

MANDATORY RECORDING OF POLICE INTERROGATIONS¹

STATE	JUDICIAL MANDATE	LEGISLATIVE MANDATE	CRIMES INCORPORATED	POTENTIAL CONSEQUENCES FOR FAILURE TO RECORD
ALASKA	X ²		Not specified	Inadmissibility of statements
DISTRICT OF COLUMBIA		X ³	“Crimes of violence” ⁴	Rebuttable presumption that the statements given were involuntary
ILLINOIS		X ⁵	Murder	Statements presumed to be inadmissible
MAINE		X ⁶	“Serious crimes”	Civil violation by law enforcement agency
MASSACHUSETTS	X ⁷		Not specified	Jury instruction advising statement

¹ Current as of June 14, 2005.

² *Stephan v. State*, 711 P.2d 1156 (Alaska 1985); 1985 Alas. LEXIS 326.

³ Act 15-751, “Electronic Recording Procedures Act of 2004.” The Act was vetoed by Mayor Williams on January 21, 2005. A veto override by the city council occurred on February 1, 2005. The full text of Act 15-751 is available at <http://www.dccouncil.washington.dc.us/images/00001/20050106110442.pdf>.

⁴ D.C. CODE ANN. § 23-1331 (4) (2004) defines “crime of violence” as “aggravated assault, an act of terrorism, arson, assault with a dangerous weapon, assault with intent to commit any offense, burglary or attempted burglary, carjacking, child sexual abuse, cruelty to children in the first degree, extortion or blackmail accompanied by threats of violence, kidnapping, mayhem, malicious disfigurement, manufacture or possession of a weapon of mass destruction, murder, robbery, sexual abuse in the first, second, or third degrees, use, dissemination, or detonation of a weapon of mass destruction, voluntary manslaughter or attempt or conspiracy to commit any of the foregoing offenses as defined by an Act of Congress or any state law if the offense is punishable by imprisonment for more than one year.”

⁵ 725 ILL. COMP. STAT. 5/103-2.1 (2004) & 705 ILL. COMP. STAT. 405/5-401.5 (2004) effective July 18, 2005. 705 ILL. COMP. STAT. 405/5-401.5 (2004) is available at <http://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=070504050HArt%2E+V+Pt%2E+4&ActID=1863&ChapAct=705%26nbsp%3BILCS%26nbsp%3B405%2F&ChapterID=50&ChapterName=COURTS&SectionID=29315&SeqStart=18900&SeqEnd=19000&ActName=Juvenile+Court+Act+of+1987%2E>. 725 ILL. COMP. STAT. 5/103-2.1 (2004) is available at <http://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=072500050HArt%2E+103&ActID=1966&ChapAct=725%26nbsp%3BILCS%26nbsp%3B5%2F&ChapterID=54&ChapterName=CRIMINAL+PROCEDURE&SectionID=61211&SeqStart=6400&SeqEnd=8300&ActName=Code+of+Criminal+Procedure+of+1963%2E>.

⁶ ME. REV. STAT. ANN. tit. 25 §2803-B (2004). The full text is available at <http://janus.state.me.us/legis/statutes/25/title25sec2803-B.html>

⁷ *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004); 2004 Mass. LEXIS 504.

STATE	JUDICIAL MANDATE	LEGISLATIVE MANDATE	CRIMES INCORPORATED	POTENTIAL CONSEQUENCES FOR FAILURE TO RECORD
MASSACHUSETTS (CONTINUED)				is to be viewed with “particular caution”
MINNESOTA	X ⁸		Not specified	Inadmissibility of statements
NEW MEXICO		X ⁹	Felony offenses	Section “shall not be construed to exclude otherwise admissible evidence in any judicial proceeding.” ¹⁰
TEXAS		X ¹¹	Any crime	Inadmissibility of statements made as a result of custodial interrogation

LEGISLATIVE MANDATES

DISTRICT OF COLUMBIA: Act 15-751, “Electronic Recording Procedures Act of 2004” repeals **D.C. CODE ANN. § 5-133.20 (2004)** and requires that the D.C. Metropolitan Police Department “record, in their entirety, and to the greatest extent feasible, custodial interrogation of persons suspected of committing a crime of violence, . . . , when the interrogation takes place in Metropolitan Police Department interview rooms equipped with electronic recording equipment.”

Method(s) of recording: electronic recording

Situations covered: persons *suspected* of committing a crime of violence as defined in Section 23-1331 (4) when the interrogation is conducted in Metropolitan Police Department interview rooms that are equipped with electronic recording equipment; the recording must begin with the first contact between the suspect and law enforcement upon the suspect being placed in the interview room and must include all

⁸ *State v. Scales*, 518 N.W. 2d 587 (Minn. 1994); 1994 Minn. LEXIS 500.

⁹ House Bill 382, 2005 New Mexico Legislature, Regular Session, signed by the governor on April 6, 2005. The full text is available at <http://legis.state.nm.us/Sessions/05%20Regular/final/HB0382.pdf>.

¹⁰ House Bill 382, Section 2, I. Chapter 252.

¹¹ TEX. CRIM. PROC. CODE ANN. Art. 38.22 (2004). The full text is available at <http://www.capitol.state.tx.us/statutes/cr.toc.htm>.

subsequent contacts while in the interview room; recordings must include the warning of rights required by law, the suspect's response, and consent, if given.

Exceptions: the suspect expressly advises that he will not make a statement if it is recorded; the warning of rights, response, and conditional response must be recorded

Consequence(s) for failure to comply: persons whose statements were obtained in violation of the Act shall be entitled to a rebuttable presumption that the statements obtained were involuntary; clear and convincing evidence of voluntariness may be presented to overcome the presumption.

ILLINOIS: 725 ILL. COMP. STAT. 5/103-2.1 (2004) & 705 ILL.COMP. STAT. 405/5-401.5 (2004) effective July 18, 2005

Method of recording: electronic recording (includes motion picture, audiotape, or videotape, or digital recording) that is substantially accurate and not intentionally altered

Situations covered: custodial interrogations of an *adult or juvenile* murder suspect at a police station or other place of detention

Consequence(s) for failure to comply: oral, written, or sign language statements made during custodial interrogation are presumed to be inadmissible in any criminal proceeding (includes any statements made by the defendant during or following that non-recorded custodial interrogation, even if otherwise in compliance) unless the statements are used for the purpose of impeachment; presumption may be overcome by a preponderance of the evidence that the statement was voluntarily given and reliable based on the totality of the circumstances.

Exceptions provided (applicable to both adults and juveniles): statements made by the accused in open court (trial/grand jury/preliminary hearing); statements made when electronic recording is not feasible; statements made by the accused that have a bearing on the credibility of the accused as a witness; spontaneous statements made by the accused; answers to routing processing questions; statements made by the suspect after a request by the suspect that the interview not be recorded; statements made by the suspect before investigators are aware that a death has occurred; and interrogations conducted out-of-state if proven by a preponderance of the evidence.

MAINE: ME. REV. STAT. ANN. tit. 25 §2803-B (2004) requires that all law enforcement agencies adopt written policies which set forth the procedures for the "[d]igital, electronic, audio, video or other recording of law enforcement interviews of suspects in serious crimes and the preservation of investigative notes and records in such cases." Mandates that the minimum standards for the policy will be established before January 1, 2005 and requires that the chief administrative officer for each agency provide certification of compliance with the mandate.

Method(s) of recording: digital, electronic, audio, video or other recording

Situations covered: persons *suspected* in serious crimes

Consequence(s) for failure to comply: law enforcement agency commits a civil violation and the locality or state government may be fined up to but not to exceed \$500 for failure to certify compliance with the mandate.

NEW MEXICO: HOUSE BILL 382 (SIGNED BY GOVERNOR APRIL 6, 2005 AND ASSIGNED CHAPTER NO. 252) requires the electronic recording of a custodial interrogation when reasonable to do so.

Method(s) of recording: recording created by visual or audio media, including motion picture, videotape, audio tape or digital media

Situations covered: felony offenses

Consequence(s) for failure to comply: H.B. 382 specifically states that the section shall be construed to exclude otherwise admissible evidence in any judicial proceeding.

Other requirement(s):

1. The custodial interrogation shall be recorded in its entirety.
2. The recording must include the advisement of constitutional rights.

Exceptions:

1. The law enforcement officer had “good cause” not to record the entire interrogation. “Good cause” includes: recording equipment is not reasonably available; equipment failure; refusal by individual to be recorded; statement was made in open court/grand jury proceeding.

Recording requirement is inapplicable in the following situations:

1. Statements were made spontaneously and not in response to custodial interrogation.
2. Statements made pursuant to a custodial interrogation conducted outside of the state of New Mexico.
3. Statements made within a correctional facility.
4. Statements used for impeachment purposes.

TEXAS: TEX. CRIM. PROC. CODE ANN. Art. 38.22 (2004) prohibits the admission of an oral or sign language statement of an accused *made as a result* of custodial interrogation unless several prerequisites are met.

Method(s) of recording: electronic recording (to include motion picture, videotape, or other visual recording) of the statement

Situations covered: does not specify particular crimes or situation; recitation of *Miranda* warnings and waiver of rights must be recorded

Consequence(s) for failure to comply: oral/sign language statement will not be admitted into evidence

Other requirement(s): in addition to requiring that an electronic recording be made, the following also must be done for the statement to be admissible:

- Accused must receive *Miranda* warnings before the taping and he/she must knowingly, intelligently, and voluntarily waive the rights;
- The recording device must have been capable of making an accurate recording;
- The operator was competent;
- The recording is accurate and has not been altered;
- All voices on the recording are identified; and
- Attorney for the defendant must receive a copy of all recordings within 20 days of the proceeding;
- The *Miranda* warnings required are interpreted by a qualified interpreter in the case of a deaf suspect

Exceptions: “any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused;” statements made in open court/before a grand jury/at examining trial by the accused; statements that are the res gestae of the arrest/offense; voluntary statement that has bearing on the credibility of the accused as a witness; statements made out-of-state and in compliance with the out-of-state law; and statements made to a federal officer and obtained in compliance with federal law.

JUDICIAL MANDATES

ALASKA: Stephan v. State, 711 P.2d 1156 (Alaska 1985) held that “an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect’s right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible.”

Method of Recording: electronic recording of the entire interview (includes audio or videotapes); or alternative methods such as the preparation of a verbatim transcript by a certified shorthand reporter.

Situations Covered: a custodial interrogation of a suspect in a place of detention when recording is feasible (includes the recitation of the accused’s *Miranda* rights).

Consequences for Failure to Comply: “renders the statement generally inadmissible” unless the failure to record is excused; excuses include equipment failure and refusal by the accused to speak if the conversation is recorded if proven by a preponderance of the evidence.

SEE EXCEPTIONS:

1. Statements obtained before a violation of the recording rule occurs are admissible;
2. Admission of statements is permitted where the unrecorded portion of the interrogation is innocuous;
3. Unrecorded statements may be admitted if no testimony is presented that the statement was inaccurate or improperly obtained aside from violating the recording rule.

MASSACHUSETTS: Commonwealth v. DiGiambattista, 813 N.E.2d 516 (Mass. 2004) held that “the admission in evidence of any confession or statement of the defendant that is the product of an unrecorded custodial interrogation, or an unrecorded interrogation conducted at a place of detention, will entitle the defendant, on request, to a jury instruction concerning the need to evaluate that alleged statement or confession with particular caution.”

Method of recording: electronic recording (includes an audiotape of the interrogation)

Situations covered: a defendant’s confession or statements made during custodial interrogation or interrogation at a place of detention

Consequences for failure to comply: (1) at the request of the defendant the jury will receive an instruction “advising that the State’s highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant’s alleged statement with great caution

and care;” (2) the instruction should also include the admonition that “the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt” (where voluntariness is an issue and the humane practice instruction is given).

MINNESOTA: State v. Scales, 518 N.W.2d 587 (Minn. 1994) mandates that all custodial interrogations in their entirety be electronically recorded

Method of recording: electronic recording

Situations covered: all custodial interrogations (includes information about rights, waiver of rights and all questioning) where feasible and when questioning occurs at a place of detention

Consequences for failure to comply: suspect statements made during interrogation *may* be suppressed; determinations conducted on a case-by-case basis; suppression will be required if the violation is found to be “substantial.”

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