

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). [In evaluating the significance of the lack of a recording in this case, you may also consider any evidence concerning whether the defendant was given an opportunity to have (his) (her) interrogation recorded, and whether the defendant voluntarily elected not to have the interrogation recorded.]

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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, 448-449 (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, 122-123 (1998); *Commonwealth v. Gendraw*, 55 Mass. App. Ct. 677, 682-683 (2002); *Commonwealth v. Ayre*, 31 Mass. App. Ct. 17, 20 (1991).

DiGiambattista applies only prospectively; that is, to cases tried after August 16, 2004. *Commonwealth v. Dagley*, 442 Mass. 713, 721 (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 (2008).

3. **Instruction must be given even where defendant refuses to have recording made.** The prosecution may “address any reasons or justifications that would explain why no recording was made, leaving it to the jury to assess what weight they should give to the lack of a recording.” *Commonwealth v. Tavares*, 81 Mass. App. Ct. 71, 73 (2011), quoting *Commonwealth v. DiGiambattista*, 442 Mass. 423, 448-449 (2004).

4. **Defendant’s objection to recording.** When a defendant is given the opportunity to have his or her interrogation recorded, the jury should be advised that they may consider whether the defendant voluntarily chose not to have a recording made. *Commonwealth v. Rousseau*, 465 Mass. 372, 393 (2013).

5. **Not required for witness interviews where defendant is not a suspect.** The *DiGiambattista* instruction is not required for unrecorded witness interviews of non-suspects, specifically, where the police did not electronically record the volunteered statement by an uncharged defendant who appeared unexpectedly at the police station to discuss the victim’s demise shortly after her death. The defendant was not a suspect at the time of the interview. *Commonwealth v. Issa*, 466 Mass. 1, 20-21 (2013).