



New York State Justice Task Force

Recommendations Regarding Electronic Recording of Custodial Interrogations

Introduction

The New York State Justice Task Force was convened on May 1, 2009 by Chief Judge Jonathan Lippman of the New York Court of Appeals. Its mission is to eradicate the systemic and individual harms caused by wrongful convictions and to promote public safety by examining the causes of wrongful convictions and recommending reforms to safeguard against any such convictions in the future. Because it is a permanent task force, it is charged not only with the task of implementing reforms but monitoring their effectiveness as well. The Justice Task Force is chaired by Janet DiFiore, Westchester County District Attorney, and the Honorable Theodore T. Jones, Associate Judge, New York Court of Appeals. Task Force members include prosecutors, defense attorneys, judges, police chiefs, legal scholars, legislative representatives, executive branch officials, forensic experts and victims' advocates. The differing institutional perspectives of Task Force members allow for thorough consideration of the complex challenges presented by the occurrence of wrongful convictions and the evaluation of recommendations to prevent them in the future, while also remaining mindful of the need to maintain public safety.

Recognizing the significant role that a false confession may play in leading to a wrongful conviction, the Justice Task Force created a Subcommittee to examine the issue of false confessions and recommend possible reforms aimed at preventing them in the future. In furtherance of this pursuit, the Subcommittee reviewed relevant national and local studies, articles and reports, examined cases involving false confessions in and outside of New York, and reviewed various state statutes relating to the electronic recording of interrogations, as well as legislation proposed by the Legal Aid Society, the Innocence Project, the New York State Bar Association, and the National Conference of Commissioners of Uniform State Laws. The Subcommittee also heard from numerous speakers, including academics, psychologists, and law enforcement representatives that have implemented reforms in an effort to identify and prevent false confessions.

After almost a year of examination by the Subcommittee on Statements of the Accused, the full Task Force began its consideration of possible reforms and

ultimately concluded that the most critical reform involved electronic recording of interrogations, as described further below.

Discussion

The Task Force's consideration of possible reforms to prevent false confessions was informed by the Subcommittee's analysis of the factors that have been found to be present in certain wrongful conviction cases involving false confessions, including dispositional factors such as age and cognitive or intellectual disability, and situational factors such as prolonged detention and isolation, presentation of false evidence, and minimization.¹

The reform most universally urged by academics and others and most commonly adopted in other jurisdictions to identify and prevent false confessions is electronic recording of interrogations. Indeed, there was unanimous agreement on the Task Force about the many benefits of recording interrogations. The Task Force agreed that recording can aid not only the innocent, the defense and the prosecution, but also enhances public confidence in the criminal justice system by increasing transparency as to what was said and done during the interrogation. Indeed, among its many benefits, recording helps identify false confessions; provides an objective and reliable record of what occurred during an interrogation; assists the judge and jury in determining a statement's voluntariness and reliability; prevents disputes about how an officer conducted himself or treated a suspect, and serves as a useful training tool to police officers.

In light of the consensus about the benefits of recording, the Task Force focused its discussion on more specific issues regarding electronic recording, including whether recording should be legislatively mandated; when recording should begin and what must be recorded; what exceptions should apply to the recording requirement; and what consequences should flow from an unexcused failure to record. The fundamental issue for the Task Force was whether to recommend mandatory recording of interrogations, continue to allow it to be voluntary or give law enforcement additional time to continue implementing it on a voluntary basis before revisiting the issue. During its examination of the issue, the Task Force members learned about the extensive and laudable efforts that law enforcement throughout the state had made to implement recording.² Indeed, as

¹ See Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli.H. Gudjonsson, Richard A. Leo, and Allison D. Redlich, Police-Induced Confessions: Risk Factors and Recommendations, 34 *Law & Hum. Behav.* 3, 16-22 (2009).

² On December 14, 2010, the New York State District Attorneys Association announced the adoption of voluntary guidelines relating to the electronic recording of interrogations, which were developed in conjunction with the New York City Police Department, the New York State Police, the New York State Chiefs of Police Association, and the New York State Sheriffs' Association (the "New York State Guidelines for Recording Custodial Interrogations").

of May 2011, the New York State Division of Criminal Justice Services had invested more than \$2 million in federal grants to state agencies and counties to support video recording of custodial interrogations, with an additional \$200,000 contributed by the New York State Bar Association. As a result, 58 of the state's 62 counties now have video recording capabilities. Nonetheless, there remained a significant concern that mandatory recording of interrogations throughout the state would create an "unfunded mandate," particularly in light of the state's current budget crisis.

In spite of this concern, the Task Force ultimately determined that electronic recording of interrogations was simply too critical to identifying false confessions and preventing wrongful convictions to recommend as a voluntary, rather than mandatory, reform. The Task Force therefore chose to recommend legislation requiring recording in certain situations, focusing on serious crimes in which lengthy interrogations which could result in false confessions were more likely to occur.

Although the Task Force recommended certain limits to a recording requirement, as outlined further below, there was agreement among members that the recording mandate should be viewed as a "floor," and that law enforcement agencies should be encouraged to record interrogations beyond those required by the proposed statute. In addition, in light of the already-strained budgets of police and district attorneys' offices across the state, the Task Force agreed that any legislation requiring the recording of custodial interrogations must be accompanied by a declaration regarding the need for adequate funding.

Recommendations³

Legislation Requiring the Recording of Custodial Interrogations

I. Scope of What Must Be Recorded

The Task Force recommends that, unless an exception applies, all custodial interrogations of suspects of qualifying offenses occurring at a place of detention⁴ must be recorded. The Task Force further recommends that such interrogations take place in an appropriate setting suitable for video recording of such interrogations.

³ The twenty-two voting members of the Task Force strived to reach consensus wherever possible; however, not all recommendations were made unanimously.

⁴ "Place of detention" is defined as a police station, correctional facility, holding facility for prisoners, prosecutor's office, or other facility where persons are held in detention in connection with criminal charges which have been or may be filed against them.

II. Qualifying Crimes

The Task Force recommends that the recording requirement apply to interrogations of suspects relating to the investigation of all A-1 non-drug felonies, all violent B felonies codified in Section 125 of the Penal Law (homicide and related offenses), and all violent B felonies codified in Section 130 of the Penal Law (sex offenses).

III. Overt vs. Covert Recording

With respect to whether recording should be overt or covert, the Task Force recommends that the recording legislation provide that the decision about whether to record covertly or overtly be left to the discretion of individual police departments, but require that if asked by a suspect if he is being recorded, the police officer answer truthfully.

IV. Exceptions to the Recording Requirement

The Task Force also recommends that there be an exception to the recording requirement when the prosecution can show “good cause” for the failure to record. The Task Force further recommends that the recording legislation provide that “good cause” may include, but is not limited to:

- equipment malfunction;
- unavailability of equipment because it is already in use;
- when the suspect asks not to be recorded, or refuses to participate in the interrogation if it is recorded, and that refusal is itself memorialized;
- when the recording would jeopardize the safety of any person or reveal the speaker to be a confidential informant;
- when an inadvertent error occurs; and/or
- when the interviewer is not aware that a qualifying offense has occurred or that the interviewee is a suspect of a qualifying offense.

V. Consequences for Unexcused Failure to Record

The Task Force recommends that the hearing court consider the failure to record as a factor in determining the admissibility of the relevant statement at trial. It also recommends that, in the event there is a trial, a cautionary jury instruction must be given by the trial court, at the request of the defendant, if the unrecorded statement is admitted.

January 2012