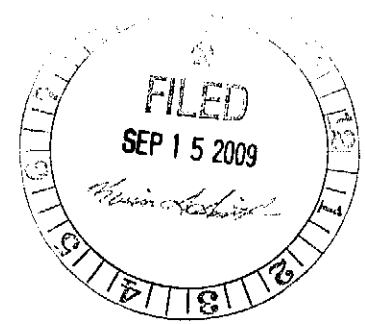


In the
Indiana Supreme Court



No. 94S00-0909-MS- 4

ORDER AMENDING RULES OF EVIDENCE

Pursuant to its authority under Article 7, Section 4 of the Indiana Constitution, Indiana Code § 34-8-1-3, and Indiana Evidence Rule 1101(B), this Court, in supervising the exercise of jurisdiction by Indiana trial courts through the adoption of rules that govern practice and procedure, directed the Supreme Court Committee on Rules of Practice and Procedure to draft and publish for public comment a proposed Rule of Evidence relating to the admission in criminal cases of unrecorded statements made during custodial interrogation.

Following the publication of such rule proposals, more than three hundred written responses were received for review by this Court, eighty-nine of which were from law enforcement officers, eighty from the general public, thirty-six from prosecutors, twenty-seven from public defenders, five from judges, sixty-one from other attorneys, and five from other judicial officers. Many responses included substantial quantities of supportive materials, in addition to which, there exists a significant body of legal and scientific research addressing this topic.

Custodial interrogations are now being electronically recorded in a growing number of states. Statutory requirements have been enacted for Illinois, Maine, Maryland, Nebraska, New Mexico, North Carolina, Texas, Wisconsin, and the District of Columbia. Court decisions or rules require or strongly encourage electronic recording in Alaska, Iowa, Massachusetts, Minnesota, New Hampshire, and New Jersey. Legislation has been proposed in several other states and endorsed by the American Bar Association. A model rule requiring the electronic recording of custodial interrogation is being considered by the National Conference of Commissioners on Uniform State Laws. The comments received report that hundreds of police and sheriff departments, including many in Indiana, currently record most custodial interrogations in felony cases. Surveys and interviews report that most law enforcement

departments that implement the practice have ultimately found it useful and report a positive experience.

Electronically recorded interrogations are a potent law enforcement tool. Confessions provide strong evidence of guilt, but often suspects make incriminating statements but later claim that police failed to give them required warnings or otherwise engaged in unlawful behavior. A complete electronic recording can confirm that police gave all required warnings and complied with the law, protect them from false claims of abuse or coercion, eliminate swearing matches, and prove that suspects confessed voluntarily, knowingly, and intelligently, leading to more guilty pleas. In addition to these benefits, recording allows officers to focus on a suspect's answers and body language rather than on taking notes; the recording can be reviewed for any overlooked details; and it can also provide a training tool for effective interrogation techniques.

Electronically recorded interrogations assist courts. Because the admissibility of a suspect's statement at a trial often requires examination of the circumstances under which the statement was made, courts often expend time and resources determining what took place in the interrogation room. As Indiana federal District Court Judge William Lee remarked, "I don't know why I have to sit here and sort through the credibility of what was said in these interviews when there's a perfect device available to resolve that and eliminate any discussion about it. . . . We shouldn't be taking up the Federal Court's time of an hour and a half . . . trying to figure out who said what to whom when in these interviews because there's no videotape of them."

Transcript of Motion to Suppress Hearing at 72-73, United States v. Bland, No. 1:02-CR-93 (N.D. Ind. Dec. 12, 2002). The Indiana Court of Appeals has also declared that it:

. . . discern[s] few instances in which law enforcement officers would be justified in failing to record custodial interrogations in places of detention. Disputes regarding the circumstances of an interrogation would be minimized, in that a tape recording preserves undisturbed that which the mind may forget. In turn, the judiciary would be relieved of much of the burden of resolving disputes involving differing recollections of events which occurred. Moreover, the recording would serve to protect police officers against false allegations that a confession was not obtained voluntarily. Therefore, in light of the slight inconvenience and expense associated with the recording of custodial interrogations in their entirety, it is strongly recommended, as a matter of sound policy, that law enforcement officers adopt this procedure.

Stoker v. State, 692 N.E.2d 1386, 1390 (Ind. Ct. App. 1998) (internal citations and footnotes omitted). "There can be little doubt that the electronic recording of a custodial interrogation

benefits all parties involved." Gasper v. State, 833 N.E.2d 1036, 1041 (Ind. Ct. App. 2005). And because they are likely to lessen factual disputes, the use of audio-video recorded interrogations should reduce the number and extent of motions to suppress evidence, court hearings to resolve such motions, and appellate litigation challenging the resulting rulings.

Electronically recorded interrogations can also be a source of important evidence to help resolve claims of false confessions. While the vast majority of suspects who confess presumably do so truthfully, with the advent of DNA evidence, there is evidence that on occasion some people may confess to crimes they did not commit. One report asserts that in a substantial number of DNA exoneration cases, innocent persons made incriminating statements or false confessions. Although extremely rare, false confessions can occur despite an interrogator's good intentions. A complete audio-video recording, which captures a suspect's tone of voice, facial expressions, and body language, as well as the interrogator's questions and tone, should substantially assist police, prosecutors, courts, and juries in their search for truth, justice, and due process of law.

The principal objections presented in the comments received from those opposed to a rule favoring electronic recording of custodial interrogation are: (a) costs of implementation; (b) implied distrust of police; (c) risks of technical malfunction; and (d) possible reluctance of some suspects to confess if being recorded.

Not only has the price of video recording equipment become very inexpensive, but equipment and operational costs are likely to be offset by saved time of police in writing reports and transcriptions of interrogations, and of prosecutors and courts through fewer motions to suppress, fewer disputes at trials, and more guilty pleas. In adopting the Rule, this Court is expressing its confidence in Indiana law enforcement officers and seeking to assure evidentiary proof of the propriety of interrogation techniques that are used. These objectives can be substantially achieved by adopting a rule that applies to police station interrogation and not to statements made by suspects during arrest or while being transported. Risks of malfunction are addressed by providing exceptions within the rule. And the concern that suspects may be unwilling to submit to recorded interviews is belied by experience elsewhere. Surveys of over 450 departments that currently record custodial interrogations show that a suspect's knowledge of being recorded has little if any effect on their cooperation.

With the foregoing considerations in mind, this Court finds that the interests of justice and sound judicial administration will be served by the adoption of a new Rule of Evidence to require electronic audio-video recordings of customary custodial interrogation of suspects in felony cases as a prerequisite for the admission of evidence of any statements made during such interrogation. Noting the joint request of the Marion County Prosecutor's Office and the Indianapolis Metropolitan Police Department to delay the implementation of any such rule, so as to permit the purchase and installation of equipment and the training of officers, we determine that the new rule shall apply only to statements made on or after January 1, 2011.

Under this Court's inherent authority to supervise the administration of all courts of this state, the Indiana Rules of Evidence are hereby amended by the addition of the following new Rule 617, which shall apply to evidence of a statement made by a person during custodial interrogation that occurs on or after January 1, 2011.

INDIANA RULES OF EVIDENCE

Rule 617. Unrecorded Statements During Custodial Interrogation

(a) In a felony criminal prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial, except upon clear and convincing proof of any one of the following:

- (1) The statement was part of a routine processing or "booking" of the person; or
- (2) Before or during a Custodial Interrogation, the person agreed to respond to questions only if his or her Statements were not Electronically Recorded, provided that such agreement and its surrounding colloquy is Electronically Recorded or documented in writing; or
- (3) The law enforcement officers conducting the Custodial Interrogation in good faith failed to make an Electronic Recording because the officers inadvertently failed to operate the recording equipment properly, or without the knowledge of any of said officers the recording equipment malfunctioned or stopped operating; or
- (4) The statement was made during a custodial interrogation that both occurred in, and was conducted by officers of, a jurisdiction outside Indiana; or
- (5) The law enforcement officers conducting or observing the Custodial Interrogation reasonably believed that the crime for which the person was being investigated was not a felony under Indiana law; or
- (6) The statement was spontaneous and not made in response to a question; or
- (7) Substantial exigent circumstances existed which prevented the making of, or rendered it not feasible to make, an Electronic Recording of the Custodial Interrogation, or prevent its preservation and availability at trial.

(b) For purposes of this rule, "Electronic Recording" means an audio-video recording that includes at least not only the visible images of the person being interviewed but also the voices of said person and the interrogating officers; "Custodial Interrogation" means an interview conducted by law enforcement during which a reasonable person would consider himself or herself to be in custody; "Place of Detention" means a jail, law enforcement agency station house, or any other stationary or mobile building owned or operated by a law enforcement agency at which persons are detained in connection with criminal investigations.

(c) The Electronic Recording must be a complete, authentic, accurate, unaltered, and continuous record of a Custodial Interrogation.

(d) This Rule is in addition to, and does not diminish, any other requirement of law regarding the admissibility of a person's statements.

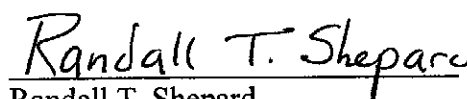
The Clerk of this Court is directed to forward a copy of this Order to the clerk of each circuit court in the State of Indiana; Administrator, Indiana Court of Appeals; Administrator, Indiana Tax Court; Attorney General of Indiana; Legislative Services Agency and its Office of Code Revision; the Indiana State Public Defender; Indiana Supreme Court Disciplinary Commission; Indiana Supreme Court Commission on Continuing Legal Education; Indiana Board of Law Examiners; Indiana Judicial Center; Division of State Court Administration; Indiana Judges and Lawyers Assistance Program; the Executive Director of the Indiana State Bar Association; the Executive Director of the Indiana Prosecuting Attorney's Council; the libraries of all law schools in this state; the Michie Company; and Thomson Reuters.

Thomson Reuters is directed to publish this Order in the advance sheets of this Court.

The Clerks of the Circuit Courts are directed to bring this Order to the attention of all judges within their respective counties and to post this Order for examination by the Bar and general public.

DONE at Indianapolis, Indiana, this 15th day of September, 2009.

For the Court



Randall T. Shepard
Chief Justice of Indiana

DICKSON, BOEHM, and RUCKER, JJ., concur
SHEPARD, C.J., dissents with opinion
SULLIVAN, J., dissents with opinion

SHEPARD, Chief Justice, dissenting.

There are states where bad conduct by police or prosecutors has led to repeated injustice in the criminal process. Indiana has not been such a place. My assessment of the honesty and professionalism of Indiana's public safety officers leads me to conclude that today's action is not warranted.

SULLIVAN, Justice, dissenting.

I respectfully dissent from the adoption of Evidence Rule 617 concerning video recording of custodial interrogations. In the course of this Court's consideration of appeals in criminal cases during the past year, I have observed that many Indiana police departments have already taken the initiative to record interrogations. Given that law enforcement agencies are already moving in this direction on their own, I do not believe that it is necessary or advisable for this Court to prescribe practice in this area by rule.