REPORT OF THE
SUPREME COURT SPECIAL COMMITTEE
ON
RECORDATION OF CUSTODIAL
INTERROGATIONS

APRIL 15, 2005

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I. BACKGROUND

On May 10 2004, the New Jersey Supreme Court decided State v. Cook, 179 N.J. 533 (2004), a case involving the murder of a fifteen-year-old girl. The defendant, who was initially arrested on the basis of two unrelated outstanding municipal court warrants, was questioned four times over two separate days before ultimately admitting that he killed the victim. None of the interrogations were electronically recorded. At trial, over the defendant's objection, the court admitted the inculpatory statements into evidence and the defendant was convicted of purposeful and knowing murder.

On appeal, the Appellate Division affirmed the conviction, following which the Supreme Court granted certification. Before the Supreme Court the defendant argued that "... modern notions of due process require the electronic recordation of his custodial statements as a condition to their admissibility". Id. at 551.

The Supreme Court declined to hold that the due process requirement of the New Jersey Constitution required electronic recordation of custodial interrogations as a condition of admissibility of statements made during such interrogations. Nevertheless, the Court noted its longstanding concern for establishing the reliability and trustworthiness of confessions as a prerequisite to their use. It recognized that the Attorney General and County Prosecutors and several other states[1] had taken steps to either require, or express a preference for, electronic recordation. Although it noted certain concerns with recordation, the Court stated that it also perceived certain benefits

[1] See Stephan v. State, 711 P.2d 1156 (Alaska 1985); State v. Scales, 518 N.W.2d 587 (Minn.1994); Commonwealth v. DiGiambattista, 813 N.E.2d 516 (2004). See also 725 Ill. Comp. Stat. Ann. 5/103-2.1 (West 2003), Tex.Crim.Proc.Code Ann. Art. 38.22 § 3 (Vernon 1999) and 25 M.R.S.A. § 2803-B. Copies of both statutes are contained in Appendix A.

to defendants, law enforcement and the administration of justice if custodial interrogations were recorded electronically.

As a result, the Court concluded that the time had arrived for it "to evaluate fully the protections that electronic recordation affords to both the State and criminal defendants." Id. at 562. The Court called for a careful and deliberate study that would balance the interests of law enforcement, defendants, and the justice system, securing to all the benefits of recordation without unduly hampering the legitimate needs of law enforcement. Toward that end, the Court indicated that it would "...establish a committee to study and make recommendations on the use of electronic recordation of custodial interrogations." Ibid.

II. CHARGE TO THE COMMITTEE

On August 10, 2004, the Chief Justice appointed the *Special Committee on Recordation of Custodial Interrogations*, (hereinafter *Committee*) to conduct the study called for by the Court. The *Committee* was charged with weighing and balancing the significant public interests involved by considering the perspectives of law enforcement, defendants and the judicial system. The *Committee* was instructed to examine the policy and financial implications arising from electronic recordation, and to recommend how and when any type of proposed electronic recordation should be implemented. The *Committee* was also charged, to consider whether electronic recordation should be encouraged through the use of a presumption against the admissibility of non-recorded statements or through other formal or less formal means.

III. COMMITTEE COMPOSITION

The following persons, representing various interests in the criminal justice process, were appointed to the *Committee*.

Hon. Richard J. Williams, J.A.D., Retired, Chair
Hon. Harvey Weissbard, J.A.D., Vice-Chair
Hon. Leonard N. Arnold, J.A.D., Retired
Hon. Frederick P. DeVesa, P.J.S.C.
Hon. Albert J. Garofolo, P.J.S.C
Hon. Betty J. Lester, J.S.C.
Vincent P. Sarubbi, Camden County Prosecutor
Thomas F. Kelaher, Ocean County Prosecutor
Paul H. Heinzel, Esq., Deputy Attorney General
Bruno Mongiardo, 1st Asst. Prosecutor, Passaic County
Marcia Blum, Esq., Asst. Dep. Public Defender
Carl D. Poplar, Esq., Association of Criminal Defense Lawyers of N. J.
Hassen I. Abdellah, Esq., New Jersey State Bar Association
Chief Douglas P. Scherzer, President, Police Chief's Association
Sergeant Robert J. Billings, New Jersey State Police

Committee Staff

Joseph J. Barraco, Esq., Assistant Director for Criminal Practice, New Jersey Administrative Office of the Courts
Jeffrey A. Newman, Deputy Clerk, Appellate Division Administrative Services
Vance D. Hagins, Assistant Chief, Criminal Practice Division, New Jersey Administrative Office of the Courts

IV. STATUS OF RECORDING REQUIREMENTS

A. Committee Work Plan

The *Committee* conducted a review of case law, state statutes and scholarly articles to ascertain which jurisdictions throughout the nation presently engage in recordation of custodial interrogations. As part of its review the *Committee* examined the *Interim Policy Statement of the New Jersey Attorney General and the New Jersey County Prosecutors' Association Regarding Electronic Recordation of Stationhouse Confessions* 76 N.J.L.J. 182 (April 13, 2004) and the *Amended Policy Statement of the New Jersey Attorney General and the New Jersey County Prosecutors' Association Regarding Electronic Recordation of Stationhouse Confessions.* See http://www.state.nj.us/lps/dcj/pdfs/policy_statement_recordings.pdf. The *Committee* also reviewed the recordation policies of the Monmouth, Passaic and Ocean County Prosecutors' Offices. In addition, representatives of the *Committee* also visited, and inspected, facilities where electronic recordation was conducted by those county prosecutors' offices.

The *Committee* consulted with Paul Scoggin[2] from the Hennepin County (Minnesota) District Attorney's Office who met with the *Committee* to describe and to answer questions about Minnesota's experience with recordation. The *Committee* also consulted via teleconference with Captain Bill Miller[3] of the Anchorage (Alaska) police department to learn about the Alaska experience and met via videoconference with

[2] At the suggestion of the Attorney General's Office Paul Scoggin from Minnesota was invited to address the Committee. Mr. Scoggin works for the Hennepin County District Attorney's Office and has been involved with recordation since the Minnesota Supreme Court required it ten years ago.

[3] At the suggestion of the Public Defender's Office Captain Bill Miller of the Anchorage Alaska Police Department was invited to address the Committee. Captain Miller has been involved with recordation for over twenty years.

Thomas P. Sullivan[4], who headed a national survey on the recordation of interrogations and who has published several articles on the results of his research.

B. National Experience with Recordation

Five states currently engage in the recordation of custodial interrogations in some form at a statewide level.[5] In addition, Texas requires recordation of a statement if the prosecution seeks to admit that statement in a criminal proceeding. Additionally, the District of Columbia and more than 260 local law enforcement agencies in 41 states electronically record custodial interviews from the point Miranda warnings are given to the end of the interrogation. These practices are discussed below.

1. Alaska

Alaska has engaged in electronic recordation of interrogations since 1985. In Stephan v. State, 711 P.2d 1156 (1985) the Alaska Supreme Court held that, as a requirement of due process under the Alaska Constitution, electronic recording is required when the interrogation occurs in a place of detention and recording is feasible. The Alaska Supreme Court stated that a recording requirement provided a more accurate record of a defendant's interrogation and thus would reduce the number of disputes over the validity of Miranda warnings and the voluntariness of purported waivers. Stephan v. State, supra, 711 P.2d at 1160-1162. The Court also said:

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[4] Mr. Sullivan is a senior partner at Jenner & Block in Chicago, Illinois. He served as Co-Chair of Illinois Governor George H. Ryan's Commission on Capital Punishment. Mr. Sullivan wrote a seminal article on recordation for the Northwestern University School of Law, Center on Wrongful Convictions in 2004. See Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, Nw. U. Sch. Law, Center on Wrongful Convictions, Special Report (2004). A copy of the listing of the 238 local law enforcement agencies that electronically recorded at the time the article was published is contained in Appendix A. Mr. Sullivan currently serves as Chair of the Advisory Board of the Center on Wrongful Convictions.

[5] New Hampshire requires that in order to admit into evidence the tape recording of an interrogation that occurred post-Miranda the recording must be complete. See State v. Barnett, 789 A.2d 629 (2001) and State v. Velez, 842 A.2d 97 (2004).

> We reach this conclusion because we are convinced that recording...is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against incrimination and, ultimately his right to a fair trial.
> [Id. at 1159-1160]

In Alaska, the remedy for an unexcused failure to electronically record an interrogation, when such recording is feasible, is exclusion of the evidence. Id. at 1164. An accused agreeing to answer questions only if he is not recorded, or an unavoidable power or equipment failure, are examples of acceptable excuses for not recording. Where a full recording is not made, the state is required to persuade the trial court, by a preponderance of the evidence, that recording was not feasible under the circumstances. Id. at 1162. In Alaska police are required to record suspects, victims and witnesses in all felony and domestic violence cases.[6] Courts in Alaska have upheld the admissibility of statements where a recording was not made and the police made a good faith effort to record their conversation, see Bodnar v. Anchorage, 2001 WL 1477922 (Alaska Ct. App. 2001), or where the police did not have a functioning tape recorder, see George v. State, 836 P.2d 960 (Alaska Ct. App. 1992), or where the recording was inadvertently erased or destroyed, see Bright v. State, 826 P.2d 765 (Alaska Ct. App. 1992).

2. Minnesota

In State v. Scales, 518 N.W.2d 587 (1994), the defendant asked the Minnesota Supreme Court to find that the Minnesota Constitutional requirement of due process required the recordation of custodial interrogations. The Minnesota Supreme Court refused to so hold. However, the Court, citing Stephan v. State, supra, 711 P.2d at

[6] Remarks of Captain Bill Miller before the *Committee.*

1150-1160, was persuaded that the recording of custodial interrogations was a reasonable and necessary safeguard essential to protecting an accused's rights. As a result, the Court held:

> Rather, in the exercise of our supervisory power to insure the fair administration of justice, we hold 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 applied to evidence of statements obtained in violation of these requirements must be decided on a case-by-case basis. *Footnote omitted.*
> [Id. at 592]

The Court went on to say that suppression would be required if a violation of the requirement was deemed by the trial court to be substantial, after considering all relevant circumstances.[7] Ibid. The rule announced in Scales was made prospective only. However, the decision was effective immediately. The recording requirement applies to all criminal cases, not just to felonies, and the recording is required from "stem to stern", i.e., the entire interrogation must be recorded, rather than just the final statement.[8] Courts in Minnesota have upheld the admissibility of statements where, because of a mistake, no recording was made, see State v. Miller, 573 N.W.2d 661 (Minn. 1998), or where the tape recorder was inoperative, see State v. Schroeder, 560 N.W.2d 739 (Minn. Ct. App. 1997).

[7] The Minnesota Supreme Court followed the approach suggested by the drafters of the Model Penal Code of Pre-Arraignment Procedure. That Procedure also contained a definition of violations that were deemed substantial.

[8] Remarks of Paul Scoggin before the *Committee.*

3. Illinois

In 2003, pursuant to a recommendation made by the Governor's Commission on Capital Punishment, Illinois adopted a statute[9] providing that an oral statement made as a result of a custodial interrogation in a homicide investigation was inadmissible unless the interrogation was electronically recorded. 725 Ill. Comp. Stat. Ann. 5/103-2.1 provides:

> (b) An oral, written, or sign language statement of an accused made as a result of a custodial interrogation at a police station or other place of detention shall be presumed to be inadmissible as evidence against the accused in any criminal proceeding brought under Section 9-1, 9-1.2, 9-2, 9-2.1, 9-3, 9-3.2, or 9-3.3 of the Criminal Code of 1961 unless:
> (1) An electronic recording is made of the custodial interrogation; and
> (2) The recording is substantially accurate and not intentionally altered.

The Illinois statute becomes effective July 18, 2005.

4. Maine

In 2004, Maine adopted a requirement that law enforcement agencies adopt written policies regarding procedures to deal with the recording of interviews with suspects. 25 M.R.S.A. § 2803-B(1)[10] provides, in pertinent part:

> 1. Law enforcement policies. All law enforcement agencies shall adopt written policies regarding procedures to deal with the following:
>
> * * * *
>
> K. Digital, 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.

[9] A copy of the entire statute is contained in Appendix A.
[10] A copy of the entire statute is contained in Appendix A.

The statute requires that the Board of Trustees of the Maine Criminal Justice Academy[11] develop minimum standards for law enforcement policies for recording and preservation of interviews by January 1, 2005.[12] Thereafter, by June 1, 2005, the chief administrative officer of each law enforcement agency is required to certify to the board that their agency has adopted written policies consistent with the minimum standards.[13]

The Board of Trustees of the Maine Criminal Justice Academy adopted minimum standards on January 7, 2005. Those standards call for the electronic recording of any statement obtained by a law enforcement officer from a person who is the subject of a custodial interrogation conducted at a place of detention for the crimes of murder, felony murder, manslaughter, aggravated assault, elevated aggravated assault, gross sexual assault, kidnapping, robbery, arson, or causing a catastrophe or the corresponding juvenile crimes. The minimum standards permit electronic recording by videotape, audiotape, motion picture or digital recording.[14]

The Maine Chiefs of Police, working with the Attorney General's Office, adopted a model policy regarding the recording of suspects in serious crimes on February 11, 2005.[15] It is expected that the Chief's model policy will be used by local law enforcement agencies in developing local written policies.

5. Massachusetts

In Commonwealth v. DiGiambattista, 813 N.E.2d 516 (2004), the Massachusetts Supreme Judicial Court also addressed the issue of recording but did not adopt the

[11] See 25 M.R.S.A. § 2801-A(1).
[12] See 25 M.R.S.A. § 2801-A(2).
[13] See 25 M.R.S.A. § 2801-A(3).
[14] A copy of the Board of Trustees of the Maine Criminal Justice Academy minimum standards is contained in Appendix A.
[15] A copy of the Chief's model policy is contained in Appendix A.

suppression of evidence approach taken by either the Alaska or Minnesota Supreme Courts. Rather, the Court required that a jury instruction be given upon request when a defendant's unrecorded statement, given in a custodial interrogation, is admitted in evidence. The Court held that:

> [H]enceforth, 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.
> [Id. at 425]

That instruction will inform the jury 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. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised 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.
> [Id. at 448]

As of March 22, 2005, guidelines have not yet been implemented; nor has Massachusetts yet developed a "model" charge.

6. Texas

In 1981, Texas adopted a statute[16] requiring that, in order to be admissible, oral statements must be recorded. Texas law enforcement officers are not required to record the entire custodial interrogation as a precondition to admissibility, only the

[16] A copy of the entire statute is contained in Appendix A.

statement that the prosecution seeks to admit at trial. Tex.Crim.Proc.Code Ann. Art. 38.22 § 3 provides:

> Sec. 3. (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:
> (1) An electronic recording, which may include motion picture, videotape, or other visual recording, is made of the statement;
> (2) Prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;
> (3) The recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;
> (4) All voices on the recording are identified; and
> (5) Not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article.
> (b) Every electronic recording of any statement made by an accused during a custodial interrogation must be preserved until such time as the defendant's conviction for any offense relating thereto is final, all direct appeals there from are exhausted, or the prosecution of such offenses is barred by law.
> (c) Subsection (a) of this section shall not apply to 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, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.
> (d) If the accused is a deaf person, the accused's statement under Section 2 or Section 3(a) of this article is not admissible against the accused unless the warning in Section 2 of this article is interpreted to the deaf person by an interpreter who is qualified and sworn as provided in Article 38.31 of this code.
> (e) The courts of this state shall strictly construe Subsection (a) of this section and may not interpret Subsection (a) as making admissible a statement unless all requirements of the subsection have been satisfied by the state, except that:
> (1) Only voices that are material are identified; and

(2) The accused was given the warning in Subsection (a) of Section 2 above or its fully effective equivalent.

7. Other Experience with Recordation

In 2003 the District of Columbia adopted a statute[17] requiring that the Chief of Police develop and implement, within six months, a General Order establishing procedures for the electronic recording of interrogations by the Metropolitan Police Department. The statute required that the order include a requirement that the Metropolitan Police Department electronically record, in their entirety and to the greatest extent feasible, any interrogations of persons suspected of committing a dangerous crime or a crime of violence, when such interrogations are conducted in Metropolitan Police Department interview rooms equipped with electronic recording equipment.

On October 29, 2003, the Chief of Police first issued GO-SPT-304.16 (Electronic Recordation of Interrogations). In late 2004, the Metropolitan Police Department of the District of Columbia (MPDC) issued a report on electronic recording of interrogations that had taken place from January 1 through September 30, 2004. That report stated that of the 1,059 investigations conducted, 226 were required to be recorded by the directive. Of those required to be recorded, there were 42 cases where the person interrogated did not consent to having the interrogation recorded. The evaluation found that the recording requirements were not being implemented consistently throughout the department and a system to monitor compliance was never put in place. On January 31, 2005, the Chief of Police rescinded the earlier general order and issued GO-SPT-

[17] A copy of the entire statute is contained in Appendix A.

304.16 (Distribution B).[18] That policy required that the District of Columbia Police Department:

> [E]lectronically record, in its entirety and to the greatest extent feasible, custodial interrogations of persons suspected of committing a dangerous crime or crime of violence, when the interrogation is conducted in a MPD interview room equipped with electronic recording equipment.

The stated purposes of recording custodial investigations were to:

1. Create an exact record of what occurred during the course of the investigation;
2. Provide evidence of criminal culpability;
3. Document the subject's physical condition and demeanor;
4. Refute allegations of police distortion, coercion, misconduct, or misrepresentations;
5. Reduce the time required to memorialize the interrogation;
6. Reduce the time to litigate suppression motions;
7. Enable the interviewer to focus completely on his/her questions and the subject's answers without the necessity of taking notes, and
8. Enable the investigator/detective to more effectively use the information obtained to advance other investigative efforts.

An extensive set of regulations was also contained in GO-SPT-304.16, detailing the contours of what must be taped and what must be done prior to taping, e.g., testing of equipment, how the tapes are to be labeled and handled, and record keeping responsibilities, including documentation of reasons why electronic recordation did not occur. Electronic recordation under the directive can be either audio or audio-video.

The *Committee* did not attempt to catalog all other local departments that required electronic recordation of custodial interrogations. Rather, it relied on the work done in this regard by Thomas P. Sullivan. In a recent article, Mr. Sullivan states that

[18] A copy of the general order is contained in Appendix A.

he has found " . . . more than 260 law enforcement agencies in 41 states (in addition to Alaska and Minnesota) that record complete custodial interviews of suspects in felony investigations."[19] The survey only counted departments that electronically record custodial interviews from the point of the Miranda warning to the end of the confession. It counts any department that records more than 50% of a given class of cases, e.g. homicides or sexual assaults, as a department that engages in electronic recordation. The survey included diversity in respondents ranging from large departments, such as Los Angeles and Miami, to numerous smaller departments.

As part of its research the *Committee* also noted that in 1975 the American Law Institute adopted *A Model Code of Pre-Arraignment Procedure*, hereinafter *Model Code.* Section 130.4(3) of the *Model Code* required the development of regulations on sound recordings as follows:

> (3) Sound Recordings. The regulations relating to sound recordings shall establish procedures to provide a sound recording of
> (a) the warning to arrested persons pursuant to Subsection 130.1(2);
> (b) the warning required by, and any waiver of the right to counsel pursuant to, Section 140.8; and
> (c) any questioning of the arrested person and any statement he makes in response thereto.
> Such recording shall include an indication of the time of the beginning and ending thereof. The arrested person shall be informed that the sound recording required hereby is being made and the statement so informing him shall be included in the sound recording. The station officer shall be responsible for insuring that such a sound recording is made.

[19] Thomas P. Sullivan, *Recording Custodial Interrogations: The Police Experience*, 52-JAN Fed. Law 20 (2005).

The *Model Code* provides for suppression of statements where there is a substantial violation of the requirement that the interrogation be recorded. See Section 150.3.

C. New Jersey Experience with Recordation

1. Statewide Attorney General and New Jersey County Prosecutors' Association Initiatives

a. Interim Policy Statement on Recordation

On April 13, 2004, the Attorney General and County Prosecutors' Association issued the *Interim Policy Statement of the New Jersey Attorney General and the New Jersey County Prosecutors' Association Regarding Electronic Recordation of Stationhouse Confessions*.[20] The *Interim Recordation Policy* required that, when feasible, the investigating officer electronically record (preferably video record) a suspect's final statements or acknowledgments when the person is suspected of committing a homicide. That policy stated as follows:

> If a person who is suspected of committing a homicide is asked by a law enforcement officer to provide or acknowledge a written statement in a stationhouse custodial setting, the investigating officer should, whenever feasible, arrange to electronically record (preferably video record) the suspect's statement or acknowledgment so as to establish a permanent and objective record that the suspect had been advised of his or her constitutional rights and that any such incriminating statement or acknowledgment was actually made by the suspect. Electronic recordation of the final statement or acknowledgment may be done on notice to and with the express permission of the suspect, or may be done surreptitiously at the discretion of the investigating officer. The electronic recordation of the suspect's final statement or acknowledgment may be in addition to or in lieu of having the suspect sign a traditional written statement.
>
> When a written statement is signed or acknowledged by a suspect in custody and no electronic recordation is

[20] A copy of the *Interim Recordation Policy* is contained in Appendix B.

> made, the officer taking the written statement or acknowledgment shall document the reasons why the statement or acknowledgment was not electronically recorded (e.g., electronic recordation equipment was not reasonably available at the time that the written statement or acknowledgment was given; the suspect indicated a desire that the statement or acknowledgment not be electronically recorded, etc.). The documented reasons for not electronically recording the final statement or acknowledgment shall be provided to the appropriate prosecuting agency.

The *Interim Recordation Policy* was binding on all law enforcement agencies in the State. The *Interim Recordation Policy* also required that, within 180 days of its effective date, the County Prosecutors recommend to the Attorney General policies concerning the electronic recordation of other crimes, and pilot programs providing for recordation at earlier stages of custodial interrogations.

b. Amended Policy Statement on Recordation

On December 17, 2004 the Attorney General and County Prosecutors' Association issued an *Amended Policy Statement of the New Jersey Attorney General and the New Jersey County Prosecutors' Association Regarding Electronic Recordation of Stationhouse Confessions*.[21] The *Amended Recordation Policy* requires that, when feasible, the investigating officer electronically record a suspect's final statements or acknowledgments. The policy states:

> If a person who is suspected of committing any first, second or third degree crime, is asked by a law enforcement officer to provide or acknowledge a written statement in a stationhouse custodial setting, the investigating officer should, whenever feasible, arrange to electronically record the suspect's statement or acknowledgment so as to establish a permanent and objective record that the suspect had been advised of his or her constitutional rights and that any such incriminating statement or acknowledgment was

[21] A copy of the *Amended Recordation Policy* is contained in Appendix B.

> actually made by the suspect. Electronic recordation of the final statement or acknowledgment may be done on notice to and with the express permission of the suspect, or may be done without notice to the suspect. The electronic recordation of the suspect's final statement or acknowledgment may be in addition to or in lieu of having the suspect sign a traditional written statement.
>
> When a written statement is signed or acknowledged by a suspect in custody in a stationhouse and no electronic recordation is made, the officer taking the written statement or acknowledgment shall document the reasons why the statement or acknowledgment was not electronically recorded (e.g., electronic recordation equipment was not reasonably available at the time that the written statement or acknowledgment was given; the suspect indicated a desire that the statement or acknowledgment not be electronically recorded, etc.). The documented reasons for not electronically recording the final statement or acknowledgment shall be provided to the appropriate prosecuting agency.
>
> The above provisions shall also apply to any juvenile, age 14 or older, suspected of committing any act that would constitute one of the crimes enumerated in N.J.S.A. 2A:4A-26a(2)(a), thereby subjecting the juvenile to waiver to adult court on the prosecutor's motion.

The *Amended Recordation Policy* expanded the types of crimes covered by the policy from homicides to all first and second-degree offenses effective September 1, 2005. Effective January 1, 2006, the policy is further expanded to cover all third degree crimes, and all juvenile cases involving crimes listed in N.J.S.A. 2A:4A-26a(2)(a). Between now and January 1, 2006, the *Amended Recordation Policy* encourages county and local law enforcement entities to experiment with electronic recordation of the entire stationhouse interrogation. At least one county prosecutor has already begun to do so.

2. County Level Initiatives

a. Monmouth

i. Description of Program

Monmouth County was the first county to implement a recording requirement when, in 1997, the county prosecutor issued a policy that required that certain video recording procedures be employed to memorialize the reviewing and signing of a formal written statement by an adult or juvenile target in a homicide investigation. On May 1, 2002, that policy was expanded to include all first and second degree crimes as well.[22] Effective January 2005, the policy was expanded to mandate the covert video recording of the entire interrogation of any adult or juvenile reasonably believed to be a target in a homicide investigation.[23] Recording is required, whether the interrogation is custodial or not, whenever it occurs in a police station, any office of the Monmouth County Prosecutor, or any other law enforcement office where covert recording is possible.

ii. Description of Physical Setup

An interrogation room has been equipped for covert recording of interrogations in the Asbury Park Office of the Monmouth County Prosecutor's Office. A bid has recently been placed and awarded for installation of two additional rooms and an upgrade of the current room. The Monmouth County Prosecutor also has a facility equipped for covert recording in his Freehold office. That facility was not visited by the *Committee*.

The existing interrogation room has a ceiling-mounted microphone and a concealed wall-mounted video camera. The camera is a fixed focus, wide-angle

[22] A copy of the *Monmouth County Uniform Policy for Videotaped Review of Formal Written Statements* (May 1, 2002) is contained in Appendix C.

[23] A copy of the *Monmouth County Uniform Policy for Video Recorded Interrogations of Targets in Homicide Cases* (January 2005) is contained in Appendix C.

camera providing an overview of the room. The recording is made in a central control room, where the interrogation is monitored and recorded on a single VCR.

The new control rooms, when completed, will have color cameras and record on a DVD for long-term storage.

b. Passaic

i. Description of Program

Effective February 1, 2004, Passaic County instituted a recordation policy. The recording policies are to be employed once an adult or juvenile agrees[24] to provide a written statement. The policy requires the video recording of the following: (1) a verbal advisement to the target that video recording procedures are being employed; (2) execution of the Miranda Rights and Waiver Form in cases where only verbal warnings were provided prior to interrogation. In cases where the form was executed prior to interrogation, it shall be reviewed in its entirety on tape; (3) the taking of the formal written statement from the target, and (4) the process by which the target reviews, corrects, and signs the formal written statement. Video recording is required once the adult target of an investigation into one or more of the following offenses has agreed to provide a formal written statement. The specific crimes to which this directive applies are: all homicides, kidnapping, first degree robbery, carjacking, aggravated sexual assault and sexual assault, aggravated arson, or an attempt or conspiracy to commit any of the offenses enumerated. The video recording[25] procedures also cover juveniles

[24] Passaic personnel reported during a visit by *Committee* staff that they have never had a defendant object to videotaping.
[25] Passaic uses digital media (DVD) to record the interrogation.

who are targets of homicide investigations. The protocol also provides requirements for the recording process itself.[26]

ii. Description of Physical Setup

In the Passaic County Prosecutor's Office there is one video interrogation room, which is linked to a central control room to record and monitor the activities in the room. The interrogation room contains a table, several chairs and a bench. Posted in the room are notices, in both English and Spanish, informing the participants that they are being video recorded.

Within the interrogation room, a single microphone is mounted in the ceiling and a concealed camera is mounted in a corner of the room. The camera's vantage point provides a view of the entire room with a fixed focus, wide-angle lens. The only area not visible is the area directly beneath the camera.

The monitor in the control room allows investigators or others to watch and listen to the interrogation. The interrogation is preserved simultaneously on two videotapes and on a DVD.

When the target under investigation is ready to provide a statement, a secretary is brought into the interrogation room to type the statement "live", using a laptop computer. The act of giving and typing the statement is also captured on the recording medium.

[26] A copy of the *Passaic County Uniform Protocol for the Video Recording of Formal Written Statements* is contained in Appendix C.

c. Ocean

i. Description of Program

Ocean County, which began videotaping in 2003, has two rooms set up for covert recording.[27] Ocean initially taped only child victims in physical and sex abuse cases. A second room is now utilized for traditional interrogation. Only final statements are recorded. Ocean County is in the process of developing written procedures and providing training for police officers.

ii. Description of Physical Setup

The Ocean County Prosecutor's Office utilizes a facility that was formerly a private home, which has been converted into a comfortable environment for individuals to meet with investigators. Within the building are two interrogation rooms linked to a central control room that records and monitors each room. There are no signs posted in these rooms regarding the video recording of the interrogation.

The interrogation rooms each contain a concealed wall-mounted robotic camera that can pan, tilt and zoom. The camera can either be left in a wide-angle mode to capture the entire room, or can be operated by an officer from the control room. Microphones are concealed in switch plates in the wall near where the questioning takes place. A wireless earpiece is available for the investigator to wear to receive communication from individuals monitoring the questioning.

One of the two interrogation rooms is designed to be "kid-friendly", with colorful walls and tiered seating for children to climb on. The microphone, concealed in a switch

[27] It cost $14,405 to retrofit two rooms in Ocean County. Ocean County uses a zoom camera (cost $2,300). During taping, three copies of the video and an audio copy are made. Additionally, Ocean Count's system allows for two-way communication between an officer in the interrogation room and someone outside the room.

plate, is capable of picking up voices from any point in the room. The second room is a more traditional interrogation room, with a table, several chairs, and a bench.

Each interrogation room is linked to three VCRs for the primary recording and a backup analog audio recording. The audio recording is used for transcription. In addition to monitoring the interrogation in the central control room, an audio/video link connects the control room to the Supervisor's office, where he is able to monitor the interrogations.

V. COSTS ASSOCIATED WITH RECORDATION

Recordation can be accomplished in a variety of ways. It can be as simple as placing a handheld recorder on a table in the interrogation room, or as elaborate as a covert multi-camera audio-video system. For reasons set forth hereinafter, the *Committee* is recommending that the method of electronic recordation be the choice of local law enforcement. In this section, the report looks at various options local law enforcement might choose and examines the cost implication attendant thereto.

A. Audio Recordation

The costs associated with electronic recordation via a tape recorder are minimal. Although a simple hand held recorder can be purchased for under $100, it is estimated that it would cost about $300 to purchase a high quality audio tape recording device such as a Marantz recorder, Model #PMD201 or equivalent. The specifications for a recording device of this quality are as follows:

Built-in condenser microphone
Input for a separate microphone
Vu meters to monitor recording level
Two speed recording - 1 7/8 IPS and 15/16 IPS
Manual level control of audio recording
Automatic level control of audio recording
A frequency response, plus or minus 3 dB
Can accept normal tape, $Cr0_2$ tape, and metal tape
AC Adapter to power the unit on standard current
Capability to run on batteries
The microphone for this or other units must be an omni-directional microphone

B. Audio-Video Recordation

The cost for audio/video recordation will vary depending on whether the recording is done covertly[28] (hidden camera) or overtly (out in the open). The variances

[28] It is permissible to covertly record a defendant who has been properly given Miranda warnings. See State v. Vandever, 314 N.J. Super. 124 (App. Div. 1998). Such recording does not violate the *New Jersey Wiretap and Electronic Surveillance Control Act* as long as an investigative or law enforcement

in cost are also related to the method for preserving the record (analog or digital), how many simultaneous copies are made at the time of the recording, and if a central recording control room is used. For under a thousand dollars a video system can be installed recording onto VHS tape. The equipment would consist of a commercial grade video camera with a wide-angle lens to cover the interrogation room, a tabletop microphone, and audio mixer. This provides a single copy of the recording on VHS tape requiring the investigator to start and stop the recording in the interrogation room.

The highest quality installation for video recording of interrogations, whether covert or overt, is to have the interrogation room(s) wired to a central control room. Here other investigators can verify the record is being made and monitor the ongoing interrogation. According to a recent quote from a State contract vendor, the cost of installation of covert cameras and microphones, wired to a control room where the interrogation can be monitored and recorded onto a DVD is approximately $5,000.

The entire cost to implement a covert audio-video system will largely depend on what changes need to be made to the physical plant of the interrogation room in each local law enforcement agency. It is difficult to be precise with any estimate. However, during the course of the *Committee's* work, *Committee* members visited three county prosecutor's offices that had installed a covert audio-video system. The costs ranged from $1,000 to $7,500 per room.

C. Training

One of the most critical needs in implementing electronic recordation is training of law enforcement personnel. Everyone who testified before the *Committee* from other

officer is a party to the communication. See N.J.S.A. 2A:156A-4(b). Nor would such recording run afoul of the Federal Wiretap Act. See 18 U.S.C.A. § 2511(2)(c).

States identified training as a key component for implementing a recordation requirement.

Estimating potential costs for training resulting **solely as a result of the *Committee's* recommendations** is difficult. Ascertaining a cost would depend on such variables as the number of officers to be trained, the length of the training, whether outside experts are needed to conduct the training, whether a train-the-trainer program can be utilized. Arriving at a cost is additionally compounded because the Attorney General, or the County Prosecutors, will have to provide some training in any event to implement the Attorney General's *Amended Recordation Policy* to electronically record a suspect's final statements or acknowledgments in first, second and third degree crimes. If possible, combining training on the Attorney General's *Amended Recordation Policy* with any additional training necessitated by the *Committee's* recommendations should be considered to reduce the overall cost of training.

D. Transcripts

During the course of the *Committee's* deliberations, an issue arose as to whether there would a significant increase in costs for transcripts if recordation is required from the beginning of the first custodial interview to the end of the last interview. An analysis of the applicable discovery rule indicates that requiring recordation will not necessarily lead to increased transcript costs. R. 3:13-3 does not require that a prosecutor provide a defendant with a transcript of statements or confessions. Rather, R. 3:13-3(c)(2) provides:

> The prosecutor shall permit defendant to inspect and copy or photograph the following relevant material if not given as part of the discovery package under section (b):
>
> * * * *

> (2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded;

Case law has also held that transcripts are not required of all conversations recorded on tapes, and that prosecutors can satisfy their obligations under the rule by providing copies of tapes. See State v. Russo, 127 N.J. Super. 286 (App. Div. 1974); State v. Morton, 155 N.J. 383 (1998). Thus, under the rule, prosecutors can satisfy their discovery obligation by providing copies of disks or tapes. If, however, a prosecutor made a transcript, the defendant would be entitled to a copy of that transcript.[29] If a prosecutor, in his or her discretion, decides to transcribe the entire interrogation there will be additional costs.

E. Supplemental Funding

The *Committee* recognizes while that there may be substantial costs associated with electronic recordation of interrogations, the amount of those costs will vary with the implementation choices made by each respective law enforcement agency. Where a law enforcement agency chooses a more costly option, one possible source of supplemental funding could be the use of forfeiture funds. See N.J.S.A. 2C:64-1 et seq.

[29] In fact, the practice of providing transcripts of tapes varies across the State. In some counties partial transcripts are provided with copies of the tapes, in others complete transcripts are provided, in still others no transcript is provided unless the case goes to trial.

VI. BENEFITS AND CONCERNS ASSOCIATED WITH RECORDATION

A. Experience in Other Jurisdictions

In assessing anticipated benefits and possible problems with the process of electronic recordation the *Committee* sought input from those having actual experience with recordation in order to supplement its review of literature and court decisions on the subject. [30]

Paul Scoggin, Chief of the Violent Crimes Unit for the Hennepin County[31] Attorney's Office in Minnesota, addressed the *Committee* about his experience of over 10 years with electronic recordation. In 1994, the Minnesota Supreme Court mandated the electronic recordation of custodial interrogations. See State v. Scales, 518 N.W.2d 587 (Minn. 1994). Scoggin was initially opposed to a recordation requirement, and even appeared on television on the day the opinion was released to strongly criticize the court's decision. Based on his practical experience he now fully supports recordation, if it is done covertly, and estimates that if polled nine out of ten police chiefs in Minnesota would agree that recordation is a good idea.

In Minnesota, recordation is done in all criminal cases, and is typically done covertly. In addition, Minnesota is a "stem-to-stern" state – the entire interrogation must be recorded, rather than just the suspect's final statement. Mr. Scoggin also noted that although Scales only required that the interrogation be audio-recorded, in the years since, many departments have moved to audio/video recording of interrogations.

Scoggin cited the following benefits from his experience with electronic recordation:

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[30] For a further discussion of the literature see Appendix D.

[31] Hennepin County includes the city of Minneapolis and contains about 1.2 million people.

- The tapes tended to eliminate fights over the voluntariness of a defendant's statement and the waiver of Miranda warnings. They provide conclusive proof that the Miranda warnings were read and waived.

- The tapes also tended to resolve fights over what the defendant actually said or meant in his statement.

- Recordation was enormously helpful in showing the demeanor of the defendant at the time of the interrogation, in contrast to the way the defendant appeared in the courtroom.

- Tapes of the defendant's description and demonstration of how he committed the crime could sometimes undercut claims of self-defense, or that the defendant was too intoxicated to form the intent necessary for a particular crime.

- Even if the defendant did not confess, allowing the jury to observe his evolving story could undercut his credibility far more than hearing the officer testify that he appeared to be making it up as he went along.

- Juries were generally willing to accept necessary interrogation tactics, such as the good cop – bad cop approach or appropriate trickery or deceit, necessary to conduct a probing inquiry of the defendant.

- There have also been instances where defendants have mentioned details that appeared to be irrelevant at the time, but which were later found to tie the defendant or other people to other, unrelated crimes.

Scoggin also noted that, in his experience, recordation could have the following problems:

- Challenges to the voluntariness of a defendant's statement and the waiver of Miranda warnings have been replaced by challenges over whether the State met an exception to the recordation requirement where the statement was not recorded.

- The sight of a tape recorder could sometimes chill the taking of statements. Also, over time, defendants who have frequent contacts with the criminal justice system have become aware that they are being covertly taped. It was also noted, however, that although it was sometimes more difficult to get those defendants to provide statements, the majority seemed to view the fact that they were being taped as an inevitable part of the process.

- There had been one high-profile homicide case in which Scoggin's office had decided not to proceed because the defendant's statement had not been recorded. This had occurred even though none of the defendant's rights had been

violated, and the district attorney's office had the defendant's unrecorded statement, as well as other corroborative evidence.

- Police officers sometimes do not notice when the tape runs out, when batteries die, or when the room's acoustics are bad.

- During the interrogation, people sometimes talk over each other and use street language, and the acoustics can be a problem. Consequently, it is sometimes difficult to make out what the parties are saying when transcribing the interrogations.

- Regarding the method of recording, voice-activated tape recorders should never be used, because there is typically a one second delay between what is said and what gets recorded. That delay is enough to change "I don't want a lawyer" to "want a lawyer."

- Tapes, whether audio or video, tend to degrade over time. For that reason, digital technology is preferable.

- Covert video recording has some limitations. People often stand up and move around during interrogations, but the camera does not follow them around the room. Consequently, Scoggin had seen videos that showed only the top of someone's head.

Captain Bill Miller of the Anchorage Police Department[32] had almost twenty years' experience with electronically recording custodial interrogations. He stated that his experience with recordation had been extremely positive. In fact, he knew of many officers who bought their own tape recorders, carried them at all times, and recorded even when they were not required to do so. Captain Miller felt that the objections to recordation that were commonly cited did not "hold water" in practice. In his experience, people were generally willing to talk if approached in the proper manner. His department used Reid & Associates, a Chicago-based company that taught police officers proper interviewing techniques, and consequently did not have much of a problem with people "clamming up." Nor did they have problems with juries objecting to the tactics that they used during interviews. He did note, however, that since

[32] Anchorage, Alaska had a population of 260,283 as of the 2000 census.

suppression hearings had been largely eliminated in Alaska, the attorneys had found other things to argue about. Regarding cost, Captain Miller recommended the use of digital technology, which costs less and was easier to store than "regular" video.

Captain Miller noted that recording custodial interrogations allowed the police to link cases that, at first glance, did not appear to be related. He also noted that it resulted in fewer questions about police conduct. He recalled an incident in which he was bringing home a teen-age girl who had been interviewed by another officer. The girl mentioned that the other officer had made some sexually suggestive comments, so Captain Miller quietly turned on the in-car recorder and engaged her in conversation. Later, the girl contacted Captain Miller's supervisor and claimed that the other officer had sexually assaulted her. Captain Miller's tape recording, however, helped to disprove that allegation. He noted that accusations of police misconduct were very common, and many involving his department had been found to be baseless because the officers had recorded the exchanges with their accusers.

The discussion with Thomas Sullivan centered on the findings of his nationwide survey of police departments that electronically record custodial interrogations.[33] Sullivan found that, among the police departments that he has heard from, there was virtually unanimous support for recording custodial interrogations. Many police departments, in fact, expressed surprise that it was not a universal practice. Officers reported that recordation allowed them to focus on suspects rather than on taking notes, which tended to distract both officers and suspects. It was also noted that that recordings made it unnecessary for detectives to struggle to recall various details of the interrogation when

[33] For a fuller discussion of the findings of Mr. Sullivan's survey, see Appendix D.

writing reports, or when testifying. In addition, subsequent review of the recordings often revealed previously overlooked inconsistencies and evasive conduct.

Although some police departments did report a certain amount of resistance to recordation, generally from some of their older detectives, it was not reported frequently enough for Sullivan to consider it a significant problem. The officers' biggest concern was that defendants would "clam up" if they knew that they were being recorded. Sullivan, however, noted that many states authorized covert taping for that very reason. He also referred to the exception under Illinois law that excused law enforcement from recording if the defendant indicated he would only talk with police if the tape recorder was turned off. He also noted that many police departments routinely informed suspects about the intent to record their statements, and that those departments typically reported that it did not make a difference in whether the suspects provided a statement or not. Another concern was that certain permissible interrogation tactics used by police, such as trickery, shouting or using foul language, might be viewed as objectionable by juries, and that some guilty defendants might be acquitted as a result. Sullivan, however, noted that juries generally had no problem with the tactics used by police, and were not letting guilty defendants go free. He added, however, that if some officers were inclined to use impermissible tactics to secure a confession, recording the interrogation would, of course, discourage that practice.

Two other concerns noted by those resistant to recording custodial interrogations were (1) the cost of the equipment; and (2) what happens if something goes wrong with the equipment? According to Sullivan, hardly any of the police departments in his survey mentioned the cost of the equipment as a problem. He noted that while there could be substantial costs in the beginning, especially with video equipment, there also

tended to be huge savings in the end. For example, motions to suppress the defendant's statement were virtually eliminated, resulting in huge savings in police overtime costs. Regarding the second concern, Sullivan noted that state courts and legislatures have generally been sympathetic to problems associated with the recording equipment. Both the Alaska and Minnesota courts, for example, have held that the inadvertent failure of the equipment, or the inadvertent failure to turn the equipment on, did not render an unrecorded statement inadmissible. In closing, Sullivan noted that recording custodial interrogations enabled the police to review the tapes and find things that they had initially overlooked. It also served as a valuable training device regarding how to, or how not to, conduct an interview.

B. Committee's Conclusions

After reviewing the literature and considering the actual experience in other jurisdictions, the *Committee* has concluded that the electronic recordation of custodial interrogations will yield a number of benefits. The *Committee* also recognizes that the practice has the potential for causing some problems. Where a possible problem has been identified the *Committee* has also identified ways to ameliorate or eliminate the problem. The following benefits from electronic recordation of custodial interrogations are anticipated:

- Recordation can provide an accurate and complete record of what transpired during the interview if the police record from the very beginning of the interview.

- Recordation can result in a reduction in Miranda admissibility motions and hearings. The voluntariness of the defendant's confession is typically apparent from viewing, or listening to, the recording.

- Recordation can serve as a valuable investigative tool, as seemingly innocuous statements may become relevant when the recording is later reviewed by the interviewers or others.

- Recordation can result in fewer trials or contested matters, as the parties become more aware of the strengths and weaknesses of their respective cases after reviewing the recording.

- Recordation can eliminate the risk of impermissible interrogation practices.

- Recordation can protect and enhance the police officers' credibility, and protect against complaints of police misconduct.

- Recordation can make the trial court's decisions more reliable, and provide a cleaner appellate record.

- Recordation can result in time savings, allowing police officers to spend less time in court for hearings.

- Recordation can allow for a more effective interrogation as the conversation flows better because the police officers conducting the interview do not have to pause to take notes.

- Even if the defendant does not provide a confession, recordation of the entire interview allows the jury to see consistencies or inconsistencies or the evolution of a defendant's responses to police questions.

- Recordation can result in a more complete evidential picture, as the jury can not only see and/or hear what the defendant said, but also can observe the defendant's demeanor as it was at the time of the interrogation.

- The recorded interviews can serve as a training aid for police officers regarding how to, or how not to, conduct an interrogation.

The *Committee* also identified the following concerns associated with recording custodial interrogations:

- There is a possibility of a "chilling effect" on suspects who may be reluctant to speak freely if they know that they are being recorded. Any chilling effect could be minimized, however, by recording covertly,[34] or where a defendant refused to be recorded, by creating an exception to the recording requirement allowing law enforcement officers to turn off the recorder and then conduct an unrecorded interrogation after first taping the defendant's statement that he or she did not want to be recorded.

[34] A recent study surveyed 800 investigators from Alaska and Minnesota that had been trained by the firm conducting the study. Although the response rate was low (14%), the survey results indicated that the perception of the investigators was that the confession rate was substantially higher when the recording device was never visible (82%) than when the recording devise was somewhat (52%), usually (50%) or always (43%) visible. Brian C. Jayne and Joseph P. Buckley (John E. Reid and Associates), *Empirical Experiences of Required Electronic Recording of Interviews and Interrogations on Investigators' Practices and Case Outcomes*, Illinois Law Enforcement Executive Forum (January 2004).

- The costs of recording equipment, training and transcription could be expensive, particularly for small police departments, depending on the choice of recording method. This is especially true with certain types of high-end video equipment and with covert recording which could require retrofitting the interrogation rooms. This concern can be ameliorated by allowing law enforcement agencies to choose an electronic recording method consistent with their budget and through the use of supplemental funding sources such as forfeiture funds.

- The time frame for implementing any recordation plan was seen as another potential concern, depending on the scope of any recording requirement. This concern can be ameliorated by providing for lead time and/or phasing in of implementation of any recording requirement.

- Recordation might slow down cases pre-indictment, especially if the defendant was not provided with transcripts of the recorded statement. A transcribed statement was described as a powerful tool, because it showed the defendant exactly what he said. It was suggested that without a transcribed statement, case movement might slow down dramatically. However, that view was countered by the view that the defendant would instead receive a copy of the actual recording, which could be more powerful evidence than a transcribed statement.[35]

- Given Captain Miller's observation that attorneys in Alaska found other things to argue about now that they no longer argue over Miranda issues, some members of the *Committee* felt that recordation might lead to more Driver[36] hearings, or other types of hearings.

[35] See discussion under Section V D supra.
[36] See State v. Driver, 38 N.J. 255 (1962).

VII. *COMMITTEE'S* RECOMMENDATIONS

As a result of the experience of members of the *Committee*, and our research and evaluation of the recordation experience in other states, the *Committee* makes the following recommendations:

RECOMMENDATION 1. The Supreme Court should exercise its supervisory authority over the administration of criminal justice to encourage electronic recordation of custodial interrogations.

The *Committee* believes that the benefits to law enforcement, individual defendants and the judicial process, from the recommendations made in this report, significantly outweigh any potential problems. Electronic recordation has been successfully implemented in numerous jurisdictions around this country at both the State and local level. With the greater comfort that comes from experience, and with advances in technology, the practice will continue to expand nationally. The *Committee* believes that the time is right for the Supreme Court to exercise its supervisory authority over the administration of criminal justice to encourage electronic recordation of custodial interrogations in New Jersey.

RECOMMENDATION 2. Electronic recordation may be accomplished through either audio or audio-visual recording. The method of recording should be left to the discretion of law enforcement.

Most states that have implemented electronic recordation, either through case law or through a statutory enactment, have not specified the method of recording, i.e. audio or audio-visual recording. The *Committee*'s recommendation that the method of recordation be either audio or audio-visual is consistent with how other states have begun electronically recording statements. It recognizes that there is a great diversity in the size and resources of law enforcement agencies throughout New Jersey and in the scope of their responsibilities. This recommendation provides law enforcement

agencies with the ability to implement the recordation requirement using a simple hand-held tape recorder, or by more sophisticated recording set-ups using audio-video recording. The experience in other states has been that, over time, electronic recording has transitioned from audio recording to audio-visual recording. The *Committee* believes that many law enforcement agencies will initially opt for audio-visual. In those that do not, we believe the transition will occur naturally over time as it has in other states.

RECOMMENDATION 3. Electronic recording should occur when a custodial interrogation is being conducted in a place of detention and should begin at, and include, the point at which Miranda warnings are required to be given.

The *Committee* recommends that electronic recording occur when a custodial interrogation is conducted in a place of detention. The *Committee* further recommends that the recording be "stem-to-stern", i.e. the entire interrogation must be recorded, rather than just the final statement. Requiring stem-to-stern recordation is consistent with what other states have done and is essential if the benefits attendant to electronic recordation are to be fully realized. Recording should begin at, and include, the point at which Miranda warnings are required to be given. The recommendation establishes a bright line that is: (1) easily understood by law enforcement officers, who already receive training on when Miranda warnings are required to be given, and (2) easier for courts to apply when reviewing issues concerning statement admissibility.

The *Committee* recommends adoption of a definition of "place of detention" as follows: A place of detention means a building or a police station or barracks that is a place of operation for a municipal or state police department, county prosecutor, sheriff or other law enforcement agency, that is owned or operated by a law enforcement agency at which persons are or may be detained in connection with criminal charges

against those persons. Place of detention shall also include a county jail, county workhouse, county penitentiary, state prison or institution of involuntary confinement where a custodial interrogation may occur. The term institution of involuntary confinement is intended to include, but it is not limited to, facilities that house defendants who may be mentally ill or that house persons alleged to be sexually violent predators.

In reaching its conclusions the *Committee* considered how other states have implemented electronic recordation. Alaska requires recordation when a custodial interrogation occurs in a place of detention. See Stephan v. State, supra, 711 P.2d at 1158 (1985). Minnesota requires recordation when questioning occurs in a place of detention but also includes recordation of interrogation outside of a place of detention if feasible. See State v. Scales, 518 N.W.2d 587, 592 (1994). Texas requires recordation of statements of an accused made as a result of custodial interrogation. See Tex.Crim.Proc.Code Ann. Art. 38.22 § 3. Illinois requires recordation of statements made by an accused in homicides as a result of a custodial interrogation at a police station or other place of detention. See 725 Ill. Comp. Stat. Ann. 5/103-2.1. Maine requires recording of law enforcement interviews of suspects in serious crimes. See 25 M.R.S.A. § 2803-B(1). The Maine Criminal Justice Academy's minimum standards require recordation when a statement is obtained by a law enforcement officer from a person who is subject to a custodial interrogation conducted at a place of detention. The District of Columbia requires recordation of custodial interrogations of persons suspected of committing a dangerous crime or crime of violence, when the interrogation is conducted in a Metropolitan Police Department interview room equipped with electronic recording equipment. See DC Code §5-133.20.

RECOMMENDATION 4. Electronic recording of custodial interrogations occurring in a place of detention should occur when the adult or juvenile being interrogated is charged with an offense requiring the use of a warrant pursuant to R. 3:3-1c.[37]

The types of offenses for which electronic recordation must occur vary from state to state. Minnesota requires recordation for all offenses.[38] Alaska requires recordation of suspects, victims and witnesses in all felony and domestic violence cases, and the suspects in any in-custody interviews.[39] Illinois requires recordation where the defendant is charged with certain homicides. See 725 Ill. Comp. Stat. Ann. 5/103-2.1. Maine will require recordation in serious crimes. See 25 M.R.S.A. § 2803-B(1). The District of Columbia requires recordation for dangerous crimes or crimes of violence. See DC Code §5-133.20.

Consideration was given to recommending electronic recordation for all crimes. The *Committee* recognized, however, that the scope of such a recommendation would place significant practical burdens on law enforcement at this time. The *Committee* also considered recommending that recordation be required only for certain degrees of crimes, as is done in the Attorney General's *Amended Recordation Policy*. However, the *Committee* was concerned that it would be difficult to determine the degree of some crimes with precision at the time the interrogation occurs. Therefore, the Committee decided to recommend electronic recordation for a select group of crimes that law enforcement officers could easily understand and with which they are now familiar. The

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[37] The offenses that require a warrant rather than a summons are: murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault, aggravated arson, burglary, violations of Chapter 35 of Title 2C that constitute first or second degree crimes, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes. Hereinafter in this report will refer to these crimes as "predicate crimes".

[38] Remarks of Paul Scoggin to the *Committee.*

[39] Remarks of Captain Bill Miller to the *Committee.*

crimes requiring recordation would be identical to the crimes for which a warrant, rather than a summons, must issue. See R. 3:3-1(c).

RECOMMENDATION 5. The requirement for electronic recordation of custodial interrogations occurring in a place of detention should not apply in circumstances where:

> (a) a statement made during a custodial interrogation is not recorded because electronic recording of the interrogation is not feasible,
> (b) a spontaneous statement is made outside the course of an interrogation,
> (c) a statement is made in response to questioning that is routinely asked during the processing of the arrest of the suspect,
> (d) a statement is made during a custodial interrogation by a suspect who indicated, prior to making the statement, that he/she would participate in the interrogation only if it were not recorded; provided however, that the agreement to participate under that condition is itself recorded,
> (e) a statement is made during a custodial interrogation that is conducted out-of-state,
> (f) a statement is given at a time when the accused is not a suspect for the crime to which that statement relates while the accused is being interrogated for a different crime that does not require recordation,
> (g) the interrogation during which the statement is given occurs at a time when the interrogators have no knowledge that a crime for which recording is required has been committed.

The *Committee* recommends that the State bear the burden of proving, by a preponderance of the evidence, that an exception described in this recommendation is applicable.

States that have implemented electronic recordation generally have an "escape clause" provision that excuses a non-willful failure to record. In states such as Alaska and Minnesota, where recordation is required by case law, the exceptions to recording

have also evolved through case law. For example, courts in Alaska have upheld the admissibility of statements where the police made a good faith effort to record their conversation, see Bodnar v. Anchorage, 2001 WL 1477922 (Alaska Ct. App. 2001); or where the police did not have a functioning tape recorder, see George v. State, 836 P.2d 960 (Alaska Ct. App. 1992); or where the recording was inadvertently erased or destroyed, see Bright v. State, 826 P.2d 765 (Alaska Ct. App. 1992). Similarly, Minnesota courts have upheld the admissibility of statements where, because of a mistake, no recording was made, see State v. Miller, 573 N.W.2d 661 (Minn. 1998); or where the tape recorder was inoperative, see State v. Schroeder, 560 N.W.2d 739 (Minn. Ct. App. 1997). In states such as Texas and Illinois, which have required recordation via statute, exceptions have generally been contained in the statute. See, for example, Tex.Crim.Proc.Code Ann. Art. 38.22 § 5 (Vernon 1999) and 725 Ill. Comp. Stat. Ann. 5/103-2.1(e) (West 2003).

The *Committee* also believes that any recording requirement it proposes should include appropriate exceptions. Therefore, the *Committee* is recommending adoption of exceptions that are modeled on those contained in the Illinois statute. See 725 Ill. Comp. Stat. Ann. 5/103-2.1.

RECOMMENDATION 6. The failure to electronically record a defendant's custodial interrogation should be a factor considered by the trial court in determining the admissibility of a statement, and by the jury in determining what weight, if any, to give to the statement. The Court should adopt a court rule and model jury charge to implement this recommendation.

In its creation of this *Committee* the Chief Justice charged the *Committee* to "consider whether electronic recordation should be encouraged through the use of a presumption against admissibility of non-recorded statements or through other formal or informal means." In addressing this issue the *Committee* began by reviewing the

processes used in other states that engaged in electronic recordation. The Alaska Supreme Court found that electronic recordation was mandated as a requirement of due process under the Alaska Constitution and determined that the remedy for an unexcused failure to record should be exclusion of any statement derived therefrom. See Stephan v. State, 711 P.2d. 1156 (1985). The Minnesota Supreme Court found that electronic recordation was essential to protecting the rights of the accused and ordered it in the exercise of its supervisory power to insure the fair administration of justice. It determined that the remedy for not recording an interrogation should be suppression of any unrecorded statement made therein. See State v. Scales, 518 N.W.2d 587 (1994). In Texas, pursuant to statute, oral statements of an accused are not admissible unless an electronic recordation is made of the statement. See Tex.Crim.Proc.Code Ann. Art. 38.22 § 3 (Vernon 1999). In Illinois, statutory law states that oral statements in homicide cases are presumed to be inadmissible unless they are recorded. The presumption can be overcome by a preponderance of the evidence. See 725 Ill. Comp. Stat. Ann. 5/103-2.1. In both Maine and the District of Columbia, statutes were enacted requiring law enforcement to develop procedures for electronic recordation. Maine has just completed development of those procedures, but according to Alan Hammond of the Maine Criminal Justice Academy, the Maine statute and procedures do not address the remedy for a failure to record. A somewhat different approach was adopted in Massachusetts. In Commonwealth v. DiGiambattista, 813 N.E.2d 516 (2004), the Massachusetts Supreme Judicial Court required that when an interrogation including a statement or confession was not recorded, the defendant would be entitled, upon request, to a jury instruction concerning the need to evaluate the alleged statement with particular caution. The Court said:

> Thus, when the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury 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. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised 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. See *Commonwealth v. Cryer,* 426 Mass. 562, 571, 689 N.E.2d 808 (1998), and cases cited (jurors must disregard defendant's statement if voluntariness not established beyond a reasonable doubt).
>
> Nothing in this instruction alters the overarching requirement that the voluntariness of a defendant's statement be determined on the totality of the circumstances. *Commonwealth v. Selby,* 420 Mass. 656, 662-663, 651 N.E.2d 843 (1995), and cases cited. To the contrary, the instruction aptly focuses the jury's attention on the fact that the Commonwealth has failed to present them with evidence of the "totality" of the circumstances, but has instead presented them with (at best) an abbreviated summary of those circumstances and the interrogating officers' recollections of the highlights of those circumstances. Jurors should use great caution when trying to assess the "totality of the circumstances" when they have before them only a highly selective sliver of those circumstances, and they may properly decide that, in the absence of that "totality," they cannot conclude that the defendant's statement was voluntary. *Footnote omitted*.
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> [Commonwealth v. DiGiambattista, supra, 813 N.E.2d at 533-534]

With the exception of Minnesota, all states requiring exclusion of a statement based solely on the failure to record an interrogation have either done so where the Supreme Court found a constitutional requirement for electronic recordation or where such was legislatively mandated. Neither is the case in New Jersey. In dealing with

this issue the *Committee* felt that it was essential to keep in mind the basic purposes to be served by encouraging recordation. In that respect the *Committee* was guided by the concerns our Supreme Court expressed in State v. Cook. Those concerns related to establishing the reliability and trustworthiness of confessions as a prerequisite to their use.

With this in mind the *Committee* recommends the approach taken in Massachusetts, with modifications so that it comports to New Jersey law. The *Committee* believes that the unexcused failure to electronically record an interrogation should be a factor for consideration by both the trial judge and the jury as each is called on to make decisions concerning the reliability and trustworthiness of any statement that is the product of that interrogation. Therefore, if a statement were to be excluded from evidence by a court or discredited by a jury it would be because it was not found to be voluntary by the court or reliable and trustworthy by the jury, not simply because there was a failure to electronically record it. Where there is an unexcused failure to electronically record, the trial judge, as gatekeeper for the admissibility of evidence, may weigh that fact in determining whether the State has met its burden of establishing that the statement was voluntarily made after a knowing and intelligent waiver of constitutional rights. In addition, the unexcused failure to electronically record should also justify an instruction to the jury similar to that given in Massachusetts.

The *Committee* believes that the forgoing approach can be best accomplished through adoption of a court rule and a model jury charge on the subject. A proposed rule and charge follow:

Rule 3:17 Electronic Recordation

a. Unless one of the exceptions set forth in paragraph (b) are present, all custodial interrogations conducted in a place of detention must be electronically recorded when the person being interrogated is charged with murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault, aggravated arson, burglary, violations of Chapter 35 of Title 2C that constitute first or second degree crimes, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes. For purposes of this rule, a "place of detention" means a building or a police station or barracks that is a place of operation for a municipal or state police department, county prosecutor, sheriff or other law enforcement agency, that is owned or operated by a law enforcement agency at which persons are or may be detained in connection with criminal charges against those persons. Place of detention shall also include a county jail, county workhouse, county penitentiary, state prison or institution of involuntary confinement where a custodial interrogation may occur.

b. Electronic recordation pursuant to paragraph (a) must occur unless: (i) a statement made during a custodial interrogation is not recorded because electronic recording of the interrogation is not feasible, (ii) a spontaneous statement is made outside the course of an interrogation, (iii) a statement is made in response to questioning that is routinely asked during the processing of the arrest of the suspect, (iv) a statement is made during a custodial interrogation by a suspect who indicated, prior to making the statement, that he/she would participate in the interrogation only if it were not recorded; provided however, that the agreement to participate under that condition is itself recorded, (v) a statement is made during a custodial interrogation that is

conducted out-of-state, (vi) a statement is given at a time when the accused is not a suspect for the crime to which that statement relates while the accused is being interrogated for a different crime that does not require recordation, (vii) the interrogation during which the statement is given occurs at a time when the interrogators have no knowledge that a crime for which recording is required has been committed. The State shall bear the burden of proving, by a preponderance of the evidence, that one of the exceptions is applicable.

(c) If the State intends to rely on any of the exceptions set forth in paragraph (b) in offering a defendant's unrecorded statement into evidence, the State shall furnish a notice of intent to rely on the unrecorded statement, stating the specific place and time at which the defendant made the statement and the specific exception or exceptions upon which the State intends to rely. The prosecutor shall, on written demand, furnish the defendant or defendant's attorney with the names and addresses of the witnesses upon whom the State intends to rely to establish one of the exceptions set forth in paragraph (b). The trial court shall then hold a hearing to determine whether one of the exceptions apply.

(d) The failure to electronically record a defendant's custodial interrogation in a place of detention 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.

(e) In the absence of an electronic recordation required under paragraph (a), the court shall, upon request of the defendant, provide the jury with a cautionary instruction.

The *Committee* recommends that the following jury charge be given when required under proposed Rule 3:17.

PROPOSED JURY CHARGES

JURY CHARGE TO BE GIVEN WHEN STATEMENT OF DEFENDANT HAS BEEN ADMITTED AFTER FINDING BY COURT THAT POLICE INEXCUSABLY FAILED TO ELECTRONICALLY RECORD STATEMENT

A. Charge to be Given When State Offers Statement as Direct Evidence of Defendant's Guilt:

There is for your consideration in this case a (written or oral) statement allegedly made by the defendant.

The prosecutor asserts that the defendant made the statement and that the information contained in it is credible. **[HERE STATE DEFENDANT'S ASSERTIONS, IF ANY.]**

It is your function to determine (1) whether the statement was actually made, and (2) whether it, or any portion of it, is credible.

To make that decision, you should take into consideration the circumstances and facts as to how the statement was made.

[HERE DISCUSS EVIDENCE ADDUCED BEFORE THE JURY RELATING TO SUCH FACTS AND CIRCUMSTANCES WHICH MAY INCLUDE BUT NEED NOT BE LIMITED TO RENDITION OF MIRANDA WARNINGS AND WAIVER; TIME AND PLACE OF INTERROGATION; TREATMENT OF DEFENDANT BY LAW ENFORCEMENT OFFICIALS; DEFENDANT'S MENTAL AND PHYSICAL CONDITION; AND WHETHER THE STATEMENT IS DEEMED VOLUNTARY UNDER ALL OF THE FACTS AND CIRCUMSTANCES.]

Among the factors you may consider in deciding whether or not the defendant actually gave the alleged statement and if so, whether any or all of the statement is credible, is the failure of law enforcement officials to make an electronic recording of the interrogation conducted and the defendant's alleged statement itself. New Jersey law favors the electronic recording of interrogations by law enforcement officers so as to ensure that you will have before you a complete picture of all circumstances under which an alleged statement of a defendant was given, so that you may determine

whether a statement was in fact made and if so, whether it was accurately reported by State's witnesses and whether it was made voluntarily or is otherwise reliable or trustworthy. Where there is a failure to electronically record an interrogation, you have not been provided with a complete picture of all of the facts surrounding the defendant's alleged statement and the precise details of that statement. By way of example, you cannot hear the tone or inflection of the defendant's or interrogator's voices, or hear first hand the interrogation, both questions and responses, in its entirety. Instead you have been presented with a summary based upon the recollections of law enforcement personnel. Therefore, you should weigh the evidence of the defendant's alleged statement with great caution and care as you determine whether or not the statement was in fact made and if so, whether what was said was accurately reported by State's witnesses, and what weight, if any, it should be given in your deliberations. The absence of an electronic recording permits but does not compel you to conclude that the State has failed to prove that a statement was in fact given and if so, accurately reported by State's witnesses.

[IF ORAL STATEMENT, CHARGE THE FOLLOWING PARAGRAPH]

Furthermore, in considering whether or not an oral statement was actually made by the defendant, and if made, whether it is credible, you should receive, weigh, and consider this evidence with caution as well, based on the generally recognized risk of misunderstanding by the hearer, or the ability of the hearer to recall accurately the words used by the defendant. The specific words used and the ability to remember them are important to the correct understanding of any oral communication because the presence, or absence, or change of a single word may substantially change the true meaning of even the shortest sentence.

If, after consideration of all these factors, you determine that the statement was not actually made, then you must disregard the statement completely.

If you find that the statement was made, you may give it what weight you think appropriate.

B. Charge to be Given When Statement of Defendant is Introduced by the State for the Purpose of Inferring the Defendant's Effort to Avoid Arrest and/or Prosecution Due to Consciousness of Guilt:

There is for your consideration in this case a (written or oral) statement allegedly made by the defendant.

The prosecutor asserts that the statement was made by the defendant, that it was knowingly false when it was made, and that you may draw inferences from this as to the defendant's state of mind at that time. **[HERE STATE DEFENDANT'S POSITION, IF ANY.]**

It is your function to determine whether the statement was actually made. In considering whether or not the statement was made by the defendant, you may taken into consideration the circumstances and facts surrounding the giving of the statement.

[HERE DISCUSS FACTS AND CIRCUMSTANCES SURROUNDING THE GIVING OF THE STATEMENT.]

Among the factors you may consider in deciding whether or not the defendant actually gave the alleged statement is the failure of law enforcement officials to make an electronic recording of the interrogation conducted and the alleged statement itself. New Jersey law favors the electronic recording of interrogations by law enforcement officers. This is done to ensure that you will have before you a complete picture of the circumstances under which an alleged statement of a defendant was given, so that you may determine whether a statement was in fact made and accurately recorded. Where

there is failure to electronically record an interrogation, you have not been provided with a complete picture of all the facts surrounding the defendant's alleged statement and the precise details of that statement. By way of example, you cannot hear the tone or inflection of the defendant's or interrogator's voices, or hear first hand the interrogation, both questions and responses, in its entirety. Instead you have been presented with a summary based upon the recollections of law enforcement personnel. Therefore, you should weigh the evidence of the defendant's alleged statement with great caution and care as you determine whether or not the statement was in fact made and if so whether it was accurately reported by State's witnesses, and what, if any, weight it should be given in your deliberations. The absence of an electronic recording permits but does not compel you to conclude that the State has failed to prove that a statement was in fact given and if so, accurately reported by State's witnesses.

[IF ORAL STATEMENT—CHARGE THE FOLLOWING PARAGRAPH]

Furthermore, in considering whether or not an oral statement was actually made by the defendant, and, if made, accurately reported by State's witnesses, you should receive, weigh, and consider this evidence with caution based on the generally recognized risk of misunderstanding by the hearer, or the ability of the hearer to recall accurately the words used by the defendant. The specific words used and the ability to remember them are important to the correct understanding of any oral communication because the presence, or absence, or change of a single word may substantially change the true meaning of even the shortest sentence.

If after consideration of all of the evidence you determine that the statement was not made, then you should disregard it completely. If you find that the statement was

made, you must determine what inferences you can draw from it and what weight, if any, to give to it.

CAVEAT

[IF THE STATE IS ALLEGING THAT PORTIONS OF THE STATEMENT ARE TRUE AND ARE ADMISSIONS OF GUILT WHILE OTHERS ARE FALSE AND EVIDENCE HIS EFFORT TO AVOID PROSECUTION AND/OR CONVICTION OR OTHERWISE EVIDENCE CONSCIOUSNESS OF GUILT, IT MAY BE NECESSARY TO GIVE PORTIONS OF BOTH A & B CHARGES.]

RECOMMENDATION 7. The requirement that electronic recording occur when a custodial interrogation is being conducted in a place of detention should become effective January 1, 2006 for homicide offenses and January 1, 2007 for all other offenses specified in proposed R. 3:17a.

The *Committee* recognizes that implementing electronic recording as recommended herein will provide challenges to law enforcement. Therefore, the *Committee* recommends that "lead time" be built into the process. This recommendation is consistent with the advice from representatives of other states consulted by the *Committee.* Additionally, law enforcement representatives on the *Committee* expressed a strong preference for covert recording because of their concern regarding the "chilling" effect non-covert recording might have suspects. Greater use of covert recording will, of necessity, present equipment and training issues.

Because most homicide cases are investigated by prosecutors' offices and because those offices can be equipped and trained more quickly, the *Committee* recommends a January 1, 2006 start date for recording interrogations on homicide cases. Because the *Committee* recommendations are broader than the current Attorney General and County Prosecutor's policy and because of the necessity to equip

and train over 500 other law enforcement agencies in the State, the *Committee* recommends a January 1, 2007 start date for recording interrogations in other cases.

RECOMMENDATION 8. The electronic recordation requirement should not mandate that the defendant be notified prior to electronic recordation.

In New Jersey, it is permissible to covertly record a defendant who has been properly been given Miranda warnings. See State v. Vandever, 314 N.J. Super. 124 (App. Div. 1998). Such recording does not violate the *New Jersey Wiretap and Electronic Surveillance Control Act* as long as the investigative or law enforcement officer is a party to the communication. See N.J.S.A. 2A:156A-4(b). Nor would such recording run afoul of the Federal Wiretap Act. See 18 U.S.C.A. § 2511(2)(c). Given this, the *Committee* believes that the decision whether to tell a suspect that his or her interrogation will be electronically recorded is best left to law enforcement.

RECOMMENDATION 9. The Supreme Court should periodically review the implementation of the recording requirement.

The *Committee* recommends that the Court review implementation of the electronic recordation requirement after a period of time has elapsed. The reason for this recommendation is twofold. First, successful implementation may indicate that a broader use of recordation is warranted, and second, the rapid development of technology may make more expansive use of recordation feasible. Issues such as expansion to other types of crimes, or expanding recording beyond places of detention, could be considered in context at that time.

Experience in how the recordation requirement is being implemented will be very important. The *Committee* has been advised that the Attorney General and County Prosecutors will be monitoring implementation of the recording requirement. Information on the total number of custodial interrogations that were required to be

recorded, the total of number of interrogations that were actually recorded and the number of times persons objected to recording will be useful in ascertaining how the Court's recording requirement is being implemented.