



TEXAS HOUSE OF REPRESENTATIVES

RUTH JONES McCLENDON

State Representative, District 120

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Texas Legislative Black Caucus

December 16, 2015

Mr. David Slayton, Executive Director  
Office of Court Administration  
205 W. 14th Street, #600  
Austin, Texas 78701



Dear Mr. Slayton,

Please accept these comments for the good of the order, and share them with the Chair Smithee and the Commission Members. Unfortunately, I was not available on December 10th to participate personally in the Commission's meeting to discuss the scope and priority of the work to be done in preparation for the report due next December.

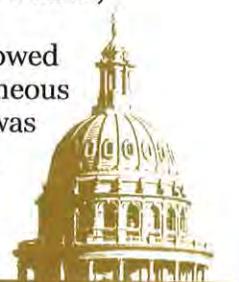
Based on the meeting materials provided, it appears that during the study period starting on January 1, 2010, about two-thirds of the exonerations were drug-related offenses. I encourage the Commission to give these cases meaningful attention, as they represent a body of data that could and should be studied in order to make recommendations for the 2017 Legislative Session. For instance, we know that there are costs associated with arrest, detention and incarceration in these cases, and we need to evaluate the long-term impacts on exonerated persons who opted to plead guilty for time served.

I would encourage the Commission to move forward with a survey of law enforcement offices concerning recording of custodial interrogations. In the August 2010 report of the Timothy Cole Advisory Panel, Recommendation 6 listed the development of standards for recording of certain custodial interrogations as a priority item. While legislation has been introduced previously, Legislative Committees need this kind of data in order to consider the pros and cons fully.

**“Panel Recommendation 6. The State of Texas should adopt a mandatory electronic recording policy, from delivery of *Miranda* warnings to the end, for custodial interrogations in certain felony crimes. The policy should include a list of exceptions to recording and the judicial discretion to issue a jury instruction in the case of an unexcused failure to record.**

Creating a complete, accurate, and reviewable document that captures the entirety of a custodial interrogation will help prevent wrongful convictions. The Panel therefore recommends that electronic recording be made mandatory in Texas for custodial interrogations in cases of murder, capital murder, kidnapping, aggravated kidnapping, continuous sexual abuse of a child, indecency with a child, sexual performance by a child, sexual assault, and aggravated sexual assault.

The Panel also recommends that exceptions to electronic recording be allowed for good cause, such as equipment malfunction, uncooperative witnesses, spontaneous statements, public safety exigencies, or instances where the investigating officer was unaware that a crime that required recorded interrogations had been committed.



This takes into consideration the contingencies that investigating officers may face when dealing with a witness or suspect in the field.

The final recommendation from the Panel is that in instances where the Court determines that unrecorded interrogations are not the result of good faith attempts to record or that none of the exceptions to recording apply, the Court may deliver an instruction to the jury that it is the policy of the State of Texas to record interrogations, and they may consider the absence of a recording when evaluating evidence that arose from the interrogation."

Depending on the results of the proposed survey about current practices in regard to recording of custodial interrogations, the Commission may well conclude that Recommendation 6 from the TCAP report of August 2010 does need to be proposed again to the Legislature for its full consideration in 2017.

Also, in Section 8 of H.B. 48, one of the several duties of the Commission is to "collect and evaluate data and information from an actual innocence exoneration reported to the commission by a state-funded innocence project, for inclusion in the commission's report under Section 9." For this purpose, I would encourage the Commission to consider an actual innocence case referred to the Commission by an Innocence Project. It need not be a case in which the Innocence Project represented the defendant in post-conviction proceedings.

If I can be of assistance, or if my staff can be helpful to you, please let me know. I am pleased that the Commission is taking such a thoughtful approach to its work, and look forward to seeing the meaningful results that will come from those efforts.

Respectfully,



Ruth Jones McClendon

cc:

The Honorable Rodney Ellis, Texas State Senator, District 13  
Mr. Jim Bethke, Executive Director, TIDC;  
Mr. Wesley Shackelford, Deputy Director/Special Counsel, TIDC;  
Ms. Terri Peirce, Judicial Information Data Analyst, TCERC

## Recommended Topics for Timothy Cole Exoneration Review Commission

During its second meeting on December 10, 2015, the Timothy Cole Exoneration Review Commission (TCERC) voted to focus its survey of wrongful convictions to roughly three to five topics of inquiry and to prioritize non-drug related cases in its review. In the planning of its investigation into the root causes of wrongful convictions in the Texas criminal justice system, and its review of the research and recommendations issued by the Timothy Cole Advisory Panel on Wrong Convictions' in its 2010 report, TCERC may wish to consider the following topics: (1) eye witness identification reform, (2) custodial interrogation practices, (3) informant regulation, and (4) the provision of inadequate defense services.

These recommended areas of inquiry are rooted in both our experience as defense and innocence professionals, and a preliminary examination of exoneration cases that have occurred in Texas since January 1, 2010.<sup>1</sup> This survey includes 47 exoneration cases (current as of December 15, 2015) that draw from a list of 140 wrongful conviction cases posted on the National Registry of Exonerations' website,<sup>2</sup> as well as two additional cases that were revealed pursuant to Public Information Act requests to the Texas Comptroller's Office. It excludes 95 cases that pertain to drug possession convictions. As outlined in further detail below, each of our four recommended issues addresses one or more of the leading causes of error in our criminal justice system. (See Figure 1 below). Further research into these subjects will facilitate TCERC's mission to identify a set of evidence-based recommendations that help ensure the fair administration of justice in Texas.

Figure 1 – Contributing Factors to Wrongful Convictions  
in Texas since 2010<sup>3</sup>

Contributing Factor	# Cases	% Cases
<b>Mistaken Witness Identification</b>	21	45%
<b>Perjury or False Accusation</b>	15	36%
<b>Official Misconduct</b>	15	36%
<b>Inadequate Legal Defense</b>	11	26%
<b>False or Misleading Forensic Evidence</b>	10	24%

### *Scope of Review*

In addition to these areas of inquiry, we recommend that TCERC include two drug-related exonerations in its initial investigation: Jose Pena, and Daniel Settle. These cases are unique among the pool of wrongful drug possession convictions, in that the exonerees in question did not hold a mistaken belief that they possessed an illicit substance at the time of their arrest. Rather, their convictions were entered due to false accusations, an inadequate legal defense and other misconduct that warrants TERC's consideration.

- Jose Pena – In 2011 Texas courts vacated Mr. Pena's conviction for felony possession of marijuana due to the State's withholding of his statements to the arresting officer, who recovered several hemp plants from Mr. Pena's truck in the course of a routine traffic stop.<sup>4</sup>

<sup>1</sup> Contributing organizations include: The Innocence Project, the Innocence Project of Texas, the Earl Carl Institute for Legal & Social Policy at the Thurgood Marshall School of Law, and the Texas Defender Service.

<sup>2</sup> The National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx>.

<sup>3</sup> Information for this chart was drawn from the National Registry of Exonerations' website.

<sup>4</sup> *Pena v. State*, 353 S.W.3d 797 (Tex. Crim. App. 2011).

In this case, the officer did not disclose the audio portion of his dashboard camera footage, which recorded Pena’s explanations that the plants in question were legal hemp that only resembled marijuana and demands that the plants be tested to confirm this contention.<sup>5</sup> After proceeding to trial, Mr. Pena was convicted and incarcerated for over a decade. The Court of Criminal Appeals reversed his conviction 13 years after his arrest, determining that the outcome of the proceedings against him would have been substantially different if both parties had possessed the dashboard camera audio file.<sup>6</sup>

- Daniel Settle – In 1999, Mr. Settle pled guilty to selling cocaine to an undercover law enforcement officer—Tom Coleman, after initially maintaining his innocence. Nearly two decades later, the Court of Criminal Appeals overturned this conviction due to a *Brady* violation when it was discovered that Coleman’s conduct during the 1999 Tulia drug sting was not disclosed to the defense. Specifically, it was discovered that Coleman lied about nearly three dozen narcotics cases, “booked into evidence drugs from his own personal stash and accused defendants of drug transactions that never occurred.”<sup>7</sup>

**Recommended Topic: Eyewitness Identification Reform**  
**Contributing Factors Addressed by Topic: Mistaken Witness Identification**

Witness misidentification is the leading contributing factor in Texas exonerations that have occurred since 2010, playing a role in 45 percent of cases. Decades of research has demonstrated that witness memory is often unreliable and can be influenced by “estimator” variables such as lighting, distance from the crime scene, presence of a weapon, stress and own-race bias (*e.g.* the tendency of people to have difficulty identifying members of races other than their own).<sup>8</sup> While these “estimator” variables cannot be controlled, there are “system” variables, such as lineup procedures, that can be controlled to help properly preserve eyewitness memory and prevent contamination.

In 2011, Texas took a significant step toward curtailing such undue “systemic” influences on a witness’ recollection through the passage of H.B. 215, which mandated that all law enforcement agencies in the state adopt and implement line up procedures that are based on evidence-based practices.<sup>9</sup> However, additional reforms remain necessary to preserve the integrity of eye witness identifications and to ensure that they are assigned proper weight in criminal proceedings. These include:

- requiring special procedures where a prospective witness searches social media to identify a suspect;

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<sup>5</sup> *Id.* at 804 & 813-14.

<sup>6</sup> *Id.* at 813-15.

<sup>77</sup> The National Registry of Exonerations, Daniel Roy Settle (Oct. 31, 2012), <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4035>.

<sup>8</sup> TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS. REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE 14-15 (2010) [hereinafter TCAP REPORT].

<sup>9</sup>82nd Tex. Leg., R.S. (Tex. 2011). Specifically, this legislation directed the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) to develop and adopt a model policy and training materials regarding the administration of photograph and live line ups. Each law enforcement agency in the state was in turn required to adopt policies and procedures for convening line ups that either conformed with LEMIT’s model policy or addressed certain enumerated issues that the model policy must also address. These issues include: procedures for double blind lineups “if practicable,” the selection of individuals to participate in a line up or photo array, instructions given to a witness before a line up, and the preservation of lineup results. *Id.* at Section 2 (c)(2).

- increasing the use of expert witnesses regarding factors that bear upon the accuracy of a witness' identification; and
- adoption of a jury charge that would guide the jury in assessing an identification in light of other evidence at issue in a case.

The advent of smartphones and other technology provides eye-witnesses with immediate access to internet databases and social media images that may have a profound effect on the integrity of any subsequent identification. The development of specialized procedures will enable law enforcement to minimize and document the witness' exposure to "contaminating" information, and thereby allow investigators and other stakeholders in the criminal justice system to take these factors into consideration as they assess and assign weight to any subsequent identification.<sup>10</sup>

In addition, TCERC should consider providing juries with necessary information and guidance to properly gauge the accuracy of any pretrial/trial identification of the defendant. As the Court of Criminal Appeals has noted, expert testimony can play an important role in enabling juries to understand the "biasing factors" that undermine the accuracy of an eyewitness identification and enter informed assessments of the evidence before them.<sup>11</sup> Indeed, several criminal justice agencies including the National Research Council (NRC), have urged local jurisdictions to ensure that defendants receive funding to obtain access to qualified experts in this field.<sup>12</sup> The NRC also recommends the "use of clear and concise jury instructions as an alternative means of conveying information regarding the factors that the jury should consider."<sup>13</sup> Other states, including New Jersey and Massachusetts, have issued jury instructions that explain how estimator variables, such as own-race bias, and identification procedures should be considered when assessing an eyewitness identification.<sup>14</sup>

**Recommended Topic: Custodial Interviews**  
**Contributing Factors Addressed by Topic: Perjury/False Accusations, Official Misconduct**

In its 2010 report Timothy Cole Advisory Panel on Wrong Convictions (TCAP) included the adoption of a mandatory electronic recording policy for certain felony offenses among its recommendations for improving the accuracy of the Texas criminal justice system.<sup>15</sup> Yet to date, this recommendation remains largely unimplemented despite broad consensus among legal scholars, social scientists, law enforcement associations and policy organizations that creating a "complete, accurate and reviewable document that captures the entirety of a custodial interrogation will help prevent wrongful convictions" and serve the interests of justice.<sup>16</sup> We thus strongly recommend that TCERC include custodial interrogation practices in its review.

<sup>10</sup> See, e.g., ASSOCIATION OF CHIEF POLICE OFFICERS OF ENGLAND, WALES, AND NORTHERN IRELAND, INTERNET SOCIAL MEDIA AND IDENTIFICATION PROCEDURES (July 2014).

<sup>11</sup> *Tillman v. State*, 354 S.W.3d 425, 442 (Tex. Crim. App. 2011).

<sup>12</sup> COMMITTEE ON SCIENTIFIC APPROACHES TO UNDERSTANDING AND MAXIMIZING THE VALIDITY AND RELIABILITY OF EYEWITNESS IDENTIFICATION IN LAW ENFORCEMENT AND THE COURTS; COMMITTEE ON SCIENCE, TECHNOLOGY, AND LAW; POLICY AND GLOBAL AFFAIRS; COMMITTEE ON LAW AND JUST, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 112 (2014), available at <http://nap.edu/18891>.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> Model Eyewitness Identification Instruction, 473 Mass. 1051 (2015); *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

<sup>15</sup> TCAP REPORT, *supra* note 8, at 18.

<sup>16</sup> *Id.* The recording of certain custodial interrogations remains the only recommendation among TCAP's 11 suggested reforms that remains unimplemented.

Among the cases within TCERC's survey pool, approximately 10% entail instances where an innocent individual either falsely confessed to a crime he/she did not commit or was implicated in the course of a police interrogation of a third party suspect. In each of these cases, a full recording of the interviewee's discussions with law enforcement would have enabled the subsequent investigators to detect issues that bear upon the accuracy of the informant's account. Further, recorded interrogations can serve as an important "law enforcement tool . . . by allowing triers-of-fact to accurately assess the credibility and voluntariness of confessions."<sup>17</sup> A survey conducted by the National Institute of Justice found that every police department that had recorded interrogations found the practice to be useful.<sup>18</sup>

A wealth of research over the past two decades has indicated that a number of factors contribute to an individual's propensity to enter a false confession or wrongfully implicate another person including youth, mental illness, an intellectual or psychological disability, sleep deprivation,<sup>19</sup> and even the interrogation practices employed by the interviewer.<sup>20</sup> By shedding light on the circumstances of the entire interview, recorded interviews provide criminal justice stakeholders with an opportunity to place inculcating statements in their proper context and thus separate truth from fiction.

For example, Stephen Brodie (*Convicted 1993; Exonerated 2010*) confessed to kidnapping and raping a 5-year-old girl, after he was interrogated for 18 hours over eight days.<sup>21</sup> For part of that time, Brodie, who is deaf, was interrogated without a sign language interpreter.<sup>22</sup> In this context, his sleep deprivation, repeated encounters with law enforcement, and limited ability to hear and comprehend the statements made to him, undoubtedly undermined the voluntariness of his statement as well as the quality of information he disclosed.

Similarly, the use of recorded interrogations would have facilitated Anthony Graves's (*Convicted: 1994; Exonerated 2010*) multi-year journey to clearing his name. In Graves's case, Robert Carter, the suspect in a brutal multiple murder, implicated Graves during a marathon interview with the Texas Rangers. Skeptical that a single individual could have committed the crime, Carter's interrogators pressed him for information regarding co-perpetrators, and he eventually succumbed to these demands and implicated Graves.<sup>23</sup> Yet, Carter recanted this statement, and made several statements professing Graves's innocence including one statement immediately prior to Graves's trial that "he acted alone."<sup>24</sup> When pressed about the presence of accomplices, Carter stated that his wife, Cookie, "had the hammer."<sup>25</sup> Yet, none of these statements, as well as a deal to spare Carter's wife from a capital prosecution, were disclosed to Graves and his defense team prior to his trial, causing Graves' to be wrongfully convicted, sentenced to death and incarcerated for 18 years. Had the state recorded

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<sup>17</sup> THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW 2 (2007), available at [http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project\(07\).pdf](http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project(07).pdf).

<sup>18</sup> *Id.*

<sup>19</sup> Jessica R. Klaver, et al., *Effects of Personality, Interrogation Techniques, and Plausibility in an Experimental False Confession Paradigm*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 71, 72 (2008).

<sup>20</sup> Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33 (2004).

<sup>21</sup> National Registry of Exonerations, Steven Brodie, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3056> (last visited Dec. 15, 2015).

<sup>22</sup> *Id.*

<sup>23</sup> See Pamela Colloff, *Innocence Lost*, TEX. MONTHLY, Oct. 2010, available at <http://www.texasmonthly.com/story/innocence-lost>.

<sup>24</sup> *Graves v. Dretke*, 442 F.3d 334, 344 (5<sup>th</sup> Cir.), cert. denied, sub. nom., *Quarterman v. Graves*, 549 U.S. 943 (2006).

<sup>25</sup> *Id.*

its interrogations of Carter, the undue influences upon Mr. Carter would have been quickly detected, enabling the state to concentrate its investigation on the true perpetrator(s).

Currently, 21 states and the District of Columbia have mandated the practice either by statute (Connecticut, Illinois, Maryland, Maine, Michigan, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oregon, Vermont and Wisconsin) or court action (Alaska, Indiana, Iowa, Massachusetts, Minnesota, New Jersey and Utah), and the U.S. Department of Justice has issued a policy for federal law enforcement agencies to record.

**Recommended Topic: Informants**  
**Contributing Factors Addressed: Perjury/False Accusation; Official Misconduct**

Incentivized witnesses, also known as informants, played a role in several Texas exoneration cases in which perjury or false accusations was a contributing factor. The actual or perceived promise of leniency, reduced sentences, or other benefits creates strong incentives for an informant to fabricate evidence.

Much like false confessions, false informant testimony can taint a criminal case at every stage, from the initial investigation to conviction. While law enforcement has a duty to disclose information to the defense that could affect the reliability of an informant's testimony, such as benefits he has received or his criminal history, this obligation was not met in several wrongful conviction cases. Without this information, cross-examination and other legal safeguards designed to discredit unreliable testimony are ineffective.<sup>26</sup>

The Texas exonerations since 2010 that involved incentivized witnesses include:

- **Kenneth Boyd, Jr.** (*Convicted: 1999; Exonerated: 2013*) Boyd was wrongfully convicted of a drug-related triple murder in Center, Texas. He became a suspect after an anonymous caller reported that he was the killer. Boyd and three other men—Rodney Moore, Jacarro Keion Bennett and Ricky Lathan—were ultimately charged with the shootings. Jailhouse informant Derrick Brown testified that while he and Rodney Moore were in jail, Moore told him that Boyd pressured him to admit to killing one of the victims. Vernon Garrett, another jailhouse informant, testified that when he and Boyd were cellmates in Shelby County Jail, Boyd admitted that he had killed two of the victims and that Rodney Moore had killed the other. In addition, Anita Ross, a sister of one of the victims, identified Boyd as having been at the house two hours before the shooting. After the Shelby District Attorney left office in 2000, her successor found a binder that contained exculpatory materials, including a statement from Garrett saying that his testimony was a lie. In 2012, Boyd's attorney obtained affidavits from both jailhouse informants and Anita Ross recanting their testimony. In 2012, Boyd was granted a new trial after a Shelby County Criminal Court judge ruled that substantial exculpatory evidence had been hidden from the defendant and false evidence was knowingly presented. The Texas Court of Criminal Appeals upheld the ruling, and the Shelby County District Attorney's Office moved to dismiss the case.<sup>27</sup>

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<sup>26</sup> THE JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW (2007), *available at* [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death\\_penalty\\_reform/jailhouse20snitch20testimony20policy20briefpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/jailhouse20snitch20testimony20policy20briefpdf.pdf) [hereinafter JUSTICE PROJECT].

<sup>27</sup>The National Registry of Exonerations, Kenneth Wayne Boyd, Jr., <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4056> (last visited Dec. 15, 2015).

- **Richard Winfrey Sr.** (*Convicted: 2007; Exonerated 2010*) Richard Winfrey Sr., his daughter Megan Winfrey, and son Richard Winfrey Jr. were suspected of killing Murray Burr, a janitor in Coldspring, Texas in 2004.<sup>28</sup> Investigators used a self-trained dog handler who claimed that his dogs identified the Winfreys' scents on Burr's clothing. No charges were brought until two years later when Winfrey went to jail on an unrelated charge and his cellmate told authorities that Winfrey had told him that some guns were taken from Burr's home after he was killed, a detail that police thought only someone involved in the crime would know. Richard Winfrey, Sr. and Megan Winfrey were convicted of the murder, while Richard Jr. was acquitted. In September 2010, Richard Winfrey Sr.'s conviction was set aside by the Texas Court of Criminal Appeals, which ruled that the dog scent evidence was insufficient to sustain a guilty verdict.<sup>29</sup> In February 2013, the Texas Court of Criminal Appeals reversed Megan Winfrey's conviction of the murder, ruling that, as in her father's case, the dog scent evidence did not sufficiently prove her guilt.<sup>30</sup>
- **David Wiggins, Fort Worth** (*Convicted: 1989; Exonerated: 2012*) Wrongfully convicted of raping a 14-year-old girl in Fort Worth, David Wiggins spent 23 years in prison for a crime he did not commit. The victim identified Wiggins in a photo lineup, and he was then arrested as a passenger in a stolen car. The driver of the car and another witness testified that Wiggins told them that he had approached a house to burglarize it but had run away when he saw a girl there. During the trial, Wiggins's attorney argued that he was misidentified and that the other two witnesses were motivated to lie. Among other incentives, both were on probation and were asked to testify by the prosecution. The jury rejected these arguments and he was sentenced to life in prison. The Innocence Project took his case in 2007, and with the cooperation of the Tarrant County District Attorney's Office, obtained testing on the clothing that the victim was wearing during the crime, which excluded Wiggins as the perpetrator.<sup>31</sup>
- **Randy Arledge, Corsicana** (*Convicted: 1984, Exonerated: 2013*) Arledge was wrongfully convicted of the rape and murder of a woman in Corsicana, Texas solely on the basis of testimony given by Benny Lamas and Paula Lucas, his co-defendants in an unrelated out-of-state armed robbery. Pursuant to a plea deal, Lamas and Lucas testified at Arledge's Texas murder trial that Arledge told them he had murdered a woman in Corsicana, Texas. In return, Lucas received favorable consideration at sentencing for the armed robbery and was given probation. In 2011, the Innocence Project secured DNA testing of crime scene evidence, with the cooperation of the Navarro County District Attorney's Office, which excluded Arledge. The sample was uploaded to Combined DNA Index System and matched the profile of convicted felon David Sims.<sup>32</sup>

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<sup>28</sup> The National Registry of Exonerations, Richard Winfrey, Sr., <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4056> (last visited Dec. 16, 2015) [hereinafter Winfrey].

<sup>29</sup> In addition to the incentivized witnesses testimony, this case also involves the use of a form of forensic evidence—identification of the perpetrator by dog scent—that had been discredited to decades before it was ever put to use in Texas. See A. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 17 (1990). And, yet, a Sheriff's deputy from Fort Bend County was permitted by the courts and investigative agencies to appoint himself as an expert in dog-scent identifications by virtue of owning and training Bloodhounds, and enter testimony in a criminal proceeding. See Winfrey, *supra* note 28.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

The Texas Legislature took a step to regulate informant testimony by enacting S.B. 1681 in 2009, which requires independent corroboration of any testimony offered by a *jailhouse* informant, meaning that an individual cannot be convicted solely on the basis of this type of evidence.<sup>33</sup> However, passage of this protection in and of itself, is insufficient to protect against wrongful accusations. Additional actions that may be considered include:

- *Requiring pre-trial reliability hearings for all informants:* As gatekeepers of information, judges have the capacity to screen out unreliable informants. They are well-positioned to gauge an informant’s reliability due to their understanding of the incentivized structures within the criminal justice system.<sup>34</sup> Yet assessments of an informant’s testimony are often relegated to the jurymen, who have limited knowledge of the types of pressures and inducements that inmates are under to provide information that is helpful to the state’s case.<sup>35</sup> Establishment of a formal reliability hearing process would thus provide judges with a framework “to screen out unfair, harmful, or prejudicial evidence [.]” improve the quality of testimony that is heard by juries and reduce the risk of wrongful convictions.<sup>36</sup>
- *Providing informants, and grand jury witnesses with access to counsel:* a number of wrongful convictions in our survey were due to instances where an individual testified against a defendant following threats of prosecution or other official misconduct—*e.g.* Graves, Brown. Providing informants and other grand jury witnesses with access to counsel would ensure that individuals are aware of the repercussions for perjured testimony and guard against any threats of criminal prosecution or other official misconduct. At least 14 states, including Arizona, California, Colorado and Utah allow counsel for a grand jury witness to be present during his or her testimony. A number of other jurisdictions, including the federal government also provide both informants and grand jury witnesses with a right to appointed counsel.
- *Jury instructions:* Jurors should be provided with carefully tailored instructions that they should weigh jailhouse informant testimony in light of any factors that may affect their credibility, such as benefits received or promised, and whether they have a history of testifying at trials and providing accurate information. California, Colorado, Illinois, Montana, Oklahoma, Ohio, and Wisconsin require jury instructions for in-custody informant testimony.<sup>37</sup> TCAP’s research document suggested the use of cautionary instructions that would direct juries to “consider factors such as the informant’s incentives to lie, whether the informant has testified at other trials, and any inconsistent statements the informant has provided.”<sup>38</sup>
- *Collecting Aggregate Data on Informant Use:* Currently, most jurisdictions lack any mechanism for keeping track of the number of informants used or their benefits to crime

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S.B. 1681, 81st Leg., R.S. (Tex. 2009) (authored by Sen. Juan Hinojosa).

<sup>34</sup> ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF THE AMERICAN JUSTICE 191 & 194-95 (2009) [hereinafter NAPATOFF].

<sup>35</sup> See *D’Agostino v. State*, 823 P.2d 283, 284 (1991) (“A legally unsophisticated jury has little knowledge as to the types of pressures and inducements that jail inmates are under to ‘cooperate’ with the state and to say anything that is ‘helpful’ to the state’s case.”).

<sup>36</sup> NATAPOFF, *supra* note 34, at 194-95. S

<sup>37</sup> See generally JUSTICE PROJECT, *supra* note 26.

<sup>38</sup> TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, RESEARCH DETAILS 124 (2010).

fighting.<sup>39</sup> Law enforcement agencies in Texas should track and report aggregate data on the number and demographics of the informants they use, crimes those informants help to solve, benefits conferred, and crimes they've committed. Like public tax data, aggregate informant data would not include information that could be used to identify individuals. Law enforcement agencies are already required to provide the FBI with a wide array of crime statistics, and aggregate informant-related information should also be tracked. In addition, the FBI monitors the overall productivity of its own informants and is required to report the total number of times each field office authorizes an informant to engage in otherwise illegal activity.<sup>40</sup> Collecting aggregate data on informants in Texas would enable legislators and law enforcement officials to more accurately assess whether informants are making communities safer and to create more effective public policy about their use.

### Recommended Topic: Inadequate Legal Defense Contributing Factors Addressed: Official Misconduct, Forensic Evidence

Defense counsel serves an indispensable function within our criminal justice system. Yet, all-too often, defense attorneys fail to discharge their obligations to their clients due either to professional negligence or inadequate access to information or resources. Competent representation requires analysis of the charges against the accused,<sup>41</sup> as well as an independent investigation and evaluation of the evidence likely to be provided to the grand jury and/or admitted at trial. In addition to the topics outlined above, TCERC should consider examining cases where a defendant received inadequate legal representation to determine whether administrative or other legal reforms are necessary to safeguard a defendant's right to due process of the law.

This inquiry should include the following questions:

- *The timing of a defendant's right to discovery in different jurisdictions around the state.* Timely access to key information—e.g., offense reports, witness names and witness statements—allows defense lawyers to evaluate the strength of the prosecution's case, locate and preserve information that is helpful to their client, and assist the accused in making informed decisions regarding how to proceed in their case. A report released by Texas Appleseed and the Texas Defender Service, indicates that some prosecutor offices provide defendants with immediate access to discovery, while others do so only after indictment or information is filed—leading to substantial delays in discovery in many cases.<sup>42</sup> Such practices hobble the defense function and TCERC should explore whether administrative reforms or judicial oversight are necessary to ensure that information is transferred quickly and efficiently between the parties.
- *The impact of fixed fee, and other payment schemes on the quality of defense provided to a defendant.* Many jurisdictions pay attorneys according to the number of cases they handle,

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<sup>39</sup> NAPATOFF, *supra* note 34, at 104.

<sup>40</sup> *Id.*

<sup>41</sup> State Bar of Texas, Performance Guideline for Non-Capital Criminal Defense Representation 2.2(B)(1) (2011), *reprinted in* 74 TEX. BAR J. 616, 621 (July 2011) (stating counsel must “[b]e familiar with the elements of the offense and the potential punishment range”).

<sup>42</sup> TEXAS APPLESEED & TEXAS DEFENDER SERVICE, TOWARDS MORE TRANSPARENT JUSTICE: THE MICHAEL MORTON ACT'S FIRST YEAR 27-30 (2015), *available at* [http://texasdefender.org/wp-content/uploads/Towards\\_More\\_Transparent\\_Justice.pdf](http://texasdefender.org/wp-content/uploads/Towards_More_Transparent_Justice.pdf).

rather than the time expended on each case. These fee schedules thus provide lawyers with a perverse incentive to minimize the time they expend on each case, thereby shirking their responsibilities to clients.

- *Defense Access to Experts and Other Resources* – unlike prosecutors who enjoy ready access to investigators, police experts and other resources, defense attorneys frequently operate without support staff or other assistance. Access to experts and other support staff is crucial to understanding the state's evidence and presenting a defense.

By: Canales

H.B. No. 541

A BILL TO BE ENTITLED

1 AN ACT  
2 relating to the electronic recording of certain custodial  
3 interrogations.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Chapter 2, Code of Criminal Procedure, is  
6 amended by adding Articles 2.32 and 2.33 to read as follows:

7 Art. 2.32. ELECTRONIC RECORDING OF CUSTODIAL  
8 INTERROGATIONS. (a) In this article:

9 (1) "Custodial interrogation" means any investigative  
10 questioning, other than routine questions associated with booking,  
11 by a peace officer during which:

12 (A) a reasonable person in the position of the  
13 person being interrogated would consider himself or herself to be  
14 in custody; and

15 (B) a question is asked that is reasonably likely  
16 to elicit an incriminating response.

17 (2) "Electronic recording" means an audio or  
18 audiovisual electronic recording of a custodial interrogation that  
19 begins at or before the time the person being interrogated receives  
20 a warning described by Section 2(a), Article 38.22, and continues  
21 until the time the interrogation ceases.

22 (3) "Place of detention" means a police station or  
23 other building that is a place of operation for a law enforcement  
24 agency, including a municipal police department or county sheriff's

1 department, and is owned or operated by the law enforcement agency  
2 for the purpose of detaining individuals in connection with the  
3 suspected violation of a penal law. The term does not include a  
4 courthouse.

5 (b) A law enforcement agency qualified under Article 2.33 to  
6 conduct a custodial interrogation of the offense shall make an  
7 electronic recording of any custodial interrogation that occurs in  
8 a place of detention and is of a person suspected of committing or  
9 charged with the commission of an offense under:

- 10 (1) Section 19.02, Penal Code (murder);
- 11 (2) Section 19.03, Penal Code (capital murder);
- 12 (3) Section 20.03, Penal Code (kidnapping);
- 13 (4) Section 20.04, Penal Code (aggravated  
14 kidnapping);
- 15 (5) Section 20A.02, Penal Code (trafficking of  
16 persons);
- 17 (6) Section 20A.03, Penal Code (continuous  
18 trafficking of persons);
- 19 (7) Section 21.02, Penal Code (continuous sexual abuse  
20 of young child or children);
- 21 (8) Section 21.11, Penal Code (indecent with a  
22 child);
- 23 (9) Section 21.12, Penal Code (improper relationship  
24 between educator and student);
- 25 (10) Section 22.011, Penal Code (sexual assault);
- 26 (11) Section 22.021, Penal Code (aggravated sexual  
27 assault); or

1           (12) Section 43.25, Penal Code (sexual performance by  
2 a child).

3           (c) For purposes of Subsection (b), an electronic recording  
4 of a custodial interrogation is complete only if the recording  
5 begins at or before the time the person being interrogated receives  
6 a warning described by Section 2(a), Article 38.22, and continues  
7 until the time the interrogation ceases.

8           (d) A recording of a custodial interrogation that complies  
9 with this article is exempt from public disclosure except as  
10 provided by Section 552.108, Government Code.

11           (e) A law enforcement agency otherwise required to make an  
12 electronic recording of a custodial interrogation under this  
13 article is excused from the duty to make the electronic recording if  
14 the law enforcement agency has good cause. For purposes of this  
15 subsection, "good cause" includes:

16           (1) the accused refused to respond to questioning or  
17 cooperate in a custodial interrogation of which an electronic  
18 recording was made, provided that:

19                   (A) a contemporaneous recording of the refusal  
20 was made; or

21                   (B) the peace officer or agent of the law  
22 enforcement agency conducting the interrogation attempted, in good  
23 faith, to record the accused's refusal but the accused was  
24 unwilling to have the refusal recorded, and the peace officer or  
25 agent contemporaneously, in writing, documented the refusal;

26           (2) the statement was not made exclusively as the  
27 result of a custodial interrogation, including a statement that was

1 made spontaneously by the accused and not in response to a question  
2 by a peace officer;

3 (3) the peace officer or agent of the law enforcement  
4 agency conducting the interrogation attempted, in good faith, to  
5 record the interrogation but the recording equipment did not  
6 function, the officer or agent inadvertently operated the equipment  
7 incorrectly, or the equipment malfunctioned or stopped operating  
8 without the knowledge of the officer or agent;

9 (4) exigent public safety concerns prevented or  
10 rendered infeasible the making of an electronic recording of the  
11 custodial interrogation; or

12 (5) the peace officer or agent of the law enforcement  
13 agency conducting the interrogation reasonably believed at the time  
14 the interrogation commenced that the accused interrogated was not  
15 taken into custody for or being interrogated concerning the  
16 commission of an offense listed in Subsection (b).

17 Art. 2.33. LAW ENFORCEMENT AGENCIES QUALIFIED TO CONDUCT  
18 CERTAIN CUSTODIAL INTERROGATIONS. Only a law enforcement agency  
19 that employs peace officers described by Subdivision (1), (2), (3),  
20 (4), (5), (6), (7), (8), or (30), Article 2.12, is qualified to  
21 conduct a custodial interrogation of an individual suspected of  
22 committing an offense listed in Article 2.32(b).

23 SECTION 2. This Act takes effect September 1, 2015.

LEGISLATIVE BUDGET BOARD

Austin, Texas

FISCAL NOTE, 84TH LEGISLATIVE REGULAR SESSION

April 8, 2015

**TO:** Honorable Allen Fletcher, Chair, House Committee on Emerging Issues In Texas Law Enforcement, Select

**FROM:** Ursula Parks, Director, Legislative Budget Board

**IN RE:** [HB541](#) by Canales (Relating to the electronic recording of certain custodial interrogations.), As Introduced

No significant fiscal implication to the State is anticipated.

The bill would amend the Code of Criminal Procedure to add provisions relating to electronic recording of custodial interrogations for persons suspected of committing or charged with certain offenses, and the qualification of peace officers to conduct these interrogations. The bill would take effect September 1, 2015. It is assumed that the Department of Criminal Justice, the Alcoholic Beverage Commission, and the Department of Public Safety could implement the provisions of the bill using available resources.

**Local Government Impact**

There may be cost to local law enforcement entities for recording equipment, media, and data storage; however, the fiscal impact is not anticipated to be significant.

Source Agencies: 405 Department of Public Safety, 458 Alcoholic Beverage Commission, 696 Department of Criminal Justice

LBB Staff: UP, ESi, AI, JAW, RCa, KVe, JN

By: Ellis

S.B. No. 181

A BILL TO BE ENTITLED

1 AN ACT  
2 relating to the electronic recording and admissibility of certain  
3 custodial interrogations.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Chapter 2, Code of Criminal Procedure, is  
6 amended by adding Articles 2.32 and 2.33 to read as follows:

7 Art. 2.32. ELECTRONIC RECORDING OF CUSTODIAL  
8 INTERROGATIONS. (a) In this article:

9 (1) "Custodial interrogation" means any investigative  
10 questioning, other than routine questions associated with booking,  
11 by a peace officer during which:

12 (A) a reasonable person in the position of the  
13 person being interrogated would consider himself or herself to be  
14 in custody; and

15 (B) a question is asked that is reasonably likely  
16 to elicit an incriminating response.

17 (2) "Law enforcement agency" means an agency of the  
18 state, or of a county, municipality, or other political subdivision  
19 of the state, authorized by law to employ peace officers described  
20 by Subdivision (1), (2), (3), (4), (5), (6), (7), or (8), Article  
21 2.12.

22 (3) "Place of detention" means a police station or  
23 other building that is a place of operation for a law enforcement  
24 agency, including a municipal police department or county sheriff's

1 department, and is owned or operated by the law enforcement agency  
2 for the purpose of detaining individuals in connection with the  
3 suspected violation of a penal law. The term does not include a  
4 courthouse.

5 (b) A law enforcement agency qualified under Article 2.33 to  
6 conduct a custodial interrogation of the offense shall make a  
7 complete, contemporaneous, audio or audiovisual electronic  
8 recording of any custodial interrogation that occurs in a place of  
9 detention and is of a person suspected of committing or charged with  
10 the commission of an offense under:

11 (1) Section 19.02, Penal Code (murder);

12 (2) Section 19.03, Penal Code (capital murder);

13 (3) Section 20.03, Penal Code (kidnapping);

14 (4) Section 20.04, Penal Code (aggravated  
15 kidnapping);

16 (5) Section 20A.02, Penal Code (trafficking of  
17 persons);

18 (6) Section 20A.03, Penal Code (continuous  
19 trafficking of persons);

20 (7) Section 21.02, Penal Code (continuous sexual abuse  
21 of young child or children);

22 (8) Section 21.11, Penal Code (indecent with a  
23 child);

24 (9) Section 21.12, Penal Code (improper relationship  
25 between educator and student);

26 (10) Section 22.011, Penal Code (sexual assault);

27 (11) Section 22.021, Penal Code (aggravated sexual

1 assault); or

2 (12) Section 43.25, Penal Code (sexual performance by  
3 a child).

4 (c) For purposes of Subsection (b), an electronic recording  
5 of a custodial interrogation is complete only if the recording  
6 begins at or before the time the person being interrogated receives  
7 a warning described by Section 2(a), Article 38.22, and continues  
8 until the time the interrogation ceases.

9 (d) A recording of a custodial interrogation that complies  
10 with this article is exempt from public disclosure except as  
11 provided by Section 552.108, Government Code.

12 Art. 2.33. LAW ENFORCEMENT AGENCIES QUALIFIED TO CONDUCT  
13 CERTAIN CUSTODIAL INTERROGATIONS. Only a law enforcement agency  
14 that employs peace officers described by Subdivision (1), (2), (3),  
15 (4), (5), (6), (7), or (8), Article 2.12, is qualified to conduct a  
16 custodial interrogation of an individual suspected of committing an  
17 offense listed in Article 2.32(b).

18 SECTION 2. Section 1, Article 38.22, Code of Criminal  
19 Procedure, is amended to read as follows:

20 Sec. 1. In this article:

21 (1) "Electronic recording" means an audio or  
22 audiovisual electronic recording of a custodial interrogation that  
23 begins at or before the time the person being interrogated receives  
24 a warning described by Section 2(a) and continues until the time the  
25 interrogation ceases.

26 (2) "Written [~~a written~~] statement" [~~of an accused~~]  
27 means:

1           (A) [~~(1)~~] a statement made by the accused in the  
2 accused's [~~his~~] own handwriting; or

3           (B) [~~(2)~~] a statement made in a language the  
4 accused can read or understand that:

5                 (i) [~~(A)~~] is signed by the accused; or

6                 (ii) [~~(B)~~] bears the mark of the accused,  
7 if the accused is unable to write and the mark is witnessed by a  
8 person other than a peace officer.

9           SECTION 3. Sections 3(a) and (b), Article 38.22, Code of  
10 Criminal Procedure, are amended to read as follows:

11           (a) Except as provided by Section 9, no oral, sign language,  
12 or written statement made as a result of a custodial interrogation  
13 of a person accused of an offense listed in Article 2.32(b) is  
14 admissible against the accused in a criminal proceeding, and no  
15 [No] oral or sign language statement made as a result of a custodial  
16 interrogation of a person [of an] accused of any other offense is  
17 [made as a result of custodial interrogation shall be] admissible  
18 against the accused in a criminal proceeding, unless:

19                 (1) an electronic recording [~~, which may include~~  
20 ~~motion picture, video tape, or other visual recording,~~] is made of  
21 the custodial interrogation [~~statement~~];

22                 (2) after being [~~prior to the statement but during the~~  
23 ~~recording the accused is]~~ given the warning described by Section  
24 2(a), [~~in Subsection (a) of Section 2 above and]~~ the accused  
25 knowingly, intelligently, and voluntarily waives any rights set out  
26 in the warning;

27                 (3) the recording device was capable of making an

1 accurate recording, the operator was competent, and the recording  
2 is accurate and has not been altered;

3 (4) all voices on the recording are identified; and

4 (5) not later than the 20th day before the date of the  
5 proceeding, the attorney representing the defendant is provided  
6 with a true, complete, and accurate copy of all recordings of the  
7 defendant made under this article.

8 (b) Every electronic recording of [~~any statement made by an~~  
9 ~~accused during~~] a custodial interrogation must be preserved until  
10 such time as the defendant's conviction for any offense relating  
11 thereto is final, all direct appeals therefrom are exhausted, or  
12 the prosecution of such offenses is barred by law.

13 SECTION 4. Article 38.22, Code of Criminal Procedure, is  
14 amended by adding Section 9 to read as follows:

15 Sec. 9. An oral, sign language, or written statement of an  
16 accused made as a result of a custodial interrogation is admissible  
17 without an electronic recording otherwise required by Section 3(a)  
18 if the attorney introducing the statement shows good cause for the  
19 lack of the recording. For purposes of this section, "good cause"  
20 includes:

21 (1) the accused refused to respond to questioning or  
22 cooperate in a custodial interrogation of which an electronic  
23 recording was made, provided that:

24 (A) a contemporaneous recording of the refusal  
25 was made; or

26 (B) the peace officer or agent of the law  
27 enforcement agency conducting the interrogation attempted, in good

1 faith, to record the accused's refusal but the accused was  
2 unwilling to have the refusal recorded, and the peace officer or  
3 agent contemporaneously, in writing, documented the refusal;

4 (2) the statement was not made exclusively as the  
5 result of a custodial interrogation, including a statement that was  
6 made spontaneously by the accused and not in response to a question  
7 by a peace officer;

8 (3) the peace officer or agent of the law enforcement  
9 agency conducting the interrogation attempted, in good faith, to  
10 record the interrogation but the recording equipment did not  
11 function, the officer or agent inadvertently operated the equipment  
12 incorrectly, or the equipment malfunctioned or stopped operating  
13 without the knowledge of the officer or agent;

14 (4) exigent public safety concerns prevented or  
15 rendered infeasible the making of an electronic recording of the  
16 custodial interrogation; or

17 (5) the peace officer or agent of the law enforcement  
18 agency conducting the interrogation reasonably believed at the time  
19 the interrogation commenced that the accused interrogated was not  
20 taken into custody for or being interrogated concerning the  
21 commission of an offense listed in Article 2.32(b).

22 SECTION 5. The changes in law made by this Act apply to the  
23 use of a statement made as a result of a custodial interrogation  
24 that occurs on or after the effective date of this Act, regardless  
25 of whether the criminal offense giving rise to that interrogation  
26 is committed before, on, or after that date.

27 SECTION 6. This Act takes effect September 1, 2015.

1-1 By: West S.B. No. 969  
1-2 (In the Senate - Filed February 28, 2013; March 12, 2013, read  
1-3 first time and referred to Committee on Criminal Justice;  
1-4 May 10, 2013, reported adversely, with favorable Committee  
1-5 Substitute by the following vote: Yeas 4, Nays 3; May 10, 2013,  
1-6 sent to printer.)

1-7 COMMITTEE VOTE

	Yea	Nay	Absent	PNV
1-8				
1-9	X			
1-10		X		
1-11	X			
1-12	X			
1-13		X		
1-14	X			
1-15		X		

1-16 COMMITTEE SUBSTITUTE FOR S.B. No. 969 By: Rodriguez

1-17 A BILL TO BE ENTITLED  
1-18 AN ACT

1-19 relating to the electronic recording of certain statements made by  
1-20 an accused as a result of custodial interrogation.

1-21 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-22 SECTION 1. Article 38.22, Code of Criminal Procedure, is  
1-23 amended by amending Section 1 and adding Section 9 to read as  
1-24 follows:

1-25 Sec. 1. In this article:

1-26 (1) "Place of detention" means a police station or  
1-27 other building that is a place of operation for a law enforcement  
1-28 agency, including a municipal police department or county sheriff's  
1-29 department, and is owned or operated by the law enforcement agency  
1-30 for the purpose of detaining individuals in connection with the  
1-31 suspected violation of a penal law. The term does not include a  
1-32 courthouse.

1-33 (2) "Written~~[, a written]~~ statement of an accused"  
1-34 means a statement signed by the accused or a statement made by the  
1-35 accused in his own handwriting or, if the accused is unable to  
1-36 write, a statement bearing his mark, when the mark has been  
1-37 witnessed by a person other than a peace officer.

1-38 Sec. 9. (a) Each law enforcement agency shall adopt,  
1-39 implement, and amend as necessary a detailed written policy  
1-40 requiring that a visual recording by motion picture film,  
1-41 videotape, or other electronic means be made of any statement made  
1-42 as a result of a custodial interrogation if:

1-43 (1) the custodial interrogation is conducted in a  
1-44 place of detention; or

1-45 (2) the custodial interrogation is conducted outside  
1-46 of a place of detention, and the law enforcement agency has, at the  
1-47 site of the interrogation, equipment described by this subsection  
1-48 that is capable of electronically recording the interrogation.

1-49 (b) Evidence of compliance with a policy adopted under this  
1-50 section or with the minimum requirements of this article concerning  
1-51 the visual recording of a custodial interrogation is not a  
1-52 condition precedent to the admissibility of a defendant's statement  
1-53 under this article, another provision of this chapter, or another  
1-54 law.

1-55 (c) Notwithstanding Article 38.23 as that article relates  
1-56 to a violation of a state statute, a failure to make a visual  
1-57 recording of a statement made as a result of a custodial  
1-58 interrogation in substantial compliance with a policy adopted under  
1-59 this section or with the minimum requirements of this article does  
1-60 not prohibit the admission of the statement in the courts of this

2-1 state.

2-2 SECTION 2. The change in law made by this Act applies only  
2-3 to the admissibility of a statement made by an accused on or after  
2-4 the effective date of this Act. The admissibility of a statement  
2-5 made by an accused before the effective date of this Act is governed  
2-6 by the law in effect when the statement was made, and the former law  
2-7 is continued in effect for that purpose.

2-8 SECTION 3. This Act takes effect September 1, 2013.

2-9

\* \* \* \* \*

# Utah Court Rules

## Rule 616. Statements Made During Custodial Interrogations.

### (a) Definitions.

(1) "Custodial interrogation" means questioning or other conduct by a law enforcement officer that is reasonably likely to elicit an incriminating response from a person and occurs when reasonable persons in the same circumstances would consider themselves in custody.

(2) "Electronic recording" means an audio recording or an audio-video recording that accurately records a custodial interrogation.

(3) "Law enforcement agency" means a governmental entity or person authorized by a governmental entity or by state law to enforce criminal laws or investigate suspected criminal activity. The term includes a nongovernmental entity that has been delegated the authority to enforce criminal laws or investigate suspected criminal activity.

(4) "Law enforcement officer" means a person described in Utah Code § 53-13-103(1).

(5) "Place of detention" means a facility or area owned or operated by a law enforcement agency where persons are detained in connection with criminal investigations or questioned about alleged criminal conduct. The term includes a law enforcement agency station, jail, holding cell, correctional or detention facility, police vehicle or any other stationary or mobile building owned or operated by a law enforcement agency.

(6) "Statement" means the same as in Rule 801(a).

**(b) Admissibility.** Except as otherwise provided in Subsection (c) of this rule, evidence of a statement made by the defendant during a custodial interrogation in a place of detention shall not be admitted against the defendant in a felony criminal prosecution unless an electronic recording of the statement was made and is available at trial. This requirement is in addition to, and does not diminish, any other requirement regarding the admissibility of a person's statements.

**(c) Exceptions.** Notwithstanding subsection (b), the court may admit a statement made under any of the following circumstances if the statement is otherwise admissible under the law:

- (1) The statement was made prior to January 1, 2016;
- (2) The statement was made during a custodial interrogation that occurred outside Utah and was conducted by officers of a jurisdiction outside Utah;
- (3) The statement is offered for impeachment purposes only;
- (4) The statement was a spontaneous statement made outside the course of a custodial interrogation or made during routine processing or booking of the person;
- (5) Before or during a custodial interrogation, the person agreed to respond to questions only if his or her statements were not electronically recorded, provided that such agreement is electronically recorded or documented in writing;
- (6) The law enforcement officers conducting the custodial interrogation in good faith failed to make an electronic recording because the officers inadvertently failed to operate the recording equipment properly, or without the knowledge of any of the officers the recording equipment malfunctioned or stopped operating;
- (7) The law enforcement officers conducting or observing the custodial interrogation reasonably believed that the crime for which the person was being investigated was not a felony under Utah law;
- (8) Substantial exigent circumstances existed that prevented or rendered unfeasible the making of an electronic recording of the custodial interrogation, or prevented its preservation and availability at trial; or
- (9) The court finds:
  - (A) The statement has substantial guarantees of trustworthiness and reliability equivalent to those of an electronic recording; and
  - (B) Admitting the statement best serves the purposes of these rules and the interests of justice.

**(d) Procedure to determine admissibility.**

- (1) **Notice.** If the prosecution intends to offer an unrecorded statement under an exception described in Subsection (c)(4) through (9) of this Rule, the prosecution must serve the

defendant with written notice of an intent to rely on such an exception not later than 30 days before trial.

- (2) **Instruction.** If the court admits into evidence a statement made during a custodial interrogation that was not electronically recorded under an exception described in Subsection (c)(4) through (9) of this Rule, the court, upon request of the defendant, may give cautionary instructions to the jury concerning the unrecorded statement.

**2015 Advisory Committee Note** – In 2008, the Utah Attorney General's Office, in cooperation with statewide law enforcement agencies, drafted a Best Practices Statement for Law Enforcement that recommended electronic recording of custodial interrogations. Since then, most agencies have adopted the Statement or their own policies to record custodial interviews. This rule is promulgated to bring statewide uniformity to the admissibility of statements made during custodial interrogations. See *State v. Perea*, 2013 UT 68, ¶ 130, 322 P.3d 624.

Several states have adopted requirements for recording custodial interviews, and the National Conference of Commissioners on Uniform State Law has approved and recommended for enactment a Uniform Electronic Recordation of Custodial Interrogations Act.

The benefits of recording custodial interrogations include “avoiding unwarranted claims of coercion”; preventing the use of “actual coercive tactics by police”; and demonstrating “the voluntariness of the confession, the context in which a particular statement was made, and . . . the actual content of the statement.” *State v. James*, 858 P.2d 1012, 1018 (Utah Ct. App. 1993) (internal quotation marks omitted). Recordings assist the fact-finder and protect police officers and agencies from false claims of coercion and misconduct. *Perea*, 2013 UT 68, ¶ 130 n.23.

The rule addresses direct custodial questioning by law enforcement as well as other conduct during custodial questioning. It is intended to ensure that the custodial interrogation, including any part of the interrogation that is written or electronically transmitted, is fully and fairly recorded. Also, the admissibility of evidence under this rule is a preliminary question governed by Rule 104.

# The Vermont Statutes

## Title 13 : Crimes And Criminal Procedure

### Chapter 182 : Innocence Protection

#### Subchapter 004 : Custodial Interrogation

##### § 5585. Electronic recording of a custodial interrogation

(a) As used in this section:

(1) "Custodial interrogation" means any interrogation:

(A) involving questioning by a law enforcement officer that is reasonably likely to elicit an incriminating response from the subject; and

(B) in which a reasonable person in the subject's position would consider himself or herself to be in custody, starting from the moment a person should have been advised of his or her Miranda rights and ending when the questioning has concluded.

(2) "Electronic recording" or "electronically recorded" means an audio and visual recording that is an authentic, accurate, unaltered record of a custodial interrogation, or if law enforcement does not have the current capacity to create a visual recording, an audio recording of the interrogation.

(3) "Place of detention" means a building or a police station that is a place of operation for the State police, a municipal police department, county sheriff department, or other law enforcement agency that is owned or operated by a law enforcement agency at which persons are or may be questioned in connection with criminal offenses or detained temporarily in connection with criminal charges pending a potential arrest or citation.

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

(b)(1) A custodial interrogation that occurs in a place of detention concerning the investigation of a felony violation of chapter 53 (homicide) or 72 (sexual assault) of this title shall be electronically recorded in its entirety.

(2) In consideration of best practices, law enforcement shall strive to record simultaneously both the interrogator and the person being interrogated.

(c)(1) The following are exceptions to the recording requirement in subsection (b) of this section:

(A) exigent circumstances;

(B) a person's refusal to be electronically recorded;

(C) interrogations conducted by other jurisdictions;

(D) a reasonable belief that the person being interrogated did not commit a felony violation of chapter 53 (homicide) or 72 (sexual assault) of this title and, therefore, an electronic recording of the interrogation was not required;

(E) the safety of a person or protection of his or her identity; and

(F) equipment malfunction.

(2) If law enforcement does not make an electronic recording of a custodial interrogation as required by this section, the prosecution shall prove by a preponderance of the evidence that one of the exceptions identified in subdivision (1) of this subsection applies. If the prosecution does not meet the burden of proof, the evidence is still admissible, but the Court shall provide cautionary instructions to the jury regarding the failure to record the interrogation. (Added 2013, No. 193 (Adj. Sess.), § 4, eff. Oct. 1, 2015.)



**AUGUST 2010**

**Timothy Cole  
Advisory Panel on  
Wrongful Convictions**

Report to the Texas Task Force  
on Indigent Defense

## Chapter 2: Recording Custodial Interrogations

### Panel Recommendation

- 6. The State of Texas should adopt a mandatory electronic recording policy, from delivery of *Miranda* warnings to the end, for custodial interrogations in certain felony crimes. The policy should include a list of exceptions to recording and the judicial discretion to issue a jury instruction in the case of an unexcused failure to record.**

Creating a complete, accurate, and reviewable document that captures the entirety of a custodial interrogation will help prevent wrongful convictions. The Panel therefore recommends that electronic recording be made mandatory in Texas for custodial interrogations in cases of murder, capital murder, kidnapping, aggravated kidnapping, continuous sexual abuse of a child, indecency with a child, sexual performance by a child, sexual assault, and aggravated sexual assault.

The Panel also recommends that exceptions to electronic recording be allowed for good cause, such as equipment malfunction, uncooperative witnesses, spontaneous statements, public safety exigencies, or instances where the investigating officer was unaware that a crime that required recorded interrogations had been committed. This takes into consideration the contingencies that investigating officers may face when dealing with a witness or suspect in the field.

The final recommendation from the Panel is that in instances where the Court determines that unrecorded interrogations are not the result of good faith attempts to record or that none of the exceptions to recording apply, the Court may deliver an instruction to the jury that it is the policy of the State of Texas to record interrogations, and they may consider the absence of a recording when evaluating evidence that arose from the interrogation.

### Panel Report

#### Introduction

False confessions have contributed to wrongful convictions in Texas.<sup>1</sup> In order to assess the adequacy of Texas statutes that govern statement evidence and to determine the best policy, the Timothy Cole Advisory Panel on Wrongful Convictions examined the science behind false confessions, recommended practices endorsed by a variety of criminal justice organizations, and the policies adopted by U.S. and Texas jurisdictions. Based on this study, the Panel recommends that Texas adopt a statewide policy to record interrogations in certain classes of crimes.

#### Texas Law

Statement evidence in Texas is regulated by Articles 38.21-.22 of the Texas Code of Criminal Procedure. Statements may be used in court if they are “freely and voluntarily made without compulsion or persuasion”<sup>2</sup> and follow the rules established in *Miranda v. Arizona*<sup>3</sup> and

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<sup>1</sup> See THE JUSTICE PROJECT. CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED: STORIES OF INJUSTICE AND THE REFORMS THAT CAN PREVENT THEM (2009), available at <http://www.thejusticeproject.org/wp-content/uploads/convicting-the-innocent.pdf>.

<sup>2</sup> TEX. CODE CRIM. PROC. ANN. art. 38.21 (Vernon 2010).

Art. 38.22. These rules require that the suspect be informed that he has the right to remain silent, that any statement may be used in court, that he has the right to an attorney, and that he has the right to end an interview at any time. Suspects must knowingly and voluntarily waive these rights in order for an interview to commence.<sup>4</sup>

Although the existing statutes provide that statements in certain situations be recorded, the provisions differ significantly from the practices voluntarily adopted by many jurisdictions within Texas and other states. First, audio and/or video recording under the existing statute is only required for a statement—not a custodial interrogation. Second, recording is only required in the case of oral or sign language statements, which are relatively rare. Law enforcement agencies overwhelmingly rely on the written statements that are described in Art. 38.22 Sec. 1.

### **The Science of False Confessions**

Post-conviction DNA testing has proven that people at times confess to crimes that they did not commit. Scientists studying this phenomenon have documented, elicited, and categorized the causes of false confessions.

#### *Types of False Confessions*

Researchers and theorists have classified the known cases of false confessions into three types: voluntary, coerced-compliant, and coerced-internalized.<sup>5</sup> In a voluntary false confession, an innocent person may offer a false confession without being questioned by investigators. The two types of coerced confessions are elicited through the process of interrogation. In coerced-compliant false confessions, the suspect confesses for a functional purpose, such as to escape a situation or avoid a threat.<sup>6</sup> Those who give coerced-internalized false confessions, however, “come not only to capitulate in their behavior, but also to believe that they committed the crime in question.”<sup>7</sup>

#### *Miranda Waivers*

Most false confessions begin with a suspect who signs a *Miranda* waiver and agrees to be interviewed by investigators without an attorney present. At some point during the interview the investigators, convinced of the person’s guilt, switch to interrogation, refuse to accept a statement of innocence, and instead pursue a confession until it is obtained.<sup>8</sup> Researchers have concluded that innocent suspects may waive their right to counsel because they believe that since they are innocent, they have nothing to hide.

#### *Investigator Bias and Ability to Detect Deception*

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<sup>3</sup> 384 U.S. 436 (1966). *See also* *Montejo v. Louisiana*, 130 S. Ct. 23 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986), which sought to assure that the right to counsel is not lost during police interrogation); *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) (ruling that a suspect must vocalize his or her wish to remain silent).

<sup>4</sup> *Miranda*, 294 U.S. at 475.

<sup>5</sup> Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 49 (reviewing the types and theories of false confessions). No Texas DNA exoneration cases that involved false confessions were related to voluntary confessions; all were coerced, but the record does not indicate whether any of the false confessions were internalized. *See* THE JUSTICE PROJECT, *supra* note 3.

<sup>6</sup> Kassin & Gudjonsson, *supra* note 6, at 49.

<sup>7</sup> *Id.* at 50.

<sup>8</sup> *See* Steven A. Drizin & Richard A. Leo. *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 911 (2004).

Numerous studies demonstrate that investigators enter interviews with a presumption of the suspect's guilt.<sup>9</sup> One such study concluded that “interrogators saw themselves as the most aggressive when they interviewed suspects who—unbeknownst to them—were truly innocent.”<sup>10</sup> These findings illustrate that an innocent suspect's decision to waive *Miranda* rights may result in a particularly aggressive interrogation, increasing the likelihood of a false confession.

Studies have also tested the ability to detect deception. Research indicates that people are poor judges of deception, in part because “people who stand falsely accused of lying often exhibit patterns of anxiety and behavior that are indistinguishable from those who are really lying.”<sup>11</sup> Studies have also shown trained investigators are no more accurate in judging the veracity of confessions than untrained college students, yet act with significantly more confidence.<sup>12</sup>

### *Traits, Techniques, and Theories of False Confessions*

There are a variety of factors that contribute to whether or not an innocent individual will make a false confession. These include youth, low intelligence or developmental or intellectual disability, and mental illness; psychological factors such as sleep deprivation and drug use or withdrawal; as well as personality variables such as antisocial tendencies, anxiety, depression, compliance, suggestibility, and low self esteem.<sup>13</sup> In addition to personal traits and interrogations techniques, theories of false confession indicate that the psychoanalytic perspective,<sup>14</sup> the decision-making model,<sup>15</sup> the cognitive-behavior perspective,<sup>16</sup> and cultural considerations<sup>17</sup> each may contribute to false confessions.

### *False Confessions and Wrongful Conviction*

A large proportion of documented false confessions from across the nation have come from suspects who were young, including 35 percent under age 18 and more than half under age 25.<sup>18</sup> Those who provided false confessions were also subjected to lengthy interrogations. More than 90 percent of normal interrogations last less than two hours, but in 44 studied cases of false confessions, 84 percent lasted more than six hours, with two lasting between 48 and 96 hours. Further, confessions have a significant impact on jury verdicts and sentencing. Studies have

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<sup>9</sup> See, e.g., Saul M. Kassin, et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187 (2003).

<sup>10</sup> *Id.* at 194.

<sup>11</sup> Saul M. Kassin & Christina T. Fong, “I’m Innocent!”: *Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499, 501 (1999).

<sup>12</sup> Saul M. Kassin, et al., “I’d Know a False Confession if I Saw One”: *A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211 (2005); Christian A. Meissner & Saul M. Kassin, “He’s Guilty!”: *Investigator Bias in Judgments of Truth and Deception*, 26 LAW & HUM. BEHAV. 469 (2002).

<sup>13</sup> Jessica R. Klaver, et al., *Effects of Personality, Interrogation Techniques, and Plausibility in an Experimental False Confession Paradigm*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 71, 72 (2008).

<sup>14</sup> Kassin & Gudjonsson, *supra* note 6, at 45.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 46.

<sup>17</sup> See Richard A. Leo, et al., *Chapter 2: Psychological and Cultural Aspects of Interrogations and False Confessions: Using Research to Inform Legal Decision-Making*, in 2 PSYCHOLOGICAL EXPERTISE IN COURT: PSYCHOLOGY IN THE COURTROOM 25 (Daniel A. Krauss & Joel D. Lieberman, eds., 2009).

<sup>18</sup> Drizin & Leo, *supra* note 8, at 945.

found that confession evidence has a greater impact *on* jurors and is seen as having a greater impact *by* jurors than any other type of evidence.<sup>19</sup>

### Organizations' Recommended Practices

Based on the body of research that has been done, legal scholars and associations, law enforcement organizations, and policy organizations have made recommendations to reduce the likelihood that suspects will be wrongfully convicted of crimes to which they falsely confess. By far, the most common recommendation has been to record interrogations from the time a suspect is read his *Miranda* rights through the end.

Legal scholars have long called for complete documentation of interrogations through audio and/or video recording because "it favors neither the defense nor the prosecution but only the pursuit of reliable and accurate fact-finding."<sup>20</sup> Taping also lends transparency to the process, which leads to better interrogation practices.<sup>21</sup> Finally, scholars argue that recorded interrogations allow judges and juries to better gauge the reliability of confession evidence.

Both professional and policy organizations also recommend complete recording of interrogations. Among these organizations are the American Law Institute,<sup>22</sup> the New York County Lawyers' Association,<sup>23</sup> the American Bar Association Section of Criminal Justice,<sup>24</sup> the National Association of Criminal Defense Lawyers,<sup>25</sup> state bar associations in Michigan<sup>26</sup> and New York,<sup>27</sup> The Justice Project,<sup>28</sup> and the *Chicago Tribune*.<sup>29</sup>

Perhaps the most ringing endorsement for recording interrogations comes from the hundreds of jurisdictions around the country that already record complete interrogations. A survey found that almost 2400 police and sheriffs' departments videotaped interrogations in at least some cases, with 84 percent believing that videotaping improved the quality of police interrogations.<sup>30</sup> A study of the law enforcement perspective on the practice found that

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<sup>19</sup> Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 481 (1997).

<sup>20</sup> *Id.* at 995.

<sup>21</sup> *Id.* at 997.

<sup>22</sup> MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975), available at [http://www.nacdl.org/sl\\_docs.nsf/a1bf9dda21904164852566d50069b69c/e1a4d2c7cf86cbcd852570820072a805/\\$FILE/ALI-Model\\_Recording\\_Code-1975.pdf](http://www.nacdl.org/sl_docs.nsf/a1bf9dda21904164852566d50069b69c/e1a4d2c7cf86cbcd852570820072a805/$FILE/ALI-Model_Recording_Code-1975.pdf).

<sup>23</sup> The N.Y. County Lawyers' Ass'n & A.B.A. Section of Criminal Justice, *Report to the House of Delegates* 15, available at <http://www.abanet.org/crimjust/policy/revisedmy048a.pdf>.

<sup>24</sup> *Id.*

<sup>25</sup> Nat'l Ass'n of Criminal Def. Lawyers, *Resolution of the Board of Directors Supporting Mandatory Videotaping of Law Enforcement Interrogations* (May 4, 2002), available at <http://www.nacdl.org/public.nsf/resolutions/7cac8b149d7416a385256d97005>.

<sup>26</sup> State Bar of Michigan. *Revised Resolution* (September 21, 2005), available at <http://www.michbar.org/generalinfo/pdfs/9-22Custodial2.pdf>.

<sup>27</sup> New York State Bar Association. *Memorandum No. 11* (June 13, 2007), available at [http://www.nysba.org/AM/Template.cfm?Section=Home&section=Legislative\\_Memoranda\\_2007\\_2008&template=/CM/ContentDisplay.cfm&ContentFileID=2009](http://www.nysba.org/AM/Template.cfm?Section=Home&section=Legislative_Memoranda_2007_2008&template=/CM/ContentDisplay.cfm&ContentFileID=2009).

<sup>28</sup> THE JUSTICE PROJECT. *ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW* (2009), available at [http://www.thejusticeproject.org/wp-content/uploads/polpack\\_recording-fin2.pdf](http://www.thejusticeproject.org/wp-content/uploads/polpack_recording-fin2.pdf).

<sup>29</sup> Editorial, *No More Excuses. Go to the Tape*, CHI. TRIB., Apr. 21, 2002, at C6.

<sup>30</sup> William A. Geller, *Videotaping Interrogations and Confessions*, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN BRIEF, March 1993.

“virtually every officer who has had experience with custodial recordings enthusiastically favors the practice.”<sup>31</sup>

### Recording in the States and Texas

To date, 17 states and the District of Columbia record interrogations as either a result of statutory law<sup>32</sup> or court rulings.<sup>33</sup> In contrast to Texas, each of these states requires audio and/or video recording of interrogations from the reading of *Miranda* rights through any confession that is given. In addition, some states have spelled out exceptions to recording in order to meet the needs of local authorities and provide remedies when there is a failure to comply.

Although not required by statute, many Texas jurisdictions record interrogations, at least in some classes of offenses. Three hundred and eighty of 441 departments who participated in a survey “indicated that they either routinely record custodial interrogations, record interrogations for certain classes of felonies, or record interrogations at the discretion of the lead investigator.”<sup>34</sup> These jurisdictions have found that the practice of recording custodial interrogations lends a variety of benefits to the officers, the defendant, and the prosecution, and it has not been cost-prohibitive for these departments. Communication with Dallas and Alpine Police Departments, for example, indicate that rooms may be outfitted for recording interrogations at a cost of \$500 to \$600 per room.<sup>35</sup>

In addition, a review of the recording policies of the largest counties and municipalities indicated that over half provided no written policies or procedures on electronic recording of custodial interrogations beyond statutory requirements. By contrast, policies for departments in Amarillo, Austin, Corpus Christi, Dallas, El Paso, Houston, Irving, Pasadena, and San Antonio provide for more robust recording of interrogations. Although false confessions may never be completely eradicated from criminal investigations due to personal or situational factors, statewide policies can be adopted to guide law enforcement, judges, and juries on the best methods to document and preserve confessions in the context in which they were elicited.

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<sup>31</sup> THOMAS SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 6 (Nw. U. Sch. of L. Center on Wrongful Convictions 2005), available at <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/SullivanReport.pdf>.

<sup>32</sup> D.C. CODE § 5-116.01 (2010) (District of Columbia); 725 ILL. COMP. STAT. 5/103-2.1 (2010) (Illinois); ME. REV. STAT. ANN. tit. 25, § 2803-B(I)(K) (2010) (Maine); MD. CODE ANN., [Crim. Proc.] § 2-401 (LexisNexis 2010) (Maryland); MO. REV. STAT. § 590.701 (2010) (Missouri); MONT. CODE ANN. § 46-4.4 (2010) (Montana); NEB. REV. STAT. § 29-4501 (2010) (Nebraska); N.M. STAT. ANN. § 29-1-16 (West 2010) (New Mexico); N.C. GEN. STAT. § 15A-211 (2010) (North Carolina); OHIO REV. CODE ANN. § 2933.81 (LexisNexis 2010) (Ohio); OR. REV. STAT. § 419C.270 (2010) (Oregon); WIS. STAT. ANN. § 972.115 (West 2010) (Wisconsin).

<sup>33</sup> N.J. SUP. CT. RULE 3.17 (2005); *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985); *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006); *Commonwealth v. Digiambattista*, 442 Mass. 423 (2004); *State v. Scales*, 518 N.2d 587, 591 (Minn. 1994); *State v. Barnett*, 147 N.H. 334 (2001).

<sup>34</sup> THE JUSTICE PROJECT. ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS IN TEXAS: A REVIEW OF CURRENT STATUTES, PRACTICES, AND POLICIES (2009), available at <http://www.thejusticeproject.org/wp-content/uploads/tx-recording-report-tjp-may-2009.pdf>.

<sup>35</sup> E-mail from Edwin Colfax, Texas Policy Director, The Justice Project, to Lieutenant Losoya, Alpine, Texas Police Department (Aug. 2, 2010) (on file with Texas Task Force on Indigent Defense). E-mail from Edwin Colfax, Texas Policy Director, The Justice Project, to Jennifer Willyard, Grant Program Specialist, Texas Task Force on Indigent Defense (Aug. 2, 2010) (on file with Texas Task Force on Indigent Defense).

# Judges, Prosecutors & Defense Attorneys

Final Survey Results

Please indicate your role.

Answer Options	Response Percent	Response Count
Judge	56.2%	114
Appellate Judge	8.4%	17
Associate Judge	0.0%	0
Prosecutor	13.8%	28
Defense Attorney	21.7%	44
<i>answered question</i>		203
<i>skipped question</i>		0

Do you think entering an audio or video recording of an interrogation as evidence would be beneficial in any of the following cases?

Answer Options	Yes	No	Not Sure	Response Count
Assault	134	6	17	157
Burglary	124	8	22	154
Criminal Homicide/ Attempted Murder	130	5	17	152
Drug Offense (Felony)	122	8	21	151
Rape	129	3	20	152
Robbery	126	6	19	151
Theft (Felony/>\$1500 taken)/ Motor Vehicle Theft	123	8	20	151
All Felonies	143	4	28	175
Other (please explain)				48
<i>answered question</i>				181
<i>skipped question</i>				22

Have you worked on or presided over cases in which an electronic recording of an interrogation was entered as evidence?

Answer Options	Response Percent	Response Count
Yes	81.4%	153
No	18.6%	35
<i>answered question</i>		<b>188</b>
<i>skipped question</i>		<b>15</b>

If your response to the previous was yes, in your opinion, was it helpful?

Answer Options	Response Percent	Response Count
Yes	95.1%	136
No	4.9%	7
Please explain why or why not.		78
<i>answered question</i>		<b>143</b>
<i>skipped question</i>		<b>60</b>

Please indicate if you agree or disagree with the following statements. Electronic recording of interrogations could:

Answer Options	Strongly Disagree	Disagree	Neither Agree nor Disagree	Agree	Strongly Agree	Response Count
Help determine whether or not the individual's statement was made freely and voluntarily.	4	5	11	80	75	175
Reduce the necessity of testimony by those involved in the interrogation.	35	52	37	30	21	175
Reduce court time for officers.	30	55	49	24	18	176
Result in less time spent reviewing and determining the facts concerning the interrogation.	28	35	33	55	25	176
Result in danger of losing cooperation/ confessions from the suspect due to their lack of willingness to be recorded.	26	60	58	22	10	176
Result in more confessions being ruled inadmissible due to a failure to follow new law requirements.	21	44	58	43	9	175
Result in the fiscal cost outweighing the value of the recorded confession.	53	56	49	10	8	176
Allow judges and juries to have a better understanding of the statements provided by those who were interrogated.	8	7	14	80	67	176
Allow the prosecution to build stronger cases against those suspected of a crime.	6	8	53	73	36	176
Allow the defense to better represent clients being prosecuted for a crime.	8	9	46	77	36	176
Increase the public's trust in the justice system.	4	14	40	60	58	176
Enable better practices and learning opportunities related to electronic recording of interrogations.	3	14	41	76	41	175
Reduce the risk of false confessions and convictions of innocent persons.	8	16	36	66	49	175
Reduce the risk of civil suits and damage awards in favor of those wrongfully convicted individuals.	8	17	67	52	31	175
<i>answered question</i>						<b>176</b>
<i>skipped question</i>						<b>27</b>

# Law Enforcement

Preliminary Survey Results

## General question for all respondents

Does your department electronically record interrogations?		
Answer Options	Response Percent	Response Count
Yes	68.4%	544
No	31.6%	251
<i>answered question</i>		<b>795</b>
<i>skipped question</i>		<b>3</b>

## Respondents who indicated they did NOT currently record interrogations

Why does your department not use audio or video to record interrogations? Please check all that apply.		
Answer Options	Response Percent	Response Count
Cost to implement	38.9%	93
Amount of training involved	10.5%	25
Will interfere with custodial interrogations	2.9%	7
Other (please explain)	72.0%	172
<i>answered question</i>		<b>239</b>
<i>skipped question</i>		<b>559</b>

Have you considered audio or video recording in the past?		
Answer Options	Response Percent	Response Count
Yes	54.8%	131
No	45.2%	108
<i>answered question</i>		<b>239</b>
<i>skipped question</i>		<b>559</b>

Do you think using audio or video recording would be beneficial in any of the following types of felony cases?				
Answer Options	Yes	No	Not Sure	Response Count
All felonies	202	9	24	235
Assault	192	6	24	222
Burglary	186	9	26	221
Criminal Homicide/ Attempted Murder	198	5	19	222
Drug Offense (Felony)	188	11	23	222
Rape	195	5	19	219
Robbery	191	6	21	218
Theft (Felony/>\$1500 taken)/ Motor Vehicle Theft	184	10	25	219
Other	112	5	48	165
<i>answered question</i>				<b>236</b>
<i>skipped question</i>				<b>562</b>

Please indicate if you agree or disagree with the following statements: Recording of interrogations could:

Answer Options	Strongly Disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree	Response Count
Permit the officers to concentrate on the suspect	13	7	57	100	57	234
Allow the officers who are not in the interrogation room	16	4	17	131	66	234
Reduce the risk of false confessions and convictions	14	14	55	92	57	232
Reduce court time for officers.	12	34	60	90	37	233
Result in less time spent reviewing and piecing notes	15	28	44	99	47	233
Result in danger of losing cooperation/ confessions	13	34	87	75	24	233
Reduce lawsuits from claims of officer misconduct	17	6	31	106	72	232
Assist officers in solving the crime in question as well	15	9	52	111	44	231
Increase the public's trust in the justice system.	12	9	52	108	52	233
Enable better practices and learning opportunities	14	3	41	120	54	232
					<i>answered question</i>	<b>234</b>
					<i>skipped question</i>	<b>564</b>

## Respondents who indicated they currently record interrogations

For what type of cases does your department electronically record? Please check all that apply.				
Answer Options	Yes	No	Not Sure	Response Count
All felonies	473	24	15	512
Assault	425	21	20	466
Burglary	426	18	20	464
Criminal Homicide/ Attempted Murder	427	17	21	465
Drug Offense (Felony)	397	32	33	462
Rape	430	14	20	464
Robbery	427	16	20	463
Theft (Felony/>\$1500 taken)/ Motor Vehicle Theft	420	24	22	466
Other	361	10	45	416
<i>answered question</i>				<b>529</b>
<i>skipped question</i>				<b>269</b>

What individuals are electronically recorded during questioning? Please check all that apply.

Answer Options	Response Percent	Response Count
Suspect (custodial)	97.3%	510
Suspect (non-custodial)	89.1%	467
Witness	72.5%	380
Other (please explain)	24.8%	130
<i>answered question</i>		<b>524</b>
<i>skipped question</i>		<b>274</b>

Does your department electronically record line ups for eyewitness identification?		
Answer Options	Response Percent	Response Count
Yes	31.6%	166
No	47.5%	250
Other (please explain)	20.9%	110
<i>answered question</i>		<b>526</b>
<i>skipped question</i>		<b>272</b>

What type of settings are typically recorded (audio or visual) by your department?Please check all that apply.		
Answer Options	Response Percent	Response Count
Informal questioning inside an interrogation room.	84.9%	443
Informal questioning outside the interrogation room.	61.1%	319
Phone conversations.	41.8%	218
Arrests	73.6%	384
Other (please specify)	21.5%	112
<i>answered question</i>		<b>522</b>
<i>skipped question</i>		<b>276</b>

Does your department record audio and video or audio only?		
Answer Options	Response Percent	Response Count
Audio and video	92.0%	484
Audio only	8.0%	42
<i>answered question</i>		<b>526</b>
<i>skipped question</i>		<b>272</b>

What type of equipment does your department currently to record interrogations? Please check all that apply.

Answer Options	Response Percent	Response Count
Closed circuit video recording system	7.1%	3
Computers	4.8%	2
Digital voice recorder	92.9%	39
Handheld digital camera	4.8%	2
Microphones	0.0%	0
Recording software	0.0%	0
Other (please specify)	19.0%	8
<i>answered question</i>		<b>42</b>
<i>skipped question</i>		<b>756</b>

Is the recording equipment displayed in an area visible to the suspect?

Answer Options	Response Percent	Response Count
Yes	78.0%	32
No	22.0%	9
<i>answered question</i>		<b>41</b>
<i>skipped question</i>		<b>757</b>

**What is your department's method of storing the recordings? Please check all that apply.**

<b>Answer Options</b>	<b>Response Percent</b>	<b>Response Count</b>
Computer server	65.1%	28
DVD	44.2%	19
USB/ Flash drive	27.9%	12
Other (please specify)	14.0%	6
<i>answered question</i>		<b>43</b>
<i>skipped question</i>		<b>755</b>

**If your department uses video equipment, which of the following best describes what the camera records?**

<b>Answer Options</b>	<b>Response Percent</b>	<b>Response Count</b>
The camera records the suspect only	22.9%	117
The camera records the interviewing officer only	0.0%	0
The camera records both the interviewer and the	61.1%	312
Department does not use video equipment	2.9%	15
Other (please specify)	13.1%	67
<i>answered question</i>		<b>511</b>
<i>skipped question</i>		<b>287</b>

**Does your department share recording and/or storage equipment with other agencies?**

<b>Answer Options</b>	<b>Response Percent</b>	<b>Response Count</b>
Yes	37.9%	198
No	62.1%	325
<i>answered question</i>		<b>523</b>
<i>skipped question</i>		<b>275</b>

Are officers trained on the process and methods to operate the equipment? Please check all that apply.

Answer Options	Response Percent	Response Count
Formal in-house training session	29.6%	155
Informal training on equipment and/or procedure	68.7%	360
Trained by company (vendors)	15.8%	83
No training provided	4.8%	25
Other (please explain)	11.5%	60
<i>answered question</i>		<b>524</b>
<i>skipped question</i>		<b>274</b>

Does your department have a written policy on recording interrogations?

Answer Options	Response Percent	Response Count
Yes	36.4%	188
No	63.6%	329
If yes, please provide your name and email address if your		66
<i>answered question</i>		<b>517</b>
<i>skipped question</i>		<b>281</b>

Does your department obtain the suspect's consent before recording a custodial interrogation?

Answer Options	Response Percent	Response Count
Yes	27.3%	142
No	72.7%	378
<i>answered question</i>		<b>520</b>
<i>skipped question</i>		<b>278</b>

In your department, when does the officer begin and conclude the recording of an interrogation?		
Answer Options	Response Percent	Response Count
From the time the suspect is read his/her Miranda	62.5%	323
Only for the confession	0.2%	1
Officer has the discretion on when to begin and end	10.6%	55
Other (please explain)	26.7%	138
<i>answered question</i>		<b>517</b>
<i>skipped question</i>		<b>281</b>

Please check all of the applicable funding streams that were used to purchase and maintain the recording equipment.		
Answer Options	Response Percent	Response Count
Federal grants	7.3%	36
State grants	6.3%	31
Department general funds	79.3%	390
Donation/gift	6.9%	34
Unknown	10.4%	51
Other (please specify)	13.0%	64
<i>answered question</i>		<b>492</b>
<i>skipped question</i>		<b>306</b>

Please indicate if you agree or disagree with the following statements:Recording of interrogations has:

Answer Options	Strongly Disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree	Response Count
Permitted the officers to concentrate on the suspect during the interrogation.	18	12	104	264	117	515
Allowed officers who are not in the interrogation room to remotely observe or review the interrogations.	26	27	77	229	153	512
Reduced the risk of false confessions and convictions of innocent persons.	20	35	133	192	133	513
Reduced court time for officers.	20	48	126	214	106	514
Resulted in less time spent reviewing and piecing notes together.	20	66	110	222	94	512
Resulted in danger of losing cooperation/ confessions from the suspect due to their lack of willingness to be recorded.	44	167	203	78	23	515
Reduced lawsuits from claims of officer misconduct during interrogations.	16	21	162	185	130	514
Assisted officers in solving the crime in question as well as others that may be connected.	15	14	114	276	96	515
Increased the public's trust in the justice system.	14	23	148	217	113	515
Enabled better practices and learning opportunities related to custodial interrogations.	15	7	93	286	113	514
					<i>answered question</i>	<b>516</b>
					<i>skipped question</i>	<b>282</b>