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**TO: Senate Judiciary Committee**

**FROM: Kansas Judicial Council – Laura Nordgren**

**DATE: February 7, 2017**

**RE: Judicial Council Testimony on SB 92 – Written Only**

The Judicial Council supports Senate Bill 92, a bill which is based on the work product of the Council's Criminal Law Advisory Committee. The attached report provides some background on the study process that resulted in recommendations nearly identical to the substance of SB 92, including how that bill differs from last year's 2016 HB 2593.

**REPORT OF THE JUDICIAL COUNCIL  
CRIMINAL LAW ADVISORY COMMITTEE  
2016 H.B. 2593**

**JANUARY 18, 2017**

On May 13, 2016, Representative Ramon C. Gonzalez, Jr. asked the Judicial Council to study 2016 H.B. 2593, which related to the recording of certain felony interrogations. The Judicial Council referred the study to the Criminal Law Advisory Committee in June, 2016.

**COMMITTEE MEMBERSHIP**

The members of the Judicial Council Criminal Law Advisory Committee are:

**Stephen E. Robison, Chair**, Member of Fleeson, Gooing, Coulson, & Kitch, LLC and Member of the Kansas Judicial Council; Wichita

**Sen. Terry Bruce**, Kansas State Senator and Practicing Attorney; Hutchinson

**Natalie Chalmers**, Assistant Attorney General; Topeka

**Sal Intagliata**, Member, Monnat & Spurrier, Chartered; Wichita

**Ed Klumpp**, Chief of Police-Retired, Topeka Police Department; Tecumseh

**Patrick M. Lewis**, Criminal Defense Attorney; Olathe

**Prof. Joel Meinecke**, Retired Attorney; Topeka

**Steven L. Opat**, Geary County Attorney; Junction City

**Hon. Cheryl A. Rios**, District Court Judge in the Third Judicial District; Topeka

**John Settle**, Pawnee County Attorney; Larned

**Ann Swegle**, Sedgwick County Deputy District Attorney; Wichita

**Kirk Thompson**, Director of Kansas Bureau of Investigation; Topeka

**Ron Wurtz**, Retired Public Defender (Federal and Kansas); Topeka

**BACKGROUND**

H.B. 2593 was introduced in the Kansas House of Representatives on February 2, 2016 and was referred to the House Committee on Corrections and Juvenile Justice. The bill required a video recording be made of custodial interrogations related to certain crimes. If a court found

by a preponderance of the evidence that a defendant was subjected to an interrogation in violation of the bill's provisions, the defendant would be entitled to a jury instruction about the failure to record the interrogation. Proponents and opponents of the bill testified during a hearing before the House Committee on February 11, 2016. During the House Committee's discussion of the bill, Representative Finch proposed an amendment. The amendment deleted all provisions of the original bill and instead required law enforcement agencies to adopt written policies within 2 years relating to the videotaping of certain custodial interrogations. The House Committee approved Representative Finch's amendment and the committee unanimously voted to table the bill.

On May 13, 2016, Representative Ramon C. Gonzalez, Jr. asked the Judicial Council to study H.B. 2593 as originally proposed and as amended. Representative Gonzalez Jr. asked the Judicial Council to specifically review the possibility of increased litigation due to the exceptions to recording, the effect on settled case law regarding the voluntariness of confessions, the interplay of the definition of "custodial interrogation" in the bill with the definition established through case law, the implementation of a jury instruction remedy in an area where suppression of evidence is the usual remedy, and the possibility of blurring the line between questions of law decided by the court and questions of fact decided by the jury due to the jury instruction remedy. Representative Gonzalez Jr. also questioned whether the language of the amendment allowed adoption of policies too broad to be effective. The Judicial Council referred the study to the Criminal Law Advisory Committee ("the Committee") on June 3, 2016.

### **METHOD OF STUDY**

During its study of H.B. 2593, the Committee read the original study request and associated materials such as the bill (copy on page 15) and related testimony from the House Committee's February 11, 2016 hearing. The Committee also read a Compendium of the Law Relating to Electronic Recording of Custodial Interrogations assembled and written by Thomas P. Sullivan, various states' statutes, as well as the articles and studies listed at the end of this report. In addition to these written materials, the Committee reached out to national and local law enforcement, prosecution, and defense attorney organizations in five states (Michigan, Missouri, Nebraska, Illinois, and Vermont) that have a statutory mandate to record certain interrogations to

request (1) the organization's overall opinion of the state's statutory mandate of the recording of certain interrogations, (2) information about costs or other hurdles to implementation of the mandate, (3) information about the effectiveness of the mandate, and (4) statistics regarding the use of each state's sanction for the failure to record. The Committee reviewed the case law citing to the recording of interrogations statutes from the same five states. It also asked questions of and received materials from Michelle Feldman, of the Innocence Project, who attended the Committee's meetings as an observer.

The Committee met four times in person and once via telephone conference between July 2016 and January 2017.

### **COMMITTEE DISCUSSION**

The Committee unanimously agreed the practice of recording custodial interrogations is useful and the best practice for law enforcement. Some law enforcement agencies in Kansas, typically the larger agencies, already record interrogations, interviews, witness statements, and other encounters when possible.<sup>1</sup> The Committee recognized the many benefits of recording interrogations. First, recording interrogations would provide law enforcement agencies and officers protection against claims of wrongdoing or coercion. Second, it would allow law enforcement officers to focus on the interrogation and avoid the distractions associated with taking detailed notes during an interrogation. Third, recordings would provide more accurate information to all parties. Fourth, it would increase the efficiency of the prosecutor, defense attorney, and the court. Fifth, the court and all parties would no longer be required to rely on the word of the officer or defendant. Sixth, the recording would likely decrease the amount of time and resources spent arguing and deciding whether the statements were freely and voluntarily made, if the defendant's rights were violated, and ultimately whether a defendant's statements should be suppressed or admitted as evidence.

Though unanimously in favor of the practice, the Committee was divided about whether such a practice should be directly mandated by a statute. Currently, fifteen states and the District

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<sup>1</sup> Thomas P. Sullivan, "Compendium: Electronic Recording of Custodial Interrogations", <https://www.nacdl.org/electronicrecordingproject> (2016).

of Columbia have a statute requiring the recording of certain custodial interrogations.<sup>2</sup> States have taken a variety of approaches in how they construct their statutes. Some states directly mandate law enforcement agencies record custodial interrogations,<sup>3</sup> while other states require law enforcement agencies to adopt a policy about recording custodial interrogations.<sup>4</sup> Some states require the recording of a limited category of crimes, such as all felonies or homicides, while others require recording for all crimes.<sup>5</sup> State statutes also vary on whether there is a consequence or sanction in the criminal case if law enforcement fails to record as required by the statute. Illinois requires the unrecorded statement be presumed inadmissible.<sup>6</sup> Some states allow the court to give a jury instruction about law enforcement's failure to record the interrogation.<sup>7</sup> Missouri allows the governor to withhold funding from any law enforcement agency failing to adopt a written policy to record certain custodial interrogations.<sup>8</sup>

#### *Direct Mandate v. Policy*

H.B. 2593, as originally proposed, directly mandated law enforcement agencies record certain custodial interrogations. The Committee was concerned with the original bill's direct approach to controlling law enforcement procedure. The Kansas Legislature has historically required law enforcement to have certain procedures by passing a statute requiring law enforcement agencies to adopt a written policy that, at a minimum, includes the elements set out in the statute.<sup>9</sup> The amendment to H.B. 2593 followed this approach of requiring the adoption of a written policy; however, the Committee agreed the amendment was too broad to be effective. The amendment failed to provide specific directives about the minimum requirements of the policy. The Committee concluded a statute requiring the adoption of a policy would need to include minimum requirements about (1) what types of cases must be covered, (2) important definitions, and (3) exceptions to the recording requirement.

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<sup>2</sup> *Id.*

<sup>3</sup> See e.g. 725 Ill. Comp. Stat. Ann. § 5/103-2.1.

<sup>4</sup> See e.g. MO Rev. Stat. § 590.700.

<sup>5</sup> See e.g. N.M. Stat. Ann. § 29-1-16; Mont. Code Ann. § 46-4-401, *et seq.*; and Vt. Stat. Ann. tit. 13, § 5585.

<sup>6</sup> 725 Ill. Comp. Stat. Ann. § 5/103-2.1.

<sup>7</sup> See e.g. M.C.L.A. § 763.9; and Neb. Rev. St. § 29-4504.

<sup>8</sup> MO Rev. Stat. § 590.700.

<sup>9</sup> See K.S.A. 22-2307 (domestic violence calls); K.S.A. 22-2310 (stalking allegations); and K.S.A. 22-4619 (eyewitness identification).

The Committee recognized Kansas has many small law enforcement agencies that have limited funds, office space, and resources in general. The Committee concluded a statute requiring law enforcement agencies to adopt a policy would allow flexibility for these smaller agencies to comply with the law while working within the confines of their resources. It would also allow agencies the freedom to expand beyond the minimum statutory requirements as technology advances or resources become available. Additionally, the Kansas County and District Attorney Association and other national organizations have already created model policies about recording custodial interrogations that would be available to law enforcement agencies to reference as they draft their policies. Based on the legislature's historical approach to mandating police procedures and the ability of policies to be crafted to meet the varying needs of law enforcement agencies, the Committee recommends the statute require law enforcement agencies to adopt a written policy that complies with the minimum standards set out in the statute.

#### *Definitions of "Custodial Interrogation"*

H.B. 2593 provided definitions for "custodial interrogation." The Committee was concerned about providing a statutory definition for "custodial interrogation" because it has been defined by case law; however, the Committee decided that providing a specific definition of the term as used with regard to recording interrogations would clarify in which situations the statute controls. The Committee concluded the proposed definition was too vague and would be unusable by law enforcement.

The Committee recommends "custodial interrogation" be defined as the "questioning of a person to whom Miranda warnings are required to be given." This would limit the definition to questions asked to a person who has been given Miranda warnings after being arrested. The definition would also provide a clear and definite line that would be easily recognized by law enforcement and the person being questioned.

#### *Type of Recording*

H.B. 2593 required law enforcement agencies "video record" certain custodial interrogations and defined "video recording" as including audio and video. The bill's amendment

required the policy involve the “videotaping” of interrogations. The Committee recognized that though the cost of audiovisual recorders have decreased over the years, requiring all law enforcement agencies to purchase the equipment needed to record both audio and video without providing additional funds for the purchase of such equipment may unduly burden law enforcement agencies. The Committee acknowledged the best practice is to have both an audio and video recording of an interrogation, but in order to avoid burdening law enforcement agencies, the Committee recommends the statute use the term “electronic recording” and define it as “an audio *or* audiovisual recording that accurately records a custodial interrogation.” This would allow law enforcement agencies that do not have the resources to purchase an audiovisual device to meet the requirements of the statute by audio recording custodial interrogations. If the resources are available an agency could still choose to draft its policy to require an audiovisual recording. In order to encourage law enforcement agencies to record both the audio and video components of an interrogation, the Committee recommends the definition of “electronic recording” include a sentence stating, “An audiovisual recording is preferred.”

#### *Types of Cases*

H.B. 2593 required the recording of interrogations associated with four specific crimes as defined in the statute – capital murder, murder in the first degree, murder in the second degree, and rape. The Committee identified that, as drafted, the statute may violate the United States Constitution’s Fourteenth Amendment equal protection clause because the statute treated the crime of rape differently than the crime of sodomy. The Kansas Supreme Court has ruled that a statute violated the Fourteenth Amendment’s equal protection clause when it provided a procedure for post-conviction DNA testing for rape without also providing the same procedure for sodomy. See *State v. Denny*, 278 Kan. 643, 101 P.3d 1257 (2004); see also *State v. Cheeks*, 298 Kan. 1, 310 P.3d 346 (2013). In order to avoid an equal protection issue, the Committee considered requiring recordings based on the severity level of the crime. However, the Committee recognized such designations would not be user friendly for law enforcement officers in the field.

The Committee recommends that instead of citing specific criminal statutes, the statute should instead require recording for crimes that fall under the general categories of “homicides and felony sex offenses.” Such designation would reduce the likelihood of violating equal

protection, while also providing categories of crimes law enforcement officers could easily identify. The Committee acknowledged the best practice would be for law enforcement agencies to record interrogations in more than homicide and felony sex offense cases, but because agencies would be adopting individualized policies, the agency would be able to include more crimes as desired.

### *Remedy for Failing to Record*

The Committee unanimously agreed the failure to record an interrogation as required by the statute and the agency's policy should not trigger suppression of the statements made during the interrogation. Suppression is typically a remedy for violations of constitutional rights. Since the statute addresses police procedure rather than constitutional rights, the Committee concluded suppression would be too extreme of a remedy. The court may decide the statement should be suppressed based on other factors, but the Committee agreed statements should not be suppressed based solely on non-compliance with the agency's policy. The Committee recommends the statute specifically state that the "lack of an electronic recording shall not be the sole basis for suppression of the interrogation or confession."

If a recording was not made as directed by the statute, H.B. 2593 allowed the defendant to request the court give a jury instruction indicating it is Kansas law to make a recording of a custodial interrogation of a person suspected of committing the crime charged. Some of the Committee thought this was an appropriate repercussion for failing to record as required and would help ensure officers followed their agencies' policies. However, a majority of the Committee was concerned that if the jury instruction was designated as the remedy, it would be throwing the imprimatur of the court, which is a neutral party in the case, behind the idea that the jury may want to view the unrecorded statement or confession with caution. Ultimately, the Committee decided the defendant's current right to cross-examine the law enforcement officer about why the statute and agency policy were not followed would provide a sufficient challenge to any testimony of an unrecorded statement. The Committee recommends against requiring a jury instruction be given if the interrogation was not recorded as required by statute and policy.



## *Exceptions*

The Committee agreed a list of situations in which a lack of recording would be excused would be important to have in the minimum guidelines for agency policies. H.B. 2593 included a list of seven exceptions. The Committee reviewed those exceptions and decided the exception excusing a failure to record because recording was “not feasible” was too vague and might result in an increase in litigation to determine when a recording was “not feasible.” Instead of such a broad exception, the Committee crafted the following specific exceptions that would define situations in which a recording would not be feasible:

- An equipment malfunction preventing electronic recording of the interrogation in its entirety, and replacement equipment is not immediately available;
- The officer, in good faith, fails to record the interrogation because the officer inadvertently fails to operate the recording equipment properly, or without the officer’s knowledge the recording equipment malfunctions or stops recording;
- Multiple interrogations are taking place, exceeding the available electronic recording capacity; and
- Exigent circumstances make recording impractical.

The Committee agreed an exception should be provided for when a statement is made (1) spontaneously and not in response to an interrogation question, (2) in response to questions routinely asked while booking someone into jail after being arrested, (3) during an interrogation, but at a time when the officer is unaware that the crime involved is one covered under the department’s policy, or (4) during an interrogation, but the officer is unaware of the person’s involvement in an offense covered under the department’s policy. The Committee discussed the real-world fluidity of investigating crimes. It contemplated a situation in which an officer was interrogating a suspect for physical child abuse, but the crime ended up being a felony sex offense that would have required the recording of the interrogation. Another situation might be if an officer interrogated a suspect for selling drugs, but when law enforcement later searched the suspect’s house they found a dead person. The suspect’s unrecorded statements during the first interrogation may be relevant evidence in the murder trial, but the lack of recording of the

interrogation would be excused because at the time of the interrogation, the officer was not aware of the person's involvement in the murder.

The Committee decided the exceptions in H.B. 2593 for when (1) a statement was made voluntarily, whether or not as a result of an interrogation, and the statement had bearing on the credibility of the accused as a witness, and (2) an interrogation took place outside of the state of Kansas, were not necessary if the statute did not authorize a jury instruction as a consequence for a lack of recording. The Committee agreed one additional exception would be needed. The exception would account for accidents that damaged or destroyed a recording. The court would be required to decide that the damage or destruction occurred "without bad faith," but despite the possible increase in litigation about that issue, the Committee felt such an exception would be important to account for true accidents.

### **RECOMMENDATION**

For the reasons discussed above, the Committee recommends against the passage of H.B. 2593 in its original form or as amended. If the Legislature chooses to pass legislation about the recording of custodial interrogations, the Committee recommends the attached language.

#### **Electronic Recording of Custodial Interrogations**

- (a) All law enforcement agencies in this state shall adopt a detailed, written policy requiring electronic recording of any custodial interrogation conducted at a place of detention.
- (b) All local law enforcement agencies in this state shall collaborate with the county or district attorney in the appropriate jurisdiction regarding the contents of written policies required by this section.
- (c) Policies adopted pursuant to this section shall be made available to all officers of such agency and shall be available for public inspection during normal business hours.
- (d) Policies adopted pursuant to this section shall be implemented by all Kansas law enforcement agencies within one year after the effective date of this act.

(e) Policies adopted pursuant to this section shall include the following:

- (1) A requirement that an electronic recording shall be made of an entire custodial interrogation at a place in detention when the interrogation concerns homicides and felony sex offenses.
- (2) A requirement that if the defendant elects to make or sign a written statement during the course of a custodial interrogation, the making and signing of the statement shall be electronically recorded.
- (3) A statement of exceptions to the requirement to electronically record custodial interrogations, including but not limited to:
  - (A) An equipment malfunction preventing electronic recording of the interrogation in its entirety, and replacement equipment is not immediately available;
  - (B) The officer, in good faith, fails to record the interrogation because the officer inadvertently fails to operate the recording equipment properly, or without the officer's knowledge the recording equipment malfunctions or stops recording;
  - (C) The suspect affirmatively asserts the desire to speak with officers without being recorded;
  - (D) Multiple interrogations are taking place, exceeding the available electronic recording capacity;
  - (E) The statement is made spontaneously and not in response to an interrogation question;
  - (F) The statement is made during questioning that is routinely asked during the processing of an arrest of a suspect;
  - (G) The statement is made at a time when the officer is unaware of the suspect's involvement in an offense covered by the policy;
  - (H) Exigent circumstances make recording impractical;
  - (I) At the time of the interrogation, the officer, in good faith, is unaware of the type of offense involved; and
  - (J) The recording is damaged or destroyed, without bad faith on the part of any person or entity in control of the recording.

(4) Requirements pertaining to the retention and storage requirements of the electronic recording.

(f) Remedies for non-compliance with statute or policies adopted pursuant to this section.

- (1) During trial, the officer may be questioned pursuant to the rules of evidence regarding any violation of the policies adopted pursuant to this section.

- (2) Lack of an electronic recording shall not be the sole basis for suppression of the interrogation or confession.
- (g) Every electronic recording of any statement as required by this section shall be confidential and exempt from the Kansas open records act in accordance with K.S.A. 45-229, and amendments thereto. The provisions of this subsection shall expire on July 1, 2021, unless the legislative reviews and reenacts this provision pursuant to K.S.A. 45-229, and amendments thereto prior to July 1, 2021.
- (h) As used in this section, the following terms shall mean:
- (1) "Custodial interrogation" means questioning of a person to whom Miranda warnings are required to be given;
  - (2) "Place of detention" means a fixed location under the control of a Kansas law enforcement agency where individuals are questioned about alleged crimes;
  - (3) "Electronic recording" means audio or audiovisual recording. An audiovisual recording is preferred.

**MATERIALS** (copies available from the Judicial Council)

Andrew E. Taslitz, "High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations", 7 NW J. L. & Soc. Pol'y 400 (2012).

Brian R. Farrell and Sara K. Farrell, "Watching the Detectives: Electronic Recording of Custodial Interrogations in Iowa", 99 Iowa L. Rev. Bull. 1 (2013).

Brian C. Jayne and John E. Reid and Associates, "Empirical Experiences of Required Electronic Recording of Interviews and Interrogations on Investigators' Practices and Case Outcomes", [www.reid.com/pdfs/Videotaping\\_study.pdf](http://www.reid.com/pdfs/Videotaping_study.pdf) (2004).

Carrie Sharlow, "State Bar Volunteers Propel New Legislation on Recording Custodial Interrogations", Michigan Bar Journal, March 2013, pg 24, [www.michbar.org/file/journal/pdf/pdf4article2188.pdf](http://www.michbar.org/file/journal/pdf/pdf4article2188.pdf).

The Constitution Project's Death Penalty Committee, "Irreversible Error: Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment",

Chapter 4 – Custodial Interrogations, [www.constitutionproject.org/wp-content/uploads/2014/06/Irreversible-Error\\_FINAL.pdf](http://www.constitutionproject.org/wp-content/uploads/2014/06/Irreversible-Error_FINAL.pdf) (2014).

Innocence Project, “Implementing Electronic Recording of Custodial Interviews: A Primer for Law Enforcement” (2015).

Innocence Project, “Recording of Custodial Interrogations: Briefing Book”.

The Justice Project, “Electronic Recording of Custodial Interrogations: A Policy Review”, [web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project\(07\).pdf](http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project(07).pdf).

Matthew D. Thurlow, “Lights, Camera, Action: Video Cameras as Tools of Justice”, 23 J. Marshall J. Computer & Info. L. 771 (2005).

Michael Kiel Kaiser, Comment, “Wrongful Convictions: If Mandatory Recording is the Antidote, Are the Side Effects Worth It?”, 67Ark. L. Rev. 167(2014).

National Conference of Commissioners of Uniform State Laws, Uniform Electronic Recordation of Custodial Interrogation Act, [www.uniformlaws.org/shared/docs/electronic%20recordation%20of%20custodial%20interrogations/uerocia\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/electronic%20recordation%20of%20custodial%20interrogations/uerocia_final_10.pdf) (2010).

Thomas P. Sullivan, “Arguing for Statewide Uniformity in Recording Custodial Interrogations, Criminal Justice”, 29 A.B.A. Criminal Justice 1, pg 21(2014).

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Timothy Cole Exoneration Review Commission, Texas Judicial Council, “Report on Electronic Recording of Interrogations”, [www.txcourts.gov/media/1329361/tcerc-meeting-book-mar-22-2016.pdf](http://www.txcourts.gov/media/1329361/tcerc-meeting-book-mar-22-2016.pdf) (2016).

Vermont DPS Law Enforcement Advisory Board, Summary Report 2010, [dps.vermont.gov/sites/psd/files/pdfs/leab/LEAB-2010-report.pdf](http://dps.vermont.gov/sites/psd/files/pdfs/leab/LEAB-2010-report.pdf).

Vermont DPS Law Enforcement Advisory Board, Summary Report 2014, [dps.vermont.gov/sites/psd/files/pdfs/leab/LEAB-2014-Report.pdf](http://dps.vermont.gov/sites/psd/files/pdfs/leab/LEAB-2014-Report.pdf).

HOUSE BILL No. 2593

By Committee on Corrections and Juvenile Justice

2-2

1 AN ACT concerning crimes, punishment and criminal procedure; relating  
2 to evidence; videotaping of certain felony interrogations.  
3

4 *Be it enacted by the Legislature of the State of Kansas:*

5 Section 1. (a) As used in this section:

6 (1) "Custodial interrogation" means questioning or other conduct by a  
7 law enforcement officer which is reasonably likely to elicit an  
8 incriminating response from an individual and occurs when reasonable  
9 individuals in the same circumstances would consider themselves in  
10 custody.

11 (2) "Place of detention" means a fixed location under the control of a  
12 law enforcement agency where individuals are questioned about an alleged  
13 crime or offense, including, but not limited to, a police or sheriff's station,  
14 a courthouse holding facility for defendants in the custody of a jail or  
15 prison, a city or county jail or work release facility, a state prison or a state  
16 security hospital or a facility operated by the department for aging and  
17 disability services for the purposes provided for under K.S.A. 59-29a02 et  
18 seq., and amendments thereto.

19 (3) "Video recording" means an audio and video recording that  
20 accurately records a custodial interrogation.

21 (b) (1) Except as provided in subsection (c), a video recording shall  
22 be made of a custodial interrogation conducted in any place of detention  
23 when the interrogation concerns a capital murder, as defined in K.S.A.  
24 2015 Supp. 21-5401, and amendments thereto, murder in the first degree,  
25 as defined in K.S.A. 2015 Supp. 21-5402, and amendments thereto,  
26 murder in the second degree, as defined in K.S.A. 2015 Supp. 21-5403,  
27 and amendments thereto, or rape, as defined in K.S.A. 2015 Supp. 21-  
28 5503, and amendments thereto. The recording shall include the giving of  
29 any required warning, advice of the rights of the individual being  
30 questioned and the waiver of any rights by the individual. If the defendant  
31 elects to make or sign a written statement during the course of a custodial  
32 interrogation, the making and signing of the writing shall be recorded. The  
33 recording shall not end until the interrogation is concluded.

34 (c) A video recording of a statement under subsection (b) is not  
35 required if the oral, written or sign language statement was made:

36 (1) During an interrogation that was not recorded as required by

- 1 subsection (b) because video recording was not feasible;  
2 (2) spontaneously and not in response to a question;  
3 (3) voluntarily, whether or not the result of an interrogation, and the  
4 statement has a bearing on the credibility of the accused as a witness;  
5 (4) after questions which are routinely asked during the processing of  
6 the arrest of a suspect;  
7 (5) in an interrogation outside the state of Kansas;  
8 (6) at a time when the interrogators are unaware that an offense  
9 covered by subsection (b) has occurred; or  
10 (7) at a time when the person being interrogated is not a suspect for  
11 the offense to which the statement relates while the person is being  
12 interrogated for an offense other than an offense specified in subsection  
13 (b).
- 14 (d) If the court finds by a preponderance of the evidence that the  
15 defendant was subjected to an interrogation in violation of this section, the  
16 defendant shall be entitled to a jury instruction on the failure to record the  
17 interrogation. If the defendant requests such an instruction, the court shall  
18 instruct the jury that it is the law of Kansas to make a video recording of a  
19 custodial interrogation of a person suspected of committing the offense  
20 charged.
- 21 (e) Every video recording required under this section shall be  
22 preserved until the defendant's conviction for an offense relating to the  
23 statement is final and all direct appeals are exhausted, or until the  
24 prosecution of offenses related to the recorded statement is barred by law,  
25 whichever occurs later.
- 26 (f) Every video recording of any statement as required by this section  
27 shall be confidential and exempt from the Kansas open records act in  
28 accordance with K.S.A. 45-221, and amendments thereto. The provisions  
29 of this subsection shall expire on July 1, 2021, unless the legislature  
30 reviews and reenacts this provision pursuant to K.S.A. 45-229, and  
31 amendments thereto, prior to July 1, 2021.
- 32 Sec. 2. This act shall take effect and be in force from and after its  
33 publication in the statute book.

HOUSE BILL No. 2593

By Committees on Corrections and Juvenile Justice

2-2

Proposed Amendment to HB 2593 - Finch  
House Committee on Corrections and Juvenile Justice  
Prepared by: Natalie Scott  
Office of Revisor of Statutes  
February 15, 2016

1 AN ACT concerning crimes, punishment and criminal procedure; relating  
2 to evidence; videotaping of certain felony interrogations.  
3

4 *Be it enacted by the Legislature of the State of Kansas.*

5 Section 1. ~~(a) AS USED IN THIS SECTION:~~

6 (1) ~~"Custodial interrogation" means questioning or other conduct by a  
7 law enforcement officer which is reasonably likely to elicit an  
8 incriminating response from an individual and occurs when reasonable  
9 individuals in the same circumstances would consider themselves in  
10 custody.~~

11 (2) ~~"Place of detention" means a fixed location under the control of a  
12 law enforcement agency where individuals are questioned about an alleged  
13 crime or offense, including, but not limited to, a police or sheriff's station,  
14 a courthouse holding facility for defendants in the custody of a jail or  
15 prison, a city or county jail or work release facility, a state prison or a state  
16 security hospital or a facility operated by the department for aging and  
17 disability services for the purposes provided for under K.S.A. 59-29a02 et  
18 seq. and amendments thereto.~~

19 (3) ~~"Video recording" means an audio and video recording that  
20 accurately records a custodial interrogation.~~

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24 2015 Supp. 21-5401, and amendments thereto, murder in the first degree,  
25 as defined in K.S.A. 2015 Supp. 21-5402, and amendments thereto,  
26 murder in the second degree, as defined in K.S.A. 2015 Supp. 21-5403,  
27 and amendments thereto, or rape, as defined in K.S.A. 2015 Supp. 21-  
28 5503, and amendments thereto. The recording shall include the giving of  
29 any required warning, advice of the rights of the individual being  
30 questioned and the waiver of any rights by the individual. If the defendant  
31 elects to make or sign a written statement during the course of a custodial  
32 interrogation, the making and signing of the writing shall be recorded. The  
33 recording shall not end until the interrogation is concluded.~~

34 (c) ~~A video recording of a statement under subsection (b) is not  
35 required if the oral, written or sign language statement was made:~~

36 (1) ~~During an interrogation that was not recorded as required by~~

- (a) All law enforcement agencies in this state shall adopt a detailed, written policy relating to the videotaping of certain interrogations.
- (b) All law enforcement agencies in this state shall collaborate with the elected county or district attorney in their jurisdiction to adopt written policies regarding videotaping of custodial interrogations. These policies shall be made available to all officers of such agency.
- (c) Policies adopted pursuant to this section shall be implemented by all Kansas law enforcement agencies within two years after the effective date of this act. The policies shall be available for public inspection during normal business hours.
- (d) The policies adopted pursuant to this section shall include, but not be limited to, identifying the circumstances under the law enforcement agency should pursue the video recordation of custodial interrogations."



1 subsection (b) because video recording was not feasible;  
2 (2) spontaneously and not in response to a question;  
3 (3) voluntarily, whether or not the result of an interrogation, and the  
4 statement has a bearing on the credibility of the accused as a witness;  
5 (4) after questions which are routinely asked during the processing of  
6 the arrest of a suspect;  
7 (5) in an interrogation outside the state of Kansas;  
8 (6) at a time when the interrogators are unaware that an offense  
9 covered by subsection (b) has occurred; or  
10 (7) at a time when the person being interrogated is not a suspect for  
11 the offense to which the statement relates while the person is being  
12 interrogated for an offense other than an offense specified in subsection  
13 (b).

14 (d) If the court finds by a preponderance of the evidence that the  
15 defendant was subjected to an interrogation in violation of this section, the  
16 defendant shall be entitled to a jury instruction on the failure to record the  
17 interrogation. If the defendant requests such an instruction, the court shall  
18 instruct the jury that it is the law of Kansas to make a video recording of a  
19 custodial interrogation of a person suspected of committing the offense  
20 charged.

21 (e) Every video recording required under this section shall be  
22 preserved until the defendant's conviction for an offense relating to the  
23 statement is final and all direct appeals are exhausted, or until the  
24 prosecution of offenses related to the recorded statement is barred by law,  
25 whichever occurs later.

26 (f) Every video recording of any statement as required by this section  
27 shall be confidential and exempt from the Kansas open records act in  
28 accordance with K.S.A. 45-221, and amendments thereto. The provisions  
29 of this subsection shall expire on July 1, 2021, unless the legislature  
30 enacts and reenacts this provision pursuant to K.S.A. 45-229, and  
31 amendments thereto, prior to July 1, 2021.

32 Sec. 2. This act shall take effect and be in force from and after its  
33 publication in the statute book.