

SUPREME COURT OF NEW JERSEY
ADMINISTRATIVE DETERMINATION

RE: REPORT OF THE SPECIAL COMMITTEE
ON THE RECORDATION OF CUSTODIAL INTERROGATIONS

In deciding State v. Thomahl Cook, 179 N.J. 533 (2004), the Supreme Court indicated that it would create a Special Committee on the Recordation of Custodial Interrogations. The members of the Special Committee were appointed by the Chief Justice in August of 2004. The Special Committee filed its formal report with the Court on April 15, 2005, and the Court published the report for comment from the Bar and the public. On the close of the comment period, the Court reviewed the submissions it received and discussed the findings and recommendations of the Special Committee.

The Special Committee summarized its Recommendations as follows:

1. The Supreme Court should exercise its supervisory authority over the administration of criminal justice to encourage electronic recordation of custodial interrogations.
2. Electronic recordation may be accomplished through either audio or audio-visual recording. The method of recording should be left to the discretion of law enforcement.
3. Electronic recording should occur when a custodial interrogation is being conducted in a place of detention and should begin at, and include, the point at which Miranda warnings are required to be given.
4. Electronic recording of custodial interrogations occurring in a place of detention should occur when the adult or juvenile being interrogated is charged with an offense requiring the use of a warrant pursuant to Rule 3:3-1(c).
5. The requirement for electronic recordation of custodial interrogations occurring in a place of detention should not apply in circumstances where:
 - (a) a statement made during a custodial interrogation is not recorded because electronic recording of the interrogation is not feasible,
 - (b) a spontaneous statement is made outside the course of an interrogation,
 - (c) a statement is made in response to questioning that is routinely asked during the processing of the arrest of the suspect,
 - (d) a statement is made during a custodial interrogation by a suspect who indicated, prior to making the statement, that he/she would participate in the interrogation only if it were not recorded; provided, however, that the agreement to participate under that condition is itself recorded,

- (e) a statement is made during a custodial interrogation that is conducted out-of-state,
 - (f) a statement is given at a time when the accused is not a suspect for the crime to which that statement relates while the accused is being interrogated for a different crime that does not require recordation,
 - (g) the interrogation during which the statement is given occurs at a time when the interrogators have no knowledge that a crime for which recording is required has been committed.
6. The failure to electronically record a defendant's custodial interrogation should be a factor considered by the trial court in determining the admissibility of a statement, and by the jury in determining what weight, if any, to give to the statement. The Court should adopt a court rule and model jury charge to implement this recommendation.
 7. The requirement that electronic recording occur when a custodial interrogation is being conducted in a place of detention should become effective January 1, 2006 for homicide offenses and January 1, 2007 for all other offenses specified in proposed Rule 3:17(a).
 8. The electronic recordation requirement should not mandate that the defendant be notified prior to electronic recordation.
 9. The Supreme Court should periodically review the implementation of the recording requirement.

With one partial exception, the Court has approved the Recommendations as submitted by the Special Committee, substantially for the reasons expressed in the Committee's report. This includes, as part of its acceptance of Recommendation 6, the Court's adoption of Rule 3:17, Electronic Recordation, by a separate Court Order, a copy of which is appended to this Administrative Determination.

The Court's sole modification of the Committee's proposals also arises out of Recommendation 6. In proposing Model Jury Charge language, the Special Committee used a phrase that does not follow the language of new Rule 3:17. The Court-approved Model Jury Charges eliminate that inconsistency. As amended, they also are appended to this Administrative Determination.

Consistent with the Special Committee's Recommendation 9, the Court is charging the Administrative Director of the Courts and the Criminal Practice Committee with the responsibility to work with the Office of the Attorney General and the County Prosecutors to review the implementation of the recordation requirement. The Court looks to receive a status report on this subject by June 1, 2007, or sooner if circumstances warrant it.

The Supreme Court wishes to extend its thanks and appreciation to all of the members of the Special Committee. Its report and recommendations reflect the results of an extraordinary effort by all concerned.

For the Court:
/s/ Stephen W. Townsend, Esq.
Clerk of the Supreme Court

October 14, 2005

APPENDIX A

SUPREME COURT OF NEW JERSEY

IT IS ORDERED that the attached Rule 3:17, Electronic Recordation, is adopted, to take effect January 1, 2006, in respect of all homicide offenses and January 1, 2007, for all other offenses specified in paragraph (a) of the Rule.

For the Court:

/s/ Deborah T. Poritz

C.J.

Dated: October 14, 2005

Rule 3:17 Electronic Recordation

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

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

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

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

(d) The failure to electronically record a defendant's custodial interrogation in a place of detention shall be a factor for consideration by the trial court in determining the admissibility of a statement, and by the jury in determining whether the statement was made, and if so, what weight, if any, to give to the statement.

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

Note: Adopted October 14, 2005, to be effective in respect of all homicide offenses as of January 1, 2006, and as of January 1, 2007, in respect of the other offenses specified in paragraph (a) of the Rule.

APPENDIX B

MODEL JURY CHARGES

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

[N.B., Material deleted from the report of the Special Committee is indicated by a ~~strikeout~~. New material is underscored. The changes made by the Court to the proposed Charges are solely to make them consistent with the language of Rule 3:17(a). Note further that the offenses to which the Rule requirement applies are being phased in. Until January 1, 2007, only homicide offenses will require the use of the appropriate version of the Model Jury Charge.]

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

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

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

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

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

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

Among the factors you may consider in deciding whether or not the defendant actually gave the alleged statement and if so, whether any or all of the statement is

credible, is the failure of law enforcement officials to make an electronic recording of the interrogation conducted and the defendant's alleged statement itself. ~~New Jersey law favors~~ Our Rules require the electronic recording of interrogations by law enforcement officers when a defendant is charged with [insert applicable offenses] so as to ensure that you will have before you a complete picture of all circumstances under which an alleged statement of a defendant was given, so that you may determine whether a statement was in fact made and if so, whether it was accurately reported by State's witnesses and whether it was made voluntarily or is otherwise reliable or trustworthy. Where there is a failure to electronically record an interrogation, you have not been provided with a complete picture of all of the facts surrounding the defendant's alleged statement and the precise details of that statement. By way of example, you cannot hear the tone or inflection of the defendant's or interrogator's voices, or hear first hand the interrogation, both questions and responses, in its entirety. Instead you have been presented with a summary based upon the recollections of law enforcement personnel. Therefore, you should weigh the evidence of the defendant's alleged statement with great caution and care as you determine whether or not the statement was in fact made and if so, whether what was said was accurately reported by State's witnesses, and what weight, if any, it should be given in your deliberations. The absence of an electronic recording permits but does not compel you to conclude that the State has failed to prove that a statement was in fact given and if so, accurately reported by State's witnesses.

[IF ORAL STATEMENT, CHARGE THE FOLLOWING PARAGRAPH]

Furthermore, in considering whether or not an oral statement was actually made by the defendant, and if made, whether it is credible, you should receive, weigh, and

consider this evidence with caution as well, based on the generally recognized risk of misunderstanding by the hearer, or the ability of the hearer to recall accurately the words used by the defendant. The specific words used and the ability to remember them are important to the correct understanding of any oral communication because the presence, or absence, or change of a single word may substantially change the true meaning of even the shortest sentence.

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

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

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

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

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

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

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

Among the factors you may consider in deciding whether or not the defendant actually gave the alleged statement is the failure of law enforcement officials to make an electronic recording of the interrogation conducted and the alleged statement itself. ~~New Jersey law favors~~ Our Rules require the electronic recording of interrogations by law enforcement officers when a defendant is charged with [insert applicable offenses]. This is done to ensure that you will have before you a complete picture of the circumstances under which an alleged statement of a defendant was given, so that you may determine whether a statement was in fact made and accurately recorded. Where there is failure to electronically record an interrogation, you have not been provided with a complete picture of all the facts surrounding the defendant's alleged statement and the precise details of that statement. By way of example, you cannot hear the tone or inflection of the defendant's or interrogator's voices, or hear first hand the interrogation, both questions and responses, in its entirety. Instead you have been presented with a summary based upon the recollections of law enforcement personnel. Therefore, you should weigh the evidence of the defendant's alleged statement with great caution and care as you determine whether or not the statement was in fact made and if so whether it was accurately reported by State's witnesses, and what, if any, weight it should be given in your deliberations. The absence of an electronic recording permits but does not compel you to conclude that the State has failed to prove that a statement was in fact given and if so, accurately reported by State's witnesses.

[IF ORAL STATEMENT—CHARGE THE FOLLOWING PARAGRAPH]

Furthermore, in considering whether or not an oral statement was actually made by the defendant, and, if made, accurately reported by State's witnesses, you should

receive, weigh, and consider this evidence with caution based on the generally recognized risk of misunderstanding by the hearer, or the ability of the hearer to recall accurately the words used by the defendant. The specific words used and the ability to remember them are important to the correct understanding of any oral communication because the presence, or absence, or change of a single word may substantially change the true meaning of even the shortest sentence.

If after consideration of all of the evidence you determine that the statement was not made, then you should disregard it completely. If you find that the statement was made, you must determine what inferences you can draw from it and what weight, if any, to give to it.

CAVEAT

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