Rule 4.7 of the Arkansas Rules of Criminal Procedure: A Squandered Opportunity or a Step in the Right Direction?*

I. INTRODUCTION

In recent years, commentators have called for reforming law-enforcement-interrogation techniques to eliminate or reduce false confessions.¹ Electronic recording of custodial interrogations protects suspects from prosecutors using false confessions against them in court and limits costs on law-enforcement agencies.² As Justice Louis Brandeis stated, “Sunlight is . . . the best of disinfectants.”³ Allowing courts to examine video or audio recordings of a police interrogation may be the “sunlight” needed to alleviate the false-confession epidemic.⁴ Mandatory recording might also curb allegations of police abuse or misconduct, or it may eliminate a defendant’s argument that the police misheard or misinterpreted his or her statements.⁵ The requirement could feasibly improve the efficiency of overburdened criminal courts by reducing the amount and complexity of pretrial motions and hearings.⁶ Arkansas recently adopted Rule 4.7 to its Rules of Criminal Procedure, which calls for

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2. Id.
4. See JUSTICE PROJECT, supra note 1.
5. See, e.g., State v. Lockhart, 4 A.3d 1176, 1194 (Conn. 2010).
6. See, e.g., id. Alternatively, detractors of a strong recording rule might argue that the amount of motions or hearings would increase. However, defendants would base their motions to suppress on concrete evidence retained in a recording as opposed to a citizen’s word against a police officer’s word.
recording interrogations when practical. This Rule has received criticism, and the Arkansas Supreme Court implied that the Rule requires a significant amount of interpretation. Although the court characterized Rule 4.7 as a “starting point,” one has difficulty determining how the Rule changes previously stated trial-court policy over analyzing recordings of custodial interrogations.

On its face, Rule 4.7 is vague and contradictory. It places a new analysis onto trial judges, defense attorneys, prosecutors, and law-enforcement officers without providing clear standards for how law enforcement should carry out the recordings and, more importantly, on what happens when a failure to record takes place. The Rule purports to be an entirely new approach, but it succumbs to the same traps as prior precedent. Arkansas courts should use the “starting point” to protect both the accused and law-enforcement agencies. Courts can accomplish this protection by interpreting the Rule to have a strong exclusionary basis, requiring a full and complete recording, clarifying the presumption of admissibility, and resisting the temptation to limit the Rule to serious offenses.

This comment explores Arkansas’s history of recordation in Part II. Part III examines the history and development of similar rules in sister jurisdictions. Arkansas

7. ARK. R. CRIM. P. 4.7(a).
10. Id.
11. See Misskelley v. State, 323 Ark. 449, 471-72, 915 S.W.2d 702, 714 (1996) (explaining that the Arkansas Supreme Court “will consider [a full recording of an interrogation] in the totality of the circumstances mix, but [it] will not invalidate a confession for [the lack of a full recording] alone”).
14. See Misskelley, 323 Ark. at 471-72, 915 S.W.2d at 714.
courts will benefit greatly from taking cues from other states that have already struggled to define their recording rules. Arkansas can look to the successes and failures of similarly situated states in order to avoid problems and facilitate success. Part IV draws on current Arkansas law and the law of other jurisdictions to suggest a framework that will take Rule 4.7 from a “starting point” to a rule that protects law-enforcement agencies and the accused. Part V concludes.

II. HISTORY OF ELECTRONIC RECORDING IN ARKANSAS

Arkansas courts have long acknowledged the benefit of recording custodial interrogations.\(^\text{15}\) In *Conner v. State*, the Arkansas Supreme Court explained that a recording could help preserve “particularly persuasive” evidence.\(^\text{16}\) Although the court has noted the benefits of having interviews recorded,\(^\text{17}\) it has also taken pains to hold that defendants do not have a constitutional right—under either the Arkansas or U.S. Constitutions—to a recording of custodial interrogations.\(^\text{18}\)

In *Misskelley v. State*, the Arkansas Supreme Court addressed the voluntariness of a confession made by one of the convicted “West Memphis Three” during a custodial interrogation.\(^\text{19}\) The Court explained that no state law or precedent requires the police to record interrogations in full.\(^\text{20}\) The court instructed that it “will consider [a full recording of an interrogation] in the totality of the circumstances mix, but [it] will not invalidate a confession for [the lack of a full recording] alone.”\(^\text{21}\) The *Misskelley* court relied on the factors set forth in *Douglas v. State*\(^\text{22}\) to determine whether a suspect voluntarily gave a confession

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15. See, e.g., *Conner v. State*, 334 Ark. 457, 466, 982 S.W.2d 655, 659 (1998) (citing a tape-recorded interview as helping to show that the defendant displayed “no indication . . . that [he] was either unintelligent, or unable to understand his rights”).
16. See id. at 468, 982 S.W.2d at 660.
17. See id. at 466, 468, 982 S.W.2d at 659-60.
19. 323 Ark. at 471, 915 S.W.2d at 714 (1996).
20. Id.
21. Id. at 471-72, 915 S.W.2d at 714.
that is otherwise valid. Each of these decisions affirmed that:

Among the factors to be considered in determining the validity of a confession are the age, education, and intelligence of the accused, the advice or lack of advice of his constitutional rights, the length of detention, the repeated or prolonged nature of questioning, or the use of mental or physical punishment.

Twelve years after Misskelley, in Clark v. State, the Arkansas Supreme Court analyzed the need for a rule requiring law enforcement to record custodial interrogations. While noting the difficulty of promulgating an effective rule and declining to provide a specific instruction, the Clark court recognized the benefit of exercising its supervisory power over the trial courts to provide a rule that would encourage electronically recording custodial interrogations. Consequently, the court referred the matter to the Committee on Criminal Practice to determine the “practicability” of adopting such a rule.

The Committee proposed a rule that “does not mandate the recording” of all custodial interrogations but “allows the trial court to consider the failure to record a statement in determining the admissibility of the statement.” The Arkansas Supreme Court then adopted Rule 4.7 of the Arkansas Rules of Criminal Procedure. The court noted in its per curiam decision adopting the Rule that Rule 4.7 represented a “starting point.” Rule 4.7 became effective on September 1, 2012.

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23. Misskelley, 323 Ark. at 466-67, 915 S.W.2d at 711.
24. Id.
26. Id. at 303-04, 287 S.W.3d at 575-76.
27. Id. at 304, 287 S.W.3d at 576.
29. Id.; see also ARK. R. CRIM. P. 4.7.
31. Id.
III. HISTORY AND DEVELOPMENT OF ELECTRONIC-RECORDING REQUIREMENT

Since the early 1980s, state courts have struggled with whether to require electronic recording and with how to implement such requirements. The states with mandatory-recording requirements have adopted four basic approaches: (A) the Alaska approach—which deems an incomplete recordation a violation of the state’s constitution; (B) the majority approach—which requires recording by using a state high court’s role to supervise the lower courts; (C) the evidentiary and criminal-procedure approach—which uses rules of evidence or criminal procedure to mandate or incentivize recording; and (D) the legislative approach—where legislation requires some form of recordation.

Although these jurisdictions have implemented rules in a number of different ways, their assessments of electronic recording overlap in many areas. As discussed in section E, determining a consensus among jurisdictions is difficult. Section F briefly discusses Arkansas’s current approach in relation to these four categories. Examining the implementation of rules in other states is useful in deciphering what will become Arkansas’s approach to electronic recording.

A. Alaska Approach

In the 1985 decision *Stephan v. State*, Alaska became the first state to mandate electronic recording. Unlike any other state, Alaska holds that an incomplete recording of a
custodial interrogation violates state constitutional protections. To satisfy the due-process requirement, recordings must indicate clearly that they recount an entire interview, including the advising of a suspect’s *Miranda* rights. Thus, “explanations should be given at the beginning, the end and before and after any interruptions in the recording, so that courts are not left to speculate about what took place.”

Prior to the *Stephan* decision, the Alaska Supreme Court, in *Mallott v. State*, suggested that recording was merely part of law enforcement’s “duty to preserve evidence.” The *Mallott* rule left the determination of a defendant’s remedy to the trial courts. Recording became mandatory after *Stephan*, with limited exceptions for feasibility. The Alaska Supreme Court enumerated the following possible excuses for not recording a custodial interrogation: (1) when unavoidable power or equipment failure occurs; (2) when an interviewee declines to talk while being recorded; and (3) when justified by a case-by-case analysis.

The Alaska approach is unique not only because it construes a failure to record as a violation of constitutional due process, but also because it provides a strong exclusionary rule. The Alaska Supreme Court found that trial courts and law-enforcement agencies were not adequately enforcing the *Mallott* rule, which lacked a strong exclusionary rule. The *Stephan* court reasoned that “a strong and certain remedy will have a considerable deterrent effect in future cases.” Moreover, compliance with the rule “imposes such minimal costs and burdens on law enforcement agencies that they will have little to gain from

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38. *See id.*
39. *Id.* at 1162.
40. *Id.*
41. 608 P.2d 737, 743 n.5 (Alaska 1980).
42. *Stephan*, 711 P.2d at 1163.
43. *See id.* at 1159, 1162.
44. *Id.* at 1162.
45. *See id.* at 1159, 1163.
46. *Id.* at 1163 (“[L]aw enforcement agencies and lower courts have repeatedly failed to give due regard to the protections the *Mallott* rule is intended to provide, even though the rule was first announced over five years ago.”).
47. *Stephan*, 711 P.2d at 1163.
noncompliance.”48 Therefore, anytime law enforcement fails to make a full recording, the State must prove by a preponderance of the evidence that recording was not feasible.49

B. Majority Approach

In the wake of Stephan, other state supreme courts have used their supervisory roles over state trial courts to mandate electronic recording through judicial precedent.50 In Minnesota, “all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention.”51 Thus, “[i]f law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial.”52 Minnesota requires the suppression of any non-recorded statement if the trial court determines that law enforcement committed a “substantial” violation of the recording rule.53 When determining whether a violation is “substantial,” trial courts must consider “all relevant circumstances.”54 If the trial court finds that the violation is not substantial, it must provide an explicit explanation for its finding.55 Likewise, New Hampshire began requiring electronic recording in State v. Barnett.56 Barnett requires a complete recording—“which occurs after Miranda rights are given”—for statements to be admissible.57 The New Hampshire Supreme Court later declined to extend the protection to pre-Miranda statements.58

48. Id.
49. Id. at 1163 n.23.
51. Scales, 518 N.W.2d at 592.
52. Id.
53. Id. (internal quotation marks omitted).
54. Id. (internal quotation marks omitted).
55. Id.
57. Id.
Conversely, Massachusetts—while stopping short of a bright-line rule requiring electronic recording of custodial interrogations—allows a defendant to request a “cautionary instruction concerning the use” of non-recorded statements. In Massachusetts, “[i]t is the Commonwealth’s burden to prove beyond a reasonable doubt” that any “improper police tactics were not ‘so manipulative . . . that they deprived [the defendant] of his ability to make an unconstrained, autonomous decision to confess.’”

C. Evidentiary and Criminal-Procedure Approach

Other states have adopted rules of evidence or criminal procedure to require electronic recording. New Jersey, in a manner similar to the tactic the Arkansas Supreme Court would later take, referred the matter of electronic recording to a state committee on criminal procedure. New Jersey eventually adopted a rule entitling a defendant to electronic recording of a custodial interrogation in a place of detention when he is charged with a first- or second-degree criminal offense or other enumerated offense. As summarized, electronic recording “must occur unless”:

(1) the act of recording is not feasible;
(2) the defendant made the statement in question spontaneously;
(3) the defendant made the statement in response to routine questions asked in processing the arrest;
(4) the defendant agreed, in a recorded waiver, to speak on the condition that law enforcement would not record;

61. Id. (quoting United States v. Walton, 10 F.3d 1024, 1030 (3d Cir. 1993) (citation omitted)).
62. Arkansas has adopted this approach. See ARK. R. CRIM. P. 4.7; infra Part III.F.
(5) the interrogation takes place out-of-state; or
(6) the accused was not suspected of a crime that necessitates recording.65 Failure to record without excuse is a “factor for consideration by the trial court in determining the admissibility of a statement, and by the jury in determining whether the statement was made, and if so, what weight, if any, to give to the statement.”66

Like New Jersey, Texas criminal procedure provides that “no oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless . . . an electronic recording . . . is made of the statement.” At the beginning of the recording, “all voices” on the recording must be identified. The Texas rule further admonishes trial courts to “strictly construe” the electronic-recording mandate.69 The trial courts can only make exceptions when “material [voices] are identified” and the suspect receives his Miranda warnings.70

D. Legislative Approach

Some states and the District of Columbia have eschewed the court system in favor of legislative guidance on the matter of electronic recording.71 For example, Wisconsin’s statute entitles a defendant in a felony case to a jury instruction if law enforcement does not electronically record his or her custodial interrogation.72 Wisconsin allows an exception in cases where a defendant refuses a recording; a defendant makes a statement as a result of routine processing; a defendant makes the statement spontaneously and not in response to a question; an exigent public-safety circumstance exists that prevented police from making a

67.  TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a)(1) (West 2005).
68.  TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a)(4).
69.  TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(e).
70.  TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(e).
71.  E.g., D.C. CODE § 5-116.01 (West 2013); 725 ILL. COMP. STAT. 5/103-2.1 (West 2013); WIS. STAT. ANN. § 972.115 (West 2013).
72.  WIS. STAT. ANN. § 972.115(d)(2)(a).
recording; or a law-enforcement officer believes in good faith that the interrogation involved a non-felonious crime.\textsuperscript{73}

Washington, D.C., requires a complete electronic recording, to the greatest extent feasible, of custodial interrogations of violent-crime suspects if the interrogation takes place at a police station.\textsuperscript{74} The D.C. statute maintains that recording should start at first contact between the officer and the interviewee in the interrogation room, including the \textit{Miranda} warnings, and not stop until the suspect requests that recording cease.\textsuperscript{75} Similarly, an Illinois statute presumes inadmissibility for any “oral, written, or sign language statement of an accused made as a result of a custodial interrogation conducted at a police station or other place of detention” unless the police make a recording.\textsuperscript{76} Like Alaska, Illinois allows the State to overcome this presumption with proof, by a preponderance of the evidence, that the defendant made the statement voluntarily.\textsuperscript{77}

\textbf{E. Consensus}

As explained by the Arkansas Supreme Court in \textit{Clark} v. \textit{State}, one has difficulty discerning any consensus that exists among the states that currently require electronic recording.\textsuperscript{78} States disagree on whether law enforcement should record waivers of recordings,\textsuperscript{79} whether to require full recordings,\textsuperscript{80} the remedies for non-recordation,\textsuperscript{81} whether to

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  \item \textsuperscript{73} WIS. STAT. ANN. § 972.115(d)(2)(a).
  \item \textsuperscript{74} D.C. CODE § 5-116.01(a)(1).
  \item \textsuperscript{75} D.C. CODE § 5-116.01(a)(2), (c)(1).
  \item \textsuperscript{76} 725 ILL. COMP. STAT. 5/103-2.1(b).
  \item \textsuperscript{77} 725 ILL. COMP. STAT. 5/103-2.1(e)--(f).
  \item \textsuperscript{78} See 374 Ark. 292, 304, 287 S.W.3d 567, 575 (2008) (“States have not been consistent in designating the portions of an interrogation that must be recorded.”).
  \item \textsuperscript{79} Compare D.C. CODE § 5-116.01 (requiring a recording), and State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (“[A]ll custodial interrogation including . . . any waiver of those rights . . . shall be recorded . . . .”), with 725 ILL. COMP. STAT. 5/103-2.1, and WIS. STAT. ANN. § 972.115 (West 2013) (containing no such requirement).
  \item \textsuperscript{80} Compare D.C. CODE § 5-116.01 (requiring electronic recording of custodial interrogations in their entirety), and State v. Velez, 842 A.2d 97, 100 (N.H. 2004) (”[T]he recording must be complete.”), with TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (West 2013) (specifying only that law enforcement must record “the statement”).
  \item \textsuperscript{81} Compare Wis. STAT. ANN. § 972.115 (requiring a jury instruction allowing the jury to consider that law enforcement did not record statements), with Velez, 842
allow certain exceptions, and which crimes invoke the recording mandates.

F. Arkansas Approach

The Arkansas Supreme Court’s adoption of Rule 4.7 became effective on September 1, 2012. The Rule states, in pertinent part:

(a) Whenever practical, a custodial interrogation at a jail, police station, or other similar place, should be electronically recorded.

(b)(1) In determining the admissibility of any custodial statement, the court may consider, together with all other relevant evidence and consistent with existing law, whether an electronic recording was made; if not, why not; and whether any recording is substantially accurate and not intentionally altered.

Rule 4.7 requires trial courts to consider: (1) relevant evidence and existing law; (2) whether law enforcement made a recording; (3) reasons for failing to make a recording; and (4) the accuracy of the recording in determining admissibility. As the Rule requires courts to look to “existing law,” trial judges consider the totality of the factual circumstances when deciding whether to suppress custodial statements.

A.2d at 100 (mandating suppression when law enforcement fails to record interrogation).

82. Compare N.J. R. C.R. R. 3:17(b) (requiring the State to prove, by a preponderance of the evidence, applicability of an excuse), and Stephan v. State, 711 P.2d 1156, 1161 (Alaska 1985), with Velez, 842 A.2d at 100 (requiring a full recording for admissibility).

83. Compare N.J. R. C.R. R. 3:17(a), with Stephan, 711 P.2d at 1162 (describing a generally applicable recording requirement).


85. Ark. R. Crim. P. 4.7(a)–(b)(1).

86. Ark. R. Crim. P. 4.7(a)–(b)(1).

87. Ark. R. Crim. P. 4.7(b)(1).

IV. SUGGESTIONS

As courts begin applying Rule 4.7, they should interpret it as having a strong exclusionary rule coupled with a presumption of inadmissibility. Further, expanding the Rule to require full and complete recordings of custodial interrogations would serve the criminal-justice system well. Additionally, appellate courts should not limit the Rule to cases of violent felonies.

A. Exclusionary Rule

Although the Arkansas Supreme Court certainly had noble reasons for changing the Rules of Criminal Procedure, one need only consider Alaska’s development of its rule to see the fatal flaw of Arkansas’s Rule 4.7. Alaska, the first state to direct law-enforcement agencies to record custodial interrogations, began with a rule that merely suggested recording and left any remedy for non-recording up to trial-court judges. Just five years later, Alaska made its rule more stringent because “law enforcement agencies and lower courts . . . repeatedly failed to give due regard” to the original rule.

Arkansas courts should apply Rule 4.7 as an exclusionary rule when law enforcement fails to record, when practical, a custodial interrogation. As it stands, however, the Rule admonishes that custodial interrogations “should” be recorded. Moreover, the Rule contemplates that courts may consider an electronic recording in determining the “admissibility” of a statement. Although the purpose of Rule 4.7 seems clear at first glance, Arkansas courts must interpret when and why they should exclude statements. Rule 4.7 calls for judges to consider the totality of circumstances. Although the Rule is a good “starting point,” it leaves prosecutors, defense attorneys, police

89. See supra Part II.A.
92. ARK. R. CRIM. P. 4.7(a).
93. ARK. R. CRIM. P. 4.7(b)(1).
94. ARK. R. CRIM. P. 4.7(b)(1).
officers, and judges with an unclear idea of how to resolve situations in which a recording does not exist. Again, as the Rule presently states, a trial court “may consider” whether an electronic recording is present in determining admissibility.96

Trial judges should have been “considering” electronic recordings all along.97 The Arkansas Supreme Court has explained that electronic recordings can provide “particularly persuasive” evidence.98 Moreover, determining whether a confession is voluntary and otherwise proper is within the province of the trial judge.99 The judge is responsible for considering the relevant evidence.100

Defendants will likely point to the Rule’s language stating that law enforcement “should” record “[w]henever practical.”101 Moreover, the Rule grants courts latitude to consider the accuracy, completeness, and existence of a recording in determining whether custodial statements are admissible.102 This part of the Rule suggests that courts should exclude a defendant’s statement if law enforcement failed to make an electronic recording when doing so would have been practical.

Conversely, the Government will likely point to the words “should” and “may.”103 Under a plain reading of the Rule, courts are not obligated to even consider whether law enforcement made a recording at all in determining admissibility.104 This result seems at odds with the Rule’s intent. The Arkansas Supreme Court adopted Rule 4.7 because, as stated in the Rule, law enforcement “should”

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96. ARK. R. CRIM. P. 4.7(b)(1).
98. Conner, 334 Ark. at 468, 982 S.W.2d at 660.
100. Id.
101. ARK. R. CRIM. P. 4.7(a).
102. ARK. R. CRIM. P. 4.7(b)(1).
103. ARK. R. CRIM. P. 4.7(a)–(b)(1).
104. See ARK. R. CRIM. P. 4.7(b)(1) (stating that courts “may consider . . . whether an electronic recording was made . . . .” (emphasis added)).
record custodial interrogations. Moreover, one has difficulty reconciling Rule 4.7’s inherent aspirational nature with the court’s previously stated policy of considering electronic recording in a totality-of-the-circumstances analysis. Because Misskelley asserted that courts would consider recording custodial interrogations, but that the absence of a recording alone is insufficient for exclusion, the question becomes what the new Rule is meant to change, if anything.

Arkansas courts are obligated to interpret rules that are susceptible to two constructions—“of which one will lead to an absurdity, [and] the other will not”—as having the construction that is not absurd. Both trial and appellate courts must be mindful of this “basic rule” of statutory construction. If Rule 4.7 were fully aspirational, it would have almost no impact on trial-court or police practices. Courts should recognize the intent of the Rule’s drafters. In adopting Rule 4.7, the Arkansas Supreme Court was attempting to afford the protections outlined in Clark v. State. As a result, courts should interpret Rule 4.7 as requiring recording, not just suggesting it. At present, the

105. ARK. R. CRIM. P. 4.7; see also In re Adoption of Ark. Rule of Criminal Procedure 4.7, 2012 Ark. 294, at 1, available at http://opinions.aoc.arkansas.gov/WebLink8/0/doc/305899/Electronic.aspx (agreeing with the approach of allowing trial courts to consider law enforcement’s failure to record when determining admissibility).
107. Id.
108. State v. Jones, 91 Ark. 5, 8, 120 S.W. 154, 155 (1909); see also Kesai v. Almand, 2011 Ark. 207, at 3, 382 S.W.3d 669, 671 (stating that the interpretation of a court rule applies the same standards as interpreting a statute).
110. See id.
111. The court explained that:
   The benefits of mandating recording include: (1) protection against admission of involuntary or invalid confessions and enhancement of the reliability of confessions; (2) protection for police officers from false allegations and improved ability of the police to assess the guilt or innocence of suspects; and (3) attainment of an objective and reviewable record that would enhance a judge or juror’s assessment of credibility, and preservation of judicial resources by discouraging defendants from raising “frivolous” pretrial challenges to confessions.
Rule is open to a varying array of interpretation that could lead to inconsistent results. A judge in Little Rock might take heed of the Rule’s direction and exclude evidence, while his counterpart in Jonesboro—utilizing the aspirational tone of the Rule to declare that recording is never absolutely necessary for the admission of statements—might admit the statements under the exact same set of facts. Thus, pursuant to judicial efficiency, settled precedent regarding statutory and rule interpretation, fundamental notions of fairness, and consistency of rule application, courts should mandate electronic recording when practical and exclude statements if they are not recorded or otherwise proven voluntary.

B. Presumption of Inadmissibility

In addition to applying a strong exclusionary rule, Rule 4.7 should presume that unrecorded statements are inadmissible, and the court should specify that the State has the burden of rebutting this presumption. Arkansas has long held that “[a] statement made while an accused is in custody is presumptively involuntary, and the burden is on the State to prove, by a preponderance of the evidence, that a custodial statement was given voluntarily and was knowingly and intelligently made.” Rule 4.7 states that judges “may consider” the lack of a recording in determining admissibility, but it also states that the consideration must be “consistent with existing law.” The Rule also provides a clear exception when recording would be impractical.

The court should expand the presumption of inadmissibility to include unrecorded statements. Moreover, the Government should be able to rebut that presumption by proving—to the preponderance of the evidence—that the accused made the statement voluntarily and intelligently and that recording the interrogation would have been

112. Jones v. State, 344 Ark. 682, 687, 42 S.W.3d 536, 540 (2001) (citing Smith v. State, 334 Ark. 190, 974 S.W.2d 427 (1998), overruled by Grillot v. State, 353 Ark. 294, 107 S.W.3d 136 (2003)); see also Grillot, 353 Ark. at 310-11, 107 S.W.3d at 145 (holding that statements made while in custody are presumptively involuntary and that the State has the burden of proving otherwise).
113. ARK. R. CRIM. P. 4.7(b)(1).
114. ARK. R. CRIM. P. 4.7(b)(2)(B).
impractical. Alaska and Illinois have successfully applied this standard. In Alaska, the State must prove that recording was not feasible to a preponderance of the evidence. Similarly, Illinois courts look to whether the unrecorded statement is “suitable or fit to be relied on.”

However, the Massachusetts standard—requiring the Government to prove harmlessness beyond a reasonable doubt—is too restrictive. The standard is also inextricably linked to Massachusetts’s law governing admissibility and determination of whether a statement was voluntary. By simply expanding current precedent relating to involuntary statements, Arkansas can provide protections to the police and accused citizens while ensuring that the criminal-justice system remains efficient.

C. Full and Complete Recording

Rule 4.7 does not require a full and complete recording, causing the Rule to lose many of its intended benefits. According to the Arkansas Supreme Court, the benefits of mandating recordation include:

(1) protection against admission of involuntary or invalid confessions and enhancement of the reliability of confessions;

(2) protection for police officers from false allegations and improved ability of the police to assess the guilt or innocence of suspects; and

115. See Grillot, 353 Ark. at 310-11, 107 S.W.3d at 145; Jones, 344 Ark. at 687, 42 S.W.3d at 540.


117. Stephan, 711 P.2d at 1162.


120. Commonwealth v. Crawford, 706 N.E.2d 289, 293 (Mass. 1999) (holding that when evidence suggests a statement is involuntary, the State must prove “beyond a reasonable doubt that the statement was voluntary”), abrogated by Commonwealth v. Carlino, 865 N.E.2d 767 (2007).


122. ARK. R. CRIM. P. 4.7.
(3) attainment of an objective and reviewable record that would enhance a judge or juror’s assessment of credibility, and preservation of judicial resources by discouraging defendants from raising “frivolous” pretrial challenges to confessions.\(^\text{123}\)

In “determin[ing] whether a waiver of *Miranda* rights is voluntary,” Arkansas courts “look[] to see if the confession was the product of free and deliberate choice rather than intimidation, coercion, or deception.”\(^\text{124}\) As the court acknowledged in *Clark*, the major benefits of electronic recording are not only that it protects defendants from being coerced or deceived, but also that it protects the Government from false allegations and “frivolous” challenges to confessions.\(^\text{125}\)

New Hampshire has handled this question especially reasonably. The State excludes the recording in cases where a complete recording does not exist, but it allows evidence “gathered during the interrogation [to] be admitted in alternative forms, subject to the usual rules of evidence.”\(^\text{126}\) Although New Hampshire does not extend recordings to pre-*Miranda* statements, it provides a rational way for judges to determine when and if they should admit evidence obtained during the interrogation.\(^\text{127}\)

The United States Supreme Court illustrates how electronic recording strongly protects the accused from deception and coercion.\(^\text{128}\) In *Missouri v. Seibert*, the police officer utilized a “two-step” interrogation technique.\(^\text{129}\) That technique involves police officers questioning a suspect, providing the familiar *Miranda* warnings, and then performing another interrogation.\(^\text{130}\) The plurality of the


\(^{124}\) *Grillot*, 353 Ark. at 311, 107 S.W.3d at 145-46 (citing *Jones*, 344 Ark. 682, 42 S.W.3d 536).

\(^{125}\) 374 Ark. at 303-04, 287 S.W.3d at 575 (internal quotation marks omitted); *see also* State v. *Cook*, 847 A.2d 530, 543 (N.J. 2004) (noting that electronic recording protects police from false allegations and discourages frivolous challenges).


\(^{127}\) *See id.*

\(^{128}\) *See Missouri v. Seibert*, 542 U.S. 600, 604-05 (2004) (plurality opinion) (holding that taped confession obtained during second interrogation was inadmissible because the officer conducted the initial interrogation in violation of *Miranda*).

\(^{129}\) *Id.* at 606.

\(^{130}\) *Id.*
Court deemed this “question first” method unconstitutional.\textsuperscript{131} Had the officer in \textit{Seibert} not recorded the second interrogation, the Court might not have realized that police used a two-step method.\textsuperscript{132}

Furthermore, high-ranking law-enforcement officials across the country have voiced their preference for having interrogations recorded.\textsuperscript{133} Three-fifths of large-city police administrators favor videotaping.\textsuperscript{134} Having video or audio records of an interrogation protects law-enforcement officers from accusations of inappropriate conduct.\textsuperscript{135} In Arkansas, requiring recording from pre-\textit{Miranda} warning onward would clearly, as the Arkansas Supreme Court pointed out, protect the accused and the officers.\textsuperscript{136}

However, one has difficulty measuring what, if any, additional burdens exist by turning on the recording equipment a few moments sooner. In \textit{Clark}, the court pointed to the two most common policy arguments against electronic recording: “(1) cost in the purchase and maintenance of recording equipment, which would be a financial burden for some municipalities; and (2) the potential to hamper police interrogation techniques and reduce the ability of police officers to obtain truthful confessions.”\textsuperscript{137} Requiring a recording of \textit{Miranda} warnings would not impose an additional burden on law enforcement. The chief “interrogation technique” that mandatory recording would hamper was ruled unconstitutional in \textit{Seibert}.\textsuperscript{138} Moreover, municipalities will feel the cost of maintenance whether or not the state mandates full recordings.

Expanding the recording requirement to include a full recording of an interview from the beginning of \textit{Miranda}

\textsuperscript{131. Id. at 604.}
\textsuperscript{132. See id. at 605.}
\textsuperscript{133. See Marvin Zalman & Brad W. Smith, The Attitudes of Police Executives Toward \textit{Miranda} and Interrogation Policies, 97 J. CRIM. L. & CRIMINOLOGY 873, 920-22 (2007).}
\textsuperscript{134. Id. at 921.}
\textsuperscript{135. See Clark v. State, 374 Ark. 292, 303, 287 S.W.3d 567, 575 (2008).}
\textsuperscript{136. See id. at 303-04, 287 S.W.3d at 575.}
\textsuperscript{137. Id. at 304, 287 S.W.3d at 575 (citing State v. Cook, 847 A.2d 530 (N.J. 2004)).}
warnings until the end of contact will protect police and the accused. Moreover, this requirement would aid judges and juries in assessing credibility, and it would contribute to judicial economy by eliminating a number of frivolous motions to suppress confessions.139

D. Severity of Crime

By suggesting recording of custodial statements for all crimes, not just a subsection of violent or dangerous crimes, the Arkansas Supreme Court and Rule 4.7 provide greater protection than some other states have afforded.140 Thus, Rule 4.7 provides a bright-line approach that will ease the burden on law enforcement in determining when to record.

Additionally, the benefits of recording for both the accused and law enforcement are not limited to facts in which a violent felony has occurred.141 Although an aggravated assault is undeniably more serious than a simple misdemeanor battery,142 the freedom of the misdemeanor battery defendant is still at stake.143 Further, none of the benefits outlined by the court in Clark would apply to a felony without applying to a misdemeanor. A misdemeanor defendant is still at risk of giving an involuntary or invalid confession; police officers would benefit from having improved ability to determine guilt or innocence, and electronic recording would protect them from false allegations of impropriety; finders of fact in a misdemeanor case must assess credibility of a confession; and defendants might raise pretrial motions in a misdemeanor case.144 Rule 4.7, at present, applies to all custodial interrogations,

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139. Clark, 374 Ark. at 303-04, 287 S.W.3d at 575.
140. Compare ARK. R. CRIM. P. 4.7(a) (“Whenever practical, a custodial interrogation . . . should be electronically recorded.”), with N.J. R. C.R. R. 3:17(a) (West 2013) (requiring recordation only for violent and/or dangerous crimes), and WIS. STAT. ANN. § 972.115(2)(a) (West 2013) (limiting recording requirement to felony cases).
141. See Clark, 374 Ark. at 303-04, 287 S.W.3d at 575.
142. Compare ARK. CODE ANN. § 5-13-203(b) (Repl. 2013) (“Battery in the third degree is a Class A misdemeanor.”), with ARK. CODE ANN. § 5-13-204(b) (Repl. 2013) (“Aggravated assault is a Class D felony.”).
143. ARK. CODE ANN. § 5-4-401(b)(1) (Repl. 2013) (“For a Class A misdemeanor, the sentence shall not exceed (1) year . . . .”).
144. See Clark, 374 Ark. at 303-04, 287 S.W.3d at 575.
regardless of the offense. While New Jersey limits mandated-recording to a list of particularly heinous crimes, that limitation is completely at odds with the spirit of Rule 4.7.

If defendants and law-enforcement agencies are to fully realize the benefits of recording, courts must resist the temptation to follow the lead of other states that have limited mandatory recording to a small number of serious offenses.

V. CONCLUSION

The Arkansas Supreme Court took a good step forward by recognizing that mandatory recording of interrogations would benefit both law enforcement and the accused. However, this step in the right direction might prove to be little more than lip service if Arkansas courts do not protect the rights provided by Rule 4.7.

Arkansas appellate courts must be mindful of the due regard given to the Rule by lower courts. In addition, they should move to make the Rule’s application feasible and as beneficial to as many parties—both law enforcement and the accused—as possible. Making the Rule better for both the accused and law enforcement is not a difficult task for the Bench or Bar. The Arkansas Supreme Court’s assertion that Rule 4.7 is a “starting point” is a fair characterization only if the court interprets the Rule to provide simple protections that the court expressly viewed as beneficial in forming the new Rule. If the court does not apply this interpretation, it risks falling back into the same rules and policy that existed before the adoption of Rule 4.7.

Arkansas appellate courts should look to the successes and failures of sister jurisdictions to interpret Rule 4.7 in a way that provides these basic protections. If courts apply the Rule merely on its face, they will waste a tremendous opportunity for advancement in the Arkansas criminal-justice system.

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145. ARK. R. CRIM. P. 4.7(a).
147. See Clark, 374 Ark. at 303-04, 287 S.W.3d at 575.