



Ohio Prosecuting Attorneys Association

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House Bill 277
Opponent Testimony
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Chair Lang, Vice-Chair Plummer, Ranking Member Leland and members of the House Criminal Justice Committee, thank you for the opportunity to provide opponent testimony on House Bill 277.

As an initial matter, I want to thank the bill sponsors, Rep. Plummer and Rep. West, as well as Rep. Seitz for working with us to fix several issues that largely have addressed through the substitute bill that is now pending before this committee. Our remaining concerns relate primarily to portions of the bill that can and should be changed rather than to the underlying policy of requiring a recording of custodial interrogations in these cases. I do think it is important to point out though that a recording, or a lack thereof, is not in itself related to voluntariness or to credibility. A statement may have been completely voluntary and one hundred percent truthful and, despite that, this bill would require a cautionary instruction to the jury if the statement was not recorded and one of the six narrow exceptions is not met. Questions of voluntariness are best left to judges and questions of credibility to juries without blanket rules that are disconnected from individual facts and circumstances. They are questions that are properly resolved through motions to suppress, jury trials, and appellate action. That said, two additional changes to this bill would relieve our opposition.

Before I address our proposed changes, I first would like to respond to arguments that the Supreme Court of Ohio decision in *State v. Barker*, 149 Ohio St. 3d, somehow necessitates a new law on recordation of custodial interrogations. The *Barker* court held only that R.C. 2933.81(B) is unconstitutional as applied to juveniles because it places the burden on the defendant to prove involuntariness. The court said nothing about the constitutionality of the rest of the statute, nor the need for a larger revamp of our recording law. The *Barker* decision could be addressed by a simple removal from division (B) of the statute of the presumption of voluntariness for recorded statements.

House Bill 277 provides a narrow set of exceptions to the recording requirement that would give Ohio one of the strictest recording requirements in the country. I have attached to this testimony two documents that I encourage you to review. The first is a list of other states that have a recording requirement along with the exceptions that exist in those states. As proponents of this legislation noted, more than half of the states impose some sort of recording requirement during custodial interrogation. Most of those states provide an exception when there was good cause not to record, when recording was not practical, or when recording was not feasible. The second attachment is the recording policy adopted by the United States Department of Justice. Proponents last week cited this policy in support of House Bill 277. The USDOJ policy, however, provides for exceptions when recording is "not reasonably practicable" or when there is an "articulable law

enforcement purpose” for not recording. Proponents also noted that the International Association of Chiefs of Police consider the recording of interrogations to be one of the best juvenile interrogation practices for law enforcement agencies, and the IACP model policy has been promoted in support of this legislation. The IACP model policy provides that “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.”

We urge this committee to include an exception for “good cause” or the “interests of justice.” This would align the recording requirement in HB 277 with the policies to in most states, with the USDOJ, and with the IACP model policy. I have heard it suggested that such an exception would swallow the rule. It most certainly would not. It merely allows the prosecutor, under unforeseen circumstances or otherwise articulable circumstances, to argue to the court that there was a good reason for the failure to record. The decision as to whether there in fact was good reason for the failure still rests with the judge as a neutral arbiter. To require a cautionary jury instruction when there was no wrongdoing does not further the purpose of the rule and more importantly given the gravity of these cases could lead to a serious miscarriage of justice if a person who made a statement freely and truthfully were to go free.

Finally, the bill provides that, if a law enforcement agency fails to electronically record an interrogation, the court may, “but is not required to,” still admit evidence from the interrogation. The phrase “but is not required to” should be removed as both duplicative and confusing. Saying that the court may still admit the evidence already makes the decision permissive. There is no need to repeat that permissiveness by saying that they are also not required to admit the evidence. The phrase also leads to a confusion when read in conjunction with language in division (D) that provides that the failure to record shall not be the sole basis for excluding or suppressing a statement. The simple fact of the matter is that the court should be required to admit an otherwise probative statement unless there is a reason to suppress or exclude that statement. The phrase “but is not required to” confuses this point.

We heard much about the benefits of a recording requirement from proponents last week, and to be fair there may be many for both defendants and for law enforcement. We also heard proponents ask what the downside is. Justice Scalia famously said that “the cost of every rule which excludes reliable and probative evidence” is “occasional injustice.” *Jaffe v. Redmond*, 518 U.S. 1, 29 (1996). In a truth-based justice system, we should always want juries to have as much truthful information as possible. The downside of the recording requirement is that, without at least the opportunity to argue that there was good cause not to record in a given situation, a judge will be handcuffed in issuing a cautionary instruction to a jury even under circumstances where a statement was both voluntary and truthful. The downside is that a statement will be excluded entirely due to misinterpretation of the phrase “but is not required to.” The downside is that an unwarranted jury instruction or unwarranted suppression will lead to someone who was guilty of a heinous crime going free. You can perhaps decrease the risk of false or involuntary confessions with a recording requirement. You need not, at the same time increase the risk having the guilty go free.

We urge your adoption of our amendments or alternatively we urge the defeat of the bill.

I would be happy to answer any questions.

Alaska – Court Ruling

- “The failure to electronically record an entire custodial interrogation will, therefore, be considered a violation of the rule, and subject to exclusion, only if the failure is unexcused. Acceptable excuses might include an unavoidable power or equipment failure, or a situation where the suspect refused to answer any questions if the conversation is being recorded. We need not anticipate all such possible excuses here, for courts must carefully scrutinize each situation on a case-by-case basis. Any time a full recording is not made, however, the state must persuade the trial court, by a preponderance of the evidence, that recording was not feasible under the circumstances, and in such cases the failure to record should be viewed with distrust.” *Stephan v. State*, 711 P.2d 1156 (Alaska 1985).

Arkansas – R. Crim. P. 4.7

- A statement made by the accused in open court at his or her trial, before a grand jury, or at a preliminary hearing
- A statement made during a custodial interrogation that was not recorded because electronic recording was not practical
- A voluntary statement, whether or not the result of a custodial interrogation, that has a bearing on the credibility of the accused as a witness
- A spontaneous statement that is not made in response to a question
- A statement made after questioning that is routinely asked during the processing of the arrest of the suspect
- Suspect requests that the interrogation not be recorded
- A statement made during a custodial interrogation that is conducted out-of-state

California – Penal Code 859.5

- Recording is not feasible
- The person requests that the interrogation not be recorded
- Occurred in another jurisdiction
- Occurs when no law enforcement officer conducting the interrogation has knowledge of facts and circumstances that would lead an officer to reasonably believe that the individual being interrogated may have committed the offense
- The law enforcement officer conducting the interrogation or the officer's superior reasonably believes that electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer, the individual being interrogated, or another individual
- Malfunction of the recording device
- Questions and statements were part of routine booking

Colorado – 16-3-601

- Suspect requests that no recording be made
- Equipment fails or is unavailable through damage or extraordinary circumstances
- Exigent circumstances relating to public safety prevent the preservation by electronic recording
- Interrogation occurs outside Colorado

Connecticut – 54-1o

- Statement made by the person in open court at his or her trial or at a preliminary hearing
- Statement made during a custodial interrogation for which electronic recording was not feasible
- Voluntary statement that has bearing on the credibility of the person as a witness
- Spontaneous statement that is not made in response to a question
- Statement made after questions that is routinely asked during the processing of the arrest
- Person agreed to speak only if not recorded
- Made during a custodial interrogation conducted out-of-state

Illinois – 705 ILCS 405/5-401.5, 725 ILCS 5/103-2.1, 725 ILCS 5/103-2.1(b), 725 ILCS 103-21

- Electronic recording was not feasible
- Statements that constitute a voluntary statement that has a bearing on the credibility of the accused as a witness
- Person requests not to be recorded
- Officers unaware of facts and circumstances that would create probable cause to believe that the accused committed an offense required to be recorded

Indiana – Rule of Evidence 617

- Suspect agreed to respond only if the interview was not recorded
- Officers inadvertently failed to operate the equipment properly
- Equipment malfunctioned
- Officers reasonably believed the crime under investigation was not a felony
- Substantial exigent circumstances existed which prevented or made it not feasible to record

Kansas – 22-4620

- Equipment malfunction
- Suspect asked that the interrogation go unrecorded

- More interrogations taking place than the law enforcement agency could feasibly record with their available equipment
- Statement made spontaneously
- Statement made in response to routine arrest processing questions
- Statement made when the officer was unaware of the suspect's involvement
- Exigent circumstances

Maine – Title 25, 2803(B)(1)(K)

- Statute requires law enforcement agencies to adopt their own written policies

Maryland – Code Criminal Procedure 2-402 and 403

- Statute requires only reasonable efforts to record

Michigan – 763.7-11

- Person objects to recording the interrogation

Minnesota – State v. Scales, 518 N.W.2d 587

- All custodial interrogation shall be electronically recorded where feasible

Missouri – 590.700 and 700.1

- Suspect requests that the interrogation not be recorded
- Spontaneous statements
- Interrogation occurs outside the state
- Exigent public safety circumstances prevent recording
- Equipment fails or is not available at the location where the interrogation takes place

Montana – 46-4-406 through 46-4-411

- State proves by a preponderance of the evidence that the statements have been made voluntarily and are reliable
- Person declared the he/she would respond only if not recorded
- Unforeseeable equipment failure and obtaining replacement was not practicable
- Exigent circumstances
- Interrogation conducted in another state

Nebraska – 29-4501-08 et seq

- Statement made when it was not practicable to electronically record the statement
- Recording equipment could not be reasonably obtained
- Suspect refused to have the statement recorded
- Equipment malfunctioned
- Officers reasonably believed that the crime for which the person was taken into custody was not designated for recording by statute
- Obtained in another state
- Obtained by federal law enforcement in compliance with federal law, not in an attempt to circumvent recording requirement

New Jersey – Supreme Court Rule 3:17

- Recording is not required when electronic recording is not feasible
- Suspect indicated that he/she would participate only if not recorded
- Interrogators had no knowledge that a crime for which a recording is required has been committed

New Mexico – 29-1-16

- Good cause not to electronically record the entire custodial interrogation and the officer makes a contemporaneous written or electronic record of the reasons for not doing so
- Recordings not required of statements used for impeachment purposes

New York – Crim. Proc. Law 60.45

- Recording equipment malfunctions
- Recording equipment is not available because it is being otherwise used
- Statements in response to routine booking questions
- Statements made spontaneously
- Statement made when interviewer is unaware that a qualifying offense has occurred
- Suspect refuses to participate in a recorded interrogation
- Law enforcement reasonably believes that recording the interrogations would jeopardize the safety of any person or reveal the identity of a confidential informant
- Statement is made at a location not equipped with video recording and the reason is not to subvert the intent of the law

North Carolina – 15A-211

- Statements made during an interrogation conducted in another state by officers of the other state or statements obtained by federal law enforcement
- Statements given when the officers are unaware that the person is suspected of homicide
- Statements used for impeachment purposes
- The state may establish through clear and convincing evidence that an unrecorded statement was both voluntary and reliable, and that law enforcement had good cause for failing to electronically record

Oregon – 133.400

- Statements made before a grand jury
- Statements made on record in open court
- Statements made spontaneously and not resulting from a custodial interview
- Statements made during processing in response to a routine question
- Statements made in another state in compliance with that state's laws, or in response to questions from a federal law enforcement officer in compliance with federal laws
- Statements made to a law enforcement agency that employs five or fewer peace officers
- Custodial interviews being conducted by a corrections officer
- Custodial interview for which the state demonstrates good cause for the failure to record

Rhode Island – Police Department Policies Require Recording

Texas – Crim. Proc. Code 2.32 and 38.22

- Person being interrogated refuses to be recorded
- Statement was not made as the result of a custodial interrogation, including a statement made spontaneously and not in response to a question
- Officer attempted in good faith to record but the equipment did not function, the officer inadvertently operated the equipment incorrectly, or the equipment malfunctioned or stopped without the knowledge of the officer
- Exigent public safety concerns prevented or rendered infeasible a recording
- Officer reasonably believed that the person in custody was not in custody or being interrogated concerning the commission of an offense

Utah – Rule of Evidence 616

- Statements made outside of Utah by officers of another jurisdiction
- Statements offered solely for impeachment purposes
- Spontaneous statements made outside of a custodial interrogation or during routine processing or booking or before or during a custodial interrogation
- Person agreed to respond only if no recording was made

- Officers in good faith failed to make a recording because they inadvertently failed to operate the recording equipment properly, or the equipment malfunctioned
- Officers reasonably believed the crime under investigation did not require recording
- Substantial exigent circumstances existed that prevented or rendered unfeasible the making of an electronic recording
- Statement has substantial guarantees of trustworthiness and reliability and admitting the statement serves the purposes of these rules and the interests of justice

Vermont – 182-3-5581 Sections 4 and 5

- Exigent circumstances
- Refusal to be recorded
- Reasonable belief that the person did not commit an offense for which recording is required
- Safety of the person or protection of his or her identity
- Equipment malfunction

Wisconsin – 972.115

- Suspect refused to respond or cooperate if a recording was made
- Officer in good faith failed to make a recording because the equipment did not function
- Officer inadvertently failed to operate the equipment properly
- Equipment malfunctioned or stopped operating
- Exigent public safety circumstances prevented a recording or rendered the making of one infeasible
- Officer reasonably believed that the offense for which the suspect was taken into custody did not require a recording

Justice Manual – Title 9

Obtaining Evidence – Chapter 13

9-13.001 - Electronic Recording of Statements

This policy establishes a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the United States Marshall Service (USMS) will electronically records statements made by individuals in their custody in the circumstances set forth below.

This policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where the presumption does not apply. The policy encourages agents and prosecutors to consult with each other in such circumstances.

I. Presumption of Recording. There is 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 the exceptions defined below. Such custodial interviews will be recorded without the need for supervisory approval.

- a. **Electronic recording.** This policy strongly encourages the use of video recording to satisfy the presumption. When video recording equipment considered suitable under agency policy is not available, audio recording may be utilized.
- b. **Custodial interviews.** The presumption applies only to interviews of persons in FBI, DEA, ATF or USMS custody. Interviews in non-custodial settings are excluded from the presumption.
- c. **Place of detention.** A place of detention is any structure where persons are held in connection with federal criminal charges where those persons can be interviewed. This includes not only federal facilities, but also any state, local, or tribal law enforcement facility, office, correctional or detention facility, jail, police or sheriff=s station, holding cell, or other structure used for such purpose. Recording under this policy is not required while a person is waiting for transportation, or is en route, to a place of detention.
- d. **Suitable recording equipment.** The presumption is limited to a place of detention that has suitable recording equipment. With respect to a place of detention owned or controlled by FBI, DEA, ATF, or USMS, suitable recording equipment means:
 - (i) an electronic recording device deemed suitable by the agency for the recording of interviews that,
 - (ii) is reasonably designed to capture electronically the entirety of the interview. Each agency will draft its own policy governing placement, maintenance and upkeep of such equipment, as well as requirements for preservation and transfer of recorded content.

With respect to an interview by FBI, DEA, ATF, or USMS in a place of detention they do not own or control, but which has recording equipment, FBI, DEA, ATF, or USMS will each determine on a case by case basis whether that recording equipment meets or is equivalent to that agency's own requirements or is otherwise suitable for use in recording interviews for purposes of this policy.

- e. **Timing.** The presumption applies to persons in custody in a place of detention with suitable recording equipment following arrest but who have not yet made an initial appearance before a judicial officer under Federal Rule of Criminal Procedure 5.
- f. **Scope of offenses.** The presumption applies to interviews in connection with all federal crimes.

- g. Scope of recording. Electronic recording will begin as soon as the subject enters the interview area or room and will continue until the interview is completed.
- h. Recording may be overt or covert. Recording under this policy may be covert or overt. Covert recording constitutes consensual monitoring, which is allowed by federal law. *See* 18 U.S.C. §2511(2)(c). Covert recording in fulfilling the requirement of this policy may be carried out without constraint by the procedures and approval requirements prescribed by other Department policies for consensual monitoring.

II. Exceptions to the Presumption. A decision not to record any interview that would otherwise presumptively be recorded under this policy must be documented by the agent as soon as practicable. Such documentation shall be made available to the United States Attorney and should be reviewed in connection with a periodic assessment of this policy by the United States Attorney and the Special Agent in Charge or their designees.

- a. Refusal by interviewee. If the interviewee is informed that the interview will be recorded and indicates that he or she is willing to give a statement but only if it is not electronically recorded, then a recording need not take place.
- b. Public Safety and National Security Exception. Recording is not prohibited in any of the circumstances covered by this exception and the decision whether or not to record should wherever possible be the subject of consultation between the agent and the prosecutor. There is no presumption of electronic recording where questioning is done for the purpose of gathering public safety information under *New York v. Quarles*. The presumption of recording likewise does not apply to those limited circumstances where questioning is undertaken to gather national security-related intelligence or questioning concerning intelligence, sources, or methods, the public disclosure of which would cause damage to national security.
- c. Recording is not reasonably practicable. Circumstances may prevent, or render not reasonably practicable, the electronic recording of an interview that would otherwise be presumptively recorded. Such circumstances may include equipment malfunction, an unexpected need to move the interview, or a need for multiple interviews in a limited timeframe exceeding the available number of recording devices.
- d. Residual exception. The presumption in favor of recording may be overcome where the Special Agent in Charge and the United States Attorney, or their designees, agree that a significant and articulable law enforcement purpose requires setting it aside. This exception is to be used sparingly.

III. Extraterritoriality. The presumption does not apply outside of the United States. However, recording may be appropriate outside the United States where it is not otherwise precluded or made infeasible by law, regulation, treaty, policy, or practical concerns such as the suitability of recording equipment. The decision whether to record an interview - whether the subject is in foreign custody, U.S. custody, or not in custody - outside the United States should be the subject of consultation between the agent and the prosecutor, in addition to other applicable requirements and authorities.

IV. Administrative Issues.

- a. Training. United States Attorneys' offices and field offices of each agency should consider collaborating if and as needed to provide periodic training for agents and prosecutors on best practices associated with electronic recording of interviews.
- b. Assignment of responsibilities. The investigative agencies will bear the cost of acquiring and maintaining, in places of detention they control where custodial interviews occur, recording equipment in sufficient numbers to meet expected needs for the recording of such interviews. Agencies will pay for electronic copies of recordings for distribution pre-indictment. Post-

indictment, the United States Attorneys' offices will pay for transcripts of recordings, as necessary.