

# Missouri's Experience with Recorded Interrogation Legislation—Prosecutors Lead Effort to Pass Sensible Law

BY ERIC G. ZAHND, PROSECUTING ATTORNEY, PLATTE COUNTY, MISSOURI

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ON JUNE 7, 2005, Ali Mahamud murdered his cousin by stabbing him 54 times with a knife. Mahamud and his victim, Sulleyman Suleiman, were sitting in a van in the parking lot of a small park in Kansas City, Missouri, when Mahamud slashed and stabbed his cousin to death. After the murder, Mahamud dragged his cousin's bleeding body across the park and dumped it in a shallow creek.

Mahamud fled the scene and was later arrested by Kansas City, Missouri, police officers. Detectives interrogated Mahamud for about two hours following his arrest, and he confessed to the murder. Although the interrogation took place in an interview room equipped with a video recording system, the entire interrogation was not recorded. Instead, pursuant to the department's policy, detectives recorded only a videotaped statement repeating the defendant's key, incriminating admissions after their initial questioning elicited a confession.

I tried Mahamud in front of a Platte County, Missouri, jury in April 2007. Our key witness was the detective who secured Mahamud's confession. He is an outstanding police officer—a man who was promoted to sergeant after his work in Mahamud's case. He is scrupulously honest and made an outstanding witness at trial.

The centerpiece of our case was Mahamud's videotaped

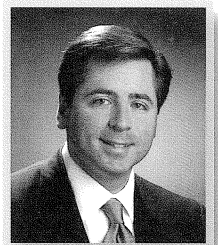
statement, in which he admitted killing his cousin. The detective also explained to the jury the police department's policy of not recording the entire interrogation but instead recording a video statement once a suspect had made his initial, unrecorded statements to police.

Not surprisingly, defense counsel made an issue of the police department's failure to record Mahamud's entire interrogation, arguing in closing that the jury would never know exactly what happened during the two hours before police turned on the recording equipment.

In response, we relied on the credibility of the police officer to demonstrate that no promises, threats, or coercion were used to obtain Mahamud's confession. But, in the end, defense counsel was at least partly right: the jury would not have access to the best evidence of what transpired during the initial portion of Mahamud's interview. And it was true that police could have provided the jury this evidence by simply switching on their recording equipment earlier.

Fortunately, the jury convicted Mahamud, and he is now

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*Eric G. Zahnd is the prosecuting attorney of Platte County, Missouri. He was first elected in 2002.*

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-serving a 28-year prison sentence. The day after the jury returned its verdict, however, I received a call from one of the jurors. He told me all of the jurors were upset that the police had not recorded Mahamud's entire interrogation. He said he and his colleagues could not understand why—when the entire interrogation occurred in a room equipped with video recording equipment—police policy was to record only a portion of the encounter.

The jury's complaint struck me as reasonable. I am firmly convinced that the overwhelming number of law enforcement officers are completely honest about what happens in every aspect of their work. But recording interrogations is more about protecting officers against the appearance of impropriety, especially given that "rogue cops" have become mainstays of popular fiction in television and movies. Given the availability and relatively low cost of recording equipment today, jurors have a reasonable expectation that entire custodial interrogations will be recorded, at least when it comes to people suspected of committing serious felonies.

More importantly, I believe recorded interrogations are a powerful tool in assisting prosecutors in our duty to do justice. A recorded interrogation helps police and prosecutors fulfill our obligation to seek truth. When a suspect's interview is recorded, there is no speculation about what the suspect said because it is memorialized for everyone to hear.

As a result of the conversation with the juror from Mahamud's case, I became convinced that police and prosecutors could do better. We should meet jurors' reasonable expectations and implement the best police practices regarding custodial interrogations. I believe it is appropriate for prosecutors to take the lead on an issue that traditionally has been the rallying cry of criminal defense attorneys and civil libertarians.

I was also concerned that if we did not move proactively, Missouri courts or the legislature could force a recording requirement on police that was tied to an exclusionary rule. Excluding statements made during custodial interrogations simply because police did not record the encounter is inappropriate where there is no evidence of police misconduct. In the absence of evidence demonstrating unconstitutional activity by police, excluding valuable and reliable evidence of a suspect's statements is an unreasonable way to handle a

decision by officers not to record an interrogation. More ominously, excluding confessions might lead to violent criminals going free.

My fears regarding the potential exclusion of evidence resulting from unrecorded interrogations were based on case law or statutes in force in several other jurisdictions. Alaska, Illinois, Minnesota, New Jersey, North Carolina, Texas, and Washington, D.C. all employ some sort of potential exclusionary remedy when police fail to record custodial interrogations.<sup>1</sup>

As a member of the Legislative Committee of the Missouri Association of Prosecuting Attorneys, I was convinced that we could create a coalition of prosecutors and police agencies to develop sensible legislation requiring the recording of custodial interrogations under certain circumstances. I was further convinced that, if we had prosecutors and police supporting the effort, the Missouri legislature would pass the legislation without an exclusionary rule that could allow guilty defendants to go free. In the end, I was confident that if prosecutors led the way, we could craft a bill that would implement a fair, transparent, and workable system of recording interrogations in our state.

I directed one of my assistant prosecutors to work toward drafting legislation to require police to record custodial interrogations in serious cases.<sup>2</sup> I told him we needed to include an incentive for police to comply with the new law but that exclusion of evidence or other court sanctions such as cautionary jury instructions seemed inappropriate.

Fortunately, we could rely on the experience of several other states in drafting the proposed legislation. In addition to the states with some sort of exclusionary rule, Maine, Maryland, Massachusetts, Nebraska, New Mexico, and Wisconsin all require police to record suspect interrogations in at least some situations.<sup>3</sup>

My office combined what we believed to be the best parts of the statutes from other states with our own experiences to develop a working draft to share with others. We also borrowed from an existing Missouri statute to provide the incentive for law enforcement agencies to comply with the law. Since 2000, Missouri has required law enforcement agencies to compile a report regarding the race of every driver stopped by the police. The law is commonly known as Missouri's "racial profiling statute." It allows the governor to withhold state funding from any agency that fails to file a report. Few Missouri agencies have failed to comply with the racial profiling law, and it seemed like the right kind of incentive for a law mandating recording of custodial interrogations.

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We first shared the draft with other prosecutors in Missouri and discussed the concept at statewide prosecutor conferences to ensure that the entire prosecutor community would support the effort. After securing the formal support of the Missouri Association of Prosecuting Attorneys, we set out to do the heavy lifting—bringing the police community on board.

We anticipated some degree of opposition from law enforcement agencies, simply because change is always difficult and police are properly suspicious of legislative efforts designed to tell them how to do their jobs. Surprisingly, a significant portion of the law enforcement community quickly embraced our efforts. We explained—and they understood—that if we did not take the lead on reasonable legislation, we might suffer under a judicially- or legislatively-imposed policy that included an exclusionary remedy.

The Missouri Sheriffs Association and Missouri Police Chiefs Association offered several suggestions that led to several additional drafts of the legislation, and their comments ultimately strengthened the bill. Like the Missouri Association of Prosecuting Attorneys, the Missouri Sheriffs Association and Missouri Police Chiefs Association voted to formally endorse the proposed legislation. One agency, the Missouri State Highway Patrol, stated that its policy was against recording interrogations and that it opposed the bill.

In the end, the bill presented to the legislature required all law enforcement agencies to adopt a written policy to record custodial interrogations of persons suspected of committing or attempting to commit a number of serious crimes. Those felonies include:

- First degree murder
- First degree arson
- Second degree murder
- Forcible rape
- First degree assault
- Forcible sodomy
- First degree assault of a law enforcement officer
- Kidnapping
- First degree domestic assault
- First degree statutory rape
- First degree elder abuse
- First degree statutory sodomy
- First degree robbery
- Child abuse
- Child kidnapping

The legislation authorized any form of recording—even

using an inexpensive microcassette recorder. In so doing, we overcame the objections of numerous smaller law enforcement agencies that did not have budgetary resources for digital video recording.

We limited the recording requirement to traditional stationhouse interviews by specifying that the law applied only to a "custodial interrogation" of a suspect who is both under arrest and no longer at the scene of the crime. The definition of "custodial interrogation" specifically excluded from the recording requirement:

- situations where a person voluntarily agrees to meet with an officer;
- temporary detentions (not rising to the level of an arrest);
- suspect booking procedures;
- DWI arrests; and
- statements made during transportation of a suspect.

We further specified that a suspect does not need to consent—or even know—his or her interrogation is being recorded and noted that an interrogation does not have to be recorded if:

- the suspect requests that the interrogation not be recorded;
- the interrogation occurs outside the state of Missouri;
- exigent public safety circumstances prevent recording;
- the suspect makes spontaneous statements;
- the recording equipment fails; or
- recording equipment is not available at the location where the interrogation takes place.

Again, as with Missouri's racial profiling statute, the legislation authorized the governor to withhold any state funds appropriated to any law enforcement agency that failed to comply with the law, if the governor found that the agency did not act in good faith in attempting to comply.

In an attempt to dispel any notion that the legislation was intended to create an exclusionary remedy or any sanction other than withholding of state funds, the legislation specifically stated that it shall not be construed as a ground to exclude evidence and a violation shall not have any impact other than the potential withholding of state funds. The legislation further noted that "compliance or noncompliance with this section shall not be admitted as evidence, argued, referenced, considered or questioned during a criminal trial."

Finally, at the request of police agencies appropriately concerned with increasing any potential civil liability, the legislation stated that it was not to be construed to autho-

rise, create, or imply any private cause of action.

With the onset of the 2009 legislative session—about two years after the project began—we were ready to approach lawmakers. With the endorsements of the Missouri Association of Prosecuting Attorneys, the Missouri Sheriffs Association, and the Missouri Police Chiefs Association in hand, we anticipated we would find willing listeners. I, for one, did not anticipate just how smooth the journey would be.

We approached the chairs of the two committees to which the bill was most likely to be assigned: the chair of the Senate Judiciary Committee, who is an attorney, and the chair of the House Crime Prevention Committee, who is a former assistant prosecuting attorney. Both received the legislation favorably, and a bill was filed.

Interestingly, the bill agreed upon by prosecutors and police was never heard in any committee. Instead, the provisions of the proposed legislation, without any amendment whatsoever, became a part of a 73-page omnibus crime bill. By its very nature, the omnibus bill had dozens of provisions, including such things as whether it would be legal to possess “beer bong” on rivers other than the Mississippi, Missouri, or Osage Rivers. That provision and others generated heated debates in the respective houses of the legislature—but not a single word was uttered on the floor of either chamber about recording interrogations.

The omnibus bill, including the recorded interrogation language as originally offered, passed on the final day of the 2009 legislative session. It was subsequently signed by the governor and became law on August 28, 2009.<sup>4</sup>

Even before the law became effective, it appears to have had its intended effect on Missouri courts. On August 18, 2009, the Court of Appeals for the Western District dealt with the issue of recorded interrogations for the first time.<sup>5</sup> In an opinion written by a judge of the state’s Supreme Court sitting by special designation, the Court found that “[t]he determination of public policy is primarily a function of the legislature.”<sup>6</sup> The Court then cited Missouri’s recorded interrogation law and stated that “this new statute would not provide future defendants” a right to suppress statements that were not recorded.<sup>7</sup> The new law and the Appellate Court’s statement on this matter should end any debate before it starts as to whether the failure to record an interrogation should result in exclusion of evidence or even cautionary jury instructions in Missouri.

I am confident that the new law, like similar laws in other states, will be good for the cause of justice. When police, prosecutors, defense attorneys, judges, jurors, and defendants

themselves get to hear exactly what a suspect said when questioned about a crime, we have an effective tool to convict the guilty and exonerate the innocent.

And unlike some states, which must deal with the potential exclusion of valuable evidence or cautionary jury instructions that may cause jurors to ignore reliable admissions from suspects, in Missouri we were able to craft legislation that avoided these potentially damaging remedies.

Recording interrogations is not about the requirements of the Constitution or the rights of defendants.<sup>8</sup> Instead, it is about the best practices for law enforcement agencies given the relative ease of recording statements in the 21st Century. I remember teachers in elementary school telling us to “show our work.” This bill allows police and prosecutors to “show our work,” demonstrating to juries that we are the truth-tellers, and our only goal is to do justice by convicting the guilty and protecting the innocent.

Ultimately, I believe this law will increase the number of convictions because jurors will not have to speculate about what a suspect said during an interrogation. It will also help ensure that we do not convict innocent people of crimes they did not commit. Police and prosecutors care deeply about achieving justice for crime victims. We were right to fight for a sensible recorded interrogation statute; the winner of that fight will be anyone concerned with seeing that justice is done.

## ENDNOTES

<sup>1</sup> *Stephen v. State*, 711 P.2d 1156, 1162 (Alaska 1995) (holding that Alaska’s Due Process Clause requires recording of custodial interrogations when feasible and failure to record will result in exclusion of the statement); 705 Ill. Comp. Stat. Ann. § 405/5-401.5; 725 Ill. Comp. Stat. Ann. § 5/103-2.1 (2003 law providing that unrecorded custodial interrogations at places of detention are presumed inadmissible in homicide cases); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (holding that, where feasible, all custodial interrogations must be recorded and unrecorded statements will be excluded if the violation of the recording requirement is deemed “substantial”); N.J. Sup. Ct. R. 3:17 (2006 rule generally requiring recording of custodial interrogations in serious cases and making the failure to record a consideration for admissibility of the evidence; the rule also requires cautionary jury instructions if an unrecorded statement is admitted at trial); N.C. Stat. § 15A-211 (2007 law requiring recording of custodial interrogations at places of detention in homicide cases and directing trial judge to consider failure to record when ruling on motions to suppress and requiring cautionary jury instructions if an unrecorded statement is admitted at trial); Tex. Code Crim. P. Art. 38.22 (1989 law providing in general that no statement made as a result of a custodial interrogation shall be admitted unless recorded); D.C. Code Ann. §§ 5-116.01 to 5-116.03 (2005 ordinance subjecting custodial statements that are not recorded to a rebuttal presumption of involuntariness which can be overcome only by clear and convincing evidence that the statement was voluntary).

<sup>2</sup> Platte County Assistant Prosecuting Attorney Joe Vanover spent many hours drafting and redrafting the legislation that eventually became the law of Missouri. Missouri would not have a recorded interrogation statute without his work.

<sup>3</sup> Me. Rev. Stat. Ann. Tit 25 § 2803-B (2005 law requiring the chief administrative officer of every Maine law enforcement agency to certify to the Board of Trustees of the Maine Criminal Justice Academy that it has adopted writ-

ten policies regarding recording interviews of people suspected of committing serious crimes); Md. Code Ann. Crim. P. § 2-401 *et seq.* (2008 law requiring law enforcement agencies with interrogation rooms capable of recording interrogations to use them for certain serious crimes and directing other agencies to take reasonable efforts to create interrogation rooms capable of recording interrogations); *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533 (Mass. 2004) (holding that statements from unrecorded custodial interrogations are subject to an instruction that “the State’s highest court has expressed a preference that [custodial] 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 evidence of the defendant’s alleged statement with great caution and care”); Neb. Rev. Stat. § 29-4501 *et seq.* (2008 law requiring recording of custodial interrogations in most circumstances and requiring court to instruct jury that it may draw an adverse inference for failure to comply with law); N.M. Stat. Ann. § 19-1-16 (2005 law requiring recording of custodial interrogations in felony cases when reasonably possible but providing that failure to record shall not be construed to exclude otherwise admissible evidence); Wis. Stat. Ann. § 972.115 (2005 law requiring cautionary jury instruction if unrecorded statement made during custodial interrogation is admitted at trial). Maryland and Nebraska adopted their recording interrogation requirements after we began the process of drafting legislation in Missouri. Iowa’s Supreme Court has also encouraged recorded interrogations in felony cases. See *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2007) (“We believe electronic recording, particularly videotaping, of custodial interrogations should be encouraged, and we take this opportunity to do so.”). New Hampshire has held that for a recorded final statement of a suspect to be admissible, the entire post-Miranda interrogation must be recorded; however, New Hampshire does not require custodial interrogations to be recorded. *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2001). In addition to these laws, the National Conference of Commissioners on Uniform State Laws has formed a Drafting Committee on Electronic Recordation of Custodial Interrogations. It is expected to approve the draft of a proposed uniform law in July 2010. The current draft of the law requires judges to consider the failure to record a custodial interrogation when deciding whether the confession is voluntary. It also calls for a jury instruction if there is a violation. See Uniform Law Commission: Drafting Committees, available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=59> (last viewed Aug. 4, 2009); Draft Electronic Recordation of Custodial Interrogations Act, available at [http://www.law.upenn.edu/bll/archives/ulc/erci/2009\\_amdraft.htm](http://www.law.upenn.edu/bll/archives/ulc/erci/2009_amdraft.htm) (last viewed Aug. 4, 2009).

<sup>4</sup> Mo. Rev. Stat. § 590.701. The full text of the statute is:

1. As used in this section, the following terms shall mean:
  - (1) “Custodial interrogation”, the questioning of a person under arrest, who is no longer at the scene of the crime, by a member of a law enforcement agency along with the answers and other statements of the person questioned. “Custodial interrogation” shall not include:
    - (a) A situation in which a person voluntarily agrees to meet with a member of a law enforcement agency;
    - (b) A detention by a law enforcement agency that has not risen to the level of an arrest;
    - (c) Questioning that is routinely asked during the processing of the arrest of the suspect;
    - (d) Questioning pursuant to an alcohol influence report;
    - (e) Questioning during the transportation of a suspect;
  - (2) “Recorded” and “recording”, any form of audiotape, videotape, motion picture, or digital recording.
2. All custodial interrogations of persons suspected of committing or attempting to commit murder in the first degree, murder in the second degree, assault in the first degree, assault of a law enforcement officer in the first degree, domestic assault in the first degree, elder abuse in the first degree, robbery in the first degree, arson in the first degree, forcible rape, forcible sodomy, kidnapping, statutory rape in the first degree, statutory sodomy in the first degree, child abuse, or child kidnapping shall be recorded when feasible.
3. Law enforcement agencies may record an interrogation in any circumstance with or without the knowledge or consent of a suspect, but they shall not be required to record an interrogation under subsection 2 of this section:
  - (1) If the suspect requests that the interrogation not be recorded;
  - (2) If the interrogation occurs outside the state of Missouri;
  - (3) If exigent public safety circumstances prevent recording;
  - (4) To the extent the suspect makes spontaneous statements;

- (5) If the recording equipment fails; or
- (6) If recording equipment is not available at the location where the interrogation takes place.
4. Each law enforcement agency shall adopt a written policy to record custodial interrogations of persons suspected of committing or attempting to commit the felony crimes described in subsection 2 of this section.
5. If a law enforcement agency fails to comply with the provisions of this section, the governor may withhold any state funds appropriated to the noncompliant law enforcement agency if the governor finds that the agency did not act in good faith in attempting to comply with the provisions of this section.
6. Nothing in this section shall be construed as a ground to exclude evidence, and a violation of this section shall not have impact other than that provided for in subsection 5 of this section. Compliance or non-compliance with this section shall not be admitted as evidence, argued, referenced, considered or questioned during a criminal trial.
7. Nothing contained in this section shall be construed to authorize, create, or imply a private cause of action.

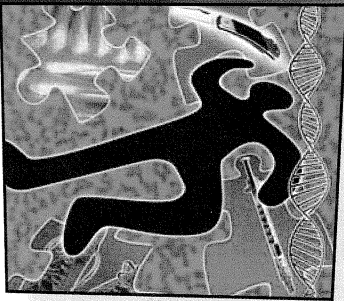
<sup>5</sup> *State v. Blair*, \_\_\_ S.W.3d \_\_\_, No. WD69602 (Mo. App. 2009).

<sup>6</sup> *Id.* at 27 (internal quotation and citations omitted).

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

<sup>8</sup> It seems clear that the United States Constitution does not mandate recording of suspect interrogations. The technology to record interrogations did not exist when the Constitution was adopted. However, the Alaska Supreme Court believes the due process clause of its state constitution requires recording of custodial interrogations. See *supra* n.1.

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