

## UNRECORDED CUSTODIAL INTERROGATION

**You have heard some evidence that there was no recording of the complete interrogation of the defendant conducted while he (she) was (in custody) (at a place of detention). The Supreme Judicial Court — this state’s highest court — has expressed a preference that such interrogations be recorded whenever practicable. Since there is no complete recording of an interrogation in this case, you should weigh evidence of the defendant’s alleged statement with great caution and care. The reason is that the Commonwealth may have had the ability to reliably record the totality of the circumstances upon which it asks you to determine beyond a reasonable doubt that the defendant’s statement was voluntary, but instead is asking you to rely on a summary of those circumstances drawn from the possibly fallible or selective memory of its witness(es).**

*Here the jury must be instructed on “Confessions and Admissions (Humane Practice)” (Instruction 3.560) when voluntariness is a live issue.*

### NOTES:

1. **When instruction required.** A defendant is entitled to this instruction on request when a defendant’s statement arises from a custodial interrogation or from one conducted at a place of detention and there is no electronic recording of the complete interrogation. *Commonwealth v. DiGiambattista*, 442 Mass. 423, 443, 813 N.E.2d 516 (2004). It must be given whether or not the prosecution offers reasons or justification for the lack of recording.

While the Commonwealth always bears the burden of proving beyond a reasonable doubt that a statement is voluntary, the preference for recording is limited to statements made during custodial interrogation or interrogation conducted at a place of detention (e.g., a police station or jail cell). Custodial interrogation consists of questioning by law enforcement officers after a person has been taken into custody or deprived of his or her freedom in any significant way. Whether a defendant is in custody at any moment depends on whether a reasonable person in the defendant's shoes would have believed that he or she was not free to leave. *Commonwealth v. Morse*, 427 Mass. 117, 691 N.E.2d 566 (1998); *Commonwealth v. Gendraw*, 55 Mass. App. Ct. 677, 774 N.E.2d 167 (2002); *Commonwealth v. Ayre*, 31 Mass. App. Ct. 17, 20, 574 N.E.2d 415, 417 (1991).

*DiGiambattista* only applies prospectively to cases decided after April 6, 2004. *Commonwealth v. Dagley*, 442 Mass. 713, 721, 816 N.E.2d 527 (2004).

2. **Voluntariness.** The absence of an electronic recording is only one factor to be considered in determining the voluntariness of a defendant's statement in the totality of the circumstances. *Commonwealth v. Trombley*, 72 Mass. App. Ct. 183, 187, 89 N.E.2d 446 (2008).