
Kent City
King CS
Kirkland
Kittitas CS
Klickitat CS
Lewis CS
Mercer Island
Mount Vernon
Pierce CS
Prosser
Snohomish CS
State Patrol
Thurston CS
Univ. WA
Walla Walla
Yakima CS

West Virginia

Charles Town
Monongalia CS
Morgantown CS
Morgantown
Wheeling

Wisconsin

All departments – statute²⁸

Wyoming

Cheyenne
Cody
Gillette City
Laramie
Laramie CS
Lovell
Polk CS

Federal²⁹

Air Force Office of
Special Investigations³⁰
Department of Defense³¹
Naval Criminal
Investigative Service³²

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¹ In July 2010, the National Conference of Commissioners on Uniform State Laws approved a comprehensive model state statute on electronic recording of custodial interrogations. <http://www.law.upenn.edu/bll/archives/ulc/erci/2010final.htm>

² *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985).

³ In *Clark v. State*, 374 Ark. 292 (2008), the Arkansas Supreme Court rejected the defendant’s argument that she had a constitutional right to have the police make a complete recording of her custodial interview. However, the Court stated, “we believe that the criminal-justice system will be better served if our supervisory authority is brought to bear on this issue. We therefore refer the practicability of adopting such a rule to the Committee on Criminal Practice for study and consideration.” *Clark*, 374 Ark. at 304. The Committee recommended adoption of a rule of the Supreme Court requiring recordings. The Court received comments from the public, and took the matter under consideration. On June 22, 2012, the Court entered an order providing, “Whenever practical, a custodial interrogation at a jail, police station, or other similar place, should be electronically recorded,” and that in determining admissibility of a custodial statement, the court may consider, among other relevant evidence, “whether an electronic recording was made; if not, why not; and whether any recording is substantially accurate and not intentionally altered.”

⁴ In July 2011, the Governor signed legislation requiring audiovisual recording of custodial interrogations of suspects of capital and Class A and B felonies, with a rebuttable presumption of inadmissibility if statements that should have been but were not recorded are offered into evidence. The statute takes effect January 1, 2014. Public Act No. 11-174.

⁵ D.C. CODE §§ 5-116.01-03.

⁶ 705 ILL. COMP. STAT. ANN. § 405/5-401.5 and 725 ILL. COMP. STAT. ANN. § 5/103-2.1.

⁷ In September 2009, the Indiana Supreme Court entered an order stating, “this Court finds that the interests of justice and sound judicial administration will be served by the adoption of a new Rule of Evidence to require electronic audio-video recordings of customary custodial interrogation of suspects in felony cases as a prerequisite for the admission of evidence of any statements made during such interrogation.” Under the Court’s “inherent authority to supervise the administration of all courts of this state,” the Court added Rule 617, which requires custodial interrogations of felony suspects to be recorded, beginning January 1, 2011. Indiana Rule of Evidence 617 - Unrecorded Statements During Custodial Interrogation.

⁸ Following the ruling of the Iowa Supreme Court in *State v. Hajtic*, 724 N.W.2d 449 (Iowa 2006), the Attorney General wrote in the State Police Association’s publication: “Although the court stated that it is ‘encouraging’ the practice of electronic recording, the attorney general’s office believes that the *Hajtic* decision should be interpreted as essentially requiring this practice.” Tom Miller, *Cautions Regarding Custodial Issues*, IOWA POLICE J., vol. 39, no. 1, at 15 (2007). In 2009, the Department of Public Safety issued guidelines for interviews providing, “Officers will audio or video record interrogations as defined in DOM 23-02.5 ... Custodial interrogations will be audio or video taped, including documentation of the *Miranda* warnings and waiver of rights consistent with DOM 23-02.15” DOS guidelines, IV C2g and E4C.

⁹ ME REV. STAT. ANN. Title 25, § 2803-B(1)(K).

¹⁰ The Maryland Code of Criminal Procedure requires that “A law enforcement unit that regularly utilizes one or more interrogation rooms capable of creating audiovisual recordings of custodial interrogations shall make reasonable efforts to create an audiovisual recording of a custodial interrogation of a criminal suspect in connection with a case involving” named felonies, “whenever possible.” Other law enforcement units “shall make reasonable efforts to create an audio recording of a custodial interrogation of a criminal suspect in connection with” cases involving the named felonies, “whenever possible.” MD. ANN. CODE, CRIM. PROC. § 2-402.

¹¹ *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004). Following this ruling, the Attorney General, the Chiefs of Police and District Attorneys Associations, and the State Police, endorsed the policy of videorecording all custodial interrogations of suspects in serious felony investigations unless strong countervailing considerations make recording impractical or the suspect refuses to be recorded.

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¹² The Michigan Senate passed Senate Bill 152 requiring that an audiovisual recording be made of custodial interviews of major felony suspects. The House has yet to vote on the bill.

¹³ *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994).

¹⁴ MO. REV. STAT. ch. 590, §701. The Missouri statute requires recording of custodial interviews of suspects of specified felonies if recording equipment is available and recording is feasible. A law enforcement agency's failure to comply with the statute shall have no impact other than that "the governor may withhold any state funds appropriated to the noncompliant law enforcement agency if the governor finds the agency did not act in good faith in attempting to comply with" the statute. Nothing in the statute "shall be construed as a ground to exclude evidence." A violation of the statute "shall not be admitted as evidence, argued, referenced, considered or questioned during a criminal trial."

¹⁵ The Montana statute requires recording of custodial interviews of felony suspects. MONT. CODE ANN. tit. 46, ch. 4, §§406-11.

¹⁶ NEB. REV. STAT. ANN. §29-4501-4508 (West 2009).

¹⁷ In *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2001), the New Hampshire Supreme Court held that if an electronically recorded statement is offered into evidence, the recording is admissible only if the entire post-*Miranda* interrogation interview was recorded. The ruling does not require that custodial interviews be recorded either in whole or in part. If a partially recorded statement is excluded from evidence because the entire interview was not recorded, testimonial evidence is nevertheless admissible as to what occurred before, during and after the custodial interview, including the portion that was recorded.

¹⁸ N.J. CT. R. 3.17 (2005).

¹⁹ N.M. STAT. ANN. §29-1-16.

²⁰ N.C. GEN. STAT. ANN. §15A-211.

²¹ In April 2011, the Governor enacted a law providing that "the legislative management shall consider studying the feasibility and desirability of adopting the Uniform Electronic Recording of Custodial Interrogations Act. The legislative management shall report its findings and recommendations, together with any legislation necessary to implement the recommendations, to the sixty-third [2012] legislative assembly."

²² OHIO REV. CODE ANN. §2933.81. Recorded statements made during custodial interviews are presumed voluntary. Failure to record is not a basis to exclude the statement.

²³ The Oregon statute requires recording of custodial interviews of suspects of aggravated homicides and crimes with mandatory minimum sentences. OR. REV. STAT. §165.540, effective July 1, 2010 and July 1, 2011.

²⁴ R.I. Gen. Laws §12-7-22, June 2011. The General Assembly established a task force to develop policies for electronically recording custodial interrogations in their entirety. The report is due by February 1, 2012.

²⁵ The Texas Code of Criminal Procedure provides that a defendant's unrecorded oral statement is inadmissible unless the statement "contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused." TEX. CODE CRIM. PROC. ANN. art. 38.22; see *Moore v. State*, 999 S.W.2d 385, 400 (Tex. App. 1999). The statute does not require recording of custodial interviews preceding recorded statements, nor exclusion of suspects' unrecorded written statements. See *Rae v. State*, No. 01-98-00283-CR, 2001 WL 125977, at 3 (Tex. App. 2001); *Franks v. State*, 712 S.W.2d 858, 860 (Tex. App. 1986).

²⁶ The Utah Attorney General has adopted a Best Practices Statement, endorsed by all state law enforcement agencies, recommending that custodial interrogations in a fixed place of detention of persons suspected of committing a statutory

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violent felony, should be electronically recorded from the *Miranda* warnings to the end in their entirety. Various exceptions to the requirement are included. Office of the Utah Attorney General, *Best Practices Statement for Law Enforcement: Recommendations for Recording of Custodial Interviews* (Oct. 2008).

²⁷ Act of June 3, 2010, §238d. Pursuant to this statute, a Working Group of the Vermont Law Enforcement Advisory Board has submitted a Best Practices Statement, recommending that custodial interviews of felony suspects be electronically recorded by audio and visual whenever practicable. Action on the Group's recommendation is anticipated in the legislative session beginning January 2012. The statute provides that recordings are to begin in July 2012.

²⁸ Wis. Stat. Ann. §§968.073, 972.115.

²⁹ In October, 2009, the Commission on Military Justice (the "Cox Commission") released a report containing recommendations "to advance principles of justice, equity, and fairness in American military justice," including: "Require military law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at law enforcement offices, detention centers, or other places where suspects are held for questioning, or, where videotaping is not practicable, to audiotape the entirety of such custodial interrogations."

³⁰ AFOSI Manual, General Investigative Methods (AFOSIMAN 71-124), effective Oct. 2009, Ch. 4, Sec. 4E4.18, requires DVD recording of all subject interviews, with limited exceptions, and the optional recording of witness and victim interviews. Judge Advocate General's Corp. Online News Service, Vol. IX, Issue 34, 26 Aug. 09, par. 10.

³¹ Section 1080 of the National Defense Authorization Act for Fiscal Year 2010 requires that "each strategic intelligence interrogation of any person who is in the custody or under the effective control of the Department of Defense or under detention in a [DOD] facility is videotaped or otherwise electronically recorded." The "term 'strategic intelligence interrogation' means an interrogation of a person . . . conducted at a theater-level detention facility." On May 10, 2010, the DOD Judge Advocate General issued detailed guidelines. Directive-Type Memorandum 09-031.

³² U.S. Naval Criminal Investigative Services Manual, General Order 00-0012, "Policy Change Regarding Recording of Interrogations," Sept. 4, 2008. Require audio or video recording of interrogations of suspects involving crimes of violence which take place within an NCIS facility. The Special Agent-in-Charge or supervisory designee may make a decision not to record when recording would be counterproductive or impede the interrogation.

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APPENDIX 3

APPENDIX 3

The following national organizations, listed alphabetically, have taken formal positions regarding the practice of electronic recording of custodial interrogations.

American Bar Association	Innocence Project
American Civil Liberties Union	International Association of Chiefs of Police
American Federation of Police and Concerned Citizens	Justice Project
American Judicature Society	National Association of Criminal Defense Lawyers
American Law Institute	National Conference of Commissioners on Uniform State Laws
Center For Policy Alternatives	National District Attorney's Association
Constitution Project	Police Executive Research Forum

American Bar Association

In February 2004, the House of Delegates approved a resolution urging "all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at places where suspects are held for questioning, or, where videotaping is impractical, to audiotape the entirety of such custodial interrogations." The House of Delegates also urged "legislatures and/or courts to enact laws or rules of procedure" to the same effect. ABA Resolution 8A - *Videotaping Custodial Interrogations*.

American Civil Liberties Union

Members of the ACLU work “in courts, legislatures and communities to defend and preserve the individual right and liberties that the Constitution and laws of the United States guarantee everyone in this country.”

In May 2008, the Director and Legislative Counsel of the ACLU sent a memorandum to members of the United States House of Representatives urging them “to support the video recording amendment” to the defense authorization bill, which “would make an important – and extraordinarily practical - change to Defense Department interrogation practices by requiring the recording and retention of videos of strategic interrogations of persons under the custody or control of the Defense Department.”

American Federation of Police and Concerned Citizens

This is a national organization, founded in 1966, among other purposes, to assist family members and children of officers killed in the line of duty, and promotes the training of police reserves. In November 2011, the Executive Director wrote to the author on behalf of the national President:

“Over the years we have been instrumental in promoting not only safety in law enforcement but also advocating for the wellness and welfare of departments and their individual officers. We believe that the use of recording devices during interrogation and during other crucial times of an investigation provides a great measure of safety to the interrogating officers and to the departments as well, especially when trying to meet certain legal guidelines and stave off potential litigation. Therefore we endorse your writings pertaining to the promotion of recording devices to be utilized whenever possible.”

American Judicature Society

The Society is an independent, non-partisan, membership organization working nationally to protect the integrity of the American justice system. A 2006 editorial in the Society’s publication, entitled *Systemic flaws on our criminal justice system*, states (89 Judicature 244 at 246):

“*Confessions*. DNA exonerations have shown what many are not willing to believe: that even in the *Miranda* era, some confessions are still coerced, and some are simply false, due to police manipulation of suspects who are misled into confessing to crimes they did not commit. To avoid

over-reaching and impermissible psychological ploys, all station house interrogation could be videotaped from start to finish (not just the formal statement of the suspect).”

American Law Institute

The Institute is an independent organization producing scholarly work to clarify, modernize, and otherwise improve the law. In 1975, the Institute adopted its Model Code of Pre-Arrest Procedure §130.4 (3) (c) (1975), which provides that law enforcement agencies should make a sound recording of “any questioning of the arrested person and any statement he makes in response thereto.” The purpose is “to aid the resolution of factual disputes which may subsequently arise concerning what happened to an arrested person in custody. Such a provision is central to the Code’s attempt to provide clear and enforceable rules governing the period between arrest and judicial appearance” (Note, page 39).

Center For Policy Alternatives

The Center is an independent, nonpartisan, nonprofit organization working to strengthen the capacity of state legislators to lead and achieve progressive change. In 2005, the Center recommended that states enact The Electronic Recording of Interrogations Act, which requires that any custodial interrogation conducted by police must be electronically recorded in its entirety (2005).

Constitution Project

Founded in 1996, the Project enlists experts and practitioners from across the political spectrum in order to promote and safeguard the Constitution, America’s founding charter, reform the nation’s broken criminal justice system, and strengthen the rule of law through scholarship, consensus policy reforms, and public education. Its report, *Mandatory Justice: The Death Penalty Revisited* (2005), contains the following recommendation (No. 23, p. xx; see also pp.75 -84, 131-133):

“Custodial interrogations of a suspect in a homicide case should be videotaped or digitally recorded whenever practicable. Recordings should include the entire custodial interrogation process. Where videotaping or digital video recording is impracticable, an alternative uniform method, such as audiotaping, should be established. Where no recording is practicable,

any statements made by the homicide suspect should later be repeated to the suspect and his or her comments recorded. Only a substantial violation of these rules requires suppression at trial of a resulting statement.”

Innocence Project

The Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future injustice. In 2011, the Project published its model state statute, an Act Directing the Electronic Recording of Custodial Interrogations. In an accompanying statement, the Project wrote, “Mandating the recordation of custodial interrogations has long been identified as a reform that shields the innocent from wrongful convictions by creating a record of the questioning that yields a confession.” The Project also recounted benefits that the practice offers law enforcement: capturing details that may be lost if unrecorded which aids better investigations; creating a record of the suspect’s statements, making it difficult for him/her to change the account; permitting officers to concentrate on the interview without the distraction of note taking; providing a record of how the officer acted and treated the suspect during the interview; protecting officers from false claims of coercion; enhancing public confidence in law enforcement; and reducing citizen complaints against the police.

International Association of Chiefs of Police

The IACP is the world’s oldest and largest nonprofit membership organization of police executives, with over 20,000 members in over 100 different countries. In 2006, the IACP issued its Model Policy on Electronic Recording of Interrogations and Confessions.

Policy. “It is the policy of this law enforcement agency to electronically record specific custodial interrogations and confessions in order to provide an evidentiary record of statements made by suspects of major crimes. Such electronic recordings can help protect both the suspect(s) and interviewing officers against potential assertions of police coercion or related interrogation misconduct, and may increase the likelihood of successful prosecution.” §II.

General Rule: “Officers shall electronically record interrogations conducted in a place of detention involving major crimes as defined by this department.” §IV.A.1.

“Interrogations and confessions shall be recorded in their entirety starting with the interrogator’s entrance into the interview room and concluding upon departure of the interrogator and suspect.” §IV.B.4.

Exceptions. If electronic recordings cannot be conducted due to equipment failure, lack of suspect cooperation, or for other reasons deemed pertinent to successful interrogation by the case manager, the basis for such occurrences shall be documented. This includes but is not limited to spontaneous declarations or other statements not elicited by the police questioning. §IV.A.4.

Preservation. All recordings shall be governed by this department’s policy and procedures for the handling and preservation of evidence. Recordings shall be retained by the department in secure storage for a period of time as defined by state law or the office of the prosecutor. §IV11-12.

In February 2007, the IACP Policy Center issued a Concepts and Issues Paper, to accompany the Model Policy. Included in this document are the following:

“All things considered, full recording of interrogation sessions and confessions are generally preferable. This is the only positive means by which police can demonstrate that interrogations were conducted properly and confessions elicited legally.

* * *

“There is little conclusive evidence to show that the use of recordings has any significant effect on the willingness of suspects to talk. While some are willing to talk or even play to the camera, others are reluctant. But the majority of agencies that use recordings have found that they were able to get more incriminating information from suspects who were recorded than they were in traditional interrogations.

“Possibly of more interest to investigators who routinely conduct interrogations are study findings that recordings do not noticeably inhibit the interrogation practices of officers over the long run.

* * *

“In terms of the quality of confessions, the survey of agencies using recordings confirmed that defense attorneys lodged fewer allegations of coercion or intimidation after the agencies began to record. Administrations of *Miranda* warnings on camera are a primary reason for this, as well as the straight-forward record of the interrogation or confession or both provided by the recording.

* * *

“Prosecutors surveyed indicate that the use of videotape has little or no bearing on their decision to charge suspects. But they almost unanimously agree that recordings help them assess the strengths and weaknesses of the state’s case and help them prepare for trial. Recordings, they say, provide the details of the interrogation (such as the sophistication of the suspect, how he answers questions, body language and intonation) that are not possible to capture on audiotape alone or through transcripts but are important to case preparation.

“Electronic recordings can also be of value to prosecutors in negotiating acceptable pleas. If the recording shows a particularly strong case for the state, a plea bargain would normally favor the prosecution. On the other hand, should there be weaknesses with the case that are revealed on the tape, a reasonable plea bargain may be struck that averts more serious prosecutorial dilemmas should the case proceed to trial.”

Justice Project

The Justice Project consists of two non-partisan organizations dedicated to combating injustice and to creating a more humane and just world. In 2007, the Project issued a policy review entitled *Electronic Recording of Custodial Interrogations, A Policy Review*, which includes a summary of the benefits to be obtained by both law enforcement and suspects from recording custodial interviews, and detriments resulting from failure to record (pages 2-7, 15-21). A Model Bill for Electronic Recording of Custodial Interrogations is included (pages 22-23).

National Association of Criminal Defense Lawyers

The NACDL is a nationwide organization of lawyers who specialize in the defense of person accused of violations of state and federal criminal laws. In 2002, the Board of Directors adopted a resolution supporting “the

videotaping of law enforcement interrogations from beginning to end and calls upon Congress and state legislatures to pass legislation mandating this practice.”

National Conference of Commissioners on Uniform State Laws

The Conference, commonly known as the Uniform Law Commission (ULC), established over 115 years ago, is a state- supported organization which provides non-partisan, well-conceived and well-drafted legislation, in order to bring clarity and stability to critical areas of state statutory law.

Commissioners are lawyers appointed by state governments, the District of Columbia, Puerto Rico and the U. S. Virgin Islands, to research, draft and promote enactment of uniform state laws where uniformity among the states is desirable and practical. The Commissioners donate thousands of hours every year as a public service, and receive no salary or compensation for their work.

- In 1987, the ULC approved and recommended for enactment in all states Uniform Rules of Criminal Procedure, which included the following Comment to Rule 243, relating to questioning of arrested persons in custody: “The informing of rights, any waiver thereof, and any questioning must be recorded upon a sound recording device whenever feasible or if questioning occurs at a place of detention.”
- In July 2010, the ULC approved and recommended for enactment in all states a comprehensive uniform state statute on electronic recording of custodial interrogation. The Prefatory Note explains the need for a uniform state law on the subject of recording custodial interviews in felony investigations, as well as the benefits to be derived from the practice of making electronic recordings of interviews from beginning to end (pages 6-11). A detailed explanation accompanies each section of the model statute (pages 12 -53).

National District Attorney’s Association

The NDAA is the oldest and largest professional organization representing criminal prosecutors in the world. NDAA serves as a nationwide, interdisciplinary resource center for training, research, technical assistance, and publications reflecting the highest standards and cutting-edge practices of the prosecutorial profession.

- In 2004, the NDAA Board of Directors adopted a Policy on Electronic Recording of Statements. The policy states:

The National District Attorneys Association opposes the exclusion of otherwise truthful and reliable statements by suspects and witnesses simply because the statement was not electronically recorded.

“America’s prosecutors encourage police agencies to record statements by suspects and witnesses but recognize that there are circumstances in which the statements are not or could not be recorded. In a truth-based justice system we should always want juries to have as much truthful information as possible. The use of juries as the trusted finders of fact in criminal trials throughout the courts of the United States provides the best assurance that true and correct verdicts will be found. Every concern raised by proponents of mandatory electronically recorded statements is properly resolved by motions to suppress, jury trials, or appellate action. Virtually every jurisdiction in the United States requires prosecutors not only to prove the accuracy of a confession, but also to prove that it was freely, voluntarily, and knowingly given. Exclusion of reliable evidence harms the truth seeking process and increases the risk of miscarriages of justice.”

- In 2009, the NDAA also endorsed a series of proposals contained in a document entitled “Expanding Electronic Recording of Statements by Law Enforcement: An Incentive-Based Approach,” which was submitted to the Uniform Law Commissioners. The first paragraph of the Executive Summary states (page i):

“The benefits of electronic recording of statements obtained by law enforcement officers through custodial interviews have been widely recognized by various commentators and courts. Electronic recording provides an objective record of what happened during the interview. By preserving the actual words as they were spoken during police/suspect encounters, electronic recording can reveal the content and context of the statements, demonstrate police compliance with *Miranda*, assist courts in determining the voluntariness of a statement, and disproving unfounded defense claims that coercion, duress, entrapment or other types of misconduct occurred.”

The Summary continues by pointing out various costs associated with electronic recording, in particular for equipment, and clerical and record keeping support. The Summary continues (page i):

“The biggest cost from recording, however, would come if rule makers were to put in place some sort of ‘exclusionary rule’ that would bar prosecutors from presenting reliable but unrecorded statements from defendants. Such an exclusionary rule would obviously provide an incentive to law enforcement agencies to adopt electronic recording, but at the excessive cost of depriving juries of extremely important information about the guilt of a suspect. Moreover, because of these potential costs, a rulemaker considering mandating electronic recording might be required to keep the mandate narrow (by, for example, limiting the recording requirement to custodial interviews for a few serious crimes conducted at police stations).

“Rather than pursuing this ‘stick’ approach to encouraging electronic record, a far better idea would be to use a ‘carrot’ or incentive. Law enforcement and prosecuting agencies should be provided an incentive to use electronic recording. In particular, given the objective record that recording provides of what happened during a custodial interview, the recording should be automatically admissible in evidence without the need to call the police officer who made the recording in all proceedings – with the exception of a trial, where the defendant has a constitutional right to confront the witnesses against him. Accordingly, if a police officer certifies under penalty of perjury that the recording is accurate, then the recording should be admissible at pre-trial and post-trial hearings unless the defendant can make a substantial preliminary showing that there is some reason to disbelieve the officer. Such an approach would provide substantial incentives to law enforcement agencies to record custodial interrogations, by allowing agencies to avoid the need to send officers to testify at preliminary hearings recording the statements that they have obtained.”

In the next section of the document, the benefits of electronic recordings of custodial interviews are expanded upon (page 1):

“The benefits of electronic recording of custodial interviews have been widely discussed in the literature and need only be briefly reviewed here. In particular, recording of interviews of a suspect provides an objective record of what has happened during police interrogations, eliminating ‘swearing contests’ about who said what to whom. For example, by demonstrating exactly what happened during questioning, claims by suspects that they have been mistreated to extract a confession are often effectively rebutted by a recording.

“Recording has other benefits for police officers. By maintaining a recording of what is happening during questioning, the recording permits the interrogating officer to focus on questioning the suspect rather than writing notes. The recording also eliminates the need for a detailed report from officer about precisely what was said during the interview. The officer is also free to go back to review the recording to see whether any details about the investigation might have been overlooked. Later hearings about the interrogation are also simplified, as the recording usually eliminates debate about what happened during the recorded interview.

“Defendants and the courts also benefit from recorded statements. Because the officer is aware that an objective record is being made of the interview, there is a clear disincentive for the officer to use improper questioning techniques. Also, in highly unusual cases where a mentally disabled suspect has ‘confessed’ to a crime that he did not commit, the recording will provide an opportunity for a reviewing court to identify the problem. More generally, recorded statements provide clear evidence to judges and juries of what was said during an interview – including the demeanor and physical appearance of those involved.”

The document goes on to recount that proponents of recording have proposed the imposition of sanctions in the event a recording should have been but was not made, namely:

“...suppression of the statement from the defendant that law enforcement agent has obtained, regardless of how reliable the statement may be and how important it is to obtaining the conviction of a guilty criminal. In other cases, the sanction may be a jury instruction, cautioning the jury that it should not readily credit the law enforcement officer’s testimony about the circumstances surrounding the interrogation.”

Then follows an explanation as to why it is unwise to mandate electronic recording of custodial interviews, and why a “carrot” rather than a “stick” approach ought to be used. Instead of sanctioning an unexcused failure to record (the “stick”), there should be no requirement imposed that recordings must be made (pages 3-6). Instead, provisions should be to reward law enforcement agencies for making electronic recordings – “the ‘carrot’ of giving a presumption of admissibility to any recorded custodial interview in a pre-trial or post-trial proceeding” (page 6). A proposed model statute is included, which embodies the “carrot” approach (pages 6-8),

followed by an analysis of the proposed statute (pages 8-16). The Conclusion states:

“Recording of custodial interviews by law enforcement officers is desirable objective to encourage. At the same time, however, that objective is better accomplished by providing incentives to law enforcement agents to record such interviews, rather than drawing up a set of rules to punish them for failing to do so by excluding reliable confessions. A proposed model statute creating a presumption of admissibility for recorded statements effectively accomplishes this goal.”

- The NDAA Executive Director has said of electronic recordings, “It’s more compelling, powerful evidence.” B. Warren, *Scripps Howard News*, Jan. 13, 2012.
- *Commentary*: The so-called “carrot” suggested by the NDAA is of little or no real value to prosecutors. In the usual pretrial hearing, the admissibility of the recordings are usually stipulated, thus rendering testimony by a participating officer unnecessary. As the NDAA acknowledges, in trials in criminal cases, consistent with the constitutional right to confront government witnesses – contained in the Sixth Amendment to the federal Constitution, and virtually all state constitutions – there is serious doubt that a statute may authorize introduction of a tape recording without presenting a witness who has personal knowledge of the circumstances under which the recording was made. In any event, the calling of an officer to testify to the foundation for a recording is routine, and normally takes but a few minutes.

The fundamental problem with the NDAA proposal has been explained in the Commentaries to the Guidelines and Best Practices Statements in Part 2. They lack the force of law, contain no requirement that they either be adopted or followed, and provide no sanction for non-compliance. While better than nothing, they are in no way the equivalent of a statewide statutory mandate that contains some provision for enforcement by , for example, a presumption of inadmissibility or a cautionary jury instruction.

Police Executive Research Forum

The Police Executive Research Forum (PERF) is a nonprofit police research organization which provides management services, technical

assistance, and executive-level training to support law enforcement agencies. PERF helps to improve the delivery of police services through the exercise of strong national leadership; public debate of police and criminal justice issues; and research and development policies.

In the PERF publication *Promoting Effective Homicide Investigations* (2007), Chapter 5, entitled *Videotaped Interrogations*, contains an outdated discussion of the pros and cons of departments adopting policies requiring electronic recording of custodial interrogations, which includes the following (pages 76, 78, 80):

“What steps need to be taken to make the decision whether or not to videotape interrogations? Departments should involve all key stakeholders, especially the local prosecutor, and all affected groups (detectives and technological staff) in evaluating and/or developing the protocols.

* * *

“As noted earlier, some judges are becoming unsympathetic to departments that fail to produce a taped interrogation. A firm and rational policy may assist the department in defending its decisions. For departments that choose not to videotape interrogations, it is important that they are able to support their decision.

Conclusion

“Videotaping can be a valuable tool for law enforcement agencies. Many departments do it, but not all use it the same way or in the same situations. Departments that videotape seemingly are satisfied with the benefits they believe are a result of videotaped interrogations. On the other hand, departments that do not videotape, or do so in limited situations, express concern that videotaping may be more of a hindrance than a help. What most departments agree on, however, is the need for empirical data that show the measurable outcomes of videotaping, specifically the impact of confessions, clearance rates, and convictions. Such data would allow departments to obtain the support necessary to implement video interrogations or revise policies accordingly. This research should include pilot studies in law enforcement agencies, to provide settings, procedures, and outcomes.”