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April 13, 2007

Honorable Elaine Alquist
Member of the California Senate
State Capitol, Room 5080
Sacramento, CA 95814

Dear Senator Alquist:

The California Peace Officers' Association and the California Police Chiefs Association have looked closely at Senate Bill 511 and regret that they must oppose this legislation. We have a number of concerns with the bill:

1. The bill appears to be limited to an individual "suspected" of certain crimes. Although the intent is to focus the bill, it actually may create its own set of confusing issues: Suspected, *at what point?* From the outset? At some point during questioning about another offense, based on the suspect's statements (as often happens)? What if police suspect only a crime not listed in 667.5(c), but the DA files one that is? Does the cautionary instruction apply because the person was "accused" of a qualifying offense, though at the time of questioning the officer did not correctly anticipate this?
2. Similarly, the bill applies to interrogation of one who is "accused" of the crimes. Again, a number of issues are raised: Accused, *by whom?* By the victim? By private person's arrest for the specified offense, though investigation unfounds it? By police booking charges? In the DA's complaint or the Grand Jury's indictment?
3. The bill includes all homicides. Does this language mean that recording will be required in misdemeanor vehicular manslaughter cases?
4. The bill provides that the questioning shall be recorded "in its entirety." This could be an invitation to litigate issues of what transpired off-tape and as tape was being turned over or reloaded. If the interrogation is over, the tape is turned off, and then the suspect or the officer says something else, is there a violation?
5. The bill requires that tapes must be kept until habeas limits are exhausted, which is 15-20 years or never, if factual innocence is later claimed. The archiving problem created by this provision is nearly overwhelming.
6. Under SB 511, tapes must be archived until the statute of limitations runs on uncharged crimes. But, some crimes have no statute of limitations. Even if the person was "suspected" and then cleared or the crime unfounded, does the agency still has to archive these tapes forever?

7. Under Senate Bill 511, officers are "required" to comply with this statute. Does this make them subject to criminal prosecution under GC § 1222 if they don't? Will they be subject to civil liability under *Carlo v. Chino* (9th Cir. 1997) 105 F.3d 493, 499-502, for failing to comply with a state mandate that creates a liberty interest on the part of a prisoner?

8. The bill provides one reason for failing to record (in proposed § 859.5(b)(1)) is that recording equipment was unobtainable "during the period of time that the defendant could be lawfully detained." This makes no provision for emergencies and rescues—suppose a terrorist bomber or child kidnapper is arrested and although recording equipment will be available later during his 48-hour legal detention, it isn't immediately available when officers need to ask questions to prevent death and destruction. Under this section as written, an officer would have to wait until recording equipment was available—perhaps many hours later—to conduct questioning.

9. The exact remedy for non-compliance is left unwritten by the Legislature and is deferred to a subsequent Judicial Council formulation of a jury instruction. Since that jury instruction has not yet been devised and could presumably be revised from time to time by the Judicial Council, there is no way of knowing at present exactly how strong the sanction will be. This is a partial delegation of legislative power to a group that has not been elected to make law.

10. Section 859.5(e) requires the court to make a finding as to whether or not the interrogation failed to comply with this mandate or fit into one of the exceptions. This means a new hearing—even in those cases where there is no other confession-admissibility hearing necessary because the suspect validly waived Miranda and makes no claims of coercion. This multiplies the litigation of serious criminal cases, slowing down the process, and introducing new grounds for appeal, all further delaying justice.

11. As revised from the language of last year's bill, the definition of "custodial interrogation" means questioning at a place of detention where Miranda advice is "required." This raises another litigation issue, since the question of whether or not Miranda warnings are required will have to be litigated in every case where recordings were not made, again multiplying and expanding the litigation and introducing new grounds for appeal. Numerous state and federal cases hold, for example, that no new warning is required where the suspect has previously waived to another officer, or on another case, within a reasonably contemporaneous period of time. This would mean that the second officer—who may be asking questions about the more serious case—would not have to give warnings, and so would presumably not have to record the interrogation. But this issue will have to be litigated before the trial judge and reviewed on appeal. Many other similar problems exist on the issue of whether or not warnings are required. Pretrial motions and hearings, as well as appellate challenges to trial court rulings, will be dramatically increased.

12. The test of "custodial interrogation" also includes the condition that "a reasonable person in the defendant's position would believe that he or she is in custody." This is not the constitutional test, for two significant reasons: (1) the test is not whether a person would subjectively believe he or she is in custody, but whether a person would be objectively justified in believing he or she is in custody. ("Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California* (1994) 511 US 318, 323.) Also, (2) the constitutional test does not use a person "in the defendant's position" as the test, since the suspect may be a guilty person with different apprehensions than an innocent reasonable person, and "The 'reasonable person' test presupposes an innocent person." (*Florida v. Bostick* (1991) 501 US 429, 438.) By deviating from the constitutional standards, this bill forces officers and judges

to use and apply two different tests for deciding interrogation issues, which necessitates additional training, creates confusion and invites error.

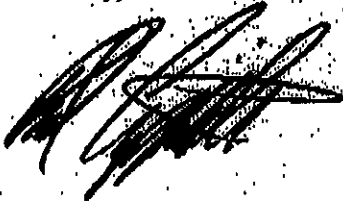
13. The bill speaks of retaining the recording of the interrogation until "the prosecution of the defendant is barred by law." (859.5(a)(3)) When the recording is made, the person being questioned is not usually a charged "defendant," but is merely a "suspect." If charges are not filed, the suspect never becomes the defendant. This seems to mean that tapes need not be kept of interrogations of uncharged suspects. And if the case is time-barred due to the statute of limitation, the person cannot ever become a "defendant." Therefore, how could the prosecution of a "defendant" be barred by law?

14. Video tape, if used, must "capture images" of both suspect and officers. What kinds of images? Visage? Profile? Is it enough if the tape shows everyone's back and the back of their heads? And if video recording technology that does not employ "videotape" is used, do these same requirements apply?

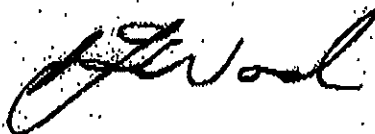
15. Since this bill creates a state mandate, will the State pay all costs to state, county and city agencies for purchasing, maintaining and replacing recording rooms and equipment and supplies, for the cost of purchasing, duplicating, storing and retrieving recording tapes and discs, and for the cost of training officers to comply with the statute?

It remains desirable to have tapes of interrogations, whenever it is practical to obtain them. However, this bill is proposed without any recital of documented, false, oral, recent, California confessions that would warrant imposing such a requirement that could cause guilty murderers and other violent criminals to escape justice. From the standpoint of protection of the public safety, it does not appear to be sound policy to impose greater restrictions on police and greater uncertainty on criminal trials without a corresponding showing of compelling need.

Sincerely,



Paul Cappitelli
President
California Peace Officers Association



Richard Word
President
California Police Chiefs Association

CC: Allison Anderson, Chief Counsel, Senate Committee on Public Safety.