

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

TENTATIVE RECOMMENDATIONS RE: FALSE CONFESSIONS

MAY 18, 2006

1. The Commission urges all California law enforcement agencies to videotape the entirety of all custodial interrogations of crime suspects or, where videotaping is impractical, to audiotape the entirety of such custodial interrogations.
2. The Commission recommends that the state legislature enact the following statute to require the videotaping of the entirety of custodial interrogations of individuals suspected of homicide, and require the electronic recording by video or audio of the entirety of custodial interrogations of individuals suspected of serious felonies other than homicide:

The People of the State of California do enact as follows:

Section 1: Definitions.

- (a) "Cautionary Instruction" means an instruction, in a form to be recommended by the California Judicial Council, which advises the jury to view statements which have not been Electronically Recorded with caution.
- (b) "Custodial Interrogation" means an interview which occurs while a person is in custody in a Place of Detention, involving a law enforcement officer's questioning that is reasonably likely to elicit incriminating responses.
- (c) "Place of Detention" means a jail, police or sheriff's station, holding cell, correctional or detention facility, or other place where persons are held in connection with juvenile or criminal charges.
- (d) "Electronic Recording" or "Electronically Recorded" means an audio, video or digital audio or video that is an authentic, accurate, unaltered record of a Custodial Interrogation, beginning with a law enforcement officer's advice of the person's constitutional rights and ending when the interview has completely finished.
- (e) "Homicide" means any offense defined in Chapter 1 (commencing with Section 187) of Title 8 or Part 1 of the California Penal Code.
- (f) "Serious Felony" means any of the offenses listed in Section 1192.7(c) of the California Penal Code.
- (g) "Statement" means an oral, written, sign language or nonverbal communication.

Section 2: Recordings Required.

All Statements made by a person during a Custodial Interrogation relating to a Serious Felony shall be electronically recorded. All Statements made by a person during a Custodial Interrogation relating to a Homicide shall be electronically recorded by means of video or digital video.

Section 3: Cautionary Instruction Required.

If any Statement is admitted in evidence in any criminal proceeding which was not Electronically Recorded in compliance with Section 2, the court shall, at the request of the defendant, provide the jury with a cautionary instruction unless the court finds:

- (a) That the Statement is admissible under applicable provisions of the Evidence Code; and
- (b) That the Statement is proven to have been made voluntarily and to be reliable; and
- (c) That, if feasible to do so, law enforcement personnel made a contemporaneous record of the reason for not making an Electronic Recording of the Statement; and
- (d) That it is proven by a preponderance of the evidence that one or more of the following circumstances existed at the time of the Custodial Interrogation:
 - (i) The questions put by law enforcement personnel, and the person's responsive Statements, were part of a routine processing or "booking" of the person; or
 - (ii) Before or during a Custodial Interrogation, the person agreed to respond to the officer's questions only if his or her Statements were not Electronically Recorded; or
 - (iii) The law enforcement officers in good faith failed to make an Electronic Recording of the Custodial Interrogation because the officers inadvertently failed to operate the recording equipment properly, or without the officer's knowledge the recording equipment malfunctioned or stopped operating; or
 - (iv) The Custodial Interrogation took place in another jurisdiction and was conducted by officers of that jurisdiction in compliance with the law of that jurisdiction; or
 - (v) The law enforcement officers conducting or contemporaneously observing the Custodial Interrogation reasonably believed that the crime for which the person was taken into custody, or was being investigated or questioned, was not among those listed in Section 2; or
 - (vi) Exigent circumstances existed which prevented the making of, or rendered it not feasible to make, an Electronic Recording of the Custodial Interrogation.

Section 4: Handling and Preservation of Electronic Recordings.

(a) Every Electronic Recording of a Custodial Interrogation shall be clearly identified and catalogued by law enforcement personnel.

(b) If a juvenile or criminal proceeding is brought against a person who was the subject of an Electronically Recorded Custodial Interrogation, the Electronic Recording shall be preserved by law enforcement personnel until all appeals, post-conviction and habeas corpus proceedings are final and concluded, or the time within which they must be brought has expired.

(c) If no juvenile or criminal proceeding is brought against a person who has been the subject of an Electronically Recorded Custodial Interrogation, the related Electronic Recording shall be preserved by law enforcement personnel until all applicable state and federal statutes of limitations bar prosecution of the person.