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Response to Opposition Letters to S.B. 511 (Alquist), Recording of Police Interrogation.

The opposition letters filed by the California Peace Officers Association [CPOA] and the California Police Chiefs Association [CPCA], San Bernardino County Sheriff Gary Penrod [SBCS], and the California State Sheriffs' Association [CSSA] raise numerous objections, many of which are actually addressed to the previous version of this legislation [S.B. 171] and have been amended or changed in the current version of the bill. Those changes will be noted in addressing the objections in the order in which they appear.

1. CPOA/CPCA question the use of the term "suspected," suggesting it may create confusion as to what the person is suspected of or when suspicion arises to trigger the recording requirement. The Governor raised a similar objection in his veto message with respect to S.B. 171. The current version of S.B. 511 directly addresses this concern by defining "suspected" in Section 859.5(d)(5):

A person is "suspected of" committing a homicide or violent felony, for purposes of this section, if law enforcement officers have reasonable cause, at the time of interrogation, to believe that the person committed a homicide or violent felony.

"Reasonable cause" is a well accepted legal term creating an objective standard which protects an officer who is acting in good faith. See, e.g., California Penal Code Section 11162.5(d) ("Reasonably suspects" means that it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training or experience, to suspect.)

CPOA/CPCA also asks "What if police suspect only a crime not listed in 667.5(c), but the DA files one that is?" The reference to Section 667.5(c) relates to S.B. 171. The current definition of which crimes are included in S.B. 511 is contained in Section 859.5(a)(1). Again, this question is directly addressed in the exception to the recording requirement spelled out in Section 859.5(b)(6):

The law enforcement officers conducting or contemporaneously observing the custodial interrogation reasonably believed that the crime of which the person was suspected was not among those listed in paragraph (1) of subdivision (a).

Gerald F. Uelmen, Executive Director
Chris Boscia, Executive Assistant

900 Lafayette Street
Suite 608
Santa Clara, CA 95050

PHONE (408) 554-5002
FAX (408) 554-5026
WEB SITE <http://www.ccfaj.org>

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Thus, the subsequent filing of a charge of homicide or a violent felony would not retroactively require the recording of interrogation which took place before such crimes were reasonably suspected.

2. CPOA/CPCA questions the lack of definition of the alternative term “accused,” in requiring the recording of interrogation of an individual who “is suspected of committing or accused of a homicide or violent felony.”

The California Penal Code currently defines accusatory pleadings to include the complaint, the information, the indictment, and any citation or notice to appear issued on a form approved by the Judicial Council. California Penal Code Section 959.1(b). Since any such accusatory pleading requires reasonable cause, the term “accused” would not encompass any individual who was not already included by being “suspected.” The existence of an accusatory pleading would merely short-circuit the need to inquire into the existence of reasonable suspicion.

3. CPOA/CPCA questions whether the inclusion of all homicides would include misdemeanor vehicular homicide cases.

Since the definition of misdemeanor vehicular homicide, California Penal Code Section 192(c)(2), is in Chapter 1 of Title 8 of the Penal Code, it would be included in the current version of S.B. 511. If there are policy reasons to exclude misdemeanor vehicular homicides, the bill could be easily amended to insert “felonious” or “felony” before “homicide” in each place where the word “homicide” appears.

4. CPOA/CPCA suggests that the requirement to record interrogation “in its entirety” invites litigation over what transpired off-tape while reloading or turning over a tape, or after the interrogation is over.

S.B. 511 requires the recording of any “custodial interrogation.” Custodial interrogation is carefully defined in Section 859.5(d)(1) to mean “express questioning or its functional equivalent that is conducted by a law enforcement officer from the time that the suspect is, or should be, informed of his or her rights to counsel and to remain silent, until the time that the questioning ends.” If an officer continues questioning after the tape is turned off, the interrogation is not over. If a suspect volunteers a statement that is not responsive to express questioning or its equivalent, the requirement of recording does not apply. Litigation will only be invited if officers continue custodial interrogation when the tape is not running. Officers will be trained to assure that off-tape interrogation does not occur.

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5. CPOA/CPCA objects that the requirement of preservation of the tapes in Section 859.5(a)(3) creates a “nearly overwhelming” archiving problem.

The current language of S.B. 511 anticipates this problem by permitting the interrogating entity to make copies of the electronic recording “in a different format.” This will permit the conversion of tapes to digital format, which takes up very little storage space. The Commission collected information on the available technology of digital storage. See <http://www.ccfaj.org/rr-false-fed.html> Many law enforcement agencies already preserve police reports, scientific evidence and recordings indefinitely, to preserve their ability to respond to false claims of misconduct. California Penal Code Section 1417.9 currently requires preservation of biological material “for the period of time that any person remains incarcerated” in the case. Thus, the archiving problem is hardly overwhelming, and in fact will become even easier with advancing technology.

6. CPOA/CPCA asks whether archiving would be required until the prosecution of the defendant for the offense is barred even in cases where prosecution is never barred (e.g., murder) and even in cases where the suspect is cleared and not charged.

The simple answer is yes. The selective destruction of some tapes and not others would be fraught with peril, and result in very little savings in time or space. The prosecution of homicide cases twenty or thirty years after the initial investigation based on DNA “cold hits” has become a common occurrence in California. The destruction of recorded interrogations in such cases would seriously compromise the fairness of subsequent prosecutions.

7. CPOA/CPCA asks whether the requirement that officers comply with S.B. 511 could give rise to criminal prosecution or civil liability for failure to comply with a state mandate under *Carlo v. Chino*?

California Government Code Section 1222 provides:

Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor.

It is unlikely that Section 1222 could be applied to the S.B. 511 requirement that an officer conducting a custodial interrogation make an electronic recording. Enforcement of this requirement is not contemplated by civil or criminal liability of the individual officer, but by a cautionary instruction to the jury in considering the results of an

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unrecorded interrogation. An apt analogy would be the enforcement of search and seizure requirements by means of the exclusionary rule. If an officer fails to give notice of his authority and purpose prior to forcible entry to execute a search warrant, pursuant to Penal Code Section 1531, the evidence may be suppressed. But no officer has ever been criminally prosecuted for that failure.

Even if Section 1222 were applied to an officer's failure to record a custodial interrogation, it would not apply to an officer who negligently failed to record a custodial interrogation under S.B. 511. It would only apply to an officer who, knowing that the law requires recording, deliberately chose not to do so.

In *Carlo v. Chino*, 105 F.3d 493, 499-502 (9th Cir. 1997), the court upheld a trial court's finding that a law enforcement officer had violated the defendant's 14th amendment liberty interests by denying a statutorily required post booking telephone call, because incommunicado detention deprives one of a substantial liberty interest. It is highly unlikely that the rationale of *Carlo v. Chino* could be applied to S.B. 511, because the statute does not mandate the recording of interrogation; it merely provides that failure to do so will result in a cautionary instruction to the jury. In subsequent cases, the Ninth Circuit Court of Appeals has limited the doctrine of *Carlo v. Chino* to statutes that mandate a particular outcome, such as the explicit requirement that arrestees be allowed to make three telephone calls within three hours of arrest. *Valdez v. Rosenbaum*, 302 F.3d 1039 (9th Cir. 2002).

8. CPOA/CPCA suggests that the exception in Section 859(b)(1), that "Access to equipment required to electronically record an interrogation could not be obtained during the period of time that the defendant could be lawfully detained" might not apply to emergencies and rescues, when immediate questioning is needed to prevent death and destruction. Both SBCS and CSSA raise a similar concern about the need for immediate questioning at the scene, that may save a child's life.

First, such questioning would not even come within the S.B. 511 definition of custodial interrogation, because it would fall within the well-recognized "public safety" exception under which a Miranda warning need not be given.

See *New York v. Quarles*, 467 U.S. 649 (1984). Section 859(d)(1) of the bill defines custodial interrogation to be questioning from the time the suspect is, or should be, informed of his or her rights to counsel and to remain silent, until the time that the questioning ends. Thus, questioning conducted under circumstances where no Miranda warning is required, such the public safety examples offered, would not be included within the recording requirement.

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Secondly, even if such questioning were included, Section 859(b)(7) presents an even broader exception to the recording requirement that “Exigent circumstances existed which prevented the making of, or rendered it not feasible to make, an electronic recording of the custodial interrogation.” Surely the circumstances described in the opposition letters would qualify as exigent circumstances.

9. CPOA/CPCA objects to the delegation of responsibility to draft a cautionary jury instruction to the Judicial Council, arguing that would be an unconstitutional delegation of legislative power.

S.B. 511, however, would very explicitly define the remedy for failure to comply with its recording requirements: the jury would be advised “to view the statements made in that custodial interrogation with caution.” Section 859(c). The Judicial Council is merely asked to develop a standard instruction in appropriate form to convey that advice. Like every other CALCRIM recommended jury instruction, the instruction does not enact law, but merely declares existing law in plain language that juries can understand.

10. CPOA/CPCA suggests that the requirement of a finding of a violation of the recording requirement would require evidentiary hearings that would introduce new delays in the administration of criminal justice.

The need for a hearing to determine whether the recording requirement has been violated would occur only in the unusual case where a recording was not made. It should, of course, be assumed that the usual course of police investigations will be in full compliance with the law, and in the vast majority of cases, there will be a recording which fully complies with the law. Evidentiary hearings would be required only in cases where an exception to the recording requirement is asserted.

The existence of recordings of police interrogation will actually increase the speed and efficiency of criminal litigation. Without recordings, courts are required to resolve contentious disputes about what was said by whom, relying on the oral testimony of opposing witnesses. The existence of tape recordings will reduce spurious claims of coercion and lead to pretrial disposition of cases without the need for evidentiary hearings at all.

11. CPOA/CPCA similarly suggests evidentiary hearings will be required to determine whether Miranda warnings were “required,” triggering the S.B. 511 definition of “custodial interrogation.” Section 859.5(d)(1).

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The definition of “custodial interrogation” in S.B. 511 mirrors the definition utilized by the Courts in administering the requirement of *Miranda v. Arizona*. If *Miranda* requirements were not met, there is likely to be a suppression motion and evidentiary hearing whether the interrogation was recorded or not. Thus, it is difficult to imagine how the recording requirement would increase the need for evidentiary hearings. The existence of a tape recording would resolve any disputes as to whether an appropriate warning was given and a waiver took place, thus reducing the burdens of evidentiary hearings that are currently occurring.

12. CPOA/CPCA objects to inclusion of a condition that “a reasonable person in the defendant’s position would believe that he or she is in custody” in the definition of “custodial interrogation,” since this does not accurately reflect the constitutional test utilized by the courts.

This condition does not appear in the current definition of custodial interrogation in Section 859.5(d)(1) of S.B. 511.

13. CPOA/CPCA objects to the use of the term “defendant” in the requirement that recordings be retained, Section 859.5(a)(3), since this may not include a suspect who was never charged.

This is a valid objection, and could be the source of confusion in implementing S.B. 511. The problem could be eliminated simply by removing any reference to “the defendant” from the language used in Section 859(a)(3). The Section would then read:

“(3) The interrogating entity shall not destroy or alter any electronic recording made of a custodial interrogation until the time that a conviction for any offense relating to the interrogation is final and all direct and habeas corpus appeals are exhausted or the prosecution of the offense is barred by law. The interrogating entity may make one or more true, accurate, and complete copies of the electronic recording in a different format.”

14. CPOA/CPCA suggests use of the term “capture images” in the recommendation of video taping contained in Section 859.5(d)(2) might cause confusion.

Again, this is a valid objection which is easily remedied. The language should be amended to read “capture facial images.”

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15. CPOA/CPCA ask whether the State will pay the costs of purchasing and maintaining the recording equipment, storage costs and training expenses necessary to implement S.B. 511, since this will be a state mandate.

The Fiscal Summary for S.B. 511 by the Senate Appropriations Committee acknowledges that the bill creates a state mandate, and law enforcement agency expenses in implementing it would be reimbursed by the State's General Fund. Reimbursement as a state mandate will actually be a substantial benefit for the departments that are already recording police interrogation on a voluntary basis.

16. SBCS and CSSA express general concerns with the breadth of S.B. 511, and that "the focus of a trial will be more on the procedures of law enforcement using proper recording devices than on the actions of the suspect."

The nature of the adversary criminal process inevitably focuses trials on the procedures of law enforcement. S.B. 511 will actually benefit law enforcement, by providing new means to rebut false and spurious claims that interrogation was coercive or improperly conducted. As the Commission noted in its Report and Recommendations Regarding False Confessions:

"There are a number of reasons why the taping of interrogations actually benefits the police departments that require it. First, taping creates an objective, comprehensive record of the interrogation. Second, taping leads to the improved quality of interrogation, with a higher level of scrutiny that will deter police misconduct and improve the quality of interrogation practices. Third, taping provides the police protection against false claims of police misconduct. Finally, with taping, detectives, police managers, prosecutors, defense attorneys and judges are able to more easily detect false confessions and more easily prevent their admission into evidence. Indeed, these reasons have convinced over 500 police departments throughout the country to require the taping of interrogations. Thomas Sullivan described for the Commission his efforts to document the police experience with recording custodial interrogations.¹ He informed the Commission that a substantial number of police departments in California already report that they currently record a majority of custodial interrogations.² Experienced detectives

¹ See Sullivan, "Police Experiences with Recording Custodial Interrogations," Special Report No. 1, Northwestern University School of Law Center on Wrongful Convictions (Summer, 2004); Sullivan, "Electronic Recording of Custodial Interrogations: Everybody Wins," 95 Journal of Criminal Law and Criminology 1127 (2005); Sullivan, "Electronic Recordings of Custodial Interrogations," XIX The Chief of Police, No. 6, p. 17 (Nov./Dec. 2005).

² These departments include the County Sheriffs of Alameda, Butte, Contra Costa, El Dorado, Orange, Placer, Sacramento, San Bernardino, San Joaquin, Santa Clara, Ventura and Yolo Counties, and the municipal police departments for Sacramento, San Diego, San Francisco, and San Jose.

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from these departments report great satisfaction with the results of recorded interrogations, which often lead to higher conviction rates, less time litigating unwarranted suppression motions, and fewer claims of police misconduct.”

17. SBCS and CSSA express concern that recording equipment may not be immediately available, especially in large counties where facilities are widely dispersed.

Section 859.5(b)(1) and (7) create exceptions to the recording requirement where “Access to equipment required to electronically record an interrogation could not be obtained during the period of time that the defendant could lawfully be detained,” and where “Exigent circumstances existed which prevented the making of, or rendered it not feasible to make, an electronic recording of the custodial interrogation.” If immediate questioning is necessary to protect a potential victim or protect public safety, S.B. 511 would not apply at all, because Miranda warnings would not be required. Thus, the recording requirement will present no obstacle to appropriate police response to emergencies.

18. SBCS and CSSA express concerns that state prison authorities do not allow recording devices to be brought into prison facilities without special permission.

Full cooperation of the California Department of Corrections can certainly be anticipated in the implementation of S.B. 511. The procedures for quick approval of special permission requests can easily be expedited.

19. Finally, CPOA and CPCA conclude their letter with the objection that a compelling need for the recording of confessions has not been demonstrated without documentation of California cases in which innocent persons were the victims of false confessions.

The Commission’s Report and Recommendations on False Confessions recited the circumstances of numerous California cases in which innocent persons falsely confessed to serious crimes. In some of these cases, the existence of a recording was crucial to establishing the unreliability of the confession:

“The research of Professors Steven Drizin and Richard A. Leo identifies 125 cases which occurred between 1972 and 2002, with 31% of them occurring in the five years previous to 2003. Eight of these examples, or 6% of the sample, occurred in California cases. The overwhelming majority of the false confession cases identified by Drizin and Leo occurred in very serious cases: 81% were homicide cases, followed by 9% rape cases.

Not all false confessions lead to conviction. Of the eight California cases

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identified by Drizin and Leo, none of the defendants charged was convicted of the crimes to which they falsely confessed.

It should be noted, of course, that even where charges do not result in conviction, the pendency of charges based upon false confessions can impose tremendous burdens upon the accused and their families, as well as the victims and their families. The research suggests that false confessions are often extracted from the most vulnerable suspects. One-third (33%) of the Drizin and Leo sample were juveniles; another 22% were mentally retarded, and at least 10% were mentally ill. But even fully competent and rational persons may be victimized by coercive interrogation techniques. Excellent examples were presented to the Commission in the testimony of Harold Hall and Chris Ochoa.

Harold Hall spent nineteen years in prison for a rape and double murder he did not commit in Los Angeles. At the age of eighteen, he was subjected to seventeen hours of interrogation, and confessed when he concluded a confession was the only way he could end the interrogation. In 2004 he was exonerated by DNA testing that established his innocence. He earned his G.E.D. in prison and is now employed by the Los Angeles County Bar Association.

Chris Ochoa was convicted of rape and murder in Texas, and served 12 years in prison before a confession by another person and DNA tests confirmed that he had not committed the crime. Ochoa confessed after he was threatened with execution under the Texas death penalty law if he did not admit his participation in the crime and implicate an innocent co-defendant. After his exoneration, he entered law school and recently graduated from the University of Wisconsin School of Law.

Both Mr. Hall and Mr. Ochoa told the Commission that they doubt they would ever have been convicted if their interrogation had been electronically recorded, and a judge or jury was able to see the coerciveness of the interrogation techniques that were used. While it is unlikely that all false confessions can ever be eliminated, the risk of harm caused by false confessions could be greatly reduced if police were required to electronically record the entirety of custodial interrogations of suspects in serious criminal cases.”