THE ROOKIE

May 2010

Ohio's Law Enforcement Officers will now be required to record custodial interrogations with suspects of certain serious crimes under Ohio Senate Bill 77.

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POLICE INSTRUCTOR

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FREQUENTLY ASKED QUESTIONS ABOUT SENATE BILL 77 OF THE 128TH LEGISLATURE

New law will prompt changes for law enforcement agencies

Law enforcement agencies are required to implement or change a number of procedures as a result of the recent passage of Senate Bill 77.

I know many of my brothers and sisters in the law enforcement community will not like the changes, requiring even more of their time. However, it will do no good for you to become cynical about anything, including this new Senate Bill. Like all the others before it we must learn to follow the laws that we have sworn an oath to "God Almighty" to follow. Learn and follow the newest requirements of Ohio's law enforcement community.

Most provisions of SB 77 take effect July 6, 2010, including those requiring law enforcement to:

- Record custodial interrogations of suspects
- Collect and preserve biological evidence in a uniform manner
- Follow a specific protocol for conducting photo lineups

Beginning July 1, 2011, SB 77 also will require the collection of a DNA sample from any adult arrested on a felony charge.

Here, the Ohio Attorney General's Office provides answers to questions law enforcement officers and prosecutors may have about SB 77. In addition, training on this topic will be available through eOPOTA. Peace Officer Basic Training lesson plans will be supplemented to reflect the changes as well.

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The *"Peace Memorial"* was completed by Bruce Wilder Saville in 1923. The bronze and granite monument honors both the men and women of the Civil War. It was commissioned by the Women's Relief Corp of Ohio. It can be seen today on the North grounds of the Ohio Statehouse facing Broad Street.

Recording custodial interrogations

When and how do interrogations need to be recorded?

All custodial interrogations of a suspect for aggravated murder, murder, voluntary manslaughter, first- or second-degree involuntary manslaughter or vehicular homicide, rape, attempted rape or sexual battery that occur in a place of detention must be recorded. Both audio and audiovisual recordings are acceptable.

How does SB 77 define "custodial interrogation?"

SB 77 uses a definition of custodial interrogation that is functionally equivalent to "custody" for Miranda purposes.

What does SB 77 consider to be a place of detention?

Places of detention include a jail, police or sheriff's station, holding cell, state correctional institution, local correctional facility, detention facility or Department of Youth Services facility. A law enforcement vehicle is ***NOT*** a place of detention for the purpose of SB 77.

How are the recordings to be used?

While SB 77 does not state how a recording can be used, existing law suggests it must be provided if requested by a defendant's attorney during discovery.

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The center room in the Ohio Statehouse is the *"Rotunda".* In the top of the dome, a glass skylight is 120 feet above the marble floor. The center of the skylight shows the 1847 version of the Great Seal of the State of Ohio. The room is painted the same historical colors as it was in 1861, when the Statehouse was completed. The floor is composed of 4,957 pieces of marble and is 64'5" in diameter.

Collecting and preserving biological evidence

What does SB 77 require concerning the collection of biological evidence?

SB 77 requires law enforcement to collect and preserve biological evidence two different ways. First, any biological evidence collected from a crime scene at which certain crimes are specified must be preserved. Second, any adult arrested on a felony charge must submit to DNA collection.

When does this go into effect?

The requirement to preserve biological evidence is effective July 6, 2010. The requirement that adult offenders submit to DNA collection goes into effect July 1, 2011.

Who is responsible for collecting DNA samples from adults arrested on felony charges?

SB 77 states that the head of the arresting agency must arrange for the DNA specimen to be collected from the suspect during the intake process at the jail, community-based correctional facility, detention facility or law enforcement agency the suspect is transported to after the arrest.

What sort of biological evidence do I have to preserve?

SB 77 requires the preservation of sexual assault kits and any item, such as clothing, that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or any other identifiable biological material that was collected as part of an investigation and might reasonably incriminate or exonerate a suspect.

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Do I have to maintain biological evidence for every crime?

No. You must retain evidence for crimes of aggravated murder, murder, voluntary manslaughter, first- and second-degree involuntary manslaughter, first- and second-degree aggravated vehicular manslaughter, rape, attempted rape, sexual battery or underage gross sexual imposition.

How long do I have to preserve the biological evidence?

In the case of aggravated murder or murder, you must secure the evidence for as long as the crime remains unsolved. In unsolved cases involving other offenses, you must maintain the evidence for 30 years from the time of collection.

If a person is convicted of the crime but did not plead guilty, the evidence must be maintained for 30 years or until the expiration of the latest period of time (whichever comes first) that the person is:

- Incarcerated
- Under community control sanction
- Under any order of disposition for the offense
- Under judicial or supervised release for the offense
- On probation or parole for the offense
- Under post-release control for the offense
- Involved in civil litigation or subject to registration

If the offender is still incarcerated after 30 years, the evidence must be kept until the offender is released from incarceration or dies.

In other words, the offender must have fully completed his sentence, including probation. The offender must not be subject to any registration requirements, such as sex offender registration. And there must be no pending civil litigation stemming from the offense. If all of these criteria are met, you may dispose of the biological evidence. Otherwise, you must wait 30 years.

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"What counts is not necessarily the size of the dog in the fight - it's the size of the fight in the dog."

~Dwight D. Eisenhower

Can I ever dispose of the evidence before those time periods expire?

Yes, there are two circumstances under which you can dispose of the evidence. Which one applies depends on whether the offender was found guilty or pleaded guilty.

What if the offender is found guilty?

To dispose of the evidence, you must provide written notice of your intent by certified mail to all of the following:

- The offender
- The attorney of record for the offender
- The Ohio public defender
- The county prosecutor
- The Ohio attorney general

If you receive no responses after one year, you can dispose of the evidence. If any of those parties request that the evidence be retained, you must comply.

What if the offender pleads guilty?

If the offender pleads guilty or no contest, you can destroy the evidence five years after the plea and any appeals from the plea have been exhausted unless the offender requests retention and a court finds good cause to retain the evidence.

What if I have something like a car? Do I have to keep that?

No. SB 77 allows disposal of items that are too large to retain. However, you must remove and preserve portions of the evidence that are likely to contain biological evidence.

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"The probability that we may fail in the struggle ought not to deter us from the support of a cause we believe to be just."
~Abraham Lincoln

Do I have any other obligations?

Yes, any "governmental evidence-retention entity" (law enforcement agency, prosecutor's office, court, public hospital, crime laboratory or other governmental entity that is charged with collecting, storing or retrieving biological evidence) must provide an inventory of the biological evidence it possesses in connection with a case if requested to do so in writing by the defendant.

Also, you must maintain the biological evidence in a manner and amount sufficient to develop a DNA profile.

How will policies and procedures for preserving biological evidence be established?

SB 77 calls for the formation of a Preservation of Biological Evidence Task Force within the Attorney General's Bureau of Criminal Identification and Investigation (BCI). The task force is to include BCI employees as well as a representative from each of the following: the Ohio Prosecuting Attorneys Association, the Ohio State Coroners Association, the Ohio Association of Chiefs of Police, the Office of the Ohio Public Defender (in consultation with the Ohio Innocence Project) and the Buckeye State Sheriffs' Association.

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Administering lineups

Are lineups permitted under SB 77?

Yes, but law enforcement agencies must follow specific procedures for them.

Who can administer the lineups?

If practical, a blind or blinded administrator should administer the lineups. A blind administrator is one who does not know the identity of the suspect. A blinded administrator is one who knows the identity of the suspect, but does not know which lineup member the eyewitness is looking at because a folder system or a substantially similar system is used.

What is a folder system for conducting a photo lineup?

Using this system, the administrator:

- Obtains the suspect photo, five photos of non-suspects who match the suspect's description and four blank photos that contain no images.
- Places one of the non-suspect photos in a plain manila folder and marks the folder as Folder 1.
- Places the suspect photo and the remaining non-suspect photos in five empty manila folders, shuffles them and marks them Folders 2 through 6.
- Places the four blank photos in four empty folders and marks them Folders 7 through 10.
- Advises the witness that the alleged perpetrator may or may not be in the photos.
- Tells the witness they are not to show the administrator any of the images and that if they see the alleged perpetrator, they are to identify that person by number only.
- Hands the witness each of the 10 folders individually without looking at the photos. Each time the witness views a photo, he is to indicate if it is the person he saw and his degree of confidence in that identification. He is then to return the folder to the administrator.
- Follows the same procedure if the witness asks for a second viewing. There can be no more than two viewings.
- Says nothing to the witness about the witness' identification until the lineup has concluded and has been documented and recorded

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The Ohio Law Enforcement Gateway's Electronic Photo Lineup can be used to obtain photographs for a photo lineup.

What if I can't arrange for a blind or blinded administrator?

If it is not practical to have a blind administrator, the blinded administrator must state in writing why that is the case. If it is not practical to have a blind or blinded administrator, the administrator must state the reason in writing.

What are the administrator's duties?

Administrators must record all of the following:

- All identification or non-identification results, including confidence statements by the eyewitnesses and the results of any subsequent viewings.
- The names of all people present.
- The date and time of the lineup.
- Eyewitness identification of any of the individuals in the lineup.
- Names of the lineup members and the source of the photographs or people in the lineup.

A blind administrator also must inform the eyewitness that the suspect may or may not be in the lineup and that the administrator does not know who the suspect is.

The days of a single folder with 6 similar photos is over. This type of lineup is now unacceptable and the outlined system of 10 folders must be followed.

What happens if I don't follow these rules?

Failure to comply with the rules — or any other rules adopted under this section of SB 77 — will be considered by the trial court in determining admissibility of the eyewitness identification.

Additionally, even if the identification is deemed admissible, failure to comply with the rule will be admitted to the jury to consider the credibility of the identification -- as long as it is otherwise admissible under the Rules of Evidence. The trial judge will instruct the jury that it can consider evidence of noncompliance to determine the reliability of the identification.

SB 77 says the Attorney General can establish additional lineup rules. Has the Attorney General done this?

As of this time, the Attorney General has not established additional rules regarding lineups.

I'm not sure why anyone would choose to ignore the new rules for lineups. Can you imagine testifying as to why you chose not to follow the law? The defense attorney will quickly question "why is it okay for you to arrest my client for violating the law, but it was okay for you to violate one?" Why should the jury now give any credibility to your testimony or the photo lineup? The reality is they probably won't. Why should they? You chose to violate the laws you took an oath to uphold. An oath to *God*! What integrity will you have left at that point. Don't make that mistake!

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U.S. v. Everett, April 6, 2010 6th Circuit Court of Appeals

Defendant Harvey Everett III was convicted of being a felon in possession of a firearm after he volunteered during a traffic stop, in response to the detaining officer's questioning, that he had a shotgun in his car. He appeals his conviction, arguing that the shotgun should have been suppressed because the officer's questioning on a subject unrelated to his traffic offense violated the Fourth Amendment.

This case presents us with an issue of first impression in this circuit: under Muehler v. Mena, 544 U.S. 93 (2005), and Arizona v. Johnson, 129 S. Ct. 781 (2009), when, if ever, may an officer conduct questioning during a traffic stop that (1) is ***unrelated*** to the underlying traffic violation, (2) is ***unsupported*** by independent reasonable suspicion, and (3) ***prolongs*** the stop by even a small amount? We hold that the questioning here did not violate the Fourth Amendment, and accordingly, we affirm.

Everett does not argue – nor could he – that the traffic stop was invalid at its outset. Even if Ford's decision to stop him for a traffic violation was a pretext to fish for evidence of other crimes, as the record suggests was the case, "the constitutional reasonableness of traffic stops [under the Fourth Amendment does not] depend on the actual motivations of the individual officers involved." Whren v. United States, (1996).

Everett admits that he was speeding, and this alone is enough to render the stop lawful under the Fourth Amendment at its initiation.

The proper inquiry is whether the totality of the circumstances surrounding the stop indicates that the duration of the stop as a whole – including any prolongation due to suspicionless, unrelated questioning – was reasonable. The overarching consideration is the officer's diligence

in ascertaining whether the suspected traffic violation occurred, and, if necessary, issuing a ticket.

The subject (that is to say, some questions are "farther afield" than others) and the quantity of the suspicionless, unrelated questions are part of the "totality of the circumstances" of the stop. Some amount of questioning relevant only to ferreting out unrelated criminal conduct is permissible. A lack of diligence may be shown when questions unrelated to the traffic violation constituted the bulk of the interaction between the trooper and the motorist.

Because the safety of the officer is a legitimate and weighty interest, the officers conducting a traffic stop may inquire about dangerous weapons.

In concluding, we caution that the rule of Muehler and Johnson – i.e., that extraneous questions are a Fourth Amendment nullity in the absence of prolongation – is premised upon the assumption that the motorist's responses are voluntary and not coerced. For its proposition that "mere police questioning" does not trigger the Fourth Amendment, Muehler quoted and relied on Florida v. Bostick, 501 U.S. 429 (1991), in which the Court stated:

Since Terry, we have held repeatedly that mere police questioning does not constitute a seizure. In Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) (plurality opinion), for example, we explained that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."

* * *

We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual. . . – as long as the police do not convey a message that compliance with their requests is ***required***.

As there were no allegations of especially heavy-handed police conduct in this case, however, we leave for another day the question of when suspicionless extraneous questioning during a traffic stop crosses the line from consensual into coercive.

Some other points from the decision:

> Importantly, it is the objective conduct of the officer which the diligence standard measures; his subjective intent or hope to uncover unrelated criminal conduct is irrelevant. See Whren, 517 U.S. at 813.
>
> Indeed, since the Court held in Mimms that safety considerations justify officers ordering motorists out of their vehicles during traffic stops as a matter of course, it would be irrational to conclude that officers cannot take the "less intrusive [measure]" of "simply [asking] whether a driver has a gun." May, 1999 WL 1215651, at *3; see also Holt, 264 F.3d at 1223.
>
> Everett argues that we have effectively already adopted a bright-line "no prolongation" rule in United States v. Urrieta, 520 F.3d 569 (6th Cir. 2008). In Urrieta, we held that "[o]nce the purpose of [a] traffic stop is completed, a motorist cannot be further detained unless something that occurred during the stop caused the officer to have a reasonable and articulable suspicion that criminal activity was afoot." Id. at 574 (emphasis added). In the portion of Urrieta upon which Everett relies, we rejected the government's argument that the continued detention "was justified because [it] was reasonably brief." Id. at 578. We reasoned:
>
> > Under the Fourth Amendment, even the briefest of detentions is too long if the police ***lack*** a reasonable suspicion of specific criminal activity. In other words, law enforcement does ***not*** get a free pass to extend a lawful detention into an unlawful one simply because the unlawful extension was brief.

View full opinion:www.OfficerNeil.com/everett.pdf

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As all of you have seen over the course of the academy, anyone can start, but not everyone has the heart and determination to finish. The requirements of your law enforcement duties demanded that the training presents a challenge. It is why you did all those push-ups, learned defensive tactics, and fired hundreds of round at the range. It is not easy and it should not be.

If you would like to be removed from the newsletter please forward me an email letting me know and I'll be happy to take you off the list.

"Blessed are the peacemakers, for they shall be called children of God."
~Matthew 5:9