

State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX -

PLEASE DO NOT REMOVE FROM DRAFTING FILE

➡ Appendix B ... Part 01 of 02

Date Transfer Requested: 08/16/2005 (Per: RLR)



The 2005 drafting file for
LRB-1609/4 (transferred)

➡ LRB-3242/2 (transferred)

where used to create ...

LRB 05-3492

ⓘ The attached 2005 draft was incorporated into the new 2005 draft listed above. For research purposes, this cover sheet and the attached drafting file were added, as a appendix, to the new 2005 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

2005 DRAFTING REQUEST

Bill

Received: 06/23/2005

Received By: rryan

Wanted: As time permits

Identical to LRB:

For: Mark Gundrum (608) 267-5158

By/Representing: Don Dyke

This file may be shown to any legislator: NO

Drafter: rryan

May Contact:

Addl. Drafters: gmalaise

Subject: Criminal Law - law enforcement

Extra Copies:

Submit via email: YES

Requester's email: Rep.Gundrum@legis.state.wi.us

Carbon copy (CC:) to: don.dyke@legis.state.wi.us
cathlene.hanaman@legis.state.wi.us
michael.dsida@legis.state.wi.us

Pre Topic:

No specific pre topic given

Topic:

Recording custodial interrogations; admissibility of a defendant's statement made during a custodial interrogation

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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/1	rryan 07/28/2005	lkunkel 08/01/2005	jfrantze 08/01/2005	_____	Inorthro 08/01/2005		S&L
/2	rryan 08/16/2005	lkunkel 08/16/2005	rschluet 08/16/2005	_____	sbasford 08/16/2005		

Vers. Drafted Reviewed Typed Proofed Submitted Jacketed Required

FE Sent For:

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/?							S&L
/1	rryan 07/28/2005	lkunkel 08/01/2005	jfrantze 08/01/2005		lnorthro 08/01/2005		

FE Sent For:

12/mk 8/16

LRB-3242

08/01/2005 04:19:14 PM

Page 2

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No specific pre topic given


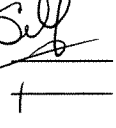
Topic:

Recording custodial interrogations; admissibility of a defendant's statement made during a custodial interrogation

Instructions:

See Attached

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<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
1/?	rryan	1/mk 8/1					S&L

FE Sent For:

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26th - comments to Leg
before April 26th

PRELIMINARY

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8

AN ACT *to amend* 165.85 (3) (d) and 757.05 (1) (a); and *to create* 16.964 (5m),
20.505 (6) (j) 13n., 20.505 (6) (kn), 972.115 and 972.117 of the statutes; **relating to:**
electronic recording of suspects' statements, creating a grant program, increasing the
penalty surcharge, and making an appropriation.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

COMMENT: This preliminary draft:

1. Creates a grant program, to be administered by the office of justice assistance, for the purchase, installation, and maintenance of equipment and training of personnel by law enforcement agencies for recording suspects' statements. See SEC. 1 of the draft.
2. Funds the grant program by increasing the penalty surcharge under current s. 757.05 (1), stats., from 24 percent to 25 percent of the fine or forfeiture imposed. See SEC. 6 of the draft. The draft contemplates appropriating the increased revenue generated by the penalty surcharge increase to the grant program. See SECS. 2, 3, and 4 of the draft.
3. Encourages the law enforcement training standards board to include recording of custodial interrogations in its training program. See SEC. 5 of the draft.
4. Provides under certain circumstances for jury consideration of the absence of a recorded statement by the defendant in a custodial interrogation if the unrecorded statement is admitted into evidence in a trial for a felony committed on or after January 1, 2010. See SEC. 7 of the draft.
5. Provides a retention period for law enforcement recordings of suspects' statements. See SEC. 8 of the draft.

SECTION 1. 16.964 (5m) of the statutes is created to read:

16.964 (5m) GRANT PROGRAM FOR RECORDING SUSPECTS' STATEMENTS. (a) *Definitions.*

In this subsection:

1 1. "Law enforcement agency" has the meaning given in s. 165.83 (1) (b).

2 2. "Record" means to memorialize audibly or audibly and visually by means of digital
3 technology.

4 3. "Suspect's statement" means a statement obtained in a custodial interrogation of a
5 person suspected of committing a crime in connection with an investigation of that crime by
6 a law enforcement agency, from the time the Miranda warning is given until the interview
7 terminates.

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in stats.
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8 (b) *Office to provide grants.* From the appropriation under s. 20.505 (6) (kn), the office
9 of justice assistance shall provide grants to law enforcement agencies for the purchase,
10 installation, and maintenance of equipment and training of personnel to record suspects'
11 statements. Grants for recording equipment may be used only for digital recording equipment.
12 Grants shall be awarded based on the order in which a complete and satisfactory grant
13 application is received by the office of justice assistance. The office may not award an annual
14 grant under this subsection in excess of \$_____ to any law enforcement agency. The office
15 shall develop criteria and procedures for use in administering this subsection.
16 Notwithstanding s. 227.10 (1), the criteria and procedures need not be promulgated as rules
17 under ch. 227.

18 (c) *Applications for grants.* A law enforcement agency may apply for a grant under this
19 subsection if it agrees to provide the matching funds required under par. (d) and if the agency
20 describes how it will use the funds and how it will address all of the following:

21 [1. Procedures to be followed when recording equipment fails to operate correctly,
22 including use of alternative recording equipment and reporting, repairing, or replacing the
23 equipment.]

1 2. Procedures for storing the recorded suspects' statements, including storage format,
2 storage location, and indexing of recorded statements for retrieval.

3 3. Measures to be taken to prevent [or detect] tampering with recorded suspect's
4 statements.

5 (d) *Required matching funds.* A law enforcement agency that is awarded a grant under
6 this subsection shall provide matching funds equal to at least ____% of the grant.

7 **SECTION 2.** 20.005 (3) (schedule) of the statutes: at the appropriate place, insert the
8 following amounts for the purposes indicated:

	2005-06	2006-07
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9
10 **20.505 Administration, department of**

11 (6) OFFICE OF JUSTICE ASSISTANCE

(kn) Electronic recording grants	PR-S	[]	[]
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12
13 **SECTION 3.** 20.505 (6) (j) 13n. of the statutes is created to read:

14 20.505 (6) (j) 13n. The amount transferred to par. (kn) shall be the amount in the
15 schedule under par. (kn).

16 **SECTION 4.** 20.505 (6) (kn) of the statutes is created to read:

17 20.505 (6) (kn) *Electronic recording grants.* The amounts in the schedule to provide
18 grants to law enforcement agencies under s. 16.964 (5m).

19 **SECTION 5.** 165.85 (3) (d) of the statutes is amended to read:

20 165.85 (3) (d) Establish minimum curriculum requirements for preparatory courses and
21 programs, and recommend minimum curriculum requirements for recertification and
22 advanced courses and programs, in schools operated by or for this state or any political
23 subdivision of the state for the specific purpose of training law enforcement recruits, law

1 enforcement officers, tribal law enforcement recruits, tribal law enforcement officers, jail
2 officer recruits, jail officers, secure detention officer recruits or secure detention officers in
3 areas of knowledge and ability necessary to the attainment of effective performance as an
4 officer, and ranging from traditional subjects such as first aid, patrolling, statutory authority,
5 techniques of arrest and, firearms, and recording of custodial interrogations to subjects
6 designed to provide a better understanding of ever-increasing complex problems in law
7 enforcement such as human relations, civil rights, constitutional law and supervision, control
8 and maintenance of a jail or secure detention facility. The board shall appoint a 13-member
9 advisory curriculum committee consisting of 6 chiefs of police and 6 sheriffs to be appointed
10 on a geographic basis of not more than one chief of police and one sheriff from any one of the
11 8 state administrative districts together with the director of training of the Wisconsin state
12 patrol. This committee shall advise the board in the establishment of the curriculum
13 requirements.

14 **SECTION 6.** 757.05 (1) (a) of the statutes is amended to read:

15 757.05 (1) (a) Whenever a court imposes a fine or forfeiture for a violation of state law
16 or for a violation of a municipal or county ordinance except for a violation of s. 101.123 (2)
17 (a), (am) 1., (ar), (bm), (br), or (bv) or (5), or for a first violation of s. 23.33 (4c) (a) 2., 30.681
18 (1) (b) 1., 346.63 (1) (b), or 350.101 (1) (b), if the person who committed the violation had
19 a blood alcohol concentration of 0.08 or more but less than 0.1 at the time of the violation, or
20 for a violation of state laws or municipal or county ordinances involving nonmoving traffic
21 violations or safety belt use violations under s. 347.48 (2m), there shall be imposed in addition
22 a penalty surcharge under ch. 814 in an amount of ~~24~~25% of the fine or forfeiture imposed.
23 If multiple offenses are involved, the penalty surcharge shall be based upon the total fine or

1 forfeiture for all offenses. When a fine or forfeiture is suspended in whole or in part, the
2 penalty surcharge shall be reduced in proportion to the suspension.

3 **SECTION 7.** 972.115 of the statutes is created to read:

4 **972.115 Unrecorded statements by defendant. (1) DEFINITIONS.** In this section:

5 (a) "Custodial interrogation" means an interrogation conducted by a law enforcement
6 agency from the time the Miranda warning is given until the interview terminates during
7 which a reasonable person in the subject's position would consider himself or herself to be in
8 custody and during which a question is asked that is reasonably likely to elicit an incriminating
9 response.

10 (b) "Law enforcement agency" has the meaning given in s. 165.83 (1) (b).

11 (c) "Place of detention" means a building owned or operated by a law enforcement
12 agency that is a place of operation for the law enforcement agency at which persons are or may
13 be held in detention in connection with the investigation of possible crimes by those persons.

14 (d) "Unrecorded statement of the defendant" means a statement made by the defendant
15 during a custodial interrogation in a place of detention that was not audibly or audibly and
16 visually recorded or that was audibly or audibly and visually recorded but is not available at
17 the time the statement is admitted into evidence.

18 **(2) CONSIDERATION BY COURT AND JURY OF UNRECORDED STATEMENT.** (a) Except as
19 provided in subs. (3) and (4), if an unrecorded statement of the defendant is admitted into
20 evidence in a trial for a felony committed on or after January 1, 2010 the court, upon request
21 of the defendant, may instruct the jury to the effect that the policy of this state favors the
22 recording of such statements whenever feasible and that the jury may consider the absence of
23 a recording of the statement in evaluating the evidence in the case.

1 (b) If an unrecorded statement of the defendant is admitted as described in par. (a), the
2 state may address any reasons or justifications explaining why no recording of the statement
3 was made or why a recorded statement is not available.

4 (3) EXCEPTIONS. This section does not apply to an unrecorded statement of the defendant
5 if the absence of a recording is a result of any of the following:

6 (a) Recording the statement was not feasible for a reason other than that the law
7 enforcement agency lacks the necessary equipment and facility to record a suspect's statement
8 at any time.

9 (b) The defendant agrees to make a statement only if a recording is not made of the
10 statement and that agreement is recorded, if feasible.

11 (c) The statement was made out-of-state.

12 (4) NONAPPLICABILITY TO CERTAIN STATEMENTS. This section does not apply to an
13 unrecorded statement of the defendant admitted into evidence if the statement is any of the
14 following:

15 (a) The statement was a spontaneous statement not made in response to a question by
16 a law enforcement officer.

17 (b) The statement was in response to questioning incident to the arrest of the defendant.

18 (c) The statement is introduced only for purposes of impeachment.

19 SECTION 8. 972.117 of the statutes is created to read:

20 **972.117 Retention of recorded suspects' statements.** (1) DEFINITIONS. (a) "Law
21 enforcement agency" has the meaning given in s. 165.83 (1) (b).

22 (b) "Recorded suspect's statement" means a statement obtained in a custodial
23 interrogation of a person suspected of committing a crime in connection with an investigation
24 of that crime by a law enforcement agency, from the time the Miranda warning is given until

1 the interview terminates, that is electronically recorded so that the statement is preserved
2 audibly or audibly and visually.

3 (2) RETENTION PERIOD. A recorded suspect's statement shall be retained by the law
4 enforcement agency that recorded the statement. A recorded suspect's statement that was
5 made in connection with a criminal investigation that resulted in a criminal conviction,
6 delinquency adjudication, or commitment under s. 971.17 or 980.06, shall be retained by the
7 law enforcement agency that made the recording until the defendant's discharge date, as
8 defined in s. 968.205 (1) (b), stats.

9

(END)

UW Inn. Prof.

ELECTRONIC RECORDING LAWS IN VARIOUS JURISDICTIONS

STATE	SOURCE	RULE/SANCTION	WHEN REQUIRED	EXCEPTIONS
Mass.	Supreme Court, <i>State v. DiGiambattista</i> , 813 N.E.2d 516 (2004).	<p>Failure to record:</p> <p>1) Entitles defendant to a jury instruction informing jury that "the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh the evidence of the defendant's alleged statement with great caution and care."</p> <p>2) Where voluntariness is an issue at trial, "the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt." 813 N.E.2d at 534.</p> <p>3) A judge deciding whether a confession was voluntary, or whether a suspect voluntarily waived <i>Miranda</i> rights, may use the fact that police failed to record as "a basis for concluding that voluntariness and valid waiver have not been established beyond a reasonable doubt." 813 N.E.2d at 529.</p>	<p>During any police interrogation that is:</p> <p>1) custodial; OR</p> <p>2) in a place of detention.</p>	<p>None. Expressly applies to "any custodial interrogation, or interrogation conducted in a place of detention, without regard to the alleged reasons for not recording the interrogation." 813 N.E.2d at 534.</p>

STATE	SOURCE	RULE/SANCTION	WHEN REQUIRED	EXCEPTIONS
Minn.	<p>Supreme Court, <i>State v. Scales</i>, 518 N.W.2d 587 (Minn. 1994), in the exercise of its supervisory power to insure the fair administration of justice.</p>	<p>"[A]ll custodial interrogation[s] including any information about rights, any waiver of those rights, and all questioning shall be recorded where feasible and must be recorded when questioning occurs at a place of detention." <i>Scales</i>, 518 N.W.2d at 592.</p> <p>Unexcused failure to record leads to SUPPRESSION.</p> <p>In addition, failure to produce fully audible tape of interrogation can contribute to court's finding that the state failed to meet its burden of showing that defendant's statement was voluntary and constitutionally obtained. <i>State v. Munson</i>, 594 N.W.2d 128 (1999).</p> <p>In addition, defendant is entitled to jury instruction that police failure to tape parts of an interrogation "may be considered in evaluating the testimony of the officer as to what defendant said." <i>State v. Logan</i>, 535 N.W.2d 320, 325 (Minn. App. 1995).</p>	<p>During any police interrogation that is:</p> <ol style="list-style-type: none"> 1) custodial, if feasible; and 2) in a place of detention, without regard to feasibility. <p><i>Scales</i>, 518 N.W.2d at 592.</p>	<ul style="list-style-type: none"> • When questioning conducted outside a place of detention and recording is not feasible. <i>Scales</i>, 518 N.W.2d at 592. • Voluntary and unsolicited statements to police. <i>State v. Edrozo</i>, 578 N.W.2d 719 (Minn. 1998). • Noncustodial interrogations, even at station house. <i>State v. Jarvis</i>, 665 N.W.2d 518 (Minn. 2003); <i>State v. Conger</i>, 652 N.W.2d 704 (Minn. 2002). • Where the violation was not "substantial," considering all relevant circumstances, determined on a case-by-case basis. <i>Scales</i>, 518 N.W.2d at 592. <ul style="list-style-type: none"> • Violations not "substantial" unless defendant raises a factual dispute about <i>Miranda</i> warnings, waiver, or substance of alleged statement. <i>State v. Inman</i>, 692 N.W.2d 76 (Minn. 2005). • Violation not "substantial" if defendant asked that statement not be recorded, so long as <i>Miranda</i> warnings and waiver of recording were recorded. <i>Inman</i>, <i>supra</i>. • Violation not substantial where tape ran out or equipment inoperable, if nothing disputed occurred in non-recorded portion or if there is no credible claim of police overreaching. <i>State v. Miller</i>, 573 N.W.2d 661 (Minn. 1998); <i>State v. Schroeder</i>, 560 N.W.2d 739 (Minn. App. 1997); <i>State v. Critt</i>, 554 N.W.2d 93 (Minn. App. 1996). • Unrecorded statements are admissible to impeach defendant's inconsistent trial testimony. <i>State v. Coleman</i>, 560 N.W.2d 717 (Minn. App. 1997). <p>Recording not required of traffic stops, field sobriety tests, and reading of implied consent advisory. <i>State v. Victorsen</i>, 627 N.W.2d 655 (Minn. App. 2001); <i>State v. Gilmartin</i>, 535 N.W.2d 650 (Minn. 1995); <i>State v. Lopez</i>, 538 N.W.2d 705 (Minn. App. 1995).</p>

STATE	SOURCE	RULE/SANCTION	WHEN REQUIRED	EXCEPTIONS
Alaska	<i>Stephan v. State</i> , 711 P.2d 1156 (1985), under the State Due Process Clause.	Unexcused failure to electronically record a custodial interrogation conducted in place of defendant's right to due process under the Alaska Constitution (Art. 1, §7) and is generally inadmissible. <i>Stephan</i> , 711 P.2d at 1157. Remedy: SUPPRESSION.	During any police interrogation that is: 1) custodial; AND 2) conducted in a place of detention.	<ul style="list-style-type: none"> Recording is not required when it is infeasible. <i>Stephan, supra</i>. Failure to record is excused where: (1) defendant was not incustody; (2) statement was voluntary; and (3) defendant was not interrogated. <i>Shindle v. State</i>, 731 P.2d 582 (Alaska App. 1987). Alternative means of recording are acceptable—such as a verbatim transcript by a certified shorthand reporter. Police officers not required to video tape the booking process to preserve evidence of the defendant's intoxication. <i>Suiter v. State</i>, 785 P.2d 28 (Ct. App., 1989). Failure to record might be deemed excusable if the failure was inadvertent and not intentional. <i>Suiter</i>, 785 P.2d at 35. Field sobriety tests need not be videotaped, but any custodial interrogation which might occur during the processing of DWI suspects falls under the <i>Stephan</i> rule and must therefore be recorded (when feasible, if in a place of detention). This requirement is satisfied by recording DWI bookings on audiotape. <i>Swanson v. City & Borough of Juneau</i>, 784 P.2d 678, 681 (Alaska. App., 1989).

STATE	SOURCE	RULE/SANCTION	WHEN REQUIRED	EXCEPTIONS
Illinois	Statute, ILCS 405/5-401.5 and 725 ILCS 5/103-2.1	<p>In juvenile and adult homicide cases, any statement of an accused made "as a result of a custodial interrogation at a police station or other place of detention shall be presumed to be inadmissible as evidence against the accused" unless it was electronically recorded.</p> <p>Remedy: SUPPRESSION</p> <p>Statute also provides grants to fund purchase equipments and requires law enforcement training and preservation of recorded statements.</p>	<p>In homicide cases, during any police interrogation that is:</p> <ol style="list-style-type: none"> 1) custodial; AND 2) conducted in a place of detention. 	<ul style="list-style-type: none"> • Where recording was not feasible. • Voluntary statements, whether or not the result of a custodial interrogation, that have a bearing on the credibility of the accused as a witness. • Spontaneous statements not made in response to a question. • Statements made in response to routine booking questions. • Statements made after the suspect requested that the statement not be recorded, "provided that an electronic recording is made of the statement of agreeing to respond to the interrogator's question, only if a recording is not made of the statement." • Statements made during out-of-state interrogations. • Statements made when interrogators were unaware that a death had occurred • Presumption of inadmissibility does not apply to statements used only for impeachment and not as substantive evidence. • Presumption of inadmissibility "may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances."

STATE	SOURCE	RULE/SANCTION	WHEN REQUIRED	EXCEPTIONS
D.C.	D.C. Code § 5-133.20	<p>Requires Chief of Police to develop and implement a General Order establishing procedures for the electronic recording of interrogations by police in Police Department interview rooms, and procedures for insuring the maximum feasible electronic recording of interrogations conducted at locations other than interview rooms equipped with electronic recording equipment.</p> <p>Sanction: None specified.</p> <p>The statute also requires the Chief to set rules governing preservation of recorded statements, and requires the Chief to keep annual statistics on interrogations conducted under this law.</p>	<p>The General Order required by this law "shall include a requirement that the Metropolitan Police Department electronically record, in their entirety and to the greatest extent feasible, interrogations of persons suspected of committing a dangerous crime of violence ... when the interrogation is conducted in Metropolitan Police Department interview rooms equipped with electronic recording equipment."</p> <p>The Order also shall insure the maximum feasible electronic recordings of interrogations at other locations.</p>	<ul style="list-style-type: none"> Recording required is required only "to the greatest extent feasible." Police Chief's General Order must make provision for what will happen "when recording equipment fails to operate correctly, including the use of alternative recording equipment"

STATE	SOURCE	RULE/SANCTION	WHEN REQUIRED	EXCEPTIONS
New Mexico	2005 Bill NM H.B. 382	<p>Requires electronic recording of custodial interrogations, in their entirety, of all individuals suspected of committing a criminal offense. If conducted in a police station, custodial interrogations must be recorded by visual and audio recording.</p> <p>Requires preservation of the recorded interrogation until the individual's conviction for an offense related to the interrogation is final and all appeals are exhausted, or the prosecution of the offense is barred by law.</p>	<p>Applies to all custodial interrogations of individuals suspected of committing a criminal offense.</p> <p>An interrogation is custodial if a reasonable person would not feel free to leave. An interrogation is presumed to be custodial if it is conducted in a police station, police car, courthouse, correctional facility, community correctional center, detention facility or any other structured environment where adequate recording equipment is reasonably available</p>	<p>A law enforcement officer shall comply with the provisions of this section unless the officer can establish by clear and convincing evidence that:</p> <ul style="list-style-type: none"> • the individual's statement was voluntary, reliable and made after the individual knowingly, intelligently and voluntarily waived the individual's constitutional rights; and • the law enforcement officer had good cause not to electronically record the entire custodial interrogation. Examples of good cause are: <ul style="list-style-type: none"> • an appropriate location was not available and the requisite electronic recording equipment was not reasonably available; or • (b) the electronic recording equipment failed and obtaining replacement equipment was not feasible.

STATE	SOURCE	RULE/SANCTION	WHEN REQUIRED	EXCEPTIONS
Wisc.	Proposed Bill	<p>If police fail to record, the court may instruct the jury "that the policy of this state favors the recording of such statements whenever feasible and that the jury may consider the absence of a recording of the statement in evaluating the evidence in the case." The state may "address any reasons or justifications explaining why no recording of the statement was made or why a recorded statement is not available."</p> <p>Provides grants to fund purchase of equipment, encourages law enforcement training, and requires preservation of recorded statements.</p>	<p>During all custodial interrogations "during which a reasonable person in the subject's position would consider himself or herself to be in custody and during which a question is asked that is reasonably likely to elicit an incriminating response" in a place of detention ("a building owned or operated by a law enforcement agency at which persons are or may be held in detention...").</p>	<ul style="list-style-type: none"> • Non-custodial questioning. • Questioning outside a place of detention. • Recording was "not feasible for a reason other than that the law enforcement agency lacks the necessary equipment and facility to record a suspect's statement at any time." • "The defendant agrees to make a statement only if a recording is not made of the statement and that agreement is recorded, if feasible." • The statement was made out-of-state. • The statement was spontaneous. • The statement was in response "to questioning incident to the arrest of the defendant." • "The statement was introduced for purposes of impeachment only."

From Doc 5/18

Dyke, Don

From: Gundrum, Mark
Sent: Friday, May 13, 2005 12:07 PM
To: Staskunas, Tony; Colon, Pedro; Gundrum, Mark; Dyke, Don; Bertelle, Sandra; Bies, Garey; 'Jerome Buting (jfbbrook@aol.com)'; 'Ray Dall'Osto (dallosto@grgblaw.com)'; Donohoo, Bob - DDA; 'Keith Findley (kafindle@wisc.edu)'; Sen.Fitzgerald; 'Fred Fleishauer (fleishf@co.portage.wi.us)'; Gahn, Norm; Horne, Scott; 'Randy R. Koschnick (Randy.Koschnick@wicourts.gov)'; 'Tom Reed (ReedT@mail.opd.state.wi.us)'; Schwaemle, Judy; 'Terry Schwefel (terry.schwefel@wicourts.gov)'; 'Ed Stenzel (e.stenz@sbcglobal.net)'; 'Neil Strobel (ns1997@ci.merrill.wi.us)'; 'Daniel Trawicki (dtrawicki@waukeshacounty.gov)'; 'David Graves (dgraves@co.walworth.wi.us)'; 'Edward Kondracki (kondrackie@cityoflacrosse.org)'; Plotkin, Adam; Zien, Dave
Subject: Avery Task Force Meeting - Wednesday, June 1 - 9:30 a.m.
Importance: High

Dear Task Force Members,

The date for our next Avery Task Force meeting will be Wednesday, June 1, beginning at 9:30 a.m. It is possible, if we make as much progress as I hope to, that this could be our last meeting. There is a possibility that the meeting might be moved up a half-hour earlier to begin at 9 a.m., if it ends up that we have a Floor Session scheduled for that day. Please be sure to review the revised draft that was emailed out yesterday. If you have any thoughts or comments you would like me or all Task Force members to consider prior to the June 1st meeting, please do not hesitate to email me your thoughts or give me a call on my cell phone at (414) 313-3962.

Look forward to seeing as many of you as possible on June 1st.

- Mark

1

PRELIMINARY

2

AN ACT *to amend* 165.85 (3) (d) and 757.05 (1) (a); *to repeal and recreate* 757.05 (1)

3

(a); and *to create* 16.964 (5m), 20.505 (6) (j) 13n., 20.505 (6) (kn) and 972.115 of

4

the statutes; **relating to**: recording of custodial interrogations, creating a grant

5

program, increasing the penalty surcharge, and making an appropriation.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

COMMENT: This preliminary draft:

1. Creates a grant program, to be administered by the office of justice assistance, for the purchase, installation, and maintenance of equipment and training of personnel by law enforcement agencies for recording custodial interrogations. See SEC. 1 of the draft.

2. Funds the grant program by temporarily increasing the penalty surcharge under current s. 757.05 (1), stats., from 24% to 25% of the fine or forfeiture imposed. See SECS. 6, 7, and 9 of the draft. The draft contemplates appropriating the increased revenue generated by the penalty surcharge increase to the grant program. See SECS. 2, 3, and 4 of the draft.

3. Encourages the law enforcement training standards board to include recording of custodial interrogations in its training program. See SEC. 5 of the draft.

4. Provides a state policy on the recording of custodial interrogations and, subject to exceptions, presumes a jury instruction concerning that policy if an unrecorded statement of a defendant is admitted in a trial for a crime committed on or after January 1, 2010. See SEC. 8 of the draft.

6

SECTION 1. 16.964 (5m) of the statutes is created to read:

7

16.964 (5m) GRANT PROGRAM FOR RECORDING CUSTODIAL INTERROGATIONS. (a)

8

Definitions. In this subsection:

9

1. "Custodial interrogation" has the meaning given in s. 972.115 (1) (a).

1 (d) *Required matching funds.* A law enforcement agency that is awarded a grant under
2 this subsection shall provide matching funds equal to at least ____% of the grant.

3 SECTION 2. 20.005 (3) (schedule) of the statutes: at the appropriate place, insert the
4 following amounts for the purposes indicated:

	2005-06	2006-07
5		
6	20.505 Administration, department of	
7	(6) OFFICE OF JUSTICE ASSISTANCE	
8	(kn) Electronic recording grants	PR-S [] []

9 SECTION 3. 20.505 (6) (j) 13n. of the statutes is created to read:
10 20.505 (6) (j) 13n. The amount transferred to par. (kn) shall be the amount in the
11 schedule under par. (kn).

12 SECTION 4. 20.505 (6) (kn) of the statutes is created to read:
13 20.505 (6) (kn) *Electronic recording grants.* The amounts in the schedule to provide
14 grants to law enforcement agencies under s. 16.964 (5m).

15 SECTION 5. 165.85 (3) (d) of the statutes is amended to read:
16 165.85 (3) (d) Establish minimum curriculum requirements for preparatory courses and
17 programs, and recommend minimum curriculum requirements for recertification and
18 advanced courses and programs, in schools operated by or for this state or any political
19 subdivision of the state for the specific purpose of training law enforcement recruits, law
20 enforcement officers, tribal law enforcement recruits, tribal law enforcement officers, jail
21 officer recruits, jail officers, secure detention officer recruits or secure detention officers in
22 areas of knowledge and ability necessary to the attainment of effective performance as an
23 officer, and ranging from ~~traditional~~ subjects such as first aid, patrolling, statutory authority,

COMMENT: Repeals, or “sunsets”, the 1% increase in the penalty surcharge provided for in SEC. 6, returning the surcharge to its current 24% level. This will occur on the date chosen for insertion in SEC. 9 of the draft.

1 **SECTION 8.** 972.115 of the statutes is created to read:

2 **972.115 Recording custodial interrogations. (1) DEFINITIONS.** In this section:

3 (a) “Custodial interrogation” means an interrogation of a crime suspect conducted in
4 a place of detention by or on behalf of a law enforcement agency from the time the Miranda
5 warning is given until the interview terminates during which a reasonable person in the
6 subject’s position would consider himself or herself to be in custody and during which a
7 question is asked that is reasonably likely to elicit an incriminating response.

8 (b) “Law enforcement agency” has the meaning given in s. 165.83 (1) (b).

9 (c) “Defendant’s statement” means a statement made by the defendant during a
10 custodial interrogation.

11 (d) “Place of detention” means a jail, prison, police or sheriff’s station, correctional or
12 holding facility, or other building under the control of a law enforcement agency at which
13 arrested persons are detained or held in connection with criminal charges.

14 (e) “Record” means to memorialize audibly or audibly and visually [].

15 **(2) STATE POLICY.** Subject to the exceptions in sub. (4) or other good cause shown under
16 sub. (3), it is the policy of this state that custodial interrogations shall be recorded by or on
17 behalf of law enforcement agencies.

18 **(3) UNRECORDED DEFENDANT’S STATEMENT ADMITTED IN EVIDENCE.** If a defendant’s
19 statement is admitted into evidence in a trial for a crime committed on or after January 1, 2010
20 and there is no available recording of that statement, it is presumed that the court, upon request
21 of the defendant under s. 972.10, shall instruct the jury to the effect that the policy of this state

1 [(g) The statement is offered in evidence solely to impeach or rebut the defendant's
2 testimony, and not as substantive evidence.]

3 (h) The law enforcement officer conducting the interrogation reasonably believed that
4 the making of an electronic recording of the interrogation would jeopardize the safety of the
5 officer, the defendant, or another person, or the identity of a confidential informant.

6 (5) LACK OF CONSENT: ADMISSIBILITY OF RECORDED STATEMENT. Notwithstanding s.
7 968.29 (3), lack of consent to a recording of a custodial interrogation does not affect the
8 admissibility in evidence of a recorded defendant's statement made during that interrogation.

9 **SECTION 9. Effective dates.** This repeal and recreation of s. 757.05 (1) (a) of the statutes
10 takes effect on [].

COMMENT: See SEC. 7 of the draft and the comment thereto.

11

(END)

1 requires the recording of such statements and that the jury may consider the absence of a
2 recording of the statement in evaluating the evidence in the case. The presumption under this
3 subsection may be overcome if the state asserts and the court determines that, based on [a
4 preponderance of the evidence] or [evidence that is clear, satisfactory and convincing], an
5 exception under sub. (4) applies or there is other good cause shown for not giving the
6 instruction.

7 (4) EXCEPTIONS. Subsection (3) does not apply to an unrecorded defendant's statement
8 if the absence of a recording is a result of any of the following:

9 (a) The defendant refused to respond or cooperate in the interrogation if his or her
10 statements were electronically recorded, and a contemporaneous written or electronic record
11 was made of the defendant's refusal.

12 (b) The inquiries and defendant's responses were part of a routine processing or
13 "booking" following the arrest of the defendant.

14 (c) The law enforcement officer in good faith failed to make an electronic recording of
15 the interrogation because the officer inadvertently failed to operate the recording equipment
16 properly, or without the officer's knowledge the recording equipment malfunctioned or
17 stopped operating.

18 (d) The statement was made spontaneously, and not in response to a question put by a
19 law enforcement officer.

20 [(e) The custodial interrogation took place in another state and was conducted in
21 compliance with the laws of that state.]

22 (f) The interrogation was conducted by a federal officer in a federal place of detention,
23 and was conducted in compliance with applicable federal laws.

1 techniques of arrest ~~and~~ firearms, and recording of custodial interrogations to subjects
2 designed to provide a better understanding of ever-increasing complex problems in law
3 enforcement such as human relations, civil rights, constitutional law and supervision, control
4 and maintenance of a jail or secure detention facility. The board shall appoint a 13-member
5 advisory curriculum committee consisting of 6 chiefs of police and 6 sheriffs to be appointed
6 on a geographic basis of not more than one chief of police and one sheriff from any one of the
7 8 state administrative districts together with the director of training of the Wisconsin state
8 patrol. This committee shall advise the board in the establishment of the curriculum
9 requirements.

10 **SECTION 6.** 757.05 (1) (a) of the statutes is amended to read:

11 757.05 (1) (a) Whenever a court imposes a fine or forfeiture for a violation of state law
12 or for a violation of a municipal or county ordinance except for a violation of s. 101.123 (2)
13 (a), (am) 1., (ar), (bm), (br), or (bv) or (5), or for a first violation of s. 23.33 (4c) (a) 2., 30.681
14 (1) (b) 1., 346.63 (1) (b), or 350.101 (1) (b), if the person who committed the violation had
15 a blood alcohol concentration of 0.08 or more but less than 0.1 at the time of the violation, or
16 for a violation of state laws or municipal or county ordinances involving nonmoving traffic
17 violations or safety belt use violations under s. 347.48 (2m), there shall be imposed in addition
18 a penalty surcharge under ch. 814 in an amount of ~~24~~25% of the fine or forfeiture imposed.
19 If multiple offenses are involved, the penalty surcharge shall be based upon the total fine or
20 forfeiture for all offenses. When a fine or forfeiture is suspended in whole or in part, the
21 penalty surcharge shall be reduced in proportion to the suspension.

22 **SECTION 7.** 757.05 (1) (a) of the statutes is repealed and recreated to read:

23 757.05 (1) (a) [... 24% ...]

1 2. "Law enforcement agency" has the meaning given in s. 165.83 (1) (b).

2 3. "Record" means to memorialize audibly or audibly and visually by means of digital
3 technology.

4 (b) *Office to provide grants.* From the appropriation under s. 20.505 (6) (kn), the office
5 of justice assistance shall provide grants to law enforcement agencies for the purchase,
6 installation, and maintenance of equipment and training of personnel to record custodial
7 interrogations. Grants for recording equipment may be used only for digital recording
8 equipment. Grants shall be awarded based on the order in which a complete and satisfactory
9 grant application is received by the office of justice assistance. The office may not award an
10 annual grant under this subsection in excess of \$_____ to any law enforcement agency. The
11 office shall develop criteria and procedures for use in administering this subsection.
12 Notwithstanding s. 227.10 (1), the criteria and procedures need not be promulgated as rules
13 under ch. 227.

14 (c) *Applications for grants.* A law enforcement agency may apply for a grant under this
15 subsection if it agrees to provide the matching funds required under par. (d) and if the agency
16 describes how it will use the funds and how it will address all of the following:

17 [1. Procedures to be followed when recording equipment fails to operate correctly,
18 including use of alternative recording equipment and reporting, repairing, or replacing the
19 equipment.]

20 2. Procedures for storing the recorded custodial interrogations, including storage
21 format, storage location, and indexing of recorded custodial interrogations for retrieval.

22 3. Measures to be taken to prevent [or detect] tampering with recorded custodial
23 interrogations.

MEMORANDUM

JENNER & BLOCK

April 12, 2005

Jenner & Block LLP
Chicago
Dallas
Washington, DC

To:

Edwin Colfax (IL)
Michael A. DiLauro (RI)
Steven A. Drizin (IL)
Scott Ehlers (NACDL)
Michael A. Fitzpatrick (CT)
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Keith A. Findley (WI)
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Andy Taslitz (NY)
Misty Thomas (VA)
Sarah Tofte (NY)
Thomas Ullmann (CT)
Andrew W. Vail (J&B)
Hillary A. Victor (J&B)
Stephen Young (TN)
Rob Warden (IL)

Re: Draft model state statute on recording custodial interrogations

After considering the various statutes, bills and model bills which deal with electronic recording of custodial interrogations, I decided to try my hand at a draft. Please let me have your comments, as well as suggestions as to who else should get a copy for review.

When considering this draft, please note the following:

1. The specific crimes under investigation for which electronic recordings are required to be inserted in Section 1.

2. As in the DC and Illinois statutes, the draft makes unrecorded statements presumptively inadmissible in evidence, rather than completely inadmissible.

3. The exceptions are quite broad, and are designed to address suggestions and concerns expressed by law enforcement personnel regarding various proposed statutes. I also include in Section 4(k) a variation of the final expansive exception in the Illinois statute. In my view, these statutes should contain generous exceptions, in order to allay the fears of law enforcement personnel that they will lose confessions when glitches occur, etc., etc. It seems to me that if a recording statute is enacted with a presumption against admissibility of non-recorded statements, officers are unlikely to willfully not record with the hope that a court will apply an exception, thereby risking the loss of a confession if they are wrong. Further, I've been told repeatedly that once detectives gain experience with recording, they realize how beneficial it is for them, embrace the practice, and do not try to avoid recording custodial interrogations.

4. Each state's wiretap or eavesdropping laws should be carefully checked to determine whether law enforcement personnel are required to inform the suspect and/or obtain the suspect's consent prior to making an electronic

recording. A recording statute that is not consistent with state wiretap laws puts law enforcement at risk of losing legitimate recorded confessions and admissions.

In my opinion, it is preferable that law enforcement personnel be permitted to record custodial interrogations surreptitiously, without having to inform the suspect or obtain consent.

The Illinois Eavesdropping Act bans the use in court electronic recordings made without the knowledge of the person recorded. When the recording statute was adopted in Illinois re investigations of homicides in police facilities, a companion bill was enacted which specifically exempts recordings from Act when they are “made of a custodial interrogation of an individual at a police station or other place of detention by a law enforcement officer under [citation to the mandatory recording statute].”

5. This draft does not provide for a pilot program (such as we now have in progress in Illinois) to prepare law enforcement for the advent of mandatory statewide recording, or funding for equipment, preparation of interview rooms, training, storage, and the like.

Your reactions will be greatly appreciated.

TPS
4/12/05

Attachment

**TPS DRAFT MODEL BILL FOR ELECTRONIC
RECORDING OF CUSTODIAL INTERROGATIONS**

Be it enacted by [insert name of state legislature]:

Section 1: Application. The provisions of this Act are applicable only in criminal proceedings brought under Sections [insert] of the [insert name of state] Criminal Code.

Section 2: Definitions.

(a) “Custodial interrogation” means any interrogation of an arrested person who is in custody in a place of detention, and a question is asked of the person that is reasonably likely to elicit an incriminating response.

(b) “Place of detention” means a jail, police or sheriff’s station, correctional or holding facility, or other building under the control of a law enforcement agency at which arrested persons are detained or held in connection with criminal charges.

(c) “Electronic recording” means a motion picture, videotape, audiotape or digital recording which is a complete, authentic and accurate representation of a custodial interrogation, and has not been intentionally altered.

(d) “Statement” means an oral or sign language communication.

Section 3. Recordings required.

(a) All statements made by a person in a place of detention during a custodial interrogation relating to a crime enumerated in Section 1, including the law enforcement officer's advice of the person's constitutional rights, shall be electronically recorded.

(b) Unless an exception set forth in Section 4 is applicable, any statement made by a person in a place of detention during a custodial interrogation that is not electronically recorded, completely and accurately, and any statement (whether or not recorded) made by the person after a non-recorded custodial interrogation, shall be presumed inadmissible in evidence in a criminal prosecution brought under a section of the Criminal Code set forth in Section 1.

Section 4. Exceptions. The presumption of inadmissibility of a non-recorded statement may be overcome, and a non-recorded statement may be admitted into evidence in a criminal proceeding brought under a section of the Criminal Code set forth in Section 1, if the court finds the statement is admissible under applicable rules of evidence, and if the prosecution establishes by [clear and convincing – a preponderance of the] evidence that the statement was made voluntarily, is reliable, and:

✓ (a) The person refused to respond or cooperate in the interrogation if his or her statements were electronically recorded, and a contemporaneous written or electronic record was made of the person's refusal; or

✓ (b) The inquiries and responses were part of a routine processing or "booking" of the arrested person; or

✓ (c) The law enforcement officer in good faith failed to make an electronic recording of the interrogation because the officer inadvertently failed to operate the recording equipment properly, or without the officer's knowledge the recording equipment malfunctioned or stopped operating; or

✓ (d) The statement was made spontaneously, and not in response to a question put by a law enforcement officer; or

← (e) The custodial interrogation took place in another state and was conducted in compliance with the laws of that state; or

Ⓞ (f) The interrogation was conducted by a federal officer in a federal place of detention, and was conducted in compliance with applicable federal laws; or

✓ (g) The statement is offered in evidence solely to impeach or rebut the person's testimony, and not as substantive evidence; or

(h) The law enforcement officer conducting the interrogation reasonably believed that the making of an electronic recording of the interrogation would jeopardize the safety of the officer, the suspect, or another person, or the identity of a confidential informant; or

✓ (i) The law enforcement officers conducting the interrogation were not aware that the crime under investigation was among those set forth in Section 1; or

(j) The interrogation occurred before a grand jury or court; or

(k) Other exigent circumstances existed which prevented the making of, or rendered it not feasible to make, an electronic recording of the interrogation.

Section 5. Handling and preservation of electronic recordings.

(a) Every electronic recording of a custodial interrogation made at a place of detention under this Act shall be clearly marked, identified and catalogued by the law enforcement agency that made the recording; maintained and preserved in its original condition in a single location within the county in which the statement was recorded, or, if recorded in another state, in the county whose officers are responsible for the criminal investigation.

(b) In any criminal proceeding brought against the person whose statements have been recorded, related to the subject of the recording, a copy of the recording shall be made available to the person's defense counsel, as required by the laws of this state.

(c) Recordings shall be preserved until all criminal proceedings in state and federal trial and reviewing courts, brought against the person who has been recorded, including post-conviction and habeas corpus proceedings, have become final and are concluded, or, if no criminal prosecution has been instituted against the person interrogated, all applicable state and federal statutes of limitations bar prosecution of the person.

(d) Electronic recordings made during custodial interrogations under this Act shall be confidential and exempt from public inspection and copying.

Effective date: This Act shall take effect on [insert date].

– END –

Thomas P. Sullivan
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April 12, 2005

1 **AN ACT** *to amend* 165.85 (3) (d), 757.05 (1) (a) and 938.31 (4); and *to create* 16.964
2 (5m), 20.505 (6) (j) 13n., 20.505 (6) (kn), 938.195 and 972.115 of the statutes;
3 **relating to:** recording of custodial interrogations, creating a grant program,
4 increasing the penalty surcharge, and making an appropriation.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

COMMENT: This draft:

1. Creates a program, administered by the office of justice assistance, to provide grants to law enforcement agencies for the purchase, installation, and maintenance of equipment and training of personnel for recording custodial interrogations of crime suspects (including juveniles suspected of being delinquent.) See SEC. 1 of the draft.
2. Funds the grant program by increasing the penalty surcharge under current s. 757.05 (1), stats., from 24% to 25% of the fine or forfeiture imposed. See SEC. 6 of the draft. The draft contemplates appropriating the increased revenue generated by the penalty surcharge increase to the grant program. See SECS. 2, 3, and 4 of the draft.
3. Encourages the law enforcement training standards board to include recording of custodial interrogations in its training program. See SEC. 5 of the draft.
4. Establishes a state policy on the recording of custodial interrogations of juveniles suspected of being delinquent and, subject to exceptions, allows the court to consider the absence of a recording of a juvenile's statement admitted in a fact-finding hearing for a delinquent act committed on or after January 1, 2009. See SECS. 7 and 8 of the draft.
5. Establishes a state policy on the recording of custodial interrogations of felony suspects and, subject to exceptions, requires a jury instruction concerning that policy if an unrecorded statement of a defendant is admitted in a trial for a felony committed on or after January 1, 2009. Includes a provision on access to electronic recordings of custodial interrogations. See SEC. 9 of the draft.

5 **SECTION 1.** 16.964 (5m) of the statutes is created to read:

1 16.964 (5m) GRANT PROGRAM FOR RECORDING CUSTODIAL INTERROGATIONS. (a)

2 *Definitions.* In this subsection:

3 1. "Custodial interrogations" has the meanings given in ss. 938.195 (1) (a) and 972.115
4 (1) (a).

5 2. "Law enforcement agency" has the meaning given in s. 165.83 (1) (b).

6 3. "Record" means to memorialize audibly or audibly and visually by means of digital
7 technology.

8 (b) The grant program under this subsection is established to further the goal of
9 recording custodial interrogations, when feasible, by all law enforcement agencies. From the
10 appropriation under s. 20.505 (6) (kn), the office shall provide grants to law enforcement
11 agencies to fund or reimburse expenses incurred on or after the effective date of this paragraph
12 ... [revisor inserts date] for the purchase, installation, and maintenance of equipment and
13 training of personnel to record custodial interrogations. More than one grant may be made
14 to a law enforcement agency. Grants for recording equipment may be used only for digital
15 recording equipment. To encourage recording of all custodial interrogations, grants may be
16 awarded in connection with recording custodial interrogations of juveniles, misdemeanor
17 suspects, and felony suspects. The office shall develop criteria and procedures for use in
18 administering this subsection. Notwithstanding s. 227.10 (1), the criteria and procedures need
19 not be promulgated as rules under ch. 227.

20 (c) *Applications for grants.* A law enforcement agency that applies for a grant under
21 this subsection shall include in its application all of the following information:

22 1. How the agency proposes to use the funds.

1 2. Procedures to be followed when recording equipment fails to operate correctly,
2 including use of alternative recording equipment and reporting, repairing, or replacing the
3 equipment.

4 3. Procedures for storing the recorded custodial interrogations, including storage
5 format, storage location, and indexing of recorded custodial interrogations for retrieval.

6 4. Measures to be taken to prevent or detect tampering with recorded custodial
7 interrogations.

8 5. Any other information required by the office.

9 **SECTION 2.** 20.005 (3) (schedule) of the statutes: at the appropriate place, insert the
10 following amounts for the purposes indicated:

	2005-06	2006-07
--	---------	---------

12 **20.505 Administration, department of**

13 (6) OFFICE OF JUSTICE ASSISTANCE

(kn) Electronic recording grants	PR-S	[]	[]
----------------------------------	------	-------	-------

15 **SECTION 3.** 20.505 (6) (j) 13n. of the statutes is created to read:

16 20.505 (6) (j) 13n. The amount transferred to par. (kn) shall be the amount in the
17 schedule under par. (kn).

18 **SECTION 4.** 20.505 (6) (kn) of the statutes is created to read:

19 20.505 (6) (kn) *Electronic recording grants.* The amounts in the schedule to provide
20 grants to law enforcement agencies under s. 16.964 (5m).

21 **SECTION 5.** 165.85 (3) (d) of the statutes is amended to read:

22 165.85 (3) (d) Establish minimum curriculum requirements for preparatory courses and
23 programs, and recommend minimum curriculum requirements for recertification and

1 advanced courses and programs, in schools operated by or for this state or any political
2 subdivision of the state for the specific purpose of training law enforcement recruits, law
3 enforcement officers, tribal law enforcement recruits, tribal law enforcement officers, jail
4 officer recruits, jail officers, secure detention officer recruits or secure detention officers in
5 areas of knowledge and ability necessary to the attainment of effective performance as an
6 officer, and ranging from ~~traditional~~ subjects such as first aid, patrolling, statutory authority,
7 techniques of arrest ~~and, firearms, and recording of custodial interrogations~~ to subjects
8 designed to provide a better understanding of ever-increasing complex problems in law
9 enforcement such as human relations, civil rights, constitutional law and supervision, control
10 and maintenance of a jail or secure detention facility. The board shall appoint a 13-member
11 advisory curriculum committee consisting of 6 chiefs of police and 6 sheriffs to be appointed
12 on a geographic basis of not more than one chief of police and one sheriff from any one of the
13 8 state administrative districts together with the director of training of the Wisconsin state
14 patrol. This committee shall advise the board in the establishment of the curriculum
15 requirements.

16 **SECTION 6.** 757.05 (1) (a) of the statutes is amended to read:

17 757.05 (1) (a) Whenever a court imposes a fine or forfeiture for a violation of state law
18 or for a violation of a municipal or county ordinance except for a violation of s. 101.123 (2)
19 (a), (am) 1., (ar), (bm), (br), or (bv) or (5), or for a first violation of s. 23.33 (4c) (a) 2., 30.681
20 (1) (b) 1., 346.63 (1) (b), or 350.101 (1) (b), if the person who committed the violation had
21 a blood alcohol concentration of 0.08 or more but less than 0.1 at the time of the violation, or
22 for a violation of state laws or municipal or county ordinances involving nonmoving traffic
23 violations or safety belt use violations under s. 347.48 (2m), there shall be imposed in addition
24 a penalty surcharge under ch. 814 in an amount of ~~24~~25% of the fine or forfeiture imposed.

1 If multiple offenses are involved, the penalty surcharge shall be based upon the total fine or
2 forfeiture for all offenses. When a fine or forfeiture is suspended in whole or in part, the
3 penalty surcharge shall be reduced in proportion to the suspension.

4 **SECTION 7.** 938.195 of the statutes is created to read:

5 **938.195 Recording custodial interrogations. (1) DEFINITIONS.** In this section:

6 (a) "Custodial interrogation" means questioning of a juvenile suspected of being
7 delinquent conducted in a place of detention by or on behalf of a law enforcement agency from
8 the time the juvenile is apprised of his or her rights to counsel and to remain silent until the
9 questioning terminates during which a reasonable person in the juvenile's position would
10 consider himself or herself to be in custody and during which a question is asked that is
11 reasonably likely to elicit an incriminating response.

12 (b) "Electronically recorded" means memorialized audibly or audibly and visually by
13 any medium, including audiotape, videotape, or digital recording.

14 (c) "Law enforcement agency" has the meaning given in s. 165.83 (1) (b).

15 (d) "Juvenile's statement" means an oral, written, sign language, or nonverbal
16 communication made by the juvenile during a custodial interrogation.

17 (e) "Place of detention" means a secure detention facility, jail, municipal lock-up
18 facility, police station, sheriff's office, or other building under the control of a governmental
19 entity, at which juveniles are taken into and held in custody in connection with allegations of
20 delinquency.

21 (2) **STATE POLICY.** Subject to the exceptions in sub. (4) or for other good cause shown,
22 it is the policy of this state that a custodial interrogation shall be electronically recorded.

23 (3) **UNRECORDED JUVENILE'S STATEMENT ADMITTED IN EVIDENCE.** If a juvenile's statement
24 is admitted into evidence in a fact-finding hearing for a delinquent act committed on or after

1 January 1, 2009 and there is no available electronic recording of that statement, the court may
2 consider the absence of an electronic recording of that statement in evaluating the evidence
3 in the case unless the state asserts and the court determines that an exception under sub. (4)
4 applies or there is other good cause shown for the absence of an electronic recording of that
5 statement.

6 (4) EXCEPTIONS. Subsection (3) does not apply if the absence of an electronic recording
7 of a juvenile's statement is a result of any of the following:

8 (a) The juvenile refused to respond or cooperate in the interrogation if his or her
9 statements were recorded, and a contemporaneous written or electronic record was made of
10 the juvenile's refusal.

11 (b) The inquiries and juvenile's responses were part of routine processing after the
12 juvenile was taken into custody.

13 (c) The law enforcement officer in good faith failed to make an electronic recording of
14 the interrogation because the recording equipment was not functioning, the officer
15 inadvertently failed to operate the recording equipment properly, or, without the officer's
16 knowledge, the recording equipment malfunctioned or stopped operating.

17 (d) The statement was made spontaneously, and not in response to a question by a law
18 enforcement officer.

19 (e) The custodial interrogation took place in another jurisdiction and was conducted by
20 officials of that jurisdiction in compliance with the laws of that jurisdiction.

21 (f) Other exigent public safety circumstances existed that prevented the making of, or
22 rendered it not feasible to make, an electronic recording of the interrogation.

1 (5) LACK OF CONSENT: ADMISSIBILITY OF RECORDED STATEMENT. Lack of consent to a
2 recording of a custodial interrogation does not affect the admissibility in evidence of an
3 electronic recording of a juvenile's statement made during that interrogation.

4 **SECTION 8.** 938.31 (4) of the statutes is amended to read:

5 938.31 (4) The court shall make findings of fact and conclusions of law relating to the
6 allegations of a petition under s. 938.12, 938.125, or 938.13. In cases alleging a juvenile to
7 be delinquent or in need of protection or services under s. 938.13 (12), the court shall make
8 findings relating to the proof of the violation of law and to the proof that the juvenile named
9 in the petition committed the violation alleged. In cases alleging a juvenile to be delinquent,
10 the court may consider the absence of an electronic recording of a juvenile's statement as
11 provided in s. 938.195 (3), unless the court determines that an exception under s. 938.195 (4)
12 applies or there is other good cause shown for the absence of an electronic recording of that
13 statement.

14 **SECTION 9.** 972.115 of the statutes is created to read:

15 **972.115 Recording custodial interrogations. (1) DEFINITIONS.** In this section:

16 (a) "Custodial interrogation" means questioning of a crime suspect conducted in a place
17 of detention by or on behalf of a law enforcement agency from the time the Miranda warnings
18 are given until the questioning terminates during which a reasonable person in the subject's
19 position would consider himself or herself to be in custody and during which a question is
20 asked that is reasonably likely to elicit an incriminating response.

21 (b) "Electronically recorded" means memorialized audibly or audibly and visually by
22 any medium, including audiotape, videotape, or digital recording.

23 (c) "Law enforcement agency" has the meaning given in s. 165.83 (1) (b).

1 (d) "Defendant's statement" means an oral, written, sign language, or nonverbal
2 communication made by the defendant during a custodial interrogation.

3 (e) "Place of detention" means a jail, prison, police or sheriff's station, correctional or
4 holding facility, or other building under the control of a law enforcement agency at which
5 arrested persons are detained or held in connection with criminal charges.

6 (2) STATE POLICY. Subject to the exceptions in sub. (4) or for other good cause shown
7 under sub. (3), it is the policy of this state that a custodial interrogation of a person suspected
8 of committing a felony shall be electronically recorded.

9 (3) UNRECORDED DEFENDANT'S STATEMENT ADMITTED IN EVIDENCE. If a defendant's
10 statement is admitted into evidence in a trial for a felony committed on or after January 1, 2009
11 and there is no available electronic recording of that statement:

12 (a) In a trial to the jury, the court, upon request of the defendant under s. 972.10, shall
13 instruct the jury to the effect that the policy of this state requires the recording of such
14 statements and that the jury may consider the absence of a recording of the statement in
15 evaluating the evidence in the case, unless the state asserts and the court determines that an
16 exception under sub. (4) applies or there is other good cause shown for not giving the
17 instruction. On its own motion, the court may determine in the interests of justice not to so
18 instruct the jury.

19 (b) In a trial to the court, the court may consider the absence of an electronic recording
20 of the statement in evaluating the evidence in the case.

21 (4) EXCEPTIONS. Subsection (3) does not apply if the absence of an electronic recording
22 of a defendant's statement is a result of any of the following:

1 (a) The defendant refused to respond or cooperate in the interrogation if his or her
2 statements were recorded, and a contemporaneous written or electronic record was made of
3 the defendant's refusal.

4 (b) The inquiries and defendant's responses were part of a routine processing or
5 "booking" following the arrest of the defendant.

6 (c) The law enforcement officer in good faith failed to make an electronic recording of
7 the interrogation because the recording equipment was not functioning, the officer
8 inadvertently failed to operate the recording equipment properly, or, without the officer's
9 knowledge, the recording equipment malfunctioned or stopped operating.

10 (d) The statement was made spontaneously, and not in response to a question by a law
11 enforcement officer.

12 (e) The custodial interrogation took place in another jurisdiction and was conducted by
13 officials of that jurisdiction in compliance with the laws of that jurisdiction.

14 (f) Other exigent public safety circumstances existed that prevented the making of, or
15 rendered it not feasible to make, an electronic recording of the interrogation.

16 (g) The law enforcement officers conducting or contemporaneously observing the
17 custodial interrogation reasonably believed that the crime for which the defendant was taken
18 into custody, or was being investigated or questioned, was not a felony.

19 (5) ACCESS TO ELECTRONIC RECORDING. Sections 19.31 to 19.39 do not apply to an
20 electronic recording of a custodial interrogation until:

21 (a) If par. (b) does not apply, the investigation and prosecution to which the custodial
22 interrogation relates are closed.

1 (b) A judgment of acquittal or conviction has been entered under s. 972.13 in connection
2 with a criminal charge against the person questioned in the custodial interrogation that is
3 related to that interrogation.

4 (6) LACK OF CONSENT: ADMISSIBILITY OF RECORDED STATEMENT. Lack of consent to a
5 recording of a custodial interrogation does not affect the admissibility in evidence of an
6 electronic recording of a defendant's statement made during that interrogation.

7 (END)

LRB

Research (608-266-0341)

Library (608-266-7040)

Legal (608-266-3561)

7/13/05

LRB

⇒ et. lang. how about leaving "w/out excep." out

⇒ Gordon's lang. for jury "pl. of ~~steps~~ ^{dm.}"

squad cars
schools

define POD for juveniles - catchall
building under control of CEA

make purchases after E. of Jenell
reimbursable (on or after 7/7/2005)

Don't put in "w/out exception"

- ① ^{st.} Record where feasible
- ② At place of dm. ^{must} record _{shall}

Say if not in accord w/ policy
inadmissible

make sure that whole intang. must be
recorded for statement to be admissible

p. 8

p. 5 drop. conducted in pl. of dm. from
def. of cust. intang.

p. 5 line 10

use lang from case law - reas -
person believes not free to
leave



LRB

Research (608-266-0341)

Library (608-266-7040)

Legal (608-266-3561)

p. 7

- don't want to require that I
be informed that being recorded
- clear that doesn't affect admissibility

one party consent statute limited to felonies
- is this in conflict

see p. 10 (6) - Don says applies to
felonies & misdemeanors so OK

So news 968.30?? whatever one-party
consent recorded interviews

Unclear that wiretap provisions conflict w/ p. 10, line 1,
but notwithstanding wiretap provisions for comfort of committee members
if done by Wis. LB out of state
should be recorded

ED for adults

1/1/07 - IA
- Interrogations there after

page and line #s refer to WLC:0103/3



From Don
7/26

APPENDIX

MODEL BILL FOR ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

Be it enacted by [insert name of state legislature]:

Section 1: Definitions.

- (a) "Custodial Interrogation" means an interview which occurs while a person is in custody in a Place of Detention, involving a law enforcement officer's questioning that is reasonably likely to elicit incriminating responses.
- (b) "Place of Detention" means a jail, police or sheriff's station, holding cell, correctional or detention facility, or other place where persons are held in connection with juvenile or criminal charges.¹
- (c) "Electronic Recording" or "Electronically Recorded" means an audio, video or digital recording that is an authentic, accurate, unaltered record of a Custodial Interrogation, beginning with a law enforcement officer's advice of the person's constitutional rights and ending when the interview has completely finished.
- (d) "Statement" means an oral, written, sign language or nonverbal communication.

Section 2. Recordings Required. All Statements made by a person during a Custodial Interrogation relating to a crime described in the following sections of the [insert jurisdiction] Criminal and Juvenile Codes shall be Electronically Recorded: [insert section numbers].

Section 3. Presumption of Inadmissibility. Except as provided in Sections 4 and 5, all Statements made by a person during a Custodial Interrogation that is not Electronically Recorded, and all Statements made thereafter by the person during Custodial Interrogations, including but not limited to Statements that are Electronically Recorded, shall be presumed inadmissible as evidence against the person in any juvenile or criminal proceeding brought against the person.

Section 4. Overcoming the Presumption of Inadmissibility. The presumption of inadmissibility of Statements provided in Section 3 may be overcome, and Statements that were not Electronically Recorded may be admitted into evidence in a juvenile or criminal proceeding brought against the person, if the court finds:

- (a) That the Statements are admissible under applicable rules of evidence; and

¹ In the event it is intended to expand the reach of this bill to include custodial interrogations of persons who are in custody outside a "Place of Detention," delete Section 1(b), and delete the words "in a Place of Detention" from Section 1(a). Consideration should be given to the addition of an exception for excited utterances.

(b) That the Statements are proven [insert applicable burden of proof] to have been made voluntarily, and are reliable; and

(c) That, if feasible to do so, law enforcement personnel made a contemporaneous record of the reason for not making an Electronic Recording of the Statements; and

(d) That it is proven [insert applicable burden of proof] that one or more of the following circumstances existed at the time of the Custodial Interrogation:

(i) The questions put by law enforcement personnel, and the person's responsive Statements, were a part of the routine processing or "booking" of the person; or

(ii) Before or during a Custodial Interrogation, the person agreed to respond to the officer's questions only if his or her Statements were not Electronically Recorded; or

(iii) The law enforcement officers in good faith failed to make an Electronic Recording of the Custodial Interrogation because the officers inadvertently failed to operate the recording equipment properly, or without the officers' knowledge the recording equipment malfunctioned or stopped operating; or

(iv) The Custodial Interrogation took place in another jurisdiction and was conducted by officials of that jurisdiction in compliance with the law of that jurisdiction; or

(v) The law enforcement officers conducting or contemporaneously observing the Custodial Interrogation reasonably believed that the making of an Electronic Recording would jeopardize the safety of the person, a law enforcement officer, another person, or the identity of a confidential informant; or

(vi) The law enforcement officers conducting or contemporaneously observing the Custodial Interrogation reasonably believed that the crime for which the person was taken into custody, or was being investigated or questioned, was not among those listed in Section 2; or

(vii) The law enforcement officers conducting the Custodial Interrogation reasonably believed circumstances existed which rendered it not prudent or feasible to make an Electronic Recording of the Custodial Interrogation.

Section 5. Exemptions. Statements, whether or not Electronically Recorded, which are admissible under applicable rules of evidence, and are proven [insert applicable burden of proof] to have been made by the person voluntarily, and are reliable, may be admitted into evidence in a juvenile or criminal proceeding brought against the person if the court finds:

(a) The Statements are offered as evidence solely to impeach or rebut the person's testimony, and not as substantive evidence; or

(b) The Custodial Interrogation occurred before a grand jury or court; or

(c) The person agreed to participate in a Custodial Interrogation after having consulted with his or her lawyer.

Section 6. Handling and Preservation of Electronic Recordings.

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

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

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

Section 7. Effective Date: This Act shall take effect on [insert date].