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# THE TIME HAS COME FOR LAW ENFORCEMENT RECORDINGS OF CUSTODIAL INTERVIEWS, START TO FINISH

THOMAS P. SULLIVAN\*

## INTRODUCTION

Throughout the United States, more and more law enforcement officials are coming to realize the tremendous benefits they receive when the questioning of suspects in police facilities is recorded from beginning to end, starting with the *Miranda* warnings and continuing until the interview is completely finished. Recordings put an end to a host of problems for detectives: having to scribble notes during interviews and later type reports; straining on the witness stand weeks and months later, trying to describe what happened behind closed doors at the station; becoming embroiled in courtroom disputes about what was said and done during custodial interrogations, and about whether suspects' statements were voluntary; and having to defend against charges of use of unlawful tactics or misstating what occurred.<sup>1</sup> Recordings of interviews *Miranda* to the end will also improve on non-recorded questioning followed by recorded final statements, which leave detectives open to charges that they improperly induced confessions dur-

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<sup>1</sup> See Thomas P. Sullivan, Northwestern University Center on Wrongful Convictions Special Report, *Police Experiences with Recording Custodial Interrogations*, 1, 2-3 (2004), available at <http://www.jenner.com/policestudy> (last visited Aug. 1, 2006).

ing the preliminary non-recorded sessions.

Recording complete custodial interrogations creates an incontestable, real-time record that the lawyers, judges and juries may evaluate as though it took place right in front of them.

#### I. THE TREND TOWARD REQUIRING CUSTODIAL SUSPECT RECORDINGS IN FELONY INVESTIGATIONS

Reform to the system of station house questioning has been a long time coming, but is clearly gaining momentum. In 1985 the Supreme Court of Alaska,<sup>2</sup> and in 1994 the Supreme Court of Minnesota,<sup>3</sup> ordered statewide recordings of custodial interviews. As we entered the Twenty-First Century, no other state reviewing court had followed the lead of the Alaska and Minnesota courts, nor had any state legislature enacted a law requiring recordings of custodial interrogations. That inertia was ended by the Illinois General Assembly in 2003, following a series of exonerations of defendants who had been given death sentences, and the recommendation of a special Governor's Commission,<sup>4</sup> on which I served as Co-Chair: a statute was enacted requiring electronic recording of questioning of suspects in homicide investigations.<sup>5</sup> Other legislatures have followed suit: mandatory recording statutes have been enacted in Maine (2004),<sup>6</sup> New Mexico (2006),<sup>7</sup> Wisconsin (2005),<sup>8</sup> and the District of Columbia (2005).<sup>9</sup> Similar statutes have been introduced in many other state legislatures.

The highest courts of two other states have also acted recently. The Supreme Judicial Court of Massachusetts held in 2004 that cautionary jury instructions must be given about

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

<sup>3</sup> *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994).

<sup>4</sup> ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT, Recommendation 4 (Apr. 15, 2002) [hereinafter ILLINOIS COMMISSION].

<sup>5</sup> 725 ILL. COMP. STAT. ANN., § 5/103-2.1 (West 2006) (adults); 705 ILL. COMP. STAT. ANN., § 405/5-401.5 (West 2006) (minors). The Illinois Eavesdropping Act was amended to permit police recordings to be made covertly. 720 ILL. COMP. STAT. ANN., § 5/14-3(k) (West 2006).

<sup>6</sup> ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (West 2006).

<sup>7</sup> N.M. STAT. ANN. § 29-1-16 (West 2006).

<sup>8</sup> WIS. STAT. §§ 968.073, 972.115 (2005). This statute was enacted shortly after the Supreme Court of Wisconsin held that custodial questioning of juveniles in detention facilities must be electronically recorded. *In re Jerrell*, 699 N.W.2d 110, 123 (Wis. 2005).

<sup>9</sup> D.C. CODE §§ 5-116.01-03 (2005).

non-recorded custodial statements offered into evidence by the prosecution,<sup>10</sup> causing many departments to begin recording in order to avoid the impact of the instructions. The New Jersey Supreme Court adopted a rule in 2005 mandating recordings statewide and cautionary jury instructions about non-recorded statements.<sup>11</sup>

## II. OUR INQUIRIES INTO POLICE EXPERIENCES WITH RECORDINGS

There is an interesting irony at play here. Historically, the proponents of recording custodial interrogations have been members of the criminal defense bar who warn that recordings of custodial interviews are needed to dissuade detectives from coercing confessions and/or misstating what the suspects said and did.<sup>12</sup> The usual opponents are law enforcement officers who insist they do not use improper tactics and do not misstate what occurred, and argue that there is no need to require them to use this expensive, cumbersome method of recording custodial interviews. When my associates and I have spoken with police and prosecutors who have not tried recording interviews, they often recount a litany of reasons why recording custodial interrogations is a worthless idea that would seriously impair law enforcement efforts to ferret out the truth and solve crimes.

Which brings me to the point of this article. Back in 2003, after the Illinois Governor's Commission's report was published but before the Illinois legislature adopted the mandatory recording statute, several colleagues and I decided to try to learn the experiences of officers who, although not required to record their custodial stationhouse questioning, do so on a voluntary basis.<sup>13</sup> We started making calls to police and sheriff's departments and state agencies we had reason to believe recorded custodial questioning from *Miranda* to the end. We began with a list of ten, and when we found one that recorded we asked the

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<sup>10</sup> *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004).

<sup>11</sup> SUP. CT. R. 3.17 (2005). This rule resulted from recommendations of a Special Committee appointed by the New Jersey Supreme Court. See *State v. Cook*, 847 A.2d 530, 533, 546-547 (N.J. 2004). See also *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2002) (holding that if an electronically recorded final statement is offered into evidence, it is admissible only if the entire post-*Miranda* interrogation session was recorded).

<sup>12</sup> See Sullivan, *Police Experiences with Recording Custodial Interrogations*, *supra* note 1, at 2.

<sup>13</sup> See *id.* at 2-3.

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officer to suggest names of others that might also record. Our inquiries were thus not made through normal survey techniques; rather, we followed leads garnered through the calls made to departments we were advised might be recording full interviews.

As this article went to press, we had identified over 450 police and sheriff's departments in small, medium and large communities from almost every state (many in California) that customarily record a majority of their custodial interrogations – by audio, video or both – in a defined class of felony investigations, for example, homicides, crimes of violence to the person, major/serious felonies, and the like. Our current list is attached as Appendix 1 to this article.<sup>14</sup> We learn of more and more each week as our calls continue, and we are confident there are many other recording departments we have not yet identified.<sup>15</sup>

### III. OUR FINDINGS

After speaking with many detectives and state prosecutors, and reviewing the case law on the subject of recording, here is what we have found. Of the hundreds of experienced detectives to whom we have spoken who have given custodial recording a fair try, we have yet to speak with one who wants to revert to non-recording. They enthusiastically endorse the practice. The words they use vary, but their reasons are so repetitious they seem rehearsed. Over and over we have been told that recordings protect officers from claims of misconduct, and practically eliminate motions to suppress based on alleged police use of overbearing, unlawful tactics; remove the need for testimony about what was said and done during interviews; allow officers to concentrate on the suspects' responses without the distraction of note taking; permit fellow officers to view interviews by remote hookup and make suggestions to those conducting the

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<sup>14</sup> The list identifies departments that have advised us they record a majority of their interrogations of suspects held in custody in police facilities, from the *Miranda* warnings until the end, in a defined kind of felony investigation. After each call, I send a letter, with a copy of a memorandum summarizing the telephone conversation, to the officer to whom my associates or I spoke, with a request for written confirmation that our summary is accurate, or corrections to make it accurate.

<sup>15</sup> Readers who know of additional departments that record are requested to send contact information to [tsullivan@jenner.com](mailto:tsullivan@jenner.com).

interview; disclose previously overlooked clues and leads during later viewings; protect suspects who are innocent; make strong, often invincible cases against guilty suspects who confess or make guilty admissions by act or conduct; increase guilty pleas; serve as a training tool for the officers conducting interviews, as well as for officers aspiring to become detectives; and provide protection against civil damage awards based on police misconduct.

We have also spoken to many state prosecutors in communities where recordings are made. They too are outspoken supporters of custodial recordings. They say that proof of confessions or admissions, or evasions and signs of guilty conscience, is immeasurably stronger when established by electronic recordings, rather than by police testimony based on notes, typewritten reports, and testimonial descriptions. Guilty pleas often result, and prosecutors' bargaining power with respect to dispositions is increased.

As illustrated by the cases referred to in the footnote,<sup>16</sup> trial and reviewing court judges much prefer having electronic records of custodial interviews, which makes it unnecessary for them to listen to (trial courts) or read and evaluate (reviewing courts) disputed testimony about what went on in station interview rooms.

In the end, the beneficiaries of recording custodial interrogations are (1) officers who conduct interviews in a lawful manner, (2) suspects who are not involved in the crime under investigation, (3) the interests of efficient, accurate, fair law enforcement, and (4) law enforcement budgets. The major "detriment" falls upon (1) guilty suspects who, having been given *Miranda* warnings, waive their rights and voluntarily engage in recorded interviews, and then confess, make damaging admissions, or engage in conduct reflecting consciousness of guilt, and (2) the few errant officers who use improper interrogation tactics and/or misstate what occurred during the session.

The criminal justice system as a whole benefits because rightful convictions increase, the guilty are imprisoned, and the

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<sup>16</sup> See, e.g., *In re Jerrell*, 699 N.W.2d 110 (Wis. 2005); *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004); *State v. Cook*, 847 A.2d 530 (N.J. 2004); *State v. Barnett*, 789 A.2d 629 (N.H. 2002); *State v. Scales*, 518 N.W.2d 587 (Minn. 1994); *Stephan v. State*, 711 P.2d 1156 (Alaska 1985); see also Thomas P. Sullivan *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1130, n.6, 1138-39 (2005).

risk of wrongful convictions decreases.

#### IV. THE COMMON OBJECTIONS TO RECORDINGS

We have become all too well aware of the objections commonly made by those in law enforcement *who have not attempted custodial recordings*: suspects will “clam up” and refuse to speak, resulting in loss of confessions and admissions; judges and juries will be repulsed by certain permissible interrogation tactics (for example, falsely asserting that incriminating evidence of the suspects’ guilt has been obtained, shouting, using street talk, blaming the victim); recording devices may malfunction or run out of tape; and costs will be prohibitive. I have explained elsewhere why none of these objections has proven to be a valid reason for not recording.<sup>17</sup> Indeed, only a handful of the officers in the recording departments we have spoken with have even mentioned these kinds of problems, and none said they were of major significance.

#### V. CONCLUSION

In this electronic age, the time has come for all federal, state and local law enforcement agencies to take advantage of the benefits to be reaped from recording custodial interviews. Federal investigative agencies, which often lead the way with new techniques and devices, are sadly remiss when it comes to recording custodial interviews. Personnel of these agencies from top to bottom are well aware of marvelous advances recently made in electronic equipment. Squad cars often carry recording devices. Public and private facilities, including many police buildings, require entrants to submit to electronic searches. Officers regularly use recording devices for audio and video taping family events. Their children use electronics both in school and at home.

Law enforcement officials throughout the United States should put aside fanciful, hypothetical objections to this major improvement in the way they do their jobs. Members of our state and federal legislatures should give serious consideration to legislation requiring that custodial interrogations be re-

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<sup>17</sup> Sullivan, *Police Experiences with Recording Custodial Interrogations*, *supra* note 1, at 19-25; Vol. XIX *The Chief of Police*, No. 6 (Nov.-Dec. 2005); and see Sullivan, *Electronic Recording of Custodial Interrogations*, *supra* note 16, at 17-19.

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corded,<sup>18</sup> thus bringing their law enforcement personnel into line with best practices, which will result in a savings of public funds and greatly assist in accurate, efficient law enforcement.

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<sup>18</sup> A model electronic recording statute is attached as Appendix 2.



## APPENDIX 1

VI. DEPARTMENTS THAT CURRENTLY RECORD A MAJORITY OF  
CUSTODIAL INTERROGATIONS

*PD stands for Police Department. CS stands for County Sheriff.*

<b>Alabama</b> Mobile CS Mobile PD Prichard PD	Prescott PD Scottsdale PD Sierra Vista PD Somerton PD South Tucson PD Surprise PD Tempe PD Tucson PD Yavapai CS Yuma CS Yuma PD	El Cajon PD El Dorado CS Escondido PD Folsom PD Grass Valley PD Hayward PD LaMesa PD Livermore PD Oceanside PD Orange CO Fire Authority Orange CS Placer CS Rocklin PD Roseville PD Sacramento CS Sacramento PD San Bernardino CS San Diego PD San Francisco PD San Joaquin CS San Jose PD San Leandro PD San Luis PD Santa Clara CS Santa Clara PD Santa Cruz PD Stockton PD
<b>Alaska</b> All departments – Supreme Court ruling <sup>19</sup>	<b>Arkansas</b> Fayetteville FD Fayetteville PD 14th Judicial District Drug Task Force State Police Washington CS Van Buren PD	
<b>Arizona</b> Casa Grande PD Chandler PD Coconino CS El Mirage PD Flagstaff PD Gila CS Gilbert PD Glendale PD Marana PD Maricopa CS Mesa PD Oro Valley PD Payson PD Peoria PD Phoenix PD Pima CS Pinal CS	<b>California</b> Alameda CS Auburn PD Butte CS Carlsbad PD Contra Costa CS	

<sup>19</sup> *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985).

Union City PD Ventura CS West Sacramento PD Woodland PD Yolo CS  <b>Colorado</b> Arvada PD Aurora PD Boulder PD Brighton PD Broomfield PD Colorado Springs PD Commerce City PD Cortez PD Denver PD El Paso CS Ft. Collins PD Lakewood PD Larimer CS Logan CS Loveland PD Montezuma CS Sterling PD Thornton PD  <b>Connecticut</b> Bloomfield PD Cheshire PD	<b>Delaware</b> New Castle County PD New Castle City PD State Police  <b>District of            Columbia</b> All departments – statute <sup>20</sup>  <b>Florida</b> Broward CS Cape Coral PD Collier CS Coral Springs PD Daytona Beach PD Ft. Lauderdale PD Ft. Myers PD Hallandale Beach PD Hialeah PD Hollywood PD Kissimmee PD Lee CS Manatee CS Margate PD Miami PD Mount Dora PD Orange CS Osceola CS Palatka PD Pembroke Pines PD	Pinellas CS Port Orange PD St. Petersburg PD  <b>Georgia</b> Atlanta PD Cobb County PD DeKalb County PD Fulton County PD Gwinnett County PD Macon PD Savannah- Chatham PD Warner Robins PD  <b>Hawaii</b> Honolulu PD  <b>Idaho</b> Ada CS Blaine CS Boise City PD Bonneville CS Caldwell PD Canyon CS Cassia CS Coeur d' Alene PD Dept. Fish & Games Garden City PD Gooding CS Gooding PD Hailey PD Idaho Falls PD
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<sup>20</sup> D.C. CODE §§ 5-116.01-03 (2005).

Jerome CS Jerome PD Ketchum PD Lincoln CS Meridian PD Nampa PD Pocatello PD Post Falls PD State Police Twin Falls PD	Clark CS Clarksville PD Dyer PD Elkhart PD Fishers PD Floyd CS Fort Wayne PD Greensburg PD Hamilton CS Hancock CS Hartford PD Jeffersonville PD Johnson CS Montpelier PD Noblesville PD Schererville PD Sheridan PD Steuben CS State Police Westfield PD	Fayette CS Fayette County PD Iowa City PD Marshalltown PD Muscatine PD Nevada PD Parkersburg PD Polk CS Sioux City PD Vinton PD
<b>Illinois</b> All departments – homicides – statute <sup>21</sup> Other felonies – Bloomington PD Dixon PD DuPage CS East St. Louis PD Galena PD Kankakee CS Kankakee PD Naperville PD O'Fallon PD Rockton PD Winnebago CS	<b>Iowa</b> Altoona PD Ames PD Ankeny PD Arnolds Park PD Benton CS Bettendorf PD Davenport PD Dept. of Public Safety, Crim. Intgns. Div. Des Moines PD	<b>Kansas</b> Liberal PD Ottawa PD Sedgwick CS Wichita PD  <b>Kentucky</b> Elizabethtown PD Hardin CS Louisville Metro PD Louisville PD Oldham CS  <b>Louisiana</b> Lafayette City PD Lake Charles PD Oak Grove PD Plaquemines Parish CS St. Tammany Parish CS

<sup>21</sup> 705 ILL. COMP. STAT. ANN. § 405/5-401.5 (West 2006); 725 ILL. COMP. STAT. ANN. § 5/103-2.1 (West 2006); 720 ILL. COMP. STAT. ANN. § 5/14-3(k) (West 2006).

<p><b>Maine</b> All departments – statute<sup>22</sup></p> <p><b>Maryland</b> Harford CS Montgomery PD Prince George’s County PD</p> <p><b>Massachusetts</b><sup>23</sup> Boston PD Bourne PD Brewster PD Cambridge Chatham PD Dennis PD Edgartown PD Fall River PD Oak Bluffs PD Orleans PD Revere Fire Dept. Somerset PD Trooro PD Yarmouth PD</p> <p><b>Michigan</b> Auburn Hills PD Benzie CS Bloomfield Hill Public Safety Detroit Gladwin PD Isabella CS</p>	<p>Kentwood PD Lake CS Ludington PD Manistee CS Mason CS Mt. Pleasant PD Onaway PD Scottville PD State Police Troy PD Waterford PD West Branch PD</p> <p><b>Minnesota</b> All departments – Supreme Court ruling<sup>24</sup></p> <p><b>Mississippi</b> Biloxi PD Cleveland PD Gulfport PD Harrison CS Jackson CS</p> <p><b>Missouri</b> Lake Area Narcotics Enf. Group Platte CS St. Louis County Major Case Squad St. Louis Co. PD</p>	<p>Montana Billings PD Bozeman PD Butte/Silverbow LED Cascade CS Flathead CS Gallatin CS Great Falls PD Helena PD Kalispell PD Lewis &amp; Clark CS Missoula PD Missoula CS</p> <p><b>Nebraska</b> Beatrice PD Buffalo CS Cozad PD Dawson CS Douglas CS Hall CS Holdredge PD Kearney PD Lancaster CS Lincoln CS Lincoln PD Madison CS Norfolk PD North Platte PD Omaha PD O’Neill PD Sarpy CS State Patrol</p>
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<sup>22</sup> ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (West 2006).

<sup>23</sup> Owing to the ruling of the Supreme Judicial Court of Massachusetts in *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004), many law enforcement agencies have begun to record custodial felony interrogations.

<sup>24</sup> *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994).

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<p><b>Nevada</b> Boulder City PD Carlin PD Dept. Public Safety Douglas CS Elko CS Elko PD Henderson PD Lander CS Las Vegas     Metro PD North Las     Vegas PD Reno PD Sparks PD Washoe CS Wells PD Yerington PD</p> <p><b>New Hampshire</b><sup>25</sup> Carroll CS Concord PD Conway PD Enfield PD Keene PD Laconia PD Lebanon PD Nashua PD Plymouth PD Portsmouth PD State Police</p>	<p><b>New Jersey</b> All departments – Supreme Ct. Rule:     homicides 1/06,     other felonies     1/07<sup>26</sup></p> <p><b>New Mexico</b> All departments – statute<sup>27</sup></p> <p><b>New York</b> Binghamton PD Broome CS Cayuga Heights PD Delaware CS Deposit PD Endicott PD State Police –     Binghamton     Ithaca     Oneonta     Sidney Tompkins CS Vestal PD</p> <p><b>North Carolina</b> Concord PD Wilmington PD</p> <p><b>Ohio</b> Akron PD Board of Pharmacy Brown CS Columbus PD Dawson CS</p>	<p>Garfield Hts. PD Grandview Heights     PD Hartford PD Hudson PD Millersburg PD Ohio State     Univ. PD Reynoldsburg PD Upper     Arlington PD Wapakoneta PD Westerville PD Westlake PD Worthington PD</p> <p><b>Oklahoma</b> Moore PD Norman PD Oklahoma CS Tecumseh PD</p> <p><b>Oregon</b> Bend PD Clackamas CS Eugene PD Lincoln City PD Medford PD Salem PD State Police,     Springfield Warrenton PD Yamhill CS</p>
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<sup>25</sup> In *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2002), the Supreme Court held that, if an electronically recorded final statement is offered into evidence, it is admissible only if the entire post-*Miranda* interrogation session was recorded.

<sup>26</sup> SUP. CT. R. 3.17 (2005).

<sup>27</sup> N.M. STAT. ANN. § 29-1-16 (West 2006).

<p><b>South Carolina</b> Aiken CS Aiken Dept. of Public Safety N. Augusta Dept. of Public Safety Savannah River Site Law Enf.</p> <p><b>South Dakota</b> Aberdeen PD Brown CS Clay CS Lincoln CS Sioux Falls PD State Div. of Crim. Investigations Vermillion PD</p> <p><b>Tennessee</b> Blount CS Bradley CS Brentwood PD Chattanooga PD Cleveland PD Goodlettsville PD Hamilton CS Hendersonville PD Loudon CS Montgomery CS Murfreesboro PD Nashville PD</p>	<p><b>Texas</b><sup>28</sup> Austin PD Burleson PD Cedar Park PD Cleburne PD Collin CS Corpus Christi PD Dallas PD Frisco PD Georgetown PD Harris CS Houston PD Johnson CS Leander PD Plano PD Randall CS Richardson PD Round Rock PD San Antonio PD Taylor PD Webster PD Williamson CS</p> <p><b>Utah</b> Salt Lake City PD Salt Lake CS Utah CS</p> <p><b>Vermont</b> Norwich PD</p>	<p><b>Washington</b> Adams CS Bellevue PD Bothell PD Buckley PD Chehalis CS Columbia CS Ellesburg PD Federal Way PD King CS King County Fire/Arson Investigation Unit Kittitas CS Lewis CS Mercer Island PD Mount Vernon PD Pierce CS Snohomish CS State Patrol Thurston CS U. WA PD Yakima CS</p> <p><b>Wisconsin</b> All departments – statute (juveniles 1/1/06, adults 1/1/07)<sup>29</sup></p>
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<sup>28</sup> The Texas Code of Criminal Procedure provides that a defendant's oral statement is inadmissible unless recorded, but does not require that questioning preceding the final statement be recorded, and does not deal with suspects' written statements. TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2004); *see also* *Rae v. State*, No. 01-98-00283-CR, 2001 WL 125977, at 3 (Tex. App. 2001) (not designated for publication); *Franks v. State*, 712 S.W.2d 858, 860 (Tex. App. 1986).

<sup>29</sup> WIS. STAT. §§ 968.073, 972.115 (2005).

APPENDIX 2

VII. MODEL BILL FOR ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS<sup>30</sup>

Be it enacted by [insert name of legislature]:

Section 1. Definitions.

(a) "Custodial Interrogation" means an interview which occurs while a person is in custody in a Place of Detention, involving a law enforcement officer's questioning that is reasonably likely to elicit incriminating responses.

(b) "Place of Detention" means a jail, police or sheriff's station, holding cell, correctional or detention facility, or other place where persons are held in connection with juvenile or criminal charges.<sup>31</sup>

(c) "Electronic Recording" or "Electronically Recorded" means an audio, video or digital recording that is an authentic, accurate, unaltered record of a Custodial Interrogation, beginning with a law enforcement officer's advice of the person's constitutional rights and ending when the interview has completely finished.

(d) "Statement" means an oral, written, sign language or nonverbal communication.

Section 2. Recordings Required. All Statements made by a person during a Custodial Interrogation relating to a crime described in the following sections of the [insert jurisdiction] Criminal and Juvenile Codes shall be Electronically Recorded: [insert section numbers].

Section 3. Presumption of Inadmissibility. Except as provided in Sections 4 and 5, all Statements made by a person during a Custodial Interrogation that is not Electronically Re-

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<sup>30</sup> Reprinted by special permission of Northwestern University School of Law, *The Journal of Criminal Law and Criminology*.

<sup>31</sup> In the event legislators wish to expand the reach of this bill to include custodial interrogations of persons who are in custody outside a "Place of Detention," delete Section 1(b), and delete the words "in a Place of Detention" from Section 1(a). Consideration should be given to the addition of exception for excited utterances.

corded, and all Statements made thereafter by the person during Custodial Interrogations, including but not limited to Statements that are Electronically Recorded, shall be presumed inadmissible as evidence against the person in any juvenile or criminal proceeding brought against the person.

Section 4. Overcoming the Presumption of Inadmissibility. The presumption of inadmissibility of Statements provided in Section 3 may be overcome, and Statements that were not Electronically Recorded may be admitted into evidence in a juvenile or criminal proceeding brought against the person, if the court finds:

- (a) That the Statements are admissible under applicable rules of evidence; and
- (b) That the Statements are proven [insert applicable burden of proof] to have been made voluntarily, and are reliable; and
- (c) That, if feasible to do so, law enforcement personnel made a contemporaneous record of the reason for not making an Electronic Recording of the Statements; and
- (d) That it is proven [insert applicable burden of proof] that one or more of the following circumstances existed at the time of the Custodial Interrogation:
  - (i) The questions put by law enforcement personnel, and the person's responsive Statements, were a part of the routine processing or "booking" of the person; or
  - (ii) Before or during a Custodial Interrogation, the person agreed to respond to the officer's questions only if his or her Statements were not Electronically Recorded; or
  - (iii) The law enforcement officers in good faith failed to make an Electronic Recording of the Custodial Interrogation because the officers inadvertently failed to operate the recording equipment properly, or without the officers' knowledge the recording equipment malfunctioned or stopped operating; or
  - (iv) The Custodial Interrogation took place in another jurisdiction and was conducted by officials of that jurisdiction in compliance with the law of that jurisdiction; or
  - (v) The law enforcement officers conducting or contemporaneously observing the Custodial Interrogation reasonably believed that the making of an Electronic Recording would jeopardize the safety of the person, a law enforcement officer, another person, or the identity of a confidential informant; or
  - (vi) The law enforcement officers conducting or contem-



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poraneously observing the Custodial Interrogation reasonably believed that the crime for which the person was taken into custody, or was being investigated or questioned, was not among those listed in Section 2; or  
(vii) Exigent circumstances existed which prevented the making of, or rendered it not feasible to make, an Electronic Recording of the Custodial Interrogation.

Section 5. Exceptions. Statements, whether or not Electronically Recorded, which are admissible under applicable rules of evidence, and are proven [insert applicable burden of proof] to have been made by the person voluntarily, and are reliable, may be admitted into evidence in a juvenile or criminal proceeding brought against the person if the court finds:

- (a) The Statements are offered as evidence solely to impeach or rebut the person's testimony, and not as substantive evidence; or
- (b) The Custodial Interrogation occurred before a grand jury or court; or
- (c) The person agreed to participate in a Custodial Interrogation after having consulted with his or her lawyer.

Section 6. Handling and Preservation of Electronic Recordings.

- (a) Every Electronic Recording of a Custodial Interrogation shall be clearly identified and catalogued by law enforcement personnel.
- (b) If a juvenile or criminal proceeding is brought against a person who was the subject of an Electronically Recorded Custodial Interrogation, the Electronic Recording shall be preserved by law enforcement personnel until all appeals, post-conviction and habeas corpus proceedings are final and concluded, or the time within which they must be brought has expired.
- (c) If no juvenile or criminal proceeding is brought against a person who has been the subject of an Electronically Recorded Custodial Interrogation, the related Electronic Recording shall be preserved by law enforcement personnel until all applicable statutes of limitations bar prosecution of the person.

Section 7. Effective Date: This Act shall take effect on [insert date].