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Criminal Law: Too Much of a Good Thing: Limiting the Scope of the Scales Recording Requirement to Custodial Interrogations Conducted in Minnesota-State v. Sanders

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CRIMINAL LAW: TOO MUCH OF A GOOD THING: LIMITING THE SCOPE OF THE SCALES RECORDING REQUIREMENT TO CUSTODIAL INTERROGATIONS CONDUCTED IN MINNESOTA—STATE V. SANDERS

Courtney A. Lawrence†

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“It was ‘the best thing we’ve ever had rammed down our throats.’”

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I. INTRODUCTION

Alan Harris was referring to Minnesota’s landmark decision in *State v. Scales* that mandated electronic recording of custodial interrogations. At the time, Minnesota was only the second state to adopt a recording requirement. Since *Scales*, the practice has gained wide support in Minnesota and throughout the country. Substantial law has developed around recording in the form of statutes, court rules, and special jury instructions. Yet questions remain as to the extent of the requirement’s application in Minnesota.

Recently, in *State v. Sanders*, the Minnesota Supreme Court faced the question of whether the recording requirement applies to custodial interrogations conducted in another jurisdiction. Sanders was interrogated by Federal Bureau of Investigation (FBI) agents in Illinois, but, in accordance with FBI policy and Illinois law, the interrogation was not recorded. Evidence from this interrogation was ultimately admitted in trial, and Sanders was convicted of criminal sexual conduct. On appeal, Sanders argued in part that the unrecorded interrogation substantially violated *Scales* and should be suppressed. However, the supreme court disposed of the case without resolving whether *Scales* applies to interrogations conducted outside Minnesota.

This note first examines the history of mandatory recording of custodial interrogations and its expansion throughout the country. It then details the facts and procedural history of *Sanders*, concentrating on the supreme court’s holding, followed
by an analysis of the decision. Finally, the note concludes by asserting that the Minnesota Supreme Court should have adopted an exception to Scales for out-of-state interrogations conducted without the involvement of Minnesota law enforcement agencies.

II. HISTORY

A. Early Beginnings

Law enforcement agencies and legal scholars recognized mandatory recording of interrogations as an advancement in criminal justice long before the days of tape recorders. In fact, Yale Professor Edwin Borchard first advocated for mandatory recording using phonographic records in 1932. The National Commission on Law Observance and Enforcement (Wickersham Commission) was one of the earliest groups to support recording interrogations as a means to “remedy” the “evil” of third-degree police tactics. These early advocates viewed recording as a method to prevent false confessions, increase the effective administration of criminal justice, and improve relationships between law enforcement and the public.

The landmark decision in Miranda v. Arizona was the first case to draw attention to these issues in 1966. Miranda held that the failure to warn a suspect of his right to counsel and his right to remain silent prior to a custodial interrogation renders the suspect’s statements inadmissible. While Miranda assured courts
that the defendant understood his rights, uncertainty remained as to what actually occurred in interrogations. 20 “Defendants and police often differ at trial over whether police followed Miranda, whether the defendant waived his or her right to remain silent, and whether the defendant knowingly and voluntarily confessed to the crime charged.” 21 In these situations, the fact-finder must resort to “testimony that provides biased guidance: either it comes from officers who want the statement admitted, or it comes from the defendant who wants it suppressed.” 22

It did not take long before organizations formally recognized the inherent dilemma of relying on testimony regarding the circumstances of the interrogation. The American Law Institute (ALI) regarded mandatory recording as the obvious solution to this problem, and enacted a Model Code of Pre-Arraignment Procedure (Model Code) in 1975 that required police officers to record all interrogations. 23 The National Conference of Commissioners on Uniform State Laws also provided guidelines that similarly required recording. 24

B. States Take the Lead While the Feds Lag Behind

The movement for mandatory recording was slow to gain momentum among individual jurisdictions. It was not until 1985 that Alaska became the first jurisdiction to adopt a recording requirement. 25 In Stephan v. State, the Alaska Supreme Court held

20. Daniel D. Donovan & John Rhodes, The Case for Recording Interrogations, 61 Mont. L. Rev. 223, 226 (2000). Although the Supreme Court itself has noted that the secrecy of interrogations “results in a gap in our knowledge as to what in fact goes on in the interrogation rooms,” the Court has never addressed whether recording interrogations should be mandatory. Miranda, 384 U.S. at 448; Oliver, supra note 18, at 268.
22. Donovan & Rhodes, supra note 20, at 226.
25. See State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994). The Stephan decision was composed of two separate cases that were consolidated due to similar factual issues and a common legal issue. Stephan v. State, 711 P.2d 1156, 1159 (Alaska 1985). In both cases, the defendants were arrested, interrogated, and subsequently confessed. Id. at 1158. Also in both cases, there was a working audio or video recorder in the interrogation room that the police used to record some, but not all of the interrogations. Id.
that the due process clause of the Alaska Constitution required recording a defendant’s custodial interrogation.\textsuperscript{26} The majority was “convinced that recording, in such circumstances, [was] a reasonable and necessary safeguard, essential to the adequate protection of the accused’s right to counsel, his right against self incrimination and, ultimately, his right to a fair trial.”\textsuperscript{27} After previously recommending this practice,\textsuperscript{28} the court intended to deter future noncompliance by creating an exclusionary rule that precludes admission of unrecorded interrogations at trial.\textsuperscript{29}

Minnesota was the first state to follow Alaska’s lead.\textsuperscript{30} In \textit{State v. Scales}, police interrogated the defendant, a murder suspect, for three hours before a formal statement was recorded.\textsuperscript{31} Similar to the Alaska court, the Minnesota Supreme Court had previously urged law enforcement officers to record interrogations.\textsuperscript{32} In \textit{Scales}, “disturbed by the fact that law enforcement officials ignored [the court’s] warnings,” the court held that, where feasible, all custodial interrogations must be electronically recorded if they occur at a place of detention.\textsuperscript{33} The court was largely persuaded by the

\begin{itemize}
\item \textsuperscript{26} \textit{Stephen}, 711 P.2d at 1159. Similar to early legal commentators, the Alaska Supreme Court recognized that recording not only protects a defendant’s rights, but also “protects the public’s interest in honest and effective law enforcement . . . .” \textit{Id.} at 1161.
\item \textsuperscript{27} \textit{Id.} at 1159–60.
\item \textsuperscript{28} \textit{See} Mallott v. State, 608 P.2d 737, 743 n.5 (Alaska 1980) (informing police that “it is incumbent upon them” to record custodial interrogations); \textit{see also} S.B. v. State, 614 P.2d 786, 790 n.9 (Alaska 1980) (“In future cases, it will be a great aid to the trial court’s determinations and our own review of the record if an electronic record of the police interview with a defendant is available . . . .” (citing \textit{Mallott}, 608 P.2d at 743 n.5)); McMahan v. State, 617 P.2d 494, 499 n.11 (Alaska 1980) (“Again we advise law enforcement agencies that, as part of their duty to preserve evidence, it is incumbent upon them to tape record, where feasible, any questioning and particularly that which occurs in a place of detention.” (citing \textit{Mallott}, 608 P.2d at 743 n.5)).
\item \textsuperscript{29} \textit{Stephen}, 711 P.2d at 1164.
\item \textsuperscript{30} \textit{State v. Scales}, 518 N.W.2d 587, 591–92 (Minn. 1994).
\item \textsuperscript{31} \textit{Id.} at 590.
\item \textsuperscript{32} \textit{See} State v. Pilcher, 472 N.W.2d 327, 333 (Minn. 1991) (warning that the court would “look with great disfavor upon any further refusal to heed these admonitions”); State v. Robinson, 427 N.W.2d 217, 224 n.5 (Minn. 1988) (urging recording conversations between police and suspects to avoid factual disputes and preserve the integrity of the interrogation). These cases, as well as \textit{Scales}, stem from the protection of defendants’ constitutional rights against compelled self-incrimination and the procedures required by the Supreme Court in \textit{Miranda v. Arizona}, 384 U.S. 436 (1966).
\item \textsuperscript{33} \textit{Scales}, 518 N.W.2d at 592. However, the court nonetheless affirmed Scales’s conviction because the remaining evidence was strong and the result
reasoning employed in *Stephan*, but unlike Alaska, the Minnesota Supreme Court declined to address whether recording is a due process requirement under the Minnesota Constitution. Instead, it decided that recording falls within the court’s supervisory powers to “insure the fair administration of justice.”

Following the instruction in *Scales*, Minnesota courts have fostered the new recording requirement on a case-by-case basis. In their analyses, courts have consistently applied a two-part test to determine whether to admit unrecorded statements. First, courts must determine whether *Scales* applies to the facts of the case. Second, if *Scales* applies, courts must proceed to examine whether the violation is “substantial” based on factors enumerated in the Model Code. Since *Scales*, courts have addressed a myriad of issues pertaining to the recording requirement, adapted the requirement where necessary, and created exceptions to the rule through case law.

would have been the same. *Id.* at 593.

34. *Id.* at 592 (citing *Stephan*, 711 P.2d at 1150–60).

35. *Id.*

36. *Id.* (citing *State v. Borst*, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967)).

37. *Id.*

38. See, e.g., cases cited infra note 42.

39. See, e.g., *State v. Inman*, 692 N.W.2d 76, 80 (Minn. 2005) (outlining the two steps in analyzing an alleged *Scales* violation); *State v. Miller*, 573 N.W.2d 661, 674 (Minn. 1998) (finding that *Scales* applied because the defendant was in custody, but that the violation was not substantial pursuant to the second step of the test); *State v. Schroeder*, 560 N.W.2d 739, 740 (Minn. Ct. App. 1997) (denying suppression of the defendant’s statements because the alleged *Scales* violation was not substantial pursuant to the second step of the test); see also 7 Henry W. McCarr & Jack S. Nordby, Minnesota Practice Series: Criminal Law & Procedure § 6.14 (3d ed. 2009).

40. See, e.g., *Inman*, 692 N.W.2d at 80.

41. See, e.g., *id.* *Inman* provides a useful summary of the pertinent factors: These circumstances include the extent to which the violation was willful, the extent to which the exclusion will tend to prevent future violations, the extent to which the violation is likely to have influenced the defendant’s decision to make the statement, and the extent to which the violation prejudiced the defendant’s ability to support his motion to suppress or to defend himself at trial. *Id.* at 80 n.3 (citing *Scales*, 518 N.W.2d at 592; Model Code of Pre-Arraignment Procedure § 150.3(3)(b), (d), (f), (g) (1975)).

42. See, e.g., *State v. Conger*, 652 N.W.2d 704, 709 (Minn. 2002) (holding that the recording requirement does not extend to non-custodial interrogations); *State v. Coleman*, 560 N.W.2d 717, 721 (Minn. Ct. App. 1997) (holding that unrecorded custodial statements may be used to impeach defendant’s inconsistent trial testimony); *State v. Gilmartin*, 535 N.W.2d 650, 652 (Minn. Ct. App. 1995)
As the courts continued to develop the Scales recording requirement, the practice of mandatory recording slowly expanded beyond Minnesota’s borders. Even though technology has advanced, the same policy promoted by early legal scholars has continued to serve as the foundation for mandatory recording. Contemporary legal scholars have echoed their predecessors and found that recording facilitates truth-finding, fairness, accountability, and, consequently, the law’s integrity. State courts, legislators, and law enforcement agencies across the country have agreed and adopted their own recording requirements. Further, many prestigious organizations have endorsed recording custodial interrogations, including the American Bar Association.

Despite the overwhelming support for reform on the state level, neither the United States Supreme Court nor Congress has addressed the issue. Surprisingly, federal law enforcement (holding that the reading of the implied consent advisory is not subject to Scales).


44. Not surprisingly, in some cases technological advancements have promoted mandatory recording because jurors find it increasingly difficult to accept police officers’ assertions that they did not tape interrogations because it was not their policy to do so. Angela Rozas & Joshua Howes, 2 Juries Dubious Over Confession Tapes’ Merits; They Wanted Interrogations Included, CHI. TRIB., Aug. 17, 2003, at C1.

45. See Drizin & Reich, supra note 17, at 622.

46. See Donovan & Rhodes, supra note 20, at 227.


48. ABA RESOLUTION, supra note 4 (urging legislatures or courts to enact laws or rules requiring the practice of recording); see also THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW, available at http://www.thejusticeproject.org/national/solution/electronic-recording/ (hereinafter THE JUSTICE PROJECT) (promoting mandatory recording to guard against false confessions).

agencies, which are ordinarily “leaders in the use of innovative investigative methods[,]” have similarly objected to implementing a requirement.50

Nonetheless, as described by one commentator, “[a] movement is under way in the United States to adopt the practice of recording custodial” interrogations.51 As laws develop around recording requirements in Minnesota and the rest of the country, courts will continue to face new issues concerning the scope of their application. State v. Sanders, in which the Minnesota Supreme Court considered whether the recording requirement applied to custodial interrogations conducted outside Minnesota, is a case in point.52

III. THE SANDERS DECISION

A. Facts and Procedural Posture

In 2004, Jonathan Sanders lived with S.J. and S.J.’s daughter, B.J., who was eleven years old at the time.55 Sanders allegedly sexually assaulted B.J. while Sanders was home alone with her on October 29, 2004.54 After B.J. told her mother what happened, S.J. called the St. Paul Police Department, and B.J. described the incident to the police.55 S.J. suggested to the police that Sanders might have fled to Chicago.56

The St. Paul Police Department issued a warrant and worked with the Minneapolis office of the FBI to apprehend Sanders.57 The Minneapolis office then contacted the FBI agents in the Chicago office for assistance in locating Sanders based on S.J.’s belief that Sanders may have fled to Chicago.58 FBI agents in Chicago eventually apprehended Sanders at his mother’s residence on May 24, 2005, and interrogated him at a Chicago Police...
Department booking station. However, the agents did not record the session because electronic recording was not required under Illinois law or FBI policy.

At trial, the district court ruled that Scales does not apply to interrogations conducted outside Minnesota and allowed one of the FBI agents to testify about the interrogation. The FBI agent testified that Sanders waived his constitutional rights and agreed to be interviewed despite refusing to sign an "Advice-of-Rights" form. The agent further testified that, during the interview, Sanders made several explicit statements and denied having sexual contact with B.J. When Sanders testified in trial, he continued to deny committing the offense, but also claimed that the FBI agent fabricated the other statements attributed to him.

The State, however, did not focus its argument in trial on the testimony provided by the FBI agent. Instead, it focused its argument on B.J.'s testimony and expert testimony that Sanders could be a source of the DNA found on the towel that Sanders allegedly used after sexually assaulting B.J. The jury subsequently found Sanders guilty of first-degree criminal sexual conduct.

B. The Court of Appeals Decision

Sanders appealed his conviction, arguing in part that the district court committed reversible error when it admitted the unrecorded statements he made to the FBI agents during his

59. Id.
61. Sanders, 775 N.W.2d at 886.
62. Id. at 885.
63. Id. at 886. These statements included:
   (1) he did not 'f* * *' B.J.; (2) he masturbated throughout the house on a regular basis, including B.J.'s room, but not while she was present; (3) he would not have sex with B.J., because he believed that she had a venereal disease . . . and (4) he had never observed B.J.'s genitalia.
64. Sanders, 775 N.W.2d at 886.
65. Id.
66. Id.
67. Id.
interrogation. In support, he asserted that the Scales recording requirement applied to the interrogation because “while the Minnesota courts do not have jurisdiction over Illinois or FBI procedure, the Scales requirement is a procedural requirement in Minnesota and courts of this state have the power to admit or exclude evidence obtained elsewhere if state standards are not met.” Accordingly, Sanders argued that the court had the power to exclude the evidence from the interrogation.

The court of appeals focused its analysis on the supreme court’s intent behind the Scales requirement, as well as its underlying policy. The court pointed out that the considerations taken into account when determining whether Scales was substantially violated include “whether the act was a willful deviation from lawful conduct and whether exclusion of evidence would deter future violations.” In light of these considerations, the court reasoned that Scales “is a state procedural rule intended to govern conduct occurring within the state.” Because the FBI did not willfully deviate from lawful conduct and suppression of the interrogation evidence would not prevent future violations, the court of appeals ruled that the district court did not err by admitting Sanders’s statement.

C. The Supreme Court Decision

1. Majority Opinion

Unlike either of the lower courts’ approaches to Sanders, the Minnesota Supreme Court applied a harmless-error analysis rather than first addressing whether Scales even applied to the case. The court noted that there are two different harmless-error tests
depending on whether the error implicates a constitutional right.\textsuperscript{76} The court acknowledged that it was unclear which harmless-error test to use due to the fact that, in \textit{Scales}, they declined to determine whether the recording requirement is a due process right of the Minnesota Constitution.\textsuperscript{77} Rather than determining which test applies to an alleged \textit{Scales} violation, the court simply applied the “more favorable constitutional harmless-error standard” in its analysis.\textsuperscript{78}

Under this test, the State must “show beyond a reasonable doubt that the error was harmless[,]” which requires proving that “the jury’s verdict was surely unattributable to the error.”\textsuperscript{79} Ultimately, the court determined that the jury’s verdict was “surely unattributable” to the admission of the FBI agent’s testimony because it was not highly persuasive and the evidence of Sanders’s guilt was strong.\textsuperscript{80} Further, the court concluded that it subsequently “need not, and [would] not, decide whether the \textit{Scales} recording rule applies to custodial interrogations conducted outside of Minnesota or whether the alleged \textit{Scales} violation . . . was substantial.”\textsuperscript{81} As a result, the Minnesota Supreme Court affirmed Sanders’s conviction.\textsuperscript{82}

\section{Concurring Opinion}

In a concurring opinion, Justice Paul Anderson agreed with the result reached by the majority that the district court did not err by admitting the interrogation evidence.\textsuperscript{83} However, Justice Anderson wrote separately because he did not entirely agree with the approach the majority used to reach this result.\textsuperscript{84}

\begin{itemize}
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} \textit{Id.} at 888.
\item \textsuperscript{79} \textit{Id.} at 887 (citing State v. Shoen, 598 N.W.2d 370, 377 (Minn. 1999); State v. Scott, 501 N.W.2d 608, 619 (Minn. 1993)).
\item \textsuperscript{80} \textit{Id.} (applying criteria established in State v. Al-Naseer, 690 N.W.2d 744, 748 (Minn. 2005) and State v. Hall, 764 N.W.2d 837, 842 (Minn. 2009)). Indeed, as the court pointed out, the FBI agent’s testimony actually supported Sanders’s claim that he did not commit the sexual act because it demonstrated that Sanders “immediately and consistently denied the offense.” \textit{Id.}
\item \textsuperscript{81} \textit{Id.} at 889.
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.} (Anderson, J., concurring).
\item \textsuperscript{84} \textit{Id.}
\end{itemize}
Essentially, Justice Anderson agreed that the case should have been decided using a harmless-error analysis, but only after first holding that *Scales* applied to Sanders’s interrogation. In Justice Anderson’s eyes, the interrogation should have been recorded, and thus the FBI agent’s failure to record violated *Scales*. Nonetheless, he concluded that the evidence was “neither inculpatory nor prejudicial to Sanders[,]” so the error was harmless and Sanders’s conviction was properly affirmed.

Justice Anderson largely based his belief that *Scales* applied to the interrogation conducted outside Minnesota on policy considerations. Specifically, he pointed to the positive effects *Scales* has had in the criminal justice system over the past fourteen years, including protection of defendants’ rights and efficacy of law enforcement. With this in mind, he agreed with the dissent that “the rationale underlying *Scales* should and does apply with equal force to interrogations conducted both within and outside Minnesota.”

### 3. Dissenting Opinion

Similar to Justice Anderson, Justice Page and Justice Meyer criticized the majority’s analysis in their dissent. In fact, they plainly stated that the majority “ignore[d] both steps” of the two-step analysis used when addressing alleged violations of the *Scales* recording requirement. For that reason, the dissent pointedly applied the two-step analysis to the facts of the case in their separate opinion.

First, the dissent opined that *Scales* applied to the interrogation conducted in Illinois. As Justice Anderson stated in his concurrence, *Scales* applied to the interrogation because the underlying policy applied with equal force regardless of whether the interrogation was conducted within Minnesota’s borders.

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85. *Id.*
86. *Id.*
87. *Id.*
88. *See id.*
89. *Id.* at 890.
90. *Id.*
92. *Id.* at 891.
93. *Id.*
94. *Id.*
95. *Id.* The dissent analogized this case to others in which the court
Accordingly, the dissent concluded that the requirement was violated when the Chicago FBI agents did not record the interrogation in Chicago. Second, the dissent decided—pursuant to the second step of the two-part analysis—that the Scales violation was substantial. The dissent reached this conclusion using the factors outlined in the Model Code, specifically holding that the failure to record was willful and prejudicial.

Although the dissenting justices disagreed with the majority’s use of a harmless-error analysis, they nonetheless conducted their own harmless-error analysis to counter the majority’s conclusion that the jury’s verdict was unattributable to admission of FBI agent’s testimony. Unlike the majority, the dissent concluded that the State did use the FBI agent’s testimony to undermine Sanders’s credibility. The dissent opined that Sanders’s credibility was a central issue in the case and prevented the conclusion that the jury’s verdict was surely unattributable to the error in admitting the testimony. Ultimately, the dissent concluded that Sanders’s conviction should have been reversed and the case remanded for a new trial based on the foregoing analysis.

considered the admissibility of evidence from events that occurred outside of Minnesota. Id. at 892 n.2 (citing State v. Reece, 625 N.W.2d 822, 825–26 (Minn. 2001); State v. Lucas, 372 N.W.2d 731, 736–37 (Minn. 1985)).

96. Id. at 892.
97. Id.
98. Id. (citing MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.3 (2), (3) (1975)). As the dissent pointed out, the FBI agent’s failure to record the interrogation was willful even though he was following both Illinois law and FBI policy. Id. The dissent notes that under section 150.3(2)(a) of the Model Code, “[a] violation shall be deemed willful regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized by a high authority within it.” Id.

99. Id. at 895. The dissent noted that “it is unclear which harmless-error analysis should be applied to a Scales violation, if one should be applied at all.” Id. Because the majority used the constitutional standard for reviewing harmless error, the dissent followed suit. Id.
100. Id. at 895.
101. Id.
102. Id.
IV. ANALYSIS OF THE SANDERS DECISION

A. The Need for a Clear Precedent

The fundamental question in Sanders was clear: does the recording requirement apply to custodial interrogations conducted outside Minnesota? \(^{105}\) Scales provided plain instructions \(^{104}\) for future courts to decide such an issue, which the courts have consistently followed. \(^{105}\) Nonetheless, the supreme court entirely sidestepped the question and left the door open to a revisitation of the issue. \(^{106}\)

There are two reasons why the court should not have disposed of the case without ruling on whether Scales applies to interrogations conducted outside Minnesota. First, the inherent structure of the Scales requirement necessitates the court’s initiative to decide issues of first impression, such as the question posed in Sanders. \(^{107}\) Second, it is practically inevitable that the court will have to revisit the issue unless it sets a clear precedent for the lower courts to follow. \(^{108}\)

1. The Inherent Structure of the Recording Requirement

The Minnesota Supreme Court was arguably following a principle of judicial modesty by declining to decide whether Scales applies to custodial interrogations conducted outside Minnesota. \(^{109}\) Ordinarily, most legal scholars and commentators agree that such minimalism is an acceptable, and perhaps even an encouraged,
approach for the judiciary. However, the inherent structure of the *Scales* recording requirement obliges the court to abandon the generally encouraged notions of judicial modesty and squarely address pertinent issues of first impression.

The supreme court created the *Scales* recording requirement through its supervisory power, and contemporaneously held that the "parameters of the exclusionary rule . . . must be decided on a case-by-case basis." As a result, there is little guidance for implementing the requirement until it is litigated because courts are in exclusive control of the requirement’s development. The flexibility of a case-by-case approach is conceivably advantageous in some respects, but it does not take into account practical problems or exigent circumstances that police may encounter during the course of an interrogation. In fact, Minnesota’s approach has been criticized for its lack of “detailed provisions for unforeseen circumstances and inevitable glitches . . . .” Consequently, it is imperative that courts squarely address issues of first impression involving the recording requirement to ensure its effective implementation.

2. *The Inevitable Revisitation*

Interestingly, the issue of whether *Scales* applies to interrogations conducted outside Minnesota did not arise in the higher courts prior to the *Sanders* decision, but within a mere two months of the *Sanders* decision it arose in the court of appeals.

111. State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) ("[I]n the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogations . . . shall be electronically recorded . . . .").
112. Id.
113. For instance, a case-by-case basis “allow[s] officers and prosecutors ample opportunity to demonstrate valid reasons for not recording the interrogation.” See *The Justice Project*, supra note 48, at 4.
114. See *Everybody Wins*, supra note 1, at 1131 (advocating for states to implement recording through legislation to provide for more detailed provisions).
115. Id. at 1137.
In an unpublished case, In re Welfare of C.M.D., the defendant was alleged to have committed criminal sexual conduct in St. Paul, Minnesota, and was later apprehended in Texas by the Abilene Police Department. A St. Paul police officer requested the Abilene officer to interview the defendant, but, in accordance with Texas legal procedure, the Abilene officer only recorded the defendant’s Miranda waiver and prepared an oral statement admitting to the offense. In its opinion, the court of appeals specifically highlighted the fact that the Sanders court declined to address whether Scales applies to out-of-state interrogations, and similarly disposed of the case without resolving the issue.

One could easily contend that the timely occurrence of this case alone is sufficient proof that unrecorded interrogations conducted outside Minnesota will continue to be challenged as alleged Scales violations. Yet there are two additional reasons why the higher courts will continue to face the issue in their courtrooms until they create a stable precedent.

First, policies for recording vary by jurisdiction and most federal agencies are opposed to adopting a mandatory recording policy. Without a definitive resolution of the issue, Minnesota law enforcement agencies are left without procedural guidance when working in joint federal-state operations, interstate operations, or both. As a result, out-of-state interrogations may be unrecorded in such operations. Defendants will likely challenge the admission of the interrogations in trial, and, regardless of which direction the court rules, the losing party will undoubtedly use Scales as an outlet to appeal.

117. Id. at *2.
118. Id. at *3. On appeal, the defendant argued that this constituted a substantial violation of Scales because the interview was not recorded in its entirety. Id. at *7.
119. Id.
120. Id. at *8.
121. See sources cited supra note 47.
122. See generally Recording Federal Interviews, supra note 47 (discussing federal agencies’ opposition to recording despite the progression of recording requirements throughout the country).
123. Both Illinois law and FBI policy prevented the FBI agents from recording the interrogation in Sanders. See sources cited supra note 47 and 98.
Second, in its avoidance of addressing the issue, the court deviated from the well-established two-part test, and instead applied a harmless-error analysis. Yet the court also declined to determine which harmless-error analysis should be employed for alleged Scales violations. As previously discussed, the majority’s analysis in this case even confounded fellow justices on the bench. The lower courts will likely be similarly perplexed by the analysis, and may apply different tests when faced with an unrecorded interrogation conducted in another jurisdiction. In turn, the confusion could lead to inconsistent precedent and potentially conflicting results that litigants will appeal to the higher courts.

Thus, it is seemingly inevitable that the supreme court will have to revisit the issue. Rather than sidestepping it again, the court should create clear precedent and squarely address whether the recording requirement applies to out-of-state custodial interrogations. This will ensure procedural clarity for law enforcement, consistency in the courts, and ultimately promote judicial economy.

Yet the question remains: should the Scales recording requirement apply to all custodial interrogations regardless of whether they were conducted within Minnesota?

124. *See* cases cited *supra* note 39 and accompanying text.
126. *Id.*
127. The concurring and dissenting justices in Sanders criticized the majority’s approach for this reason. Justice Anderson pointed out that “[t]he majority appears to assume without deciding that the Scales rule applies to out-of-state custodial interrogations.” *Id.* at 889 (Anderson, J., concurring). Likewise, Justice Page commented that “the court ignores both steps” of the two-part analysis. *Id.* at 891 (Page, J., dissenting).
130. The Justice Project recognized the importance of defining the scope of the recording requirement “so that law enforcement officers know immediately whether recording is required in a given case.” The Justice Project, *supra* note 48, at 4.
B. Formulating the Appropriate Precedent

By evaluating the scope of the recording requirement’s authority and the underlying policy of its enactment, it is clear that the supreme court should have held that Scales does not apply to interrogations conducted outside Minnesota.

1. Supervisory Power

As previously discussed, the Minnesota Supreme Court exercised its supervisory power to implement the Scales exclusionary rule. To determine whether Scales applies to interrogations conducted outside Minnesota, it is helpful to understand the scope of this particular authority and whether it extends to other jurisdictions and their agencies.

Ordinarily, the scope of any legal authority is best ascertained by referring to its source. However, the source of the Minnesota Supreme Court’s supervisory power has been the subject of debate. The supreme court has previously stated its “supervisory power derives from [its] power to supervise the trial court.” Yet the court never actually cited an authority or basis for this power to

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131. See infra Part IV.B.1.
132. See infra Part IV.B.2.
133. See supra Part III.C.
134. State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994). Other states have also avoided using their respective state constitutions as the foundation for a recording requirement and instead used court authority to implement a recording requirement. See, e.g., Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533–34 (Mass. 2004) (implementing special jury instructions when interrogations are not recorded); State v. Cook, 847 A.2d 530, 542–43 (N.J. 2004) (implementing court rule for recording interrogations).
135. While examining the vague parameters of the Minnesota Supreme Court’s supervisory power, Gary O’Connor similarly emphasized the importance of understanding the source of the court’s power. See Gary E. O’Connor, Rule(maker) and Judge: Minnesota Courts and the Supervisory Power, 23 WM. MITCHEL L. REV. 605, 626 (1997). He stated:

   In discussing or analyzing any power that a court possesses, it is important to know not only the source of the power, but also when and how a court will exercise that power. Without such knowledge, a danger exists that the power will become a too-willing servant of the court’s caprice or whim; a servant with no fixed duties, boundaries, or standards of propriety.

Id.
136. See generally id. (discussing the possible sources and scope of supervisory power for both the Minnesota Supreme Court and Court of Appeals).
Some assert that the Minnesota Constitution authorizes the supreme court’s supervisory power. Yet, unlike other states, the state constitution does not expressly grant supervisory power to the Minnesota Supreme Court. Instead, the Minnesota Constitution vests the “judicial power of the state” in the courts, and the supreme court has “appellate jurisdiction in all cases.”

138. Id.
140. In other states’ constitutions, this power is commonly described as “superintending control” and is referred to in express terms. See, e.g., ARK. CONST. amend. 80, § 4 (“The Supreme Court shall exercise general superintending control over all courts of the state . . . .”); COLO. CONST. art. 6, § 2(1) (“The supreme court . . . shall have a general superintending control over all inferior courts . . . .”); IOWA CONST. art. 5, § 4 (“The supreme court . . . shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state.”); LA. CONST. art. 5, § 5(A) (“The supreme court has general supervisory jurisdiction over all other courts.”); MICH. CONST. art. 6, § 4 (“The supreme court shall have a general superintending control over all courts . . . .”); MO. CONST. art. 5, § 4(1) (“The supreme court shall have general superintending control over all courts and tribunals.”); MONT. CONST. art. VII, § 2(2) (“[The supreme court] has general supervisory control over all other courts.”); N.M. CONST. art. 6, § 3 (“The supreme court . . . shall have a superintending control over all inferior courts . . . .”); N.C. CONST. art. IV, § 12(1) (“[The supreme court] may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts.”); ORE. CONST. art. VII, § 4 (“The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all Agencies, Commissions and Boards created by law.”); PA. CONST. art. V, § 10(a) (“The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace . . . .”); S.D. CONST. art. V, § 12 (“The Supreme Court shall have general superintending powers over all courts and may make rules of practice and procedure and rules governing the administration of all courts.”); WIS. CONST. art. 7, § 3(1) (“The supreme court shall have superintending and administrative authority over all courts.”); WYO. CONST. art. 5, § 2 (“The supreme court . . . shall have a general superintending control over all inferior courts . . . .”).
141. MINN. CONST. art. VI, §§ 1, 2.
Likewise, unlike other states, no Minnesota statute expressly vests the supreme court with supervisory power. Instead, Minnesota law grants the supreme court the power to prescribe and modify the rules of practice, as well as the power to "regulate the pleadings, practice, procedure, and the forms thereof in criminal actions in all courts of this state, by rules promulgated by it from time to time." Despite the debatable source of the supreme court’s supervisory power, there seemingly has been no uncertainty as to whether the court possesses that power since it was first exercised in the late 1960s. In fact, the Minnesota Supreme Court has increasingly exercised its supervisory power in recent years aside from its execution in the Scales decision. However, the application of the court’s supervisory power in these cases has been limited to judicial procedure of the courts, prosecutorial conduct, or court rules. Other states with express constitutional or statutory grants of supervisory power similarly limit the scope of this

142. See, e.g., HAW. REV. STAT. § 602-04 (2007) ("The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."); MASS. GEN. LAWS ch. 211, § 3 (2005) ("The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided . . . ."); N.H. REV. STAT. ANN. § 490:4 (2009) ("The supreme court shall have general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses . . . .").

143. MINN. STAT. § 480.059 (2008).

144. O’Connor ultimately concluded that the supreme court’s supervisory power must either stem from some inherent judicial power or some inherited common-law power. O’Connor, supra note 135, at 626.

145. The supreme court first exercised its supervisory power in 1967 in State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967). In this case, the court required counsel to be provided to an indigent defendant in any case that may lead to incarceration in a penal institution. Id. at 396, 154 N.W.2d at 893. Since Borst, the court of appeals has acknowledged that supervisory powers are reserved to the supreme court. See State v. Gilmartin, 535 N.W.2d 650, 653 (Minn. Ct. App. 1995) ("As an intermediate appellate court, we decline to exercise supervisory powers reserved to this state’s supreme court.").

146. See, e.g., State v. Clifton, 701 N.W.2d 795 (Minn. 2005) (holding that the supreme court retains the “right to grant a new trial ‘prophylactically or in the interests of justice’ without a further determination of prejudice”); Powell v. Anderson, 660 N.W.2d 107 (Minn. 2003) (holding that the supreme court has the power to vacate a final decision of the court of appeals under its supervisory power); State v. Porter, 526 N.W.2d 359 (Minn. 1995) (holding that the supreme court could exercise its supervisory powers to grant the defendant a new trial when the prosecutor interfered with juror independence).

147. See cases cited supra note 146.
power over inferior courts or tribunals. Regardless of what its actual source of authority may be, the Minnesota Supreme Court’s supervisory power is presumably limited to authority over the lower courts and, by extension, officers of the court and law enforcement agents within the State of Minnesota.

Thus, interrogations conducted by agents in other jurisdictions in accordance with their respective laws are not subject to the supervisory power exercised in Scales.

2. Policy Considerations

Aside from the inherent limitations of the requirement as an act of supervisory power, there are important practical policy considerations that require limiting Scales to interrogations conducted within Minnesota. The supreme court has relied on the policy underlying Scales to determine whether the recording requirement applied in past cases. Policy should also guide the court’s decision as to whether the requirement should apply to interrogations conducted outside Minnesota for purposes of uniformity. To recapitulate, the Scales court intended to limit factual disputes about defendants’ statements, promote accuracy, discourage misleading and false testimony, curb abusive police practices, and preserve a defendant’s right to a fair trial.

While electronic recordation may be the most effective means of promoting the foregoing policy, the recording requirement should nonetheless refrain from placing undue burden on law enforcement agencies that are responsible for its execution.

148. See sources cited supra notes 140, 142.
149. E.g., State v. Conger, 652 N.W.2d 704, 709 (Minn. 2002) (holding that the “interests of justice” do not require recording all non-custodial interrogations).
150. Although they each found that the recording requirement should extend to interrogations conducted outside Minnesota, both the concurring and dissenting justices in Sanders emphasized policy considerations in their opinions. Justice Anderson argued that “the rationale underlying Scales should and does apply” to interrogations conducted outside Minnesota. State v. Sanders, 775 N.W.2d 883, 890 (Minn. 2009) (Anderson, J., concurring). The dissent also pointed out that “[the court has] never limited [its] concern for a defendant’s rights solely to cases involving Minnesota law enforcement or events occurring solely within [Minnesota].” Id. at 891 (Page, J., dissenting).
151. State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994); see generally supra Part II.
152. The Minnesota Supreme Court has previously declined to apply Scales, despite acknowledging that that it would be beneficial. See Conger, 652 N.W.2d at
light of this interest, there are several practical policy concerns that should be weighed with the underlying policy of Scales. First, law enforcement agencies should only be expected to know the law governing interrogations in their respective jurisdictions. Second, even if they are aware of other laws, it is not always clear before the interrogation is conducted where a suspect will be prosecuted, so they would not know which law to follow. Third, law enforcement agencies may not have the equipment necessary to meet the demands of Scales because not all states have recording requirements.

The first two arguments have long been made in search and seizure exclusionary rule analyses. Legal scholars in this context have argued that applying more restrictive exclusionary rules to other jurisdictions would “give inadequate weight to the real-world considerations that govern police activity, particularly the not unreasonable police expectation that their work is subject to the law of their state.” The Sanders district court agreed with this approach when it held that the recording requirement “does not extend, and would be unfair to be extended, to FBI agents or other law enforcement officials who are not aware of its terms.”

Despite the fact that, unlike the recording requirement, the laws of search and seizure are rooted in the Constitution and are relatively more developed, the buttressing arguments are quite analogous in the electronic recordation context of Scales. Both exclusionary rules in search and seizure and Scales were established with the intent to deter police misconduct. In both contexts,

708 (declining to apply Scales to non-custodial interrogations).

153. Cf. John Bernard Corr, Criminal Procedure and the Conflict of Laws, 73 GEO. L.J. 1217, 1229–30 (1985) (describing how, in the search and seizure context, agencies may not know there is an interstate connection until the search is already in progress or over, and “[i]n some cases, police may have no opportunity to learn in advance which jurisdiction will receive the evidence they obtain.”).

154. See, e.g., Richard Tullis & Linda Ludlow, Admissibility of Evidence Seized in Another Jurisdiction: Choice of Law and the Exclusionary Rule, 10 U.S.F. L. REV. 67, 80 (1975) (arguing, among other things, that the forum should admit evidence when the search was legal in the situs but illegal in the forum and exclusion would serve no deterrent purpose).


156. State v. Sanders, 775 N.W.2d 883, 891 (Minn. 2009) (Page, J., dissenting).

157. Compare 31A C.J.S. Evidence § 358 (2008) (“The prime purpose of this [the search and seizure] exclusionary rule is to deter future unlawful conduct.”), with State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (discussing the court’s frustration with the law officials’ failure to record and thereafter creating an exclusionary rule if they fail to record). The Model Code similarly considers “the
police who are unaware of applicable law clearly will not be deterred from violating it.  Consequently, not only would applying Scales to out-of-state interrogations ignore the “real-world . . . expectation” of police officers to only know the laws of their respective jurisdictions, but it would also diverge from the central function of the requirement itself.

Further, jurisdictions without recording requirements may not be equipped with the necessary recording equipment. Concededly, in the current electronic era, many agencies are readily equipped with some form of recording equipment. Nevertheless, if their equipment is unsophisticated or otherwise limited, this creates potential for other Scales challenges at trial if the equipment malfunctions or does not provide a clear recording. In these situations, it would create bad public policy to suppress probative evidence simply because a police department was only equipped to serve its own governing law.

With these three practical policy considerations in mind, it is evident that excluding valuable evidence obtained in out-of-state interrogations presents an ominous proposition for victims of
crimes and the general public that violent criminals may be easily acquitted simply because police followed their local laws and policies.\textsuperscript{164} As the renowned Justice Benjamin Cardozo lamented, “[t]he criminal is to go free because the constable has blundered.”\textsuperscript{165} To prevent the criminal from going free in this context, both the limitation on the requirement’s authority as an exercise of the court’s supervisory power and the underlying practical policy concerns require finding that \textit{Scales} does not apply to interrogations conducted out of state.

C. Implementing an Effective Precedent

Minnesota has previously acknowledged other exigent circumstances that excuse a failure to record and, to preserve the fruits of interrogations, properly adopted exceptions to the requirement.\textsuperscript{166} The issue of interrogations conducted outside Minnesota logically presents another appropriate occasion to adopt an exception. Adopting an exception for out-of-state interrogations avoids placing an undue burden on law enforcement and is largely enforced in other jurisdictions.\textsuperscript{167} However, the exception should be limited to interrogations conducted without the involvement of Minnesota law enforcement agencies to address the potential for exploitation.\textsuperscript{168}

1. Adopting an Exception to the \textit{Scales} Requirement

Mandatory electronic recordation may be one of the most effective reforms in the criminal justice system.\textsuperscript{169} At the same time, commentators have asserted that recording policies are more effective with exceptions “so as not to place an undue burden on law enforcement and allow for the admission of voluntary statements that went unrecorded for valid reasons.”\textsuperscript{170} Indeed,

\begin{itemize}
\item \textsuperscript{164} This was one of prosecuting attorney Eric Zahnd’s primary objections to creating an exclusionary rule in favor of flexible legislation with exceptions. See Eric G. Zahnd, \textit{Missouri’s Experience with Recorded Interrogation Legislation—Prosecutors Lead Effort to Pass Sensible Law}, 43 \textit{PROSECUTOR} 36, 38 (2009).
\item \textsuperscript{165} People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).
\item \textsuperscript{166} See cases cited \textit{supra} note 42.
\item \textsuperscript{167} See \textit{infra} Part IV.C.1.
\item \textsuperscript{168} See \textit{infra} Part IV.C.2.
\item \textsuperscript{169} \textit{See} State v. Sanders, 775 N.W.2d 883, 889–90 (Minn. 2009) (Anderson, J., concurring) (discussing the positive effects \textit{Scales} has had in Minnesota).
\item \textsuperscript{170} \textit{The Justice Project}, \textit{supra} note 48, at 4. The rigidity of a full-fledged exclusionary rule without exceptions has driven some jurisdictions to reject a
\end{itemize}
every jurisdiction with a recording requirement, including Minnesota, provides constructive exceptions to the rule.  

Whether *Scales* applies to out-of-state interrogations is an issue of first impression in Minnesota, so the court could look to other jurisdictions’ policies for guidance. Fortunately, as discussed, recording requirements have expanded throughout the country, so jurisdictions now have the valuable opportunity to learn from the efficacy of one another’s policies. For example, a coalition of prosecutors and police in Missouri recently relied on the experience of other states when they drafted proposed legislation for a recording requirement. Significantly, the coalition used what it “believed to be the best parts of the statutes from other states,” which included an exception to recording if the interrogation is conducted outside the state of Missouri.

In fact, all states that have enacted statutory recording requirements include exceptions that allow the admission of statements made during out-of-state interrogations. Several states direct more attention to the interrogating party and create an exception for interrogations conducted by law enforcement officers

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171. See cases cited *supra* note 42; see also statutes cited *supra* note 47.

172. *Sanders*, 775 N.W.2d at 886.

173. See 21 C.J.S. *Courts* § 190 (2006). The supreme court has previously guided its decision by referring to other jurisdictions’ policies. See, e.g., State v. Conger, 652 N.W.2d 704, 708–09 (Minn. 2002) (observing that no other states extend their recording requirements to non-custodial interrogations).

174. See sources cited *supra* note 47 and accompanying text.


176. *Id.* at 38. The proposed legislation was eventually passed without amendment on August 28, 2009. *Id.* at 40 (codified at Mo. Rev. Stat. § 590.700 (Supp. 2010)).

of another state. Interestingly, some commentators have combined the two approaches and recommend an exception for out-of-state interrogations conducted “without involvement of or connection to a law enforcement officer of [the forum state].”

Regardless of the other jurisdictions’ qualifying provisions, the relevant insight to gain from each policy is the necessity to except out-of-state interrogations.

As the number of jurisdictions with recording requirements continues to rise, it is reasonable to expect that the issue of unrecorded, out-of-state interrogations may eventually fade away. In the meantime, to avoid placing an undue burden on law enforcement and to adhere to the apparent multi-jurisdictional support for an exception to the requirement, the supreme court should create an exception to *Scales* for out-of-state custodial interrogations.

2. Averting Potential Exploitation

As was the case in implementing other exceptions to the recording requirement, there are legitimate concerns that arise by limiting *Scales* to interrogations within Minnesota. One predominating concern is that law enforcement officers could exploit the rule by intentionally interrogating suspects outside the state of Minnesota. Indeed, they could potentially utilize this tactic in interstate or joint federal-state operations by simply instructing the foreign agency to detain and interrogate the suspect in its respective jurisdiction before transferring the suspect to Minnesota.

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178. For example, North Carolina’s statute permits the admission of statements made during an interrogation that is conducted by law enforcement officers of another state or federal law enforcement officers. N.C. GEN. STAT. § 15A-211(g)(4), (5) (2009); see also D.C. CODE § 5-116.01(a)(1) (LexisNexis Supp. 2007) (limiting the requirement to members of the Metropolitan Police Department); Wis. STAT. ANN. §§ 968.073(1)(b), (c), 165.83(1)(b), 165.85(2)(c) (West 2007 & Supp. 2009) (limiting the requirement to state officers).


180. ABA RESOLUTION, supra note 4, at 5.

Coincidentally, the supreme court previously addressed a practically identical concern when deciding whether to apply Scales to non-custodial interrogations in State v. Conger. Police are in a position to similarly undermine Scales because they ultimately determine when to place a suspect in custody. However, while the court recognized both the potential for police gaming and the benefit of applying Scales to all interrogations, it nonetheless declined to extend Scales to non-custodial interrogations. The court primarily based its decision on other states’ policies, the Model Code of Pre-Arraignment Procedure, and academic scholars’ recommendations.

There is undoubtedly the potential for law enforcement to abuse an exception for out-of-state interrogations similar to the potential for abuse posed by limiting Scales to custodial interrogations. However, just as no jurisdiction requires recording non-custodial interrogations, no other state requires recording out-of-state interrogations. Further, seemingly every academic article that advocates for electronic recording also advocates for an exception to the rule if the interrogation is conducted outside the jurisdiction. Under the supreme court’s reasoning in Conger, Scales should not extend to interrogations outside Minnesota despite the potential for exploitation.

Aside from the analogous conclusion reached in Conger, there is strong evidence to support the conclusion that law enforcement agencies would have little to gain by exploiting an out-of-state interrogation exception. In fact, some argue that law
enforcement agencies are one of the greatest beneficiaries of a recording requirement. Recording interrogations improves relations between police and the community, decreases allegations of police brutality and misconduct, and eliminates “swearing matches” between police and suspects over “who said what in the interrogation room.” Further, both jurors and judges alike find it increasingly difficult to believe that recording equipment was not readily available to the interrogating officers, so recording actually enhances a law enforcement officer’s credibility in trial. Finally, recording interrogations provides an excellent tool for training new officers in proper and effective interrogation techniques.

Clearly, law enforcement agencies have more to lose than to gain by abusing an exception for interrogations conducted outside Minnesota. However, to ensure that officers do not abuse the exception, the supreme court should narrow the exception’s application to custodial interrogations conducted outside Minnesota “without the involvement of or connection to a law enforcement officer of [Minnesota].” This approach is consistent with the policy underlying the exclusionary rule in Scales, because

189. Thurlow, supra note 161, at 771.
190. Oliver, supra note 18, at 282–83.
191. Recording Federal Interviews, supra note 47, at 1316–21 (providing several examples of cases in which the judges and juries have been dissatisfied with federal agencies’ failure to record interrogations). For example, one judge was clearly frustrated by the lack of recording when he told a police witness:

If you’ve got audio and videotape there, I think you ought to use it. I don’t know why I have to sit here and sort through the credibility of what was said in these interviews when there’s a perfect device available to resolve that and eliminate any discussion about it.

Everybody Wins, supra note 1, at 1130 (citing Transcript of Motion to Suppress Hearing at 72, United States v. Bland, No. 1:02-CR-93 (N.D. Ind. Dec. 13, 2002)); see also FBI BULLETIN, supra note 162, at 6 (“By recording, the officer can demonstrate commitment to impartiality by collecting and preserving evidence in its most unbiased and unadulterated form.”).

192. FBI BULLETIN, supra note 162, at 6.

193. The advantages of recording have caused the reform to gain wide support of law enforcement agencies across the country. Ongoing surveys of law enforcement personnel in jurisdictions that record reveal enthusiastic support for the practice. Thomas P. Sullivan, The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish, 37 GOLDEN GATE U. L. REV. 175, 178 (2006). In fact, some police departments even record interrogations in jurisdictions without statewide recording requirements. See Everybody Wins, supra note 1, at 1136 (“[M]any police and sheriff departments have voluntarily adopted the practice of recording custodial questioning sessions.”).

194. Sullivan & Vail, supra note 179, at app. A § 3(f) (proposing a model statute).
the burden still falls on Minnesota officials to ensure that the out-of-state agency complies with the recording requirement or they risk losing any evidence obtained. 195 At the same time, prosecutions in joint federal-state or interstate operations will not be hampered by suppression of valuable statements lawfully obtained before Minnesota’s involvement in the case. 196

To illustrate, both Sanders and In re The Welfare of C.M.D. presented opportunities for Minnesota law enforcement to request the foreign agency to record the interrogation. In Sanders, the Chicago FBI office contacted the St. Paul Police Department before they interrogated Sanders, 197 so the St. Paul Police could have easily informed the FBI about Minnesota’s recording requirement. Similarly, in In re The Welfare of C.M.D., the St. Paul officer not only requested the Abilene officer to interview the defendant, but actually faxed Minnesota documents to him, including of “Notice of Rights” form. 198 If the exception was limited to interrogations conducted without the involvement of Minnesota agencies, Scales would have applied to both interrogations in these cases, and the courts would have more properly proceeded with the second step of the analysis determining whether the violation was substantial. 199

It therefore seems that one commentator accurately suggested that “the reason[s] so few complications have occurred [with recording requirements] are undoubtedly the liberal provisions that excuse recordings, and the good faith efforts of law enforcement personnel to comply with the recording mandates and to honor suspects’ rights.” 200 Judging from the increase in legislation that includes an

195. See supra note 188 and accompanying text.
197. See State v. Sanders, 743 N.W.2d 616, 618 (Minn. Ct. App. 2008), aff’d 775 N.W.2d 883 (Minn. 2009).
199. Cf. cases cited supra note 39 and accompanying text. Any questions regarding the level of law enforcement involvement required to trigger the application of Scales are sufficiently resolved by the Model Code factors in the “substantial” test. The note to Model Code § 150.3 explains that if a court finds that an “agency has not taken reasonably adequate steps in good faith to assure compliance . . . , it should give special credence to the account of the defendant.” State v. Sanders, 775 N.W.2d 883, 893 (Minn. 2009) (quoting MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.3 (1975)).
exception for interrogations conducted outside the jurisdiction, a consensus is developing that such an exception is an important and beneficial facet of a recording requirement.\footnote{See, e.g., sources cited supra notes 177–178 and accompanying text.} Further, the potential concern that officers will abuse the exception is effectively refuted by the many benefits recording confers on law enforcement, and the ensuing disincentive for noncompliance. Finally, the court could preempt police gaming by narrowing the exception to interrogations conducted outside Minnesota without the involvement of Minnesota law enforcement.

V. CONCLUSION

Sanders showcases why Minnesota’s lack of “detailed provisions for unforeseen circumstances and inevitable glitches” has been criticized.\footnote{Everybody Wins, supra note 1, at 1137.} Unlike inherently comprehensive statutes, Scales provides little guidance for law enforcement and courts alike, and necessitates that courts actively develop the requirement. Consequently, it is imperative that courts squarely address issues of first impression regarding the recording requirement to ensure its efficient implementation.

Accordingly, in Sanders, the Minnesota Supreme Court should have examined whether Scales applies to interrogations conducted outside Minnesota. Further, based on the requirement’s authority as an act of supervisory power and practical policy considerations, the court should have established that the recording requirement does not apply to out-of-state interrogations. Although the recording requirement has had positive effects in Minnesota,\footnote{Aside from protecting defendants’ rights, Scales has reduced the number of law enforcement issues brought to the courts, eliminated frivolous and unfounded objections by defendants, and provided the best evidence for prosecution. Sanders, 775 N.W.2d at 890 (Anderson, J., concurring).} the court should continue to recognize the necessity for exceptions to maintain the effective administration of law enforcement, and adopt an exception for interrogations conducted outside Minnesota without the involvement of Minnesota law enforcement. While Mr. Harris was accurate in his assertion that the recording requirement was the best thing for the criminal justice system in Minnesota, the issue in Sanders exemplifies the proposition that there can be too much of a good thing.