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**TO:** Nevada Advisory Commission on the Administration of Justice  
**FROM:** Brett Kandt, Chief Deputy Attorney General  
**DATE:** June 14, 2016  
**RE:** Recording Custodial Interrogations

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The memorandum summarizes state statutes, court rules and case law on the electronic recording of custodial interrogations.<sup>1</sup>

### **Alaska**

In *Stephan v. State*, 711 P.2d 1156 (Alaska 1985) the Alaska Supreme Court held that the Due Process Clause of the Alaska Constitution requires that, if feasible, the advisement of *Miranda* rights and subsequent interviews of criminal suspects during both felony and misdemeanor investigations conducted in places of detention must be electronically recorded. The Alaska court concluded that absent a justifiable excuse, the failure to record a custodial interrogation will render any statement received therein inadmissible during trial.

### **Arkansas**

Supreme Court Rule of Criminal Procedure 4.7. *Recording Custodial Interrogations*. Enacted in 2012 in response to the decision in *Clark v. State*, 287 S.W.3d 567 (Ark. 2008), this rule does not mandate the recording of all custodial statements, but allows the trial court to consider the failure to record a statement in determining the admissibility of the statement.

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<sup>1</sup> The National Conference of Commissioners on Uniform State Laws adopted the Uniform Electronic Recordation of Custodial Interrogations Act in July 2010; however, no state appears to have enacted this model legislation.

## **California**

CAL. Penal Code §859.5 and CAL. Welfare & INSTS. Code §626.8 (2013) require videotaped recording of custodial interrogations of juveniles suspected of homicide. Recording is not required if the prosecution shows by clear and convincing evidence that electronic recording was not feasible owing to exigent circumstances, which shall be recorded in the police report.

## **Connecticut**

Conn. Gen. Stat. §54-1o, effective January 1, 2014, requires audiovisual recording of custodial interrogations in a place of detention of persons under investigation for or accused of a capital or class A or B felony. The state has the burden of proof by a preponderance of the evidence that an exception is applicable. If court finds by a preponderance of the evidence that a person was subjected to a custodial interrogation in violation of the law, any statements are presumed to be inadmissible. This presumption 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.

## **District of Columbia**

D.C. Code Ann. §§5-116.01 – 116.03 (2006) requires that the D.C. Metropolitan Police Department shall electronically record, in their entirety, and to the greatest extent feasible, custodial interrogations of persons suspected of committing a crime of violence when the interrogation takes place in Department interview rooms equipped with electronic recording equipment. Any statement obtained in violation of the statute shall be subject to the rebuttable presumption that it is involuntary, which may be overcome by clear and convincing evidence that the statement was voluntarily given.

## **Illinois**

725 Ill. Comp. Stat. Ann. 5/103–2.1 (statements of adults) and 705 Ill. Comp. Stat. Ann. 405/5-401.5 (statements of minors) were amended effective June 1, 2016, to require that statements of suspects in cases involving homicide, vehicular homicide and various serious felonies made in custodial interrogation shall be presumed to be inadmissible unless an electronic recording was made. The prosecution has the burden of proving the occurrence of an exception by a preponderance of the evidence. If a court finds by a preponderance of the evidence that a person was subjected to a custodial interrogation in violation of the statute, any statements are presumed to be inadmissible. This presumption 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.

## **Indiana**

In 2009 the Indiana Supreme Court adopted Indiana Rule of Evidence 617 - *Unrecorded Statements During Custodial Interrogation*. In any felony criminal prosecution, evidence of a statement made by a person during a custodial interrogation in a place of detention shall not be admitted against the person, unless an audio-video recording of the statement was made, preserved, and is available at trial, except upon clear and convincing proof that an exception is applicable.

## **Maine**

Me. Rev. Stat. Ann. tit. 25, § 2803–B(1)(K) (West 2004) requires all law enforcement agencies to adopt written policies on procedures for the recording of custodial interrogations of persons suspected of specified crimes.

## **Maryland**

MD. Code Ann., Crim. Proc. §2-402 (2008) declares as state policy that law enforcement shall make reasonable efforts to create an audiovisual recording of a custodial interrogation of a criminal suspect in connection with a case involving murder, rape, sexual offense in the first degree, or sexual offense in the second degree, whenever possible. The statute contains no provisions for exceptions to the recording requirement, nor consequences for unexcused failures to record, or for preservation of recordings.

## **Massachusetts**

In *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004), the Supreme Judicial Court held that when the prosecution presents evidence of a defendant's unrecorded custodial interrogation, the defendant is entitled, upon request, to a cautionary instruction.

## **Michigan**

Mich. Comp. Laws §§763.7 – 763.10 (2012) requires audiovisual recordings of the entire interrogations of arrested persons in custodial detention in a place of detention regarding involvement in the commission of “a felony punishable by imprisonment for life or for any term of years, or for a statutory maximum of 20 years or more, or a violation of section 520d of the Michigan penal code” relating to criminal sexual conduct in the third degree. The only exception is if the person objects to recording the interrogation. If the state offers an unrecorded statement, and the court determines that the statement is otherwise admissible, the jury shall be instructed that it may consider the absence of a recording in evaluating the evidence.

### **Minnesota**

In *State v. Scales*, 518 N.W.2d 587 (Minn. 1994), the Minnesota Supreme Court (exercising its supervisory powers) held 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 apply to evidence of statements obtained in violation of these requirements must be decided on a case-by-case basis.

### **Missouri**

Mo. Rev. Stat. § 590.700 (2009) requires the audio or video recording of custodial interrogations of persons suspected of committing or attempting to commit certain listed felony offenses when feasible, with certain exceptions. The offenses are first and second degree murder; first degree assault, elder abuse, robbery; statutory rape, and statutory sodomy; arson; forcible rape and sodomy; kidnapping; and child abuse. Each law enforcement agency shall adopt a written policy to record custodial interrogations. Nothing in the statute shall be construed as a ground to exclude evidence.

### **Montana**

Mont. Code Ann. §§46-4-406 – 411 (2009) requires the audio or video recording of custodial interviews in felony cases with certain exceptions. The recording must contain an advisement of *Miranda* rights, a recording of the interview, and a conclusion of the interview. If the defendant objects to the introduction of evidence due to a failure to comply with the statute, and the court finds a preponderance of the evidence that the statements are admissible, the judge shall provide the jury with a cautionary instruction.

### **Nebraska**

Neb. Rev. Stat. §§29-4501-08 (2008) requires, with certain exceptions, the audio or video recording of custodial interviews in a place of detention of suspects relating to crimes resulting in death, or felonies involving sexual assault, kidnapping, child abuse or strangulation, and statements regarding the suspect's rights or the waiver of those rights. The trial court shall instruct the jury that they may draw an adverse inference for a failure to comply, unless the prosecution proves by a preponderance of the evidence that there is a reasonable exception for there not being a recording.

### **New Hampshire**

In *State v. Barnett*, 789 A.2d 629 (N.H. 2002), the New Hampshire Supreme Court (exercising its supervisory powers) held that a recorded custodial interrogation will not be admitted into evidence unless the statement was recorded in its entirety. The recording is not required to include the administration of a defendant's *Miranda* rights or the defendant's subsequent waiver of those rights. Where the incomplete recording of an interrogation results in exclusion, evidence gathered during the interrogation may still be admitted in alternative forms, subject to the usual rules of evidence.

### **New Jersey**

In 2006 the New Jersey Supreme Court in 2006 adopted Rule 3:17, *Electronic Recordation*, requiring electronic recording of a custodial interrogation being conducted in a place of detention for any offense. A failure to comply with the statute 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 (the rule includes a model jury charge).

### **New Mexico**

N.M. Stat. Ann. § 29-1-16 (Michie 2005) requires the recording of custodial interrogations of all felony suspects in their entirety, by audio or visual or both, if available. There are exceptions for good cause if the interrogating officer makes a contemporaneous record. Nothing in the statute shall be construed as a ground to exclude evidence.

### **North Carolina**

N.C. Gen. Stat. §15A-211 was enacted in 2007 to required recording of custodial interviews of homicide suspects and amended in 2011 to expand the recording requirement to all custodial interviews of juveniles, and suspects in "Class A, B1, or B2 felony, and any Class C felony of rape, sex offense, or assault with a deadly weapon with intent to kill inflicting serious injury." The state may establish through clear and convincing evidence that an unrecorded statement was both voluntary and reliable, and that law enforcement officers had good cause for failing to electronically record the interrogation in its entirety.

### **Ohio**

Ohio Rev. Code Ann. §2933.81 (2010) authorizes but does not require audio and visual recording of custodial interrogations. Statements made by a person suspected of a felony described in the statute during a custodial interview in a place of detention are presumed voluntary if the statements are electronically recorded. Nothing in the statute shall be construed as a ground to exclude evidence.

## **Oregon**

Or. Rev. Stat. §133.400 (2010) requires electronic recording of custodial interviews of suspects of aggravated homicides and offenses requiring imposition of mandatory minimum sentences, or in prosecutions of 15-17 year-old defendants as adults. If the state offers an unrecorded statement, and the state is unable to demonstrate by a preponderance of the evidence that an exception applies, upon the request of the defendant, the court shall instruct the jury regarding the legal requirements and the superior reliability of electronic recordings.

## **Texas**

Tex. Code Crim. Proc. Ann. art. 38.22, § 3 (West 1999) provides that no statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding, unless an electronic recording is made of the *Miranda* warning and waiver together with the entire statement.

## **Utah**

The Utah Supreme Court adopted Rule of Evidence 616. *Statements Made During Custodial Interrogations* effective January 1, 2016. With certain exceptions, evidence of a statement made by the defendant during a custodial interrogation in a place of detention shall not be admitted against the defendant in a felony prosecution, unless an audio or audio-video recording of the statement was made and is available at trial. If the court admits into evidence a statement made during a custodial interrogation that was not electronically recorded under an exception, the court, upon the request of the defendant, may give cautionary instructions to the jury concerning the unrecorded statement.

## **Vermont**

Vt. Stat. Ann. tit. 13, §5581 (2014) requires that an audio and video recording be made of the complete interrogation of persons in custody in a place of detention during the investigation of a homicide or sexual assault. Law enforcement shall strive to simultaneously record both the interrogator and the person being interrogated. If the prosecution does not make a recording as required and cannot prove by a preponderance of the evidence that one of the exceptions applies, the evidence is still admissible, but the court shall provide cautionary instructions to the jury regarding the failure to record the interrogation.

## **Wisconsin**

In *State v. Jerrell*, 699 N.W.2d 110 (Wis. 2005), the Wisconsin Supreme Court (exercising its supervisory powers) held that all custodial interrogations of juveniles must be electronically recorded where feasible, and without exception when questioning occurs at a place of detention. In response to *Jerrell*, Wis. Stat. § 968.073 (West 2005) (persons committing felonies) and Wis. Stat. § 938.195 (West 2005) (juveniles), were enacted to require that law enforcement agencies electronically record custodial interrogations of felony suspects regardless of location, of juveniles if they are conducted at a place of detention, and of juveniles at all other locations if feasible.

### **Exceptions**

The most common statutory exceptions to custodial interrogation recording requirements are: if the suspect requests that the interrogation not be recorded; the interrogation occurs outside the state; exigent public safety circumstances prevent recording; or the recording equipment fails.

Courts in numerous other states, while declining to mandate the recording of custodial interrogations, have noted the strong policy considerations that favor recording as a standard law enforcement practice. Recording can reduce the time spent in court resolving disputes over whether the defendant properly received *Miranda* warnings, what occurred during an interrogation, and the actual content of a statement. See *State v. Jones*, 49 P.3d 273, 279 (Ariz. 2002); *People v. Raibon*, 843 P.2d 46, 49 (Colo. 1992); *State v. Sawyer*, 561 So. 2d 278, 280 (Fla. Dist. Ct. App. 1990); *State v. Kekona*, 886 P.2d 740, 746 (Haw. 1994); *State v. Hajtic*, 724 N.W.2d 449, 454 (Iowa 2006); *Williams v. State*, 522 So.2d 201, 208 (Miss. 1988); *Jimenez v. State*, 775 P.2d 694, 696 (Nev. 1989); *State v. Godsey*, 60 S.W.3d 759, 772 (Tenn. 2001); *State v. Kilmer*, 439 S.E.2d 881, 893 (W. Va. 1993); *Lara v. State*, 25 P.3d 507, 511 (Wyo. 2001).

### **Recording as a Standard Policy**

Most law enforcement agencies, including those in Nevada, have adopted policies and procedures governing the recording of custodial interrogations, even in the absence of a legal mandate. On May 12, 2014, the U.S. Department of Justice adopted a new policy establishing “a presumption that the custodial statement of an individual in a place of detention with suitable recording equipment, following arrest but prior to initial appearance, will be electronically recorded” (subject to certain exceptions).