

1 AN ACT relating to custodial interrogations by law enforcement.

2 WHEREAS, the National Conference of Commissioners on Uniform State Laws
3 drafted the "Uniform Electronic Recordation of Custodial Interrogations Act" in 2010;
4 and

5 WHEREAS, the following organizations have taken a formal position on the
6 recording of custodial interrogations: American Bar Association, American Civil
7 Liberties Union, American Federation of Police and Concerned Citizens, American
8 Judicature Society, American Law Institute, American Psychological Association, Center
9 For Policy Alternatives, Constitution Project, Innocence Project, International
10 Association of Chiefs of Police, Justice Project, Major Cities Chiefs Association,
11 National Association for the Advancement of Colored People, National Association of
12 Criminal Defense Lawyers, National Conference of Commissioners on Uniform State
13 Laws, National District Attorney's Association, and the National Institute of Military
14 Justice; and

15 WHEREAS, the Kentucky Supreme Court in the 2000 case of *Brashars v.*
16 *Commonwealth* held that while the Kentucky Constitution did not require the electronic
17 recording of custodial interrogations, the Court acknowledged that "widespread recording
18 has its benefits"; and

19 WHEREAS, a federal court in the 2015 case *United States v. Wigginton* overruled a
20 motion to suppress a confession finding that it was voluntary after review of a video of
21 the interview; and

22 WHEREAS, the Innocence Project states that the Drug Enforcement
23 Administration, Federal Bureau of Investigation, and the Bureau of Alcohol, Tobacco,
24 Firearms and Explosives are required by law to record custodial interrogations; and

25 WHEREAS, the Innocence Project lists 25 states that are required by either statute
26 or court decision to record a custodial interrogation by law enforcement; and

27 WHEREAS, the Innocence Project found that many of the nation's more than 360

1 wrongful convictions overturned by DNA evidence involved some form of a false
2 confession; and

3 WHEREAS, recording of custodial interrogations would protect law enforcement
4 from allegations of coercion, ensure that defendants' statements are voluntary, and
5 increase confidence in the criminal justice system;

6 NOW, THEREFORE,

7 *Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

8 ➔SECTION 1. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
9 READ AS FOLLOWS:

10 *As used in Sections 1 to 20 of this Act:*

11 *(1) "Custodial interrogation" means questioning or other conduct by a law*
12 *enforcement officer which is reasonably likely to elicit an incriminating response*
13 *from an individual and occurs when reasonable individuals in the same*
14 *circumstances would consider themselves in custody;*

15 *(2) "Electronic recording" or "recorded electronically" means an audio recording*
16 *or audio and video recording that accurately records a custodial interrogation;*

17 *(3) "Law enforcement agency" means a governmental entity or person authorized by*
18 *a governmental entity or state law to enforce criminal laws or investigate*
19 *suspected criminal activity. This includes a nongovernmental entity that has been*
20 *delegated the authority to enforce criminal laws or investigate suspected criminal*
21 *activity. This does not include a law enforcement officer;*

22 *(4) "Law enforcement officer" means:*

23 *(a) An individual employed by a law enforcement agency whose responsibilities*
24 *include enforcing criminal laws or investigating suspected criminal activity;*

25 *(b) An individual acting at the request or direction of an individual described in*
26 *paragraph (a) of this subsection; or*

27 *(c) An individual elected to a law enforcement position that exists pursuant to*

1 the Kentucky Constitution;

2 (5) "Person" means an individual, corporation, business trust, statutory trust, estate,
 3 trust, partnership, limited liability company, association, joint venture, public
 4 corporation, government or governmental subdivision, agency, or
 5 instrumentality, or any other legal or commercial entity;

6 (6) "Place of detention" means a fixed location under the control of a law
 7 enforcement agency where individuals are questioned about alleged or suspected
 8 crimes. This includes a jail, police or sheriff's station, holding cell, or
 9 correctional or detention facility;

10 (7) "State" means a state of the United States, the District of Columbia, Puerto Rico,
 11 the United State Virgin Islands, or any territory or insular possession subject to
 12 the jurisdiction of the United States; and

13 (8) "Statement" means:

14 (a) An oral or written assertion; or

15 (b) Nonverbal conduct of a person, if it is intended by the person as an
 16 assertion.

17 ➔SECTION 2. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
 18 READ AS FOLLOWS:

19 (1) Except as otherwise provided by Sections 4 to 9 of this Act, a custodial
 20 interrogation, including the giving of any required warning, advice of the rights
 21 of the individual being questioned, or the waiver of any rights by the individual,
 22 shall be recorded electronically in its entirety if the interrogation relates to a
 23 misdemeanor, felony, or public offense described in the Kentucky Revised
 24 Statutes. A custodial interrogation at a place of detention shall be recorded by
 25 both audio and video means.

26 (2) If a law enforcement officer conducts a custodial interrogation to which
 27 subsection (1) of this section applies without electronically recording it in its

1 entirety, the officer shall prepare a written or electronic report explaining the
2 reason for not complying with this section and summarizing the custodial
3 interrogation process and the individual's statements.

4 (3) A law enforcement officer shall prepare the report required by subsection (2) of
5 this section as soon as practicable after completing the interrogation.

6 (4) This section shall not apply to a spontaneous statement made in response to a
7 question asked routinely during the processing of the arrest of an individual.

8 ➔SECTION 3. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
9 READ AS FOLLOWS:

10 A law enforcement officer conducting a custodial interrogation is not required to
11 obtain consent to electronic recording from the individual being interrogated or to
12 inform the individual that an electronic recording is being made of the interrogation.

13 Sections 1 to 9 of this Act do not permit a law enforcement officer or a law
14 enforcement agency to record a private communication between an individual and the
15 individual's lawyer.

16 ➔SECTION 4. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
17 READ AS FOLLOWS:

18 A custodial interrogation to which Section 2 of this Act otherwise applies shall not be
19 required to be recorded electronically if recording is not feasible because of exigent
20 circumstances. The law enforcement officer conducting the interrogation shall record
21 electronically an explanation of the exigent circumstances before conducting the
22 interrogation, if feasible, or as soon as practicable after the interrogation is completed.

23 ➔SECTION 5. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
24 READ AS FOLLOWS:

25 (1) A custodial interrogation to which Section 2 of this Act otherwise applies shall
26 not be required to be recorded electronically if the individual to be interrogated
27 indicates that the individual will not participate in the interrogation if it is

1 recorded electronically. If feasible, the agreement to participate without recording
2 shall be recorded electronically.

3 (2) If, during a custodial interrogation to which Section 2 of this Act otherwise
4 applies, the individual being interrogated indicates that the individual will not
5 participate in further interrogation unless electronic recording ceases, the
6 remainder of the custodial interrogation shall not be required to be recorded
7 electronically. If feasible, the individual's agreement to participate without
8 further recording shall be recorded electronically.

9 (3) A law enforcement officer, with intent to avoid the requirement of electronic
10 recording in Section 2 of this Act, shall not encourage an individual to request
11 that a recording not be made.

12 ➔SECTION 6. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
13 READ AS FOLLOWS:

14 If a custodial interrogation occurs in another state in compliance with that state's law
15 or is conducted by a federal law enforcement agency in compliance with federal law,
16 the interrogation shall not be required to be recorded electronically unless the
17 interrogation is conducted with intent to avoid the requirement of electronic recording
18 in Section 2 of this Act.

19 ➔SECTION 7. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
20 READ AS FOLLOWS:

21 (1) A custodial interrogation to which Section 2 of this Act otherwise applies shall
22 not be required to be recorded electronically if the interrogation occurs when no
23 law enforcement officer conducting the interrogation has knowledge of facts and
24 circumstances that would lead an officer reasonably to believe that the individual
25 being interrogated may have committed an act for which Section 2 of this Act
26 requires that a custodial interrogation be recorded electronically.

27 (2) If, during a custodial interrogation under subsection (1) of this section, the

1 individual being interrogated reveals facts and circumstances giving a law
2 enforcement officer conducting the interrogation reason to believe that an act has
3 been committed for which Section 2 of this Act requires that a custodial
4 interrogation be recorded electronically, continued custodial interrogation
5 concerning that act shall be recorded electronically, if feasible.

6 ➔SECTION 8. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
7 READ AS FOLLOWS:

8 A custodial interrogation to which Section 2 of this Act otherwise applies shall not be
9 required to be recorded electronically if a law enforcement officer conducting the
10 interrogation or the officer's superior reasonably believes that electronic recording
11 would disclose the identity of a confidential informant or jeopardize the safety of an
12 officer, the individual being interrogated, or another individual. If feasible and
13 consistent with the safety of a confidential informant, an explanation of the basis for
14 the belief that electronic recording would disclose the informant's identity shall be
15 recorded electronically at the time of the interrogation. If contemporaneous recording
16 of the basis for the belief is not feasible, the recording shall be made as soon as
17 practicable after the interrogation is completed.

18 ➔SECTION 9. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
19 READ AS FOLLOWS:

20 (1) All or part of a custodial interrogation to which Section 2 of this Act otherwise
21 applies shall not be required to be recorded electronically to the extent that
22 recording is not feasible because the available electronic recording equipment
23 fails, despite reasonable maintenance of the equipment, and timely repair or
24 replacement is not feasible.

25 (2) If both audio and video recording of a custodial interrogation are otherwise
26 required by Section 2 of this Act, recording may be by audio alone if a technical
27 problem in the video recording equipment prevents video recording, despite

1 reasonable maintenance of the equipment, and timely repair or replacement is
2 not feasible.

3 (3) If both audio and video recording of a custodial interrogation are otherwise
4 required by Section 2 of this Act, recording may be by video alone if a technical
5 problem in the audio recording equipment prevents audio recording, despite
6 reasonable maintenance of the equipment, and timely repair or replacement is
7 not feasible.

8 ➔SECTION 10. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
9 READ AS FOLLOWS:

10 If the prosecution relies on an exception in Sections 4 to 9 of this Act to justify a
11 failure to record electronically a custodial interrogation, the prosecution shall prove by
12 a preponderance of the evidence that the exception applies.

13 ➔SECTION 11. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
14 READ AS FOLLOWS:

15 If the prosecution intends to introduce in its case in chief a statement made during a
16 custodial interrogation to which Section 2 of this Act applies which was not recorded
17 electronically, the prosecution, not later than the time specified by Rule 8.20 of the
18 Kentucky Rules of Criminal Procedure, shall serve the defendant with written notice of
19 that intent and of any exception on which the prosecution intends to rely.

20 ➔SECTION 12. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
21 READ AS FOLLOWS:

22 (1) Unless the court finds that an exception in Section 4 to 9 of this Act applies, the
23 court shall consider the failure to record electronically all or part of a custodial
24 interrogation to which Section 2 of this Act applies as a factor in determining
25 whether a statement made during the interrogation is admissible, including
26 whether it was voluntarily made or is reliable.

27 (2) If the court admits into evidence a statement made during a custodial

1 interrogation that was not recorded electronically in compliance with Section 2 of
2 this Act or was not excepted from the electronic recording requirement under
3 Sections 4 to 9 of this Act, the court, on request of the defendant, shall give a
4 cautionary instruction to the jury.

5 ➔SECTION 13. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
6 READ AS FOLLOWS:

7 Each law enforcement agency in this state shall establish and enforce procedures to
8 ensure that the electronic recording of all or part of a custodial interrogation is
9 identified, accessible, and preserved as required by KRS 171.410 to 171.740.

10 ➔SECTION 14. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
11 READ AS FOLLOWS:

12 (1) The Attorney General shall promulgate administrative regulations to implement
13 Sections 1 to 20 of this Act which each law enforcement agency that is a
14 governmental entity of this state shall enforce.

15 (2) The administrative regulations promulgated pursuant to subsection (1) of this
16 section shall include the following:

17 (a) The means by which an electronic recording of a custodial interrogation
18 shall be made;

19 (b) The collection and review of electronic recordings, or the absence of
20 electronic recordings, by supervisors in each law enforcement agency;

21 (c) The assignment of supervisory responsibilities and a chain of command to
22 promote internal accountability;

23 (d) A process for explaining noncompliance with procedures and imposing
24 administrative sanctions for a failure to comply that is not justified;

25 (e) A supervisory system expressly imposing on individuals in specific positions
26 a duty to ensure adequate staffing, education, training, and material
27 resources to implement this Sections 1 to 20 of this Act; and

- 1 (f) A process for monitoring the chain of custody of an electronic recording.
2 (3) The administrative regulations promulgated pursuant to subsection (1) of this
3 section shall contain standards for the angle, focus, and field of vision of a
4 recording device which reasonably promote accurate recording of a custodial
5 interrogation at a place of detention and reliable assessment of its accuracy and
6 completeness.

7 ➔SECTION 15. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
8 READ AS FOLLOWS:

- 9 (1) A law enforcement agency that is a governmental entity in this state which has
10 implemented procedures reasonably designed to enforce administrative
11 regulations promulgated pursuant to Section 14 of this Act and ensure
12 compliance with Sections 1 to 20 of this Act shall not be subject to civil liability
13 for damages arising from a violation of Sections 1 to 20 of this Act.

- 14 (2) Sections 1 to 20 of this Act shall not create a right of action against a law
15 enforcement officer.

16 ➔SECTION 16. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
17 READ AS FOLLOWS:

- 18 (1) In any pretrial or post-trial proceeding, an electronic recording of a custodial
19 interrogation is self-authenticating if it is accompanied by a certificate of
20 authenticity sworn under oath or affirmation by an appropriate law enforcement
21 officer.

- 22 (2) Sections 1 to 20 of this Act shall not limit the right of an individual to challenge
23 the authenticity of an electronic recording of a custodial interrogation under law
24 of this state other than Sections 1 to 20 of this Act.

25 ➔SECTION 17. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
26 READ AS FOLLOWS:

- 27 (1) Sections 1 to 20 of this Act shall not create a right of an individual to require a

1 custodial interrogation to be recorded electronically.

2 (2) Sections 1 to 20 of this Act shall not require preparation of a transcript of an
3 electronic recording of a custodial interrogation.

4 ➔SECTION 18. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
5 READ AS FOLLOWS:

6 In applying and construing Sections 1 to 20 of this Act, consideration shall be given to
7 the need to promote uniformity of the law with respect to its subject matter among
8 states that enact it.

9 ➔SECTION 19. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
10 READ AS FOLLOWS:

11 Sections 1 to 20 of this Act modifies, limits, and supersedes the Electronic Signatures
12 in Global and National Commerce Act, 15 U.S.C. sec. 7001 et seq., but does not
13 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. sec. 7001(c), or
14 authorize electronic delivery of any of the notices described in Section 103(b) of that
15 act, 15 U.S.C. sec. 7003(b).

16 ➔SECTION 20. A NEW SECTION OF KRS CHAPTER 15 IS CREATED TO
17 READ AS FOLLOWS:

18 If any provision of Sections 1 to 20 of this Act or its application to any person or
19 circumstance is held invalid, the invalidity does not affect other provisions or
20 applications of Sections 1 to 20 of this Act which can be given effect without the invalid
21 provision or application, and to this end the provisions of Sections 1 to 20 of this Act
22 are severable.