

LEGISLATIVE COMMITTEE MINUTES

# **HB1540**

# Bill as Introduced

HB 1540-FN - AS AMENDED BY THE HOUSE

16Feb2022... 0616h  
31Mar2022... 1095h

2022 SESSION

22-2712  
04/08

HOUSE BILL            ***1540-FN***

AN ACT                relative to recording custodial interrogations.

SPONSORS:            Rep. Welch, Rock. 13; Rep. Wall, Straf. 6; Rep. Burt, Hills. 39

COMMITTEE:          Criminal Justice and Public Safety

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AMENDED ANALYSIS

This bill requires the recording of custodial interrogations and specifies exceptions in certain circumstances.

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Explanation:        Matter added to current law appears in ***bold italics***.  
                         Matter removed from current law appears [~~in brackets and struck through~~].  
                         Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Twenty Two*

AN ACT relative to recording custodial interrogations.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1 1 New Chapter; Recording of Custodial Interrogations. Amend RSA by inserting after chapter  
2 594 the following new chapter:

3 CHAPTER 594-A

4 RECORDING OF CUSTODIAL INTERROGATIONS

5 594-A:1 Short Title. This chapter may be known and cited as the uniform electronic recordation  
6 of custodial interrogations act.

7 594-A:2 Definitions. In this chapter:

8 I. "Custodial interrogation" means express questioning associated with a formal arrest or a  
9 restraint on freedom that is the functional equivalent of an arrest, or other actions or words by a law  
10 enforcement officer which are reasonably likely to elicit an incriminating response from an  
11 individual and occurs when reasonable individuals in the same circumstances would consider  
12 themselves in custody.

13 II. "Electronic recording" means an audio recording or audio and video recording that  
14 accurately records a custodial interrogation. "Record electronically" and "recorded electronically"  
15 shall have the same meaning.

16 III. "Law enforcement agency" means any entity or part of an entity that employs a law  
17 enforcement officer.

18 IV. "Law enforcement officer" means a sheriff or deputy sheriff of any county, a state police  
19 trooper, constable or police officer of any city or town, a conservation officer, a probation officer, a  
20 parole officer, a corrections officer, or a security officer employed by an educational institution who  
21 has the power to detain an individual.

22 V. "Person" means an individual, corporation, business trust, statutory trust, estate, trust,  
23 partnership, limited liability company, association, joint venture, public corporation, or government;  
24 political subdivision, agency, or instrumentality; or any other legal or commercial entity.

25 VI. "Place of detention" means a fixed location under the control of a law enforcement  
26 agency where individuals are questioned about alleged crimes or status offenses. The term includes  
27 a jail, police or sheriff's station, holding cell, correctional or detention facility, police vehicle, and a  
28 school in the case of a juvenile.

1 VII. "State" means a state of the United States, the District of Columbia, Puerto Rico, the  
2 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the  
3 United States.

4 VIII. "Statement" means a communication whether oral, written, electronic, or nonverbal.

5 594-A:3 Electronic Recording Equipment.

6 I. Except as otherwise provided in RSA 594-A:4, a custodial interrogation, including the  
7 giving of any required warning, advice regarding the rights of the individual being questioned, and  
8 the waiver of any rights by the individual, shall be recorded electronically in its entirety. A custodial  
9 interrogation at a jail, police or sheriff's station, holding cell, or correctional or detention facility  
10 shall be also recorded. A custodial interrogation at any other place of detention shall be recorded by  
11 audio means at minimum.

12 II. This section shall not apply to an administrative disciplinary hearing in a state  
13 correctional facility or to a parole violator not charged with a new offense.

14 594-A:4 Exceptions.

15 I. If a custodial interrogation occurs in another state in compliance with that state's law or  
16 is conducted by a federal law enforcement agency in compliance with federal law, the interrogation  
17 need not be recorded electronically unless the interrogation is conducted with intent to avoid the  
18 requirement of electronic recording in RSA 594-A:3.

19 II. If an individual to be interrogated requests that the interrogation not be recorded, or if  
20 the individual being interrogated indicates that the individual will not participate in further  
21 interrogation unless electronic recording ceases, the interrogation need not be recorded electronically  
22 provided that this request is preserved by electronic recording or in a written document that is  
23 signed by the individual. A law enforcement officer, with intent to avoid the requirement of  
24 electronic recording in RSA 594-A:3 shall not encourage an individual to request that a recording not  
25 be made.

26 594-A:5 Presumption of Inadmissibility. Except as provided in RSA 594-A:4 and RSA 594-A:6,  
27 all statements made by a person during a custodial interrogation that are not electronically  
28 recorded, and all statements made thereafter by the person during the custodial interrogations,  
29 including but not limited to statements that are electronically recorded, shall be inadmissible as  
30 evidence against the person in any criminal or juvenile delinquency proceeding brought against the  
31 person.

32 594-A:6 Overcoming the Presumption of Inadmissibility. The presumption of inadmissibility of  
33 statements provided in 594-A:5 may be overcome, and statements that were not electronically  
34 recorded may be admitted into evidence in a criminal or juvenile delinquency proceeding brought  
35 against the person, if the court finds:

36 I. That the statements are admissible under applicable rules of evidence; and

**HB 1540-FN- FISCAL NOTE**  
 AS AMENDED BY THE HOUSE (AMENDMENT #2022-0616h)

AN ACT relative to recording custodial interrogations.

FISCAL IMPACT:     State             County             Local             None

COUNTY:	Estimated Increase / (Decrease)			
	FY 2022	FY 2023	FY 2024	FY 2025
Revenue	\$0	\$0	\$0	\$0
Expenditures	\$0	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase

**LOCAL:**

Revenue	\$0	\$0	\$0	\$0
Expenditures	\$0	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase

**METHODOLOGY:**

The New Hampshire Municipal Association indicates this bill would require that a custodial interrogation, including the giving of any required warning, advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded electronically in its entirety. A custodial interrogation at a jail, police or sheriff's station, holding cell, or correctional or detention facility in New Hampshire would be required to be recorded by audio and video means and a custodial interrogation at any other place of detention in New Hampshire would need to be recorded by audio means at minimum. Thus, all jails, police and sheriff's stations, holding cells, and correctional and detention facilities in New Hampshire would be required to install audio and video recording devices at any location where a custodial interrogation may occur, and all law enforcement officers undertaking custodial interrogations in other locations would need to be equipped with audio recording devices, at a minimum. The Association indicates while many of the listed facilities likely have at least some audio and video recording equipment, it is likely that such equipment does not exist everywhere that a custodial interrogation may occur. To the Association's knowledge, audio recording equipment is not standard issue to law enforcement officers. Additionally, it is likely that facilities with audio and video recording equipment will need to obtain portable equipment for backup purposes to avert the possibility of fixed equipment malfunctioning during a custodial interrogation. It is not possible to calculate these additional costs with the information available at this time.

The New Hampshire Association of Counties indicates this bill would increase county expenditures for the purchase and maintenance of recording equipment for county facilities. The Association assumed a cost of \$12,800 for each recording unit and ongoing annual costs of \$4,250 per unit. Based on these assumptions county expenditures would increase by \$640,000 in FY 2023 and \$212,500 each year thereafter.

The Department of Safety indicated this bill would have no impact on the Department.

The Department of Justice indicated this bill would have no fiscal impact on it's budget.

**AGENCIES CONTACTED:**

Departments of Safety and Justice, New Hampshire Municipal Association and New Hampshire Association of Counties

LBA  
 22-2712  
 Amended 4/8/22

**HB 1540-FN FISCAL NOTE  
 AS AMENDED BY THE HOUSE (AMENDMENT #2202-1095h)**

AN ACT relative to recording custodial interrogations.

FISCAL IMPACT:     State             County             Local             None

COUNTY:	Estimated Increase / (Decrease)			
	FY 2022	FY 2023	FY 2024	FY 2025
Revenue	\$0	\$0	\$0	\$0
Expenditures	\$0	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase

**LOCAL:**

Revenue	\$0	\$0	\$0	\$0
Expenditures	\$0	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase

**METHODOLOGY:**

This bill requires the recording of custodial interrogations and specifies exceptions in certain circumstances.

The New Hampshire Association of Counties indicates this bill would increase county expenditures for the purchase and maintenance of recording equipment for county facilities. Each county would likely need multiple devices to ensure availability at all locations, but the Association is not able to calculate how many devices each county would require.

The New Hampshire Municipal Association indicates this bill would require that, except as otherwise provided in RSA 594-A:4, a custodial interrogation, including the giving of any required warning, advice regarding the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded by either audio or audio and video means in its entirety. The bill would also create a presumption of inadmissibility of statements obtained during custodial interrogations where recordings are not made and all statements made afterward, even if later recorded. The Association assumes, audio and video or audio recording equipment is not standard issue to law enforcement officers. Additionally, it is likely that the some facilities with audio and video recording equipment will need to obtain portable equipment



for backup purposes to avert the possibility of fixed equipment malfunctioning during a custodial interrogation. The Association states it is not possible to calculate these additional costs with the information available at this time.

**AGENCIES CONTACTED:**

New Hampshire Municipal Association and New Hampshire Association of Counties

# Committee Minutes

# SENATE CALENDAR NOTICE

## Judiciary

Sen Sharon Carson, Chair  
Sen Bill Gannon, Vice Chair  
Sen Harold French, Member  
Sen Rebecca Whitley, Member  
Sen Jay Kahn, Member

Date: April 6, 2022

### HEARINGS

Tuesday		04/12/2022
(Day)		(Date)
Judiciary	State House 100	1:00 p.m.
(Name of Committee)	(Place)	(Time)
1:00 p.m.	<b>HB 1235-FN</b>	relative to compensation paid to a crime victim.
1:15 p.m.	<b>HB 1540-FN</b>	relative to recording custodial interrogations.
1:30 p.m.	<b>HB 1682-FN-A</b>	establishing the law enforcement conduct review committee in the New Hampshire police standards and training council and making an appropriation therefor.
1:45 p.m.	<b>HB 1647-FN</b>	relative to the calculation of child support.
2:00 p.m.	<b>HB 1609-FN</b>	relative to certain provisions of the fetal life protection act requiring an ultrasound examination.

### EXECUTIVE SESSION MAY FOLLOW

#### Sponsors:

**HB 1235-FN**

Rep. Meuse

Rep. Walz

**HB 1540-FN**

Rep. Welch

Rep. Wall

Rep. Burt

**HB 1682-FN-A**

Rep. Welch

**HB 1647-FN**

Rep. Abrami

Rep. Yokela

Rep. Kofalt

**HB 1609-FN**

Rep. Wolf

Rep. Deshaies

Rep. Allard

Rep. Graham

Rep. Ham

Rep. Depalma IV

Jennifer Horgan 271-7875

Sharon M Carson  
Chairman

# Senate Judiciary Committee

*Jennifer Horgan 271-7875*

HB 1540-FN, relative to recording custodial interrogations.

**Hearing Date:** April 12, 2022

**Time Opened:** 1:15 p.m.

**Time Closed:** 2:32 p.m.

**Members of the Committee Present:** Senators Carson, Gannon, French and Kahn

**Members of the Committee Absent :** Senator Whitley

**Bill Analysis:** This bill requires the recording of custodial interrogations and specifies exceptions in certain circumstances.

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**Sponsors:**

Rep. Welch

Rep. Wall

Rep. Burt

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**Who supports the bill:** Representative Welch; Jeffrey Odland, NH Association of Criminal Defense Lawyers; Buzz Scherr; Clarence Skidmore; Susan Paschell, The Innocence Project; Walter Kirsch

**Who opposes the bill:** Representative Edgar; Major Joseph Ebert, NH State Police; Steven Endres, Merrimack County Attorney's Office; Dan Conley; Karrine Brobst; Gary Fischer; Mark Reams; Steven Mangone; Andrew Shagoury; David Croft; John Simonds; William Wright; Christopher Connelly; Tad Dionne

**Summary of testimony presented in support:**

**Representative Welch**

- The ACLU worked on this bill.
- Under this bill everything will be recorded in an interview.
- Therefore, there will be proof if someone did say or didn't say something.

**Jeffrey Odland (NH Association for Criminal Defense Lawyers)**

- 27% of cases nationally identify as exonerations have been found to have involved false confessions.
- These people were wrongfully convicted and spent years in prison.
- It is virtually impossible through the legal system to prove a confession was false without a recording.
- This bill is of fundamental importance to the integrity of our justice system.
- There are two constitutional doctrines that already affect custodial interrogations: the application of the Miranda warnings and voluntariness.

- If force was used against a suspect, their statement would be considered to be involuntary.
- Defendants make claims all the time in NH with regards to whether their statements were voluntary or whether they lawfully waived their Miranda rights.
- If statements were recorded the amount of litigation around those issues would be streamlined and reduced significantly.
- Little fact finding needs to be done by a judge if the statement was captured on video.
- Had a jury trial where a defendant was accused of violating a restraining order, the police report said he confessed to violating the restraining order. That statement wasn't recorded, and the case went to two jury trials. Thousands of state dollars were spent on that, when it all could have been spared by recording that statement.
- Expects the cost of this to be exceedingly low, as digital recording and cloud storage are not expensive in today's world.
- To NH's credit our interrogations that are routinely done are not lengthy.
- The lion's share of custodial interrogations in NH are around the one-hour range.
- A juror in a serious assault case would want a recording of the defendant confessing to the crime, especially if the defendant gets on the witness stand and says they never confessed.
- In the Gribble case, those statements would be admissible under this bill.
- The investigation was not conducted under this law, and therefore law enforcement was not prepared to comply with the law.
- Mr. Gribble told investigators he wanted to speak to them off the record, and under this proposal he would have then had to have signed the form in order to have the conversation without the recording.
- Does not think a suspect would refuse to sign a form.
- Mr. Gribble's statements later when walking through the woods were recorded and would have been admissible.

**Buzz Scherr** (provided written testimony)

- His testimony is consistent with the National Innocence Project's statements.
- We know that of all the wrongful convictions the Innocence Project has been able to track over the past 30 years, just about 27% of them have been based on false confessions.
- These convictions were determined to be wrongful by post-conviction DNA testing.
- In all of these cases, the confession was not recorded, and there was not an opportunity to challenge the validity of the confession based on a recording of it in any of the cases.
- This is intended to deal with the issue of false confessions.

- In the early 90s in NH, there was a case that started as a death penalty case involving Ken Johnson, Tony Pfaff, and another individual.
- In Tony Pfaff's case they filed a motion to suppress the confession, it was denied, and it went to trial. The defense used a false confession defense, and he was acquitted.
- The other individual used the same defense, he was interrogated by his mother who was a Bedford police officer at the time, and he lost and is still incarcerated.
- Only recently has NH updated its post-conviction DNA statute.
- False confessions do not happen all the time, but one person being convicted of a crime that he falsely confessed to is enough for a statute like this.
- This costs next to no money; House Finance investigated this.
- House Finance Division I held a hearing asking if this was going to be expensive and made some changes to make sure it wasn't going to be a burden.
- Division I passed it 5-0; House Finance passed it 21-0; and it easily passed the full House on a voice vote.
- The Innocence's Projects statement did not say that MA, VT, and ME have laws exactly like this one.
- There are over 30 states that have some version of recording an interrogations legislation.
- A letter has been sent to the Committee from the Deputy Chief of the Albuquerque Police Department saying that this has been a positive thing for police departments, defendants, and juries.
- NH State Police already has a policy of recording confessions.
- The Uniform Law Commission has a policy in support of recording interrogations.
- The Council on State Governments has endorsed that policy.
- This definition of 'custodial interrogation' tracks with the definition as laid out by the NH and US Supreme Courts.
- This is not some radical change in policy.
- This bill was endorsed by Representative Lynn, who is a former member of the NH Supreme Court.
- This legislation does not deal with terry stops.
- A roadside stop has been held by the US Supreme Court to not be a custodial interrogation.
- There are exceptions to the application of this including, the defendant being able to ask not to be recorded.
- All the officer needs to do in that case is have the person sign a form, just like if that person was signing the Miranda waiver form.
- Of course, that person will sign that form if he doesn't want to be recorded; that is a non-issue.
- In the Gribble case, Mr. Gribble said he didn't want to talk anymore and then a little later there was some conversations. That is a classic example of the catchall exceptions to this.

- It would be easy to establish that that was a casual of conversation, the recording equipment wasn't available, and Mr. Gribble was willing to talk and made certain statements about the penalties.
- This is exactly why the exemption was written the way it is.
- The full confession was recorded.
- This language wasn't in place at the time, but if it had been it may have been that the officer would have recorded all of it.
- CT does have inadmissibility language in the statute.
- The National Association of Criminal Defense Attorney's website has a long page describing all the federal policies regarding recording of confessions.
- This only includes the very few security officers at an educational institution who have the power to detain an individual.
- Page 2, line 10 says "A custodial interrogation at any other place of detention shall be recorded by audio means at minimum."
- House Finance Division I had intended that that sentence be eliminated, because the language was changed elsewhere to either be audio or video, so that line no longer makes sense.
- Senator French asked why the definition for 'person' is so broad.
  - There are individuals who are interrogated who are sometimes acting on behalf of an institution as described in lines 22-24, rather than just as an individual person. It happens very rarely but wanted to take into account those circumstances.
- Senator Kahn asked if he wants the whole sentence on page 2, line 11 to be struck.
  - Yes.
- Senator Kahn said if that is because on page 1, line 13 'electronic recording' is defined.
  - Yes.

**Summary of testimony presented in opposition:**

**Senior Assistant Attorney General Geoffrey Ward (Attorney General's Office)**

- Whether a person is subject under the law to custodial interrogation, most often is covered when an individual receives their Miranda warnings
- Custody entitling a defendant to Miranda warnings requires formal arrest or restraint on freedom of movement.
- In the absence of an actual formal arrest, the court's determine whether an individual's freedom of movement was sufficiently curtailed by considering how a reasonable person in a suspect's position would have understood their position.
- To determine that, courts consider everything in the totality of the circumstances.
- These custody analyzes are rarely based on a static set of circumstances and interrogations are fluid

- What begins as non-custodial questions may evolve over time into custodial questioning.
- There are no fewer than 131 NH Supreme Court cases that touch on this issue and approximately 210 US Supreme Court cases on it.
- There are a number of practical issues with requiring police officers to be legal scholars when it comes to making a determination as to when an interview must be recorded.
- Traffic stops (terry stops) are brief detentions but are not considered under the law to be custodial interrogations for Miranda purposes.
- The language in this would turn that on its head, making terry stops subject to recording requirements, even for questions like, 'did you know your taillight was out?'
- This bill will codify for the first time a definition for 'custodial interrogation', when currently it is based on case law and the totality of the circumstances.
- The penalty of not recording an interview is that it becomes inadmissible.
- That is the type of sanction that is usually reserved when someone's constitutional rights are violated.
- This would elevate the fact of recording to a constitutionally protected right, if not in fact in practice, based on this statute.
- There is a steep hill to overcome the presumption in the bill.
- Spoke to the State v. Gribble case where individuals engaged in a home invasion in Mont Vernon that resulted in the death of Kimberly Cates and the serious injuries of her 11-year-old daughter.
- In that case, Mr. Gribble was brought to state police barracks and was interviewed. He had waived his rights and agreed to speak, denying involvement. This portion was recorded, but eventually Mr. Gribble said he no longer wanted to talk, and the recorder was shut off.
- Mr. Gribble was left alone and at no point did he ask to leave. Officers were working in the room and Mr. Gribble leaned forward to talk in several separate conversations over the span of 15-20 minutes about whether the crimes under investigation were eligible for the death penalty and what the difference was between first and second-degree murder, certainly inculpatory statements. None of those conversations were recorded.
- The defendant then said 'go get your recorder I will tell you everything'; Mr. Gribble confessed on that recording.
- That second recording was determined to be admissible by the court.
- Under this bill the statements by Mr. Gribble, the un-recorded as well as the confession would be presumed inadmissible in evidence even though there were no violations of Mr. Gribble's constitutional rights.
- The Innocence Project outlines the national picture, including saying MA, ME, VT, and CT all require recording of custodial interrogations.
- On the National Association of Criminal Defense Attorney's website it said in MA there is no statute requiring the recording of custodial interrogations. There



is a jury instruction that a attorney can get, that points out that you should record interrogations and if they don't the jury can consider that as adverse evidence against the State.

- In ME there is requirement that law enforcement agencies have a policy that includes recording custodial interrogations of serious crimes with a civil fine for not having such policy, but it does not have the evidence suppression section this bill does.
- In VT their requirement to record custodial interrogations only applies to homicide or sexual assault cases. If the recording is not done, the evidence is still admissible.
- In CT only certain felonies are covered by the statute and there are eight exemptions that would allow for un-recorded interrogations to be admissible, including if recording the interrogation was not feasible.
- The Innocence Project also says that federal agencies are required to record interrogations.
- In his work with federal agencies, has never received a recorded interview from them; has received reports about interviews but not recordings.
- In the real world when an interview is done, law enforcement sits down with the subject and asks the person if they are willing to speak and willing to be recorded.
- NH is a two-party consent state, under RSA 570-A.
- If the individual says they are willing to be recorded, the recorder is turned on and the same conversation is repeated.
- It is not clear that having that conversation before starting the recording would violate the language in this bill.
- The bill requires not just the custodial interrogation be recorded but also the "giving of any required warning, advice regarding the rights of the individual being questioned, and the waiver of any rights by the individual,"
- In order to comply with this bill, would police have to violate RSA 570-A?
- If someone refuses to be recorded, this bill imposes an impractical impossibility to require someone to give a record asserting of that refusal or execute a written document.
- In his experience the person that doesn't want to be recorded, also is not willing to write something out.
- Audio recording statements is generally the preferred way of doing things, and that is the regular practice.
- Questions what this bill is actually trying to achieve.
- Is not aware of any wide issue of this across the State.
- Senator Gannon asked if the second interview would be inadmissible because of when Mr. Gribble started chatting with the officers off the recording it became 'fruit of the poisonous tree'.
  - 'Fruit of the poisonous tree' tends to be a constitutional issue. Mr. Gribble's constitutional rights weren't violated. This issue is on page 2,

line 27 “all statements made by a person during a custodial interrogation that are not electronically recorded, and all statements made thereafter”. Mr. Gribble made statements that were not recorded, and therefore under this bill those statements and all statements made after, including recorded statements, shall be inadmissible.

- Senator French asked what prevents an agency from just keeping the tape running as long as a subject is in a room.
  - In the Gribble case, Mr. Gribble said he no longer wanted to talk and asked for the interview to end. The investigators no longer had the authority to continue the recording, absent an exception to RSA 570-A. There is a one-party authorization the Attorney General can authorize for surreptitious recording or the individual’s consent.
- Senator French asked if the bill says it is not necessary for that ask to be recorded.
  - Under this bill, you would have to record the individual asking if they are willing to be recorded or they have to sign something. There are some practical issues of how that plays out on the ground. May be violating the law if you record someone who does not want to be recorded. Those people also don’t want to sign something that says they don’t want to be recorded but they do want to talk. This bill does not allow for that scenario.
- Senator Kahn asked if it is not recorded it is not admissible.
  - Yes. That is a significant change to current law. Where is the issue with unrecorded confessions such that this legislation is necessary? This is going much further than simply suggesting this is good policy. It is good policy to record interrogations, but this bill says you have to do it, and if there is any scenario you don’t do it that interrogation is suppressed. That is a sanction that doesn’t exist in other states that have language in the law about this issue.
- Senator Kahn asked if the standard we currently apply as to what becomes admissible, overcoming the presumption, are statements that under rules of evidence are proven by clear and convincing evidence to be voluntary and reliable.
  - Where voluntariness presently comes in with determining whether a statement is still admissible, is if a statement is suppressed because of a constitutional violation. Under certain circumstances that statement can still be used if it can be shown that it was voluntary. If there has been a constitutional violation, voluntariness is included for whether that statement can still be used for impeachment.
- Senator Kahn asked if clear and convincing evidence is the standard they currently achieve with interrogations,
  - Clear and convincing evidence is a standard used under the law. Currently if a custodial interrogation is not recorded, that can come into evidence. It does have to meet the rules of evidence, has to be relevant,

not be hearsay, etc. Absence a challenge from the defense, they don't get into clear and convincing being the standard for voluntariness.

**Assistant County Attorney Stephen Endres (Merrimack County Attorney's Office)**  
(provided written testimony)

- Echoes SAAG Ward's testimony.
- When a person is arrested in NH for driving while intoxicated, they are read an administrative license suspension (ALS) form, which goes over their rights and asks them to take a chemical test.
- During this an individual is in custody and being asked questions when going over that form, but under current constitutional law those are not Fifth Amendment questions and Miranda is not necessary,
- Under this bill going over an ALS form would constitute as a custodial interrogation and may be required to be recorded.
- During routine booking questioning, people are asked their name, date of birth, if they ingested any drugs or alcohol, etc.
- There are exceptions in constitutional jurisprudence for those questions.
- Under this bill that would be a custodial interrogation, subject to recording.
- A lot of the wording in the bill is problematic,
- Page 1, line 18 defines 'law enforcement officer' to include "a security officer employed by an educational institution who has the power to detain an individual."
- At UNH a student could get a work study job as school security officer to check the doors but thinks this bill would make them law enforcement officers under this.
- This would also apply to security officers at institutions like St. Paul's and Proctor Academy.
- These are not state employees that have ever been subject to constitutional guidelines, but this bill is expecting them to understand what custodial interrogation is.
- Page 1, line 16 the definition of 'law enforcement agency' would also become very broad due to this interpretation. Any school that hires security would become a 'law enforcement agency'.
- Page 1, line 22 "person' means an individual, corporation, business trust, statutory trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, or government; political subdivision, agency, or instrumentality; or any other legal or commercial entity"
- No idea how you would take the government or a business trust into custody and subject them to custodial interrogation.
- Page 2, line 10 says, "A custodial interrogation at any other place of detention shall be recorded by audio means at minimum."
- That seems to imply that the other locations require video recording.
- The rest of the bill does not talk about video recording, it talks about 'electronic recording'

- Page 1, line 13 says “Electronic recording’ means an audio recording or audio and video recording”
- Page 2, line 27 states “all statements made by a person during a custodial interrogation that are not electronically recorded, and all statements made thereafter by the person during the custodial interrogations, including but not limited to statements that are electronically recorded, shall be inadmissible as evidence”
- This means that no matter how many times an individual makes a statement thereafter and no matter the circumstances, that statement is inadmissible if there were statements made that were not recorded.
- This is problematic when the security officer at a private school speaks to a student and then notifies the police. When police arrive, there may have already been a custodial interrogation under this language that was not recorded, and now everything after that moment would be inadmissible.
- There are ways to overcome the presumption of inadmissibility, but page 3, line 2 talks about the statement being ‘reliable’.
- It is not clear what ‘reliable’ means in this context.
- Can you lie and have that be a reliable statement?
- This bill will result with statements that meet constitutional thresholds that will become inadmissible if they fail to meet the technicalities of this bill, and that is concerning.

**Chief Dan Connelly** (NH Association of Chiefs of Police) (provided written testimony)

- Many of the police departments in the State already have policies in place to record interrogations, and they do a good job at following them.
- Mandating this will make their jobs more complicated and at times this will not be feasible.
- This will also cost a lot of money they do not have in the budget.
- Goffstown has two interview rooms that are set up with audio-video recording capabilities and cloud storage.
- That costs a great deal of money. The initial setup and yearly data retention costs thousands of dollars.
- Goffstown also has patrol officers assigned body worn cameras.
- Any detectives or officers not assigned to a shift do not have body worn cameras.
- For any interviews that do not take place in their interview rooms or by an officer with a body worn camera, this is going to be in a problem.
- There are many smaller departments who do not have rooms with recording capabilities.
- The NH Association of Counties noted that it would cost approximately \$12,800 per recording device and \$4,250 annually per device for data retention.
- That is about what Goffstown pays.

**Karinne Brobst** (Milford Police Department/NH Association of Chiefs of Police) (provided written testimony)

- This is a radical bill that would significantly change the law.

- Milford PD, like many medium sized agencies does not have body worn cameras.
- This bill would jeopardize all interrogations done by their officers.
- Mont Vernon doesn't even have a booking room, let alone audio-video recording capabilities.
- In NH if an interrogation is not recorded the burden already falls upon the State to prove it was knowing, intelligent, and voluntary and that the individual waived Miranda beyond a reasonable doubt.
- If a confession is unrecorded, defense counsel will routinely file motions to suppress that
- Milford's booking room is not audio recorded, but the interrogation room is.
- This bill says if someone is asking about their rights that needs to be recorded but that conversation wouldn't be recorded in their booking room.
- This appears to prevent officers from answering questions about rights, about what is happening, even about administrative suspension rights, unless that is audio recorded out of fear of having a recorded confession taken after being deemed inadmissible.
- Section 594-A:5 reads to her that if at any point a person makes a statement that is not recorded, whether that is on the way to the bathroom, in the booking room, or on the side of the road, then a later confession would be completely inadmissible.
- This appears to penalize those agencies that don't have recording in rooms or body worn cameras.

**Major Joseph Ebert (NH State Police)**

- The last thing law enforcement wants is to incarcerate an innocent person.
- When you are in the room and the matter of life in prison is on the table everything is very difficult, even just signing a form saying that you don't want to be recorded.
- State Police does custodial interviews in all manner of locations.
- It is always a gut-wrenching thought that your recorder will malfunction while conducting an interview.
- Talked about interviewing a person on the Gribble case in the woods walking the scene and had two recording devices going in case something went wrong.
- Recorders malfunction all the time.
- The outcome of not electronically recording a statement under this is so significant.
- Always makes an effort to record those conversations, but there are numerous times when people say they don't want to be recorded.
- If the goal of this is to make sure everyone hears exactly what is said in that room, why provide an out of 'I don't want to be recorded'?
- Has on several occasions had people say they don't want to be recorded.
- That is likely because they know they are going to make a false statement or lie or they want to leave wiggle room to say something that occurred during that conversation was misinterpreted.

- From a law enforcement perspective, they are hearing that with this bill it is more important to make sure that law enforcement is not infringing upon someone's rights than it is to hear the actual case facts come from the individual's mouth.
- Senator Kahn asked what percent of the interrogations done by State Police are recorded.
  - Concerned that giving an actual percentage would be inaccurate. Especially in the Detective Bureau, when they sit down for a custodial interrogation, it is best practice to record, and they strive to have every one of those recorded.
- Senator Kahn asked if that best practice is in the manual.
  - It is part of the Standard of Operating Procedures.

jch

Date Hearing Report completed: April 14, 2022

# Speakers









# Senate Remote Testify

## Judiciary Committee Testify List for Bill HB1540 on 2022-04-12

Support: 3 Oppose: 9

<u>Name</u>	<u>Title</u>	<u>Representing</u>	<u>Position</u>
SKIDMORE, CLARENCE	A Member of the Public	Myself	Support
Paschell, Susan	A Lobbyist	The Innocence Project	Support
kirsch, walter	A Member of the Public	Myself	Support
Fisher, Gary	A Member of the Public	Myself	Oppose
Reams, Mark	A Member of the Public	Myself	Oppose
Mangone, Steve	A Member of the Public	Myself	Oppose
Shagoury, Andrew	A Member of the Public	Myself	Oppose
Croft, David	A Member of the Public	Myself	Oppose
Simonds, John	An Elected Official	Myself	Oppose
Wright, William	An Elected Official	Myself	Oppose
Connelly, Christopher	An Elected Official	Myself	Oppose
Dionne, Tad	A Member of the Public	Myself	Oppose

# Testimony

# OFFICE OF THE MERRIMACK COUNTY ATTORNEY

## ASSISTANT COUNTY ATTORNEYS

Susan M. Venus  
Marianne P. Ouellet  
Cristina E. Brooks  
Carley McWhirk  
Casey M. Callahan  
Melinda M. Siranian  
Jonathan L. Schulman  
Matthew J. Flynn  
Andrew T. Yourell  
Molly V. Lovell  
Melissa A. Kowalewski  
Steven R. Endres  
Terri M. Harrington  
Sarah E. Warecki  
J. Brad Bolton



## Paul A. Halvorsen County Attorney

Four Court Street  
Concord, New Hampshire 03301-4336  
Telephone: (603) 228-0529 Fax: (603) 226-4447

**George B. Waldron**  
DEPUTY COUNTY ATTORNEY

**Wayne P. Coull**  
DEPUTY COUNTY ATTORNEY

**OFFICE ADMINISTRATOR**  
Donna Barnett

## VICTIM/WITNESS PROGRAM

Karen J. Sotile  
Sarah L. Heath  
Jessica L. Clarke  
Jacqueline L. Lawrie

## INVESTIGATORS

Stacey F. Edmunds  
Michael A. Russell

April 12, 2022

New Hampshire Senate Judiciary Committee  
State House  
Concord, NH

Ref: HB 1540

Dear Chairman and Committee Members:

Thank you for this opportunity to comment on House Bill 1540 that is now before your Committee. I urge you to report this bill as inexpedient to legislate.

I have concerns about the many negative impacts associated with this bill. The vast majority of my concerns are outlined in the attached January 13, 2022, three page letter sent on behalf of all New Hampshire County Attorneys to the House Committee on Criminal Justice and Public Safety. While I understand the bill before you was amended and reported out of the House as ought to pass with amendment the bill, as presented, remains problematic.

One item of great concern to me is that this bill places a "security officer," who may most likely not be trained to New Hampshire law enforcement standards, in a position where their actions may impact the follow-on actions of trained and certified law enforcement officers. Is the legislature willing to establish public policy at a level where non-compliance by a "security officer" can compromise a properly conducted subsequent investigation handled by trained and certified law enforcement officials?

Please keep in mind that statements, admissions and confessions used in trials are subject to great judicial scrutiny using Constitutional, statutory and case law established over decades and must also comply with the New Hampshire Rules of Evidence. I believe this bill, in essence, will upend those decades of well-established law.

Thank you.

  
Paul A. Halvorsen  
Merrimack County Attorney



## New Hampshire County Attorneys



Patricia G. Conway, Rockingham  
John Coughlin, Hillsborough  
Paul Halvorsen, Merrimack  
Marc Hathaway, Sullivan  
Marcie Hornick, Grafton  
John McCormick, Coos  
Chris McLaughlin, Cheshire  
Andrew Livernois, Belknap  
Michaela O'Rourke-Andruzzi, Carroll  
Thomas P. Velardi, Strafford

JANUARY 13, 2022

FOR RELEASE: HOUSE COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

**Contact:** County Attorney Thomas Velardi, Esq.  
**Phone:** 1-603-749-2808  
**Email:** [tvelardi@strafford.nh.us](mailto:tvelardi@strafford.nh.us)

### Statement Regarding Draft Bill 1540-FN

**[NEW HAMPSHIRE, January 13, 2022]** Our offices have individually and collectively reviewed draft language regarding HB 1540, and we have a number of concerns regarding the proposed changes that we wish to bring to the committee's attention prior to public comment session. Our offices believe that there are a number of financial impacts to law enforcement and to the County Attorney's Offices which need to be addressed. Further, there are concerns which impact the existing Constitutional mandates imposed upon law enforcement and our offices. We respectfully outline our concerns below.

- Many of our law enforcement departments do not have equipment which is necessary to record, store, and transmit interrogations as mandated by this bill;
- Our offices do not have the electronic storage capacity or the personnel to receive, redact (if necessary under the law), and transmit the recordings as is required by the criminal discovery rules;
- There are already Constitutional mandates in place which address the concerns underlying this bill, including the Miranda warnings and signed waivers;
- The New Hampshire Constitution already mandates that the State prove, beyond a reasonable doubt, that a statement was given voluntarily;

- The concepts of “custody” and “interrogation” are fluid concepts, and case law exists to define these. A suspect may be in custody at one point in an interview, and then out of custody, depending on the unique circumstances of the case. There is ample caselaw which defines “custodial interrogation,” and it is not clear whether this bill will track those definitions;
- “Statements” are legally defined by caselaw and can include non-verbal acts, such as rolling eyes, looking down, etc. It is not clear how there could be an audio recording of these non-verbal statements, upending current caselaw;
- This bill creates a presumption that unrecorded interviews are inadmissible, but does not weigh that against the backdrop of New Hampshire being a two-party State for purposes of recording. A suspect can refuse to the recording and then reap the benefit of that by having his/her statements disallowed;
- The New Hampshire Supreme Court has spoken to this issue with regard to juveniles. The law in New Hampshire (since 2007) is “We have recognized that videotaping custodial interrogation may lessen inherent speculation, avoid unwanted claims of coercion, and generally assist all parties in assessing what transpired during the interrogation, such that, to the extent possible, custodial interrogations of juveniles should be videotaped.” State v. Farrell, 145 N.H. 733, 739 (2001), State v. Deschenes, 156 N.H. 71 (2007).

“We have also recognized that listening to a defendant be inculcated by his or her own voice has a persuasive power unrivaled by contradictory testimonial evidence, thus making inequitable the admission of selective recordings of a post-Miranda interrogation, and persuading us to hold that in order to admit into evidence the taped recording of an interrogation, which occurs after Miranda rights are given, the recording must be complete.” State v. Barnett, 147 N.H. 334, 337-38 (2001).” State v. Deschenes, 156 N.H. 71 (2007);

- School security may or may not be “law enforcement officers,” and it is unclear what is being deemed a “security officer employed by an educational institution.” If they are non-state actors, they will not be required to comply, leading to inconsistency in the application of this proposed law;

- The definition of “person” is very broadly defined. It is unclear under what circumstances a “government,” “political subdivision,” or “commercial entity” could be subject to “custodial interrogation,” as it is difficult to take a “government” into custody;
- The proposed language excludes “all statements” made during custodial interrogation, to include spontaneous utterances (contrary to current case law) and ALL statements made “thereafter” by the person “during the custodial interrogations,” which creates a confusion about how one can make statements after a custodial interrogation that are also considered to be DURING the custodial interrogation. Read logically, this provision is contrary to Miranda caselaw, which allow after-offered statements to be admitted under specific circumstances;
- It is unclear how this might impact the ALS process during roadside stops;
- It is unclear how this would work with the public safety exemption under New York v. Quarles;
- It is unclear how this would impact situations involving jailhouse confessions to other inmates, if acting under color of authority.

In short, this bill creates far more procedural hurdles than it solves. It requires a thorough reconciliation with existing caselaw and Constitutional analysis in order to ensure that it complies with currently existing Constitutional requirements.

Furthermore, the financial impact of this bill, which is not insubstantial in all counties, as we operate with many small police departments, is not addressed.

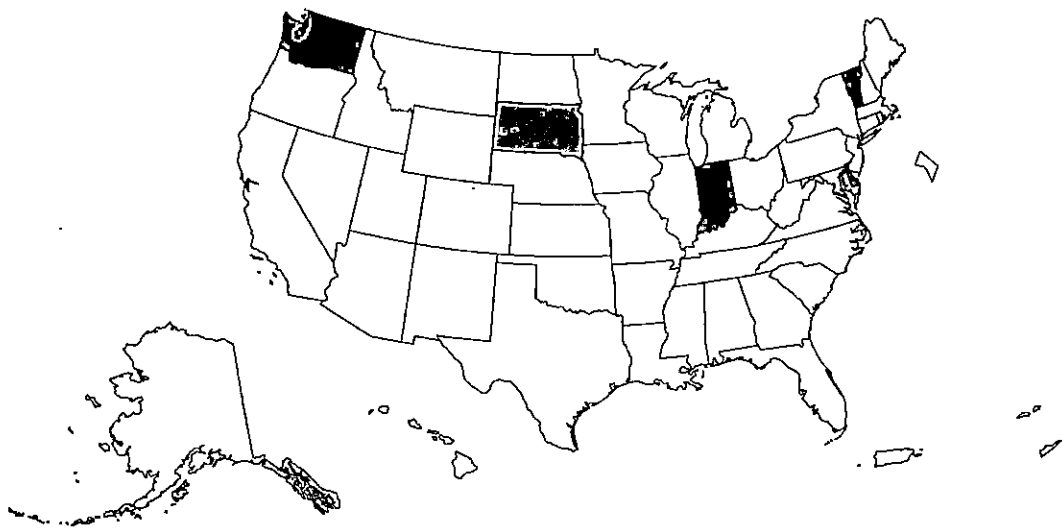
County Attorneys of New Hampshire, all concur



# 2010 | Electronic Recordation of Custodial Interrogations Act

Criminal Law

- Bill List
- Summary
- Enactment History



Enactment Map • Introduced • Enacted

### Description

Description

The Uniform Electronic Recordation of Custodial Interrogations Act (UERCIA) requires that law enforcement electronically record the entirety of a custodial interrogation. The act leaves it to the individual states to decide where and for what types of crimes this mandate applies, as well as the means by which recording must be done. UERCIA also includes a number of exceptions that excuse non-recording. For more information about enacting UERCIA, please contact Legislative Counsel Libby Snyder at (312) 450-6619 or [lsnyder@uniformlaws.org](mailto:lsnyder@uniformlaws.org).

### Contact

For information about enacting please contact:

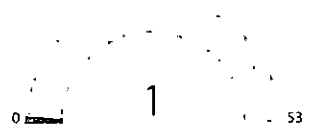
**Libby Snyder**  
Legislative Counsel

[lsnyder@uniformlaws.org](mailto:lsnyder@uniformlaws.org)  
(312) 450-6619

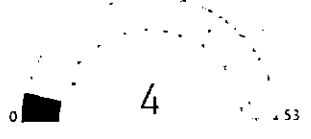
### Endorsements

Included as Shared State Legislation by the Council of State Governments (CSG).  
Approved by the American Bar Association in 2011.

Introductions



Enactments



Completed by the Uniform Law Commission in 2010.

Testimony

Senate Judiciary Committee

HB 1540-FN - Relative to recording custodial interrogations

April 12, 2022

Dear Senator Carson, Chair and Members of the Committee:

My name is Daniel Conley, and I am here to testify on behalf of the NH Association of Chiefs of Police in **Opposition** to HB 1540.

I am a Captain with the Goffstown Police Department. I am also a licensed attorney in the State of New Hampshire. As a Captain with the Goffstown Police Department, I am the Executive Officer and Prosecuting Attorney.

There are ample constitutional protections in place regarding custodial interrogations. I think you will find that law enforcement across this State follow processes and procedures for interview and interrogations and do a good job according to the law. To say that any omission of guilt to an officer while in a police department would be discounted because it is not audio and video recorded would make our jobs more complicated and at times not feasible. Most police departments are already audio and video recording interviews and interrogations, but not all police agencies are capable of doing this because of the cost of the equipment, and the cost of the retention and storage of the data. While Goffstown Police Department is fortunate to have 2 interview rooms with recording capabilities, not all agencies have the budget to install this recording equipment and store the data. As noted by the NH Association of Counties, a cost of approximately \$12,800 per recording device and \$4,250 annual costs per device.

Even for agencies that have recording capabilities, the audio and video recording devices are not where the subject is willing to speak with us. Officers have conducted numerous interviews outside the standard interview room such as in the sally port, booking room area, police station lobby, personal office inside police department, etc... The majority of police departments that have in house recording capabilities only have recording capabilities in the interview rooms. Goffstown Police Department has two interview rooms and the police officer needs to physically start and end the recording device which is located in the detective's division. Much like an independent digital audio recording device, the file from the interview rooms must be taken from the network recorder's hard drive and transferred to our department's server. Not all of our officers have access to the detective's division and the division office needs to be locked when not occupied due to sensitive case files stored in there.

In closing, we ask that you find this bill **Inexpedient to Legislate**.

Testimony

Senate Judiciary Committee

HB 1540-FN – Relative to recording custodial interrogations

April 12, 2022

Karinne Brobst

Prosecutor Milford Police Department

Former Assistant County Attorney with the Hillsborough County Attorney's Office

Instructor at the NH Police Academy on the Laws of Arrest, including *Miranda*

Testifying today on behalf of Milford Police Department and the NH Association of Chiefs of Police

**In OPPOSITION to House Bill 1540.**

It is riddled with issues. Milford PD, like many medium size agencies, does not have body worn cameras. This bill would jeopardize all interrogations that are done by agencies without BWCs.

There is no issue with police departments conducting custodial interrogations without recordings. If an interrogation is unrecorded, the burden already falls upon the State to prove that the confession was knowingly, intelligently, and voluntarily given after waiver of Miranda rights beyond a reasonable doubt. If the confession is unrecorded, defense attorneys will routinely file Motion to Suppress to exclude the confessions. The burden is on the State to prove to the Court that it was a legal confession. Also, it is incredibly rare that it happens at all. This bill seeks to remedy a problem that doesn't exist.

Additionally, it creates additional burdens on agencies without BWCs. For example, the Milford Police Department has a booking room with video recording. The only audio recording is in the actual interview room that is off from booking. This bill is so broad that it appears to prevent officers from answering any questions of the defendants or giving any information whatsoever about their rights unless specifically audio recorded. If a defendant asks, for example, "Do I need a lawyer? What are my rights?" The officers are expressly prohibited from answering them unless their answers are audio recorded or they risk losing a later recorded confession. This appears to be true even these questions are on the side of the road, prior to any arrest occurring, where there is no video available to my officers.

As an attorney and prosecutor for 10 years, I do not understand the provision of section 5. It states "all statements made by a person during a custodial interrogation that are not electronically recorded, and all statements made thereafter by the person during the custodial interrogations, including but not limited to statements that are electronically recorded, shall be inadmissible as

evidence against the person in any criminal or juvenile delinquency proceeding brought against the person.”

I am not sure exactly what this section saying, but it appears to penalize agencies that have recorded interview rooms and no BWCs. If the entirety of the arrest is not recorded, it appears that my officers will need to worry about suppression in every single case, even if their entire interview is recorded, including the waiver of the defendant’s rights.

This is an unnecessary bill. A defendant’s rights are already protected by law. This bill would just tie the hands of law enforcement agencies that cannot afford BWCs and audio recorded booking rooms.

**President**  
Wendy Piper  
Grafton County Commissioner

**Vice President**  
Tom Tombarello  
Rockingham County Commissioner

**At Large Member**  
Toni Pappas  
Hillsborough County Commissioner

**At Large Member**  
Cathy Stacey  
Rockingham County Register of Deeds



29 School St., Ste. 200  
Concord, NH 03301

[info@nhcounties.org](mailto:info@nhcounties.org)

[www.nhcounties.org](http://www.nhcounties.org)

**Immediate Past President**  
Chuck Weed  
Cheshire County Commissioner

**Treasurer**  
Suzanne Collins  
Coos County Treasurer

**Bylaws Chair**  
Chris Coates  
Cheshire County Administrator

April 11, 2022

The Honorable Sharon Carson  
Chair  
Senate Judiciary  
State House  
Concord, NH 03031

Chair Carson and Members of the Senate Judiciary Committee,

The NH Association of Counties would like to register its opposition to HB 1540, relative to recording custodial interrogations.

This bill would require that all questioning or other actions that could elicit any incriminating response from an individual in custody be recorded and stored by the county. This will have a fiscal impact on county government, and being unable to determine how many recording devices that would be needed makes it impossible to determine the costs. While cost is an allowable consideration under this legislation, that decision is left in the hands of the judge and not the County Commissioners. The Association believes this is a separation of powers issue and that the judicial branch should not have the final say on how county funds are most effectively spent. It is the Association's belief that this bill is unnecessary and attempting to fix a problem that does not exist. Placing this financial burden on county taxpayers is not the best and highest use of county funds.

The Association asks for your opposition to HB 1397. If you have any questions, please feel free to reach out to our Executive Director, Kate Horgan at [khorgan@dupontgroup.com](mailto:khorgan@dupontgroup.com).

Sincerely,

Wendy Piper  
President  
NH Association of Counties



April 12, 2022

Honorable Sharon Carson, Chair  
Senate Judiciary Committee  
State House  
Concord, New Hampshire

*Via Electronic Delivery Only*

*Re: HB 1540, relative to recording custodial interrogations.*

Dear Senator Carson:

The New Hampshire Municipal Association opposes HB 1540, requiring recording of custodial interrogations due to the lack of state funding for the purchase of the required equipment for municipal police officers and because of the difficulty in parsing the language of the bill.

The term “custodial interrogation” is defined differently than how that term was first defined by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“custodial interrogation” means “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”) or clarified by subsequent U.S. Supreme Court or New Hampshire Supreme Court decisions. As such, there may be situations where the constitutional requirement for *Miranda* warnings does not line up with the requirements of the bill, and the use of the same terminology may become confusing.

Regardless of how that issue is resolved, the bill appears intended to require either audio or video recordings of “custodial interrogations” in all circumstances except for those narrow exceptions provided in the exceptions section of the bill. However, as written, the operative section of the bill (Page 2, Lines 6-10) comprises of three sentences, the second and third of which may or may not undermine the existence of the exception section, depending on how the courts interpret the law.

The second sentence requires that, at certain locations, a “custodial interrogation” “shall be also recorded” while the third sentence requires that a “custodial interrogation” at “any other place of detention” “shall be recorded by audio means at a minimum.” The term “place of detention” is defined in the bill as “a fixed location under the control of a law enforcement agency where individuals are questioned about alleged crimes or status offenses.” Presumably, the examples that follow this definition, including “police vehicle,” are meant to demonstrate the broad range of locations that may qualify.

The problem is that these second and third sentences modify the first sentence, which provides the initial requirement to record “custodial interrogations” except in certain circumstances. It is unclear whether these following sentences act to invalidate the exceptions in certain places or whether those exceptions still function, and the second and third sentences merely provide further explanation as to when recording is required.

In practice, this uncertainty may mean that an officer asking someone under arrest questions in locations where an individual has a reasonable expectation of privacy, such as a residence, may conclude that this bill requires that the officer continue to record the individual, despite the existence of RSA 105-D:2, IX, allowing the person to decline to be recorded, and the list of exceptions, including that one, provided by this bill. Officers – and the municipalities that employ them – should be certain of when and where they must record, what to do if someone asks not to be recorded, and when they should not record. The current language of this bill is too ambiguous to provide that clarity.

In addition to the costs of litigation to clarify the language of the bill, municipalities must also contend with the fact that neither audio nor audio and video recording equipment are standard police equipment. In order to comply with the requirements of the bill, municipalities will have to purchase audio and audio/video recording equipment. As there does not appear to be sufficient funds provided on a grant basis in existing state or federal allocations or currently proposed allocations to fully fund these purchases, this requirement has the potential to violate Article 28-a of the New Hampshire Constitution.

Given the issues highlighted above and the importance of ensuring that officers, the municipalities that employ them, the attorneys who advise those municipalities, and the public understand the law as it relates to governmental created recordings, particularly in light of the new amendment to the New Hampshire Constitution, Article 2-b, protecting individuals privacy from governmental intrusion, NHMA asks the committee to recommend HB 1540 as Inexpedient to Legislate.

Thank you for your consideration.

Sincerely,



Natch Greyes  
Government Affairs Counsel

cc: Committee members



Timothy M. Keller  
Mayor

# City of Albuquerque

## Albuquerque Police Department



Harold Medina  
Chief of Police

### Interoffice Memorandum

April 11, 2022

**To: Senator Sharon Carson, Chair Senate Judiciary Committee**

**From: First Deputy Chief Mike Smathers**

**Subject: HB 1540**

**Senator Carson-Please allow me to introduce myself to you and the House Finance Committee. I am the First Deputy Chief for the Albuquerque Police Department in Albuquerque, NM. I have been in law enforcement almost 28 years. Prior to coming to Albuquerque I retired as an executive with the Charlotte Mecklenburg Police Department in Charlotte, NC. I have extensive experience in leading criminal investigations and advocating for best practices in law enforcement related to criminal investigations. In that spirit I am respectfully submitting these comments for your consideration of HB 1540 and the recording of custodial interviews by the police.**

**I am strong proponent of mandating the recording of custodial interviews by the police and have been a regular practitioner of recording such interviews for well over 15 years. These recordings provide what no in person testimony can and that is an unbiased record of what took place during an interview which is often the critical piece of evidence in the prosecution of a crime. Especially since the murder of George Floyd, many communities have questioned the practices of their police departments and advocated for various improvements to increase the police legitimacy from the citizens each department is sworn to provide. A complete recording plainly provides that unbiased account-it shows that we read the defendant their Miranda warnings, it shows how they were treated, it shows if coercion was utilized and most importantly it allows everyone to hear in the suspects own words their responses to the critical issues at hand in every case. This allows jurors to have complete confidence in the evidence being presented in total as opposed to a summary of the interview or testimony about the interview. These recordings provide full and absolute transparency to the police departments efforts in a case and in my opinion nothing builds legitimacy greater than the public seeing firsthand how their department does their work on these cases.**

**I have had the opportunity to talk with jurors after cases and hear from them directly the impact of hearing the defendants own words as evidence in a prosecution. The Public Defender's Office benefits from having these recordings as it ensures each defendant can expect to be judged for their actual responses as opposed to some lesser record of each interview. People are fallible and these recordings eliminate the influence and perceptions of a detective being presented to a jury. Nothing is more powerful to convict or exonerate someone than these recorded interviews. These recordings will lessen motions to suppress statements or other claims. As recording interviews become practice both the State Prosecutor and the Defense bar**



**will know the recording stands alone when considering these petitions. I can say without reservation there is not a downside to recording these interviews and the benefits are immense.**

**Cost is always an appropriate consideration as any statute impacts every department no matter their size or resources. Recording these interviews can be done with a wide ranging spectrum of budgets-small departments can utilize a variety of inexpensive storage media to maintain these recordings up to departments with some additional resources using more robust systems. The savings from preventing even one lawsuit along with the incalculable improvements in community confidence by maintaining these recordings makes the expense worth that investment.**

**As a police executive I understand and appreciate the considerations for and against such a bill. My intent today is to convey to you the many positive benefits I have experienced firsthand, my passion for this is rooted in lessons learned directly throughout my career. I would respectfully ask each member of the committee to consider my input and hopefully concur that law enforcement in the Granite State will be stronger if this bill passes.**

**Regards,**

A handwritten signature in black ink, appearing to read "Mike Smathers", written in a cursive style.

---

**Mike Smathers  
First Deputy Chief Albuquerque Police Department**

**Complete Document**

**Can Be Viewed**

**In Bill Folder**

165 N.H. 1  
Supreme Court of New Hampshire.

The STATE of New Hampshire

v.

Christopher GRIBBLE.

No. 2011–258.

|

Argued: Nov. 8, 2012.

|

Opinion Issued: May 7, 2013.

### Synopsis

**Background:** Defendant was convicted by jury in the Superior Court, Hillsborough County, Abramson, J., of first-degree murder, attempted murder, conspiracy to commit first-degree murder, witness tampering, and conspiracy to commit burglary. Defendant appealed.

**Holdings:** The Supreme Court, Bassett, J., held that:

defendant's *Miranda* rights were not violated;

defendant was not entitled to change of venue based on pretrial publicity; and

trial court's instruction to jury, that it could consider certain specified factors in its determination of insanity, was proper.

Affirmed.

### Attorneys and Law Firms

**\*\*1197** Michael A. Delaney, attorney general (Jeffery A. Strelzin, senior assistant attorney general, and Peter Hinckley, assistant attorney general, on the brief, and Mr. Hinckley orally), for the State.

Stephanie Hausman, assistant appellate defender, of Concord, on the brief and orally, for the defendant.

### Opinion

BASSETT, J.

**\*5** The defendant, Christopher Gribble, appeals his convictions, following a jury trial, for first-degree murder, attempted murder, conspiracy to commit first-degree murder, witness tampering, and conspiracy to commit burglary. *See* RSA 626:8 (2007); RSA 630:1–a (2007); RSA 629:1 (2007); RSA 629:3 (2007); RSA 641:5 (2007); RSA 635:1 (2007). On appeal, he argues that the Superior Court (*Abramson, J.*) erred when it: (1) denied his motion to suppress; (2) denied his motions for a change of venue; and (3) instructed the jury concerning insanity. We affirm.

The defendant's convictions arise out of a home invasion in Mont Vernon that he and three other individuals carried out in the early morning hours of October 4, 2009, which resulted in the death of Kimberly Cates. The defendant was charged with alternate counts of first-degree murder, alleging that, acting in concert with, and aided by, Steven Spader, he purposely or knowingly caused the death of Cates by attacking her with a knife. He was also charged with attempted murder of Cates' daughter, witness tampering, and conspiracy to commit murder and burglary. The defendant pleaded not guilty by reason of insanity. The jury found him sane and guilty of all of the charges. This appeal followed.

**\*6** On appeal, the defendant argues that the trial court erred in denying his motion to suppress statements he made to the New Hampshire State Police that he claimed were obtained in violation of his right to remain silent. He further contends that the court erred in denying his motions for a change of venue. He argues that a venue change was necessary due to the extensive amount of pretrial publicity regarding the crimes and the earlier trial of Steven Spader. Finally, he asserts that the court erroneously instructed the jury regarding insanity. We address each argument in turn.

### *I. Suppression*

The following facts are drawn from the trial court's order on the defendant's motion to suppress and the record, or are otherwise undisputed. On October 5, 2009, Troopers John Encarnacao and Jeffrey Ardini of the New Hampshire State Police interviewed the defendant at the New Hampshire State Police Troop B barracks in Milford regarding Cates' murder and the related crimes. At the outset of the interview, Trooper Encarnacao confirmed **\*\*1198** with the defendant that his presence at the barracks was voluntary and that the interview would be recorded. He further advised the defendant of his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The defendant stated that he understood his rights and agreed to answer questions.

which falls within the province of the jury to be considered like any other factual issue.”).

The defendant suggests that the court's instruction erroneously stressed two factors, *i.e.*, “the nature of the charged acts and whether [the defendant] knew and could choose between right and wrong.” We disagree. We do not read the instructions as emphasizing any one factor. Moreover, the court instructed the jury that it could consider whatever else it found \*31 relevant to the issue of insanity. Thus, the instructions left the jurors free to consider *any* factor they deemed relevant to the issue of insanity, whether or not the factor was mentioned in the instruction. See *id.* at 462, 594 A.2d 1279. In accordance with the applicable law on the insanity defense, the trial court also correctly stated that there is no legal definition or test for insanity. See *Fichera*, 153 N.H. at 593, 903 A.2d 1030 (explaining that “there is no test for determining whether a defendant is insane” (quotation omitted)); *Plante*, 134 N.H. at 461, 594 A.2d 1279 (“There is no specific test or criterion which determines the issue of mental illness.”).

Citing statements made by the prosecutor in the State's closing argument, the defendant asserts that the State's theory of the case was that he “was not insane because he exhibited none of the factors contained in the court's instructions,” and that, since the court provided examples of factors that supported only the State's theory, “the court shaped the course of the jury's deliberation of the evidence.” Simply because the State tailored its closing argument to the enumerated factors that the court instructed the jury that it *could* consider, does not mean that the instruction improperly supported the State's theory of the case. Cf. *United States v. Prawl*, 168 F.3d 622, 629 (2d Cir.1999) (stating that the purpose of the jury instruction notice requirement in the Federal Rules of Criminal Procedure “is to allow counsel to conform their

arguments to the law as it will thereafter be presented by the judge to the jury” (quotation omitted)); 88 C.J.S. *Trial* § 298, at 297–98 (2012) (“Counsel may base his or her argument on the instructions of the court.”).

This is not a case where the court improperly focused the jury's attention on specific portions of the State's evidence and away from the defendant's theory of the case. See *King*, 136 N.H. at 678, 621 A.2d 921 (finding improper the trial court's references in its jury instructions to specific evidence presented at trial by State and its failure to mention exculpatory testimony of defendant). Nor is this a case in which the trial court's instructions invaded the exclusive province of the jury in deciding which facts are proved by the evidence. See *State v. Ross*, 141 N.H. 397, 399–400, 685 A.2d 1234 (1996) (finding that trial court's instruction invaded the fact-finding function of the jury and eclipsed the permissible preceding statement of law). Further, the court explicitly instructed the jury that the arguments made by counsel \*\*1218 “are not evidence” and that the jury “may not consider [the arguments] as evidence.”

In view of the entire charge, we find that a reasonable juror would not have understood the instruction as supporting the State's theory of the case; rather, it empowered the jury to consider *any evidence* that it deemed \*32 relevant to the issue of the defendant's insanity. Accordingly, we hold that the trial court did not err in instructing the jury as it did.

*Affirmed.*

DALIANIS, C.J., and HICKS and CONBOY, JJ., concurred.

**All Citations**

165 N.H. 1, 66 A.3d 1194

## Jennifer Horgan

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**From:** Ebert, Joseph <Joseph.M.Ebert@DOS.NH.GOV>  
**Sent:** Tuesday, April 12, 2022 5:29 PM  
**To:** Sharon Carson; William Gannon; Harold French; Becky Whitley; Jay Kahn; Jennifer Horgan  
**Subject:** SOP for Recording Custodial Interviews and Interrogations

Good Evening,

I testified before your committee this afternoon regarding the bill to require the recording of all custodial interrogations. At the conclusion of my testimony, Senator Kahn asked me if we have a policy regarding recording interviews and I replied yes. For the sake of complete accuracy, I have included the exact wording of our policy below. It should be noted that it is a best practice that interviews, especially in significant investigations, should be recorded whenever possible. Please feel free to contact me with any questions.

Respectfully,  
Joe

**1-D.2.4 Documentation of interviews:**

- A. Interviews may be documented at the discretion of the Division member by one or more of the following options:
1. Written documentation by the Division member
  2. Audio Tape
  3. Written statement of the victim / witness
  4. Video Tape

B. If the Division member decides to utilize audio or video tape, the Division member shall record the entire interview. (State v. Barnett)

**Major Joseph M. Ebert**

**New Hampshire State Police**

**Commander, Investigative Services Bureau**

**Phone #: 603-223-8576**



# Voting Sheets

**Senate Judiciary Committee**  
**EXECUTIVE SESSION RECORD**  
*2021-2022 Session*

Bill # 1540

Hearing date: \_\_\_\_\_

Executive Session date: \_\_\_\_\_

Motion of: IS Vote: 5-0

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Gannon, V-Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. French	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Kahn	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Whitley	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Motion of: Consent Vote: 5-0

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Gannon, V-Chair	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. French	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Kahn	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Whitley	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Motion of: \_\_\_\_\_ Vote: \_\_\_\_\_

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Gannon, V-Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. French	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Kahn	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Whitley	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Reported out by: \_\_\_\_\_

Notes: next timing issue  
just not there yet  
incredible work

**Senate Judiciary Committee**  
**EXECUTIVE SESSION RECORD**  
*2021-2022 Session*

Bill # *1540*

Hearing date: \_\_\_\_\_

Executive Session date: \_\_\_\_\_

Motion of: OTP Vote: \_\_\_\_\_

*Withdrawn*

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Gannon, V-Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. French	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Kahn	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Whitley	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Motion of: \_\_\_\_\_ Vote: \_\_\_\_\_

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Gannon, V-Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. French	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Kahn	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Whitley	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Motion of: \_\_\_\_\_ Vote: \_\_\_\_\_

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Gannon, V-Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. French	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Kahn	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Whitley	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Reported out by: \_\_\_\_\_

Notes: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_



# Committee Report



FOR THE CONSENT CALENDAR

**JUDICIARY**

**HB 1540-FN**, relative to recording custodial interrogations.

Interim Study, Vote 5-0.

Senator Sharon Carson for the committee.

This bill would require the recording of custodial interrogations and specify exceptions in certain circumstances. The Committee heard testimony that this is already among the best practices for law enforcement across the State. However, in recognizing the merit this concept has for our citizens, our law enforcement community, and for our judicial process, the Committee encourages the continued effort to refine this language.

# HB1540-FN

## Bill Details

**Title:** relative to recording custodial interrogations.

**Sponsors:** *(Prime)* Welch (R), Wall (D), Burt (R)

LSR Number: **22-2712**

General Status: **SENATE**

House:

**Committee:** Finance

**Due Out:** 2/17/2022

**Status:** PASSED/ADOPTED WITH AMENDMENT

Senate:

**Committee:** Judiciary

**Floor Date:** 4/28/2022

**Status:** INTERIM STUDY

### Bill Docket

Body	Description
H	Introduced 01/05/2022 and referred to Criminal Justice and Public Safety
H	Public Hearing: 01/14/2022 02:00 pm LOB 202-204
H	--CANCELLED-- Subcommittee Work Session: 02/04/2022 10:30 am LOB 202-204
H	Full Committee Work Session: 02/09/2022 09:00 am LOB 202-204
H	Majority Committee Report: Ought to Pass with Amendment # 2022-0616h <u>(Vote 13-6; RC)</u>
H	Minority Committee Report: Inexpedient to Legislate
H	Amendment # 2022-0616h: AA VV 02/16/2022 <u>HJ 3</u>
H	Ought to Pass with Amendment 2022-0616h: MA RC 233-122 02/16/2022 <u>HJ 3</u>
H	Referred to Finance 02/16/2022 <u>HJ 3</u>
H	Division Work Session: 03/14/2022 10:00 am LOB 212
H	--CANCELLED-- Division Work Session: 03/18/2022 01:00 pm LOB 212
H	--CONTINUED-- Division I Work Session: 03/22/2022 01:00 pm LOB 212
H	Executive Session: 03/23/2022 10:00 am LOB 210-211
H	Committee Report: Ought to Pass with Amendment # 2022-1095 (Vote 21-0; CC)
H	Amendment # 2022-1095h: AA VV 03/31/2022 <u>HJ 9</u>
H	Ought to Pass with Amendment 2022-1095h: MA VV 03/31/2022 <u>HJ 9</u>
S	Introduced 03/31/2022 and Referred to Judiciary; <u>SJ 8</u>
S	Hearing: 04/12/2022, Room 100, SH, 01:15 pm; <u>SC 15</u>
S	Committee Report: Referred to Interim Study, 04/28/2022: Vote 5-0; CC; <u>SC 17</u>
S	Refer to Interim Study, MA, VV; 04/28/2022; <u>SJ 10</u>

# Other Referrals

## Senate Inventory Checklist for Archives

Bill Number: HB1540

Senate Committee: Judiciary

Please include all documents in the order listed below and indicate the documents which have been included with an "X" beside

Final docket found on Bill Status

### Bill Hearing Documents: {Legislative Aides}

Bill version as it came to the committee

All Calendar Notices

Hearing Sign-up sheet(s)

Prepared testimony, presentations, & other submissions handed in at the public hearing

Hearing Report

Revised/Amended Fiscal Notes provided by the Senate Clerk's Office

### Committee Action Documents: {Legislative Aides}

All amendments considered in committee (including those not adopted):

\_\_\_ - amendment # \_\_\_      \_\_\_ - amendment # \_\_\_

\_\_\_ - amendment # \_\_\_      \_\_\_ - amendment # \_\_\_

Executive Session Sheet

Committee Report

### Floor Action Documents: {Clerk's Office}

All floor amendments considered by the body during session (only if they are offered to the senate):

\_\_\_ - amendment # \_\_\_      \_\_\_ - amendment # \_\_\_

\_\_\_ - amendment # \_\_\_      \_\_\_ - amendment # \_\_\_

### Post Floor Action: (if applicable) {Clerk's Office}

\_\_\_ Committee of Conference Report (if signed off by all members. Include any new language proposed by the committee of conference):

\_\_\_ Enrolled Bill Amendment(s)

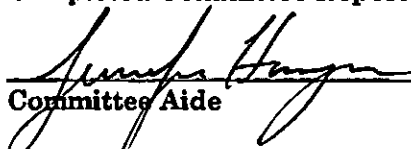
\_\_\_ Governor's Veto Message

### All available versions of the bill: {Clerk's Office}

\_\_\_ as amended by the senate      \_\_\_ as amended by the house

\_\_\_ final version

Completed Committee Report File Delivered to the Senate Clerk's Office By:

  
Committee Aide

8/12/22  
Date

Senate Clerk's Office AK