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October 26, 2001

Honorable Kathy Patterson
Chairman, Judiciary Committee
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Suite 109
Washington, D.C., 20004

RE: Supplemental Comments Concerning Bill 14-3, "The Miranda Codification Act Of 2001."

Dear Chairman Patterson,

I am writing you in my capacity as the president of the District of Columbia Association of Criminal Defense Lawyers, (DCACDL), a local affiliate of the National Association of Criminal Defense Lawyers, to continue our support for that portion of Bill 14-3, "The Miranda Codification Act Of 2001" which would require the police to record all of their interrogations of suspects. The attached written comments¹ are intended to supplement our previous written comments as well as the oral comments which I made, on behalf of our organization, at the public hearing on Friday, October 12, 2001.

We hope you find these comments helpful. Thank you for your consideration.

Respectfully

Richard K. Gilbert

¹ We have provided the Committee with 20 copies of the statement, plus for the convenience of Councilmember Ambrose a special copy printed in 24 point Arial Black.

SUPPLEMENTAL STATEMENT OF
THE DISTRICT OF COLUMBIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF BILL 14-3,
“THE MIRANDA CODIFICATION ACT OF 2001”

On behalf of the District of Columbia Association of Criminal Defense Lawyers, (DCACDL), I am pleased to submit these additional comments to supplement our written and statement and my oral testimony before the Committee on the Judiciary on October 12, 2001 in support of Bill 14-3, “The Miranda Codification Act Of 2001.” As before, we wish to focus on Section 3 of the Bill, which would require the police to make recordings, generally on videotape, of their complete interviews with people suspected of committing crimes. Requiring the entire interrogation process to be recorded, gives police officers an incentive to conduct their interrogations in accordance with accepted, and legal, practices, and failing in that, it would enable judges and juries to make a meaningful review of the conduct of the interrogation in order to determine whether confessions had been obtained through processes that cast doubt on their reliability.

At the Committee's hearing on this bill on Friday, October 12, 2001, there appeared to be widespread support for a practice of recording police interrogations of suspects in their entirety. All of the public witnesses who addressed the legislation supported it. Moreover, U.S. Attorney Roscoe C. Howard, Jr., expressed his enthusiasm about videotaping but did not favor a legislative requirement that would exclude any statement or confession taken without complying with the recording requirements. He took exception to the provision that would make a defendant's statement inadmissible if the interrogation leading to the statement had not been videotaped as required. He expressed particular concern that equipment breakdowns might result in the exclusion of otherwise probative testimony.

Likewise, Assistant Police Chief Terrance W. Gainer indicated that the Metropolitan Police might be willing to adopt a recording requirement even without legislation. He stated that all MPD interrogation rooms were already furnished with videotaping equipment, but he expressed concern about the costs associated with recording interrogations conducted at other locations and also the costs of retaining the videotapes. He also expressed concern that having a camera or tape recorder turned on at the beginning of an interview might cause suspects to be reticent.

The District of Columbia Association of Criminal Defense Lawyers welcomes this generally positive response to the idea of videotaping. I write principally to suggest why we continue to believe, however, that it is important to have an enforceable legislated requirement. However, we also suggest some possible amendments to the bill that would respond to the particular concerns expressed by Mr. Howard and Chief Gainer, and hopefully make a legislative solution more palatable to them.

Exclusionary Rule

Mr. Howard objects to an “exclusionary rule” on the grounds that it prevents the jury from hearing relevant evidence. On the contrary, requiring the police to videotape interrogations from the outset permits the jury to hear all the relevant evidence, not just what the police want the jury to hear or believe. It is an unfortunate, but undeniable, fact, gleaned from over two hundred years of experience, that at least some of the police will simply disregard “best practices,” exhortations from courts, legislatures, and their executive superiors, and even ethical constraints in the pursuit of confessions and other evidence they believe will convict a guilty person, unless that evidence is denied them in court. For that reason alone, we believe the “exclusionary rule” in the legislation should remain.

Mr. Howard has asserted that 18 United States Code §3501 precludes the Council from enacting legislation which would exclude confessions when the police do not record the interrogation. While the Committee will presumably consult its own counsel on this legal issue, we suggest otherwise. Section 3501 reads in pertinent part as follows:

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession. (emphasis added)

We respectfully suggest that the Council may effectively require the police to record their interrogation by merely adding language to the effect that, with the exceptions noted below, a confession taken without recording the entire interrogation shall be presumed to be involuntary.²

² 18 U.S.C. § 3501 also contains language as follows:

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any

However, in response to Mr. Howard's legitimate concerns about inadvertent failures, our proposed revision also recognizes the possibility of equipment malfunctions or unavailability, and permits the admission of confessions in cases where malfunction or unavailability was "excusable."

Cost

Although Chief Gainer said that all interrogation rooms are equipped with video recording equipment, he mentioned that interrogations are sometimes conducted in living rooms or hospital rooms. He expressed concern about having to have videotaping equipment at such locations. Such interrogations are extremely rare because accepted police practice is to control the interrogation environment as much as possible. Furthermore, the police simply do not (or should not) spontaneously interrogate suspects; preparation is required. Consequently, to give some operational flexibility, but to remain true to the clear intent of the legislation, we think the legislation should be amended, as indicated below, to make it clear that in such situations, as in the case of a police vehicle (now covered by section 3(c)), an audio recording is acceptable.

Reticence

Although studies have shown that the presence of recording equipment does not significantly discourage suspects who are otherwise willing to talk, the police have expressed a concern that some suspects might be willing to submit to questioning, but still be reluctant to talk before a camera or microphone. While it should be noted that there is no legal requirement in the District of Columbia that a person consent to recording, we believe the concerns of the police in this regard could be addressed by adding an additional paragraph to the revision of subsection (a) suggested below which would permit the police to turn off the recording equipment after first recording the warnings prescribed by section 2(a) and the person's statement that he or she is willing to answer questions, but objects to having the interrogation recorded.

time at which the person who made or gave such confession was not under arrest or other detention.

This language, which the proposed legislation would not effect, makes it clear that the presumption that an unrecorded confession is involuntary applies only to custodial interrogations.

Proposed Amendments³

We suggest that section 3(a) be amended to read as follows:

"(a) A police officer who interrogates a person suspected of committing an offense shall electronically record the entire interrogation and must inform the suspect that the interrogation is being recorded. The recording shall include the warnings prescribed by section 2(a) and the accused's waiver of rights, if applicable. If such warnings and waiver were given before the commencement of electronic recording, they shall be repeated at the beginning of the recorded interrogation. All persons who are present at any time during the interrogation shall be identified on the recording.

(1) If the interrogation takes place in a station house, district headquarters, Department headquarters, or other fixed location where such interrogations are commonly conducted, the recording shall be a video recording.

(2) If, for good cause, the interrogation takes place at another location, including within a police vehicle, the recording shall be a video recording if video recording equipment is available, and otherwise an audio recording.

(3) If the person is willing to answer questions, but objects to having the interrogation recorded, the police officer shall cause to be recorded the warnings prescribed by section 2(a) and the person's statement that he or she is willing to answer questions, but objects to having the interrogation recorded. The officer shall then turn off the recording device."

This revision moves material from sections 3(b)(2) and (4) into section 3(a). We then suggest that section 3(b) be revised so that it refers back to the recording requirements as stated in section 3(a). Restatement of the 3(a) requirements in section 3(b) is unnecessary and confusing, and will become even more confusing if the Committee refines those requirements as suggested above. It should be sufficient to state that a statement should be presumed involuntary if it was obtained in violation of the section 3(a) requirements. The suggested revision is as follows:

"(b) Any oral or written or sign language statement made by the accused as a result of one or more interrogations shall be presumed to be involuntary unless:

(1) The requirements of subsection (a) have been complied with and the recordings are accurate and comprehensible and have not been altered; or

(2) The court finds that failure to satisfy paragraph (1) was caused by the unavailability or malfunction of equipment and that such unavailability or malfunction was excusable."

Section 3(c) would be stricken. Since the above revision of section 3(a) would eliminate any reference to a "place of detention," a conforming amendment to section 3(d) (dealing with preservation of recordings) would be required. We suggest that the preservation requirement apply to "Every electronic recording required by subsection (a)".

We also note that the proposed revision makes the exclusionary rule apply to written as well as "oral or sign language" statements. This change accommodates the criticism offered by Ms. Laura Hankins of the Public Defender Service. The requirement that the entire interrogation be recorded is not limited to cases in which the accused's final statement is oral or sign. There is no reason to limit the enforcement mechanism to such cases.

Conclusion

Every few weeks we read in the newspapers of another prisoner exonerated of a crime after having been convicted and having exhausted his normal appellate remedies. These stories are newsworthy because they challenge one of our most cherished beliefs -- that the American system of criminal justice guarantees that innocent

³ The District of Columbia Association of Criminal Defense Lawyers would again like to give special thanks to Mr. Anthony Partridge, Esq., an attorney retired from active practice who graciously volunteered his time to assist in researching and drafting these comments. For the most part, these proposed amendments were suggested to us by Mr. Partridge.

people will be protected, even at the expense of letting some of the guilty go free. It stands to reason that, for every prisoner exonerated by DNA or other overwhelming evidence, there must be many -- perhaps hundreds -- who were wrongfully convicted but to whom exoneration never comes. In most crimes, there is no biological evidence on which DNA tests can be run. Whether other persuasive evidence of innocence develops is highly fortuitous.

Some of the causes of wrongful convictions are known to us. One of them is that people are persuaded to confess to crimes that they did not in fact commit. Although that may seem incomprehensible, there is simply no question that it occurs, and it is not necessarily a result of violations of the existing rules by police. The bill before you, by opening up interrogations to scrutiny, would provide the opportunity for defense counsel and the court to review the circumstances in which confessions were made. As such, it would make a modest but important reform of the administration of justice in the District of Columbia. The bill may require some fine tuning, but it deserves your enthusiastic support.

Respectfully,

Richard K. Gilbert