

To: Commission
From: Steven Brizek
Re: Uniform Electronic Recordation of Custodial Interrogations Act
Date: April 18, 2013

MEMORANDUM

Introduction

The Uniform Law Commission (ULC), in July, 2010, approved and recommended for enactment in all the States the Uniform Electronic Recordation of Custodial Interrogations Act (UERO CIA).

I

Purpose of the UERO CIA

The UERO CIA addresses the use of audio and/or videotaping to record law enforcement interviews of criminal suspects who are in custody. As drafted, the UERO CIA mandates only audio recordings of interrogations, leaving to the discretion of the various states and law enforcement agencies whether to require both audio and video recording of custodial interrogations.

The stated purpose of the UERO CIA is as follows: 1. To improve the ability of law enforcement to investigate and prove its cases, while lowering costs of investigation and litigation; 2. To improve “systemic accuracy”; 3. To improve fairness to the accused and to the State; 4. To protect Constitutional rights; and 5. To improve public confidence in the Justice System. Stated as well, and clearly the prominent driving force behind its proposal of the UERO CIA, is the ULC’s perception of and its preeminent objective in attempting to address “concerns raised by law enforcement and other system participants and observers about the risks of convicting the innocent”, which the ULC contends are addressed by the benefits of electronic recording.

Neither the subject matter of the UERO CIA, nor its objectives, nor the general nature of its prescriptions to advance those objectives, are new to the State of New Jersey. Our State has not only been at the forefront of advancing the cause sought to be served by the UERO CIA, but it has done so in a well drafted, succinct, clear and easily understood Criminal Practice Rule promulgated in 2005, R. 3:17. That Rule was the product of a comprehensive investigation and consideration of the matter that culminated in the April 15, 2005 Report of the Supreme Court Special Committee on Recordation of Custodial Interrogations which recommended its adoption in the form approved verbatim by the New Jersey Supreme Court on October 14, 2005. R. 3:17 became effective on January 1, 2006 with regard to all homicide offences and on January 1, 2007 with regard to all other offences covered by its terms.

The Text of R. 3:17 is set forth below:

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 applies.

(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.

Supplementing Rule 3:17 are guidelines promulgated by the New Jersey Attorney General, including a reporting form to be completed by law enforcement authorities, designed to insure and monitor compliance with that Rule.

II

Issues with regard to the UEROCIA

The UEROCIA is at odds with the holding in *Winberry v. Salisbury*, 5 N.J. 240, 255 (1950), insofar as it represents an infringement upon the rule-making power of the New Jersey Supreme Court by presuming to legislate electronic interrogation protocols substantially mirroring, and in some respects at odds with, those long since established by the Court in R. 3:17.

New Jersey State Senate Bill No. 1207 was introduced on January 23, 2012. Its stated purpose is to establish a “pilot program in the Department of Law and Public Safety requiring the electronic recording of certain police interrogations”. While there has been no further action thereon since its introduction, current practices pursuant to R. 3:17 and the New Jersey Attorney General’s guidelines address the matter with which that Bill is concerned.

The American Bar Association’s House of Delegates on February 14, 2011 gave its approval to the UEROCIA, as drafted by the ULC.

III

Structure of the UEROCIA

Among the “Key Concepts” of the UEROCIA highlighted by the ULC are the following:

The UEROCIA mandates the electronic recording of the entire custodial interrogation process by law enforcement, leaving it to individual states to decide where and for what types of wrongs this mandate applies, as well as the means by which recording must be done.

The UEROCIA permits states to vary the scope of the mandate based upon local variations in cost, perceived degree of need for different categories of criminal or delinquent wrongdoing, or other pressing local considerations.

The UEROCIA mandates are further limited by the definition of “custodial interrogation” as “questioning or other conduct by a law enforcement officer which is reasonably likely to elicit an incriminating response from an individual and occur[ring] when reasonable individuals in the same circumstances would consider themselves in custody.” This definition largely matches that in *Miranda v. Arizona*, as that decision’s meaning was understood by the United States Supreme Court at the time of the UEROCIA’s drafting. The close tracking to current understandings of the *Miranda* rule narrows the UEROCIA’s scope while triggering the electronic mandate under circumstances that have been familiar to law enforcement for over four decades. Additionally, the UEROCIA expressly declares that it does not require the recording of spontaneous statements made outside the course of a custodial interrogation or in response to questions routinely asked during the processing of the arrest of an individual, though those situations do not constitute custodial interrogations under *current post-Miranda* case law.

The UEROCIA does not require informing the individual being interrogated that the interrogation is being recorded, and it exempts electronic recording of custodial interrogations from state statutory requirements, if any, that an individual consent to the recording of the individual’s conversations.

There are a variety of exceptions from the recording mandate, such as for exigent circumstances, where the individual interrogated refuses to participate if the interrogation is electronically recorded, where custodial interrogations are conducted in other jurisdictions in compliance with their law, where the interrogator reasonably believes that the offense involved is not one that the statute mandates must be recorded, where the law enforcement officer or his superior reasonably believes that electronic recording would reveal a confidential informant’s identity or jeopardize the safety of the officer, the person interrogated, or where there are equipment malfunctions.

The UEROCIA outlines remedies for violation of its requirement that the entire custodial interrogation process be electronically recorded if no exceptions apply. The UEROCIA provides that failure to comply with that requirement renders a statement involuntary, but it does not mandate the statement’s suppression; it merely mandates that such a failure to comply be considered by the court when weighing a motion to suppress it. The trial judge must give a cautionary instruction to the jury if such an act-violative statement is deemed admissible.

The UEROCIA mandates that electronic recordings of custodial interrogations be identified, accessible, and preserved in the manner prescribed by local statutes or rules governing the preservation of evidence in criminal cases generally.

The UEROCIA requires each law enforcement agency to adopt and enforce rules to implement it and specifies a large number of matters that these rules must address.

The UEROCIA provides that a law enforcement agency in the State that has adopted and enforced rules reasonably designed to ensure compliance with its terms is not subject to civil liability arising from a violation of it, that the only sanction that may be imposed on a law enforcement officer for failing to comply with the report-writing requirement shall be administrative sanctions and that it does not create a cause of action against an individual law enforcement officer.

The UEROCIA makes electronic recordings of custodial interrogations presumptively self-authenticating.

IV

Conclusion

By virtue of the several variations that each individual adopting State is allowed by the express terms of the UEROCIA to factor into the precise form of it that each such State may choose to adopt, adoption of the UEROCIA would not necessarily yield the interstate benefits generally to be expected by the wide adoption of a uniform law, but, instead, would likely yield only the benefits that the mandate of electronic recording of custodial statements has the capacity to provide to the Criminal Justice System of each individual State that adopts such a mandate. If such is indeed the case, that fact, together with the fact that New Jersey's Criminal Justice System has been operating under such a mandate since it became fully operational in 2007, pursuant to R. 3:17, and the fact that that mandate is one of practice, procedure and administration promulgated by a Rule of the New Jersey Supreme Court not subject to overriding legislation, further consideration of the UEROCIA is not recommended.