

COMMONWEALTH OF MASSACHUSETTS.

**SUPREME JUDICIAL COURT.**

S.J.C. No. 9155

MIDDLESEX COUNTY

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COMMONWEALTH OF MASSACHUSETTS,  
Plaintiff-Appellee.

v.

VALERIO DIGIAMBATTISTA,  
Defendant-Appellant.

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ON APPEAL FROM A JUDGEMENT OF THE SUPERIOR COURT.

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Brief of Amici Curiae.

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## QUESTION PRESENTED

Whether the court should require that a custodial interrogation of an accused, at least at a place of detention, be electronically recorded before a statement made by the accused as a result of the interrogation may be admitted in evidence; and if so, how this should be accomplished. *See, e.g., Commonwealth v. Groome*, 435 Mass. 201, 219 n.26 (2001), and cases cited.

## STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

Amici rely on the Statement of Facts and the Statement of the Case submitted by the Defendant-Appellant.

### STATEMENT OF AMICI INTEREST

Suffolk Lawyers for Justice, Inc. (“SLJ”) was incorporated on March 31, 2000 as a Massachusetts non-profit corporation for the purpose of administering the delivery of criminal defense services to indigent persons accused of crimes in Suffolk County, Massachusetts. SLJ manages over 300 private attorneys who handle approximately ninety percent of the indigent criminal defense cases in 11 Boston area courts, including the Superior Court and the Juvenile Court. SLJ is under contract to manage this program with the Committee for Public Counsel Services, the state agency that oversees the assignment of all indigent criminal defense services in Massachusetts.

The New England Innocence Project (“NEIP”) is an unincorporated association of several Boston-area law school professors, lawyers, and members of the law firm of Testa, Hurwitz & Thibault, LLP, that provides *pro bono* legal services to identify, investigate, and exonerate through the use of DNA testing persons who have been wrongly convicted and imprisoned in the New England states.

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## ARGUMENT

### **I. REQUIRING RECORDING IS ESSENTIAL TO ENSURE CUSTODIAL INTERROGATION PRODUCES RELIABLE AND ADMISSIBLE STATEMENTS.**

#### **A. Recordings of interrogation are vital to ascertaining truth and their existence cannot depend on a police officer's whim.**

No lawyer briefs an appeal without reading the trial transcript, and no judge issues an opinion without examining the pleadings, yet both must construct precise details of an interrogation – upon which hangs a person's liberty – denied a contemporaneous record of it. State and federal constitutions require confessions or admissions in criminal cases be voluntary, free from coercion, and reflect a knowing and intelligent waiver of rights, yet judges (and, with regard to voluntariness, jurors) who must decide these questions, and lawyers who must litigate them, are denied essential evidence unless the police, the party with the greatest incentive not to, deign to preserve it. This defies logic, and it should defy law.

#### **B. No other part of the system of justice refuses to record what it does, forces judges to guess, and gets away with it.**

Courts and civil litigants expect contemporaneous recording of their work, and so should the police.<sup>1</sup> Their work produces key evidence whose admissibility depends upon its precise terms and the circumstances under which it was obtained. Confessions routinely involve disputes concerning what a defendant was

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<sup>1</sup> Contemporaneous recording of a trial is required in criminal appeals, Rule 8(b)(2), MA. R. APP. PRO., and a transcript is essential for both counsel and appellants. *Charpentier v. Commonwealth*, 376 Mass. 80, 87-88 (1978). Civil practice in the analogous pretrial “investigative” context is premised upon availability of a contemporaneous verbatim record. *See* MA. R. CIV. PRO. 30(c) (“testimony shall be taken stenographically or by voice writing or recorded by any other means.”)

told, how, when, and what they did or did not do, or did or did not say, in response. These questions are examined long after the fact without a contemporaneous record. Courts have electronically recorded their own proceedings for over twenty years<sup>2</sup> and used contemporaneous video recording of testimony in civil cases for nearly twenty-five.<sup>3</sup> It works.

Just two weeks ago, the United States Supreme Court explained that police interrogation is historically analogous to “testimony” before judicial tribunals, and thus demands the same constitutional protection of confrontation. *Crawford v. Washington*, 2004 WL 413301, \*10 (March 8, 2004) (“Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.”) If out-of-court statements produced by police interrogation are important enough that they require cross examination before admission, surely they are candidates for a measure, contemporaneous recording, that does at least as much to ensure reliability.

**C. This Court must establish a rule of evidence, not a recommendation, to fairly and efficiently conduct cases involving confessions.**

A rule of evidence requiring videotaped recording of custodial interrogations will provide the information necessary to accurately and quickly determine a confession’s admissibility. Rules of evidence are an area of judicial expertise, and experience-based rules are especially appropriate for a system that eschews a code of evidence.

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<sup>2</sup> See Rule 8(b)(3), MA. R. APP. PROC. (adopted Feb. 17, 1983).

<sup>3</sup> See Rule 30A, MA. R. CIV. PRO. (Audiovisual Depositions and AudioVisual Evidence) (adopted Dec. 16, 1980).

For over a decade this Court has recognized the benefits from a comprehensive system of electronic recording for determining the voluntariness of statements produced by custodial interrogation.

We believe that the electronic recording of interrogations would, in many cases, be a helpful tool in evaluating the voluntariness of confessions. Defendants, prosecutors, and courts spend an enormous amount of time and effort trying to determine precisely what transpires during custodial interrogations, and all would be benefited in some way by a complete electronic recording.

*See Commonwealth v. Fryar*, 414 Mass. 732, 742, n.8 (1993). This Court has identified the utility of such an accurate and impartial record by holding the failure to record a factor to consider in determining the voluntariness of a confession. *See Commonwealth v. Diaz*, 422 Mass. 269, 273 (1996). Patient calls for a uniform system of recording,<sup>4</sup> rather than the haphazard discretion police and prosecutors now have to grant or deny judges, jurors and defendants a contemporaneous record, has failed. Obviously police and prosecutors prefer to risk a confession being ruled involuntary than to let courts and juries know exactly how it was obtained. *Commonwealth v. LeBlanc*, 433 Mass. 549, 552 n. 3 (2001) (judicial finding failure to record confession “conformed to the routine practice of both the State Police and the Sturbridge police department”). This Court has not hesitated

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<sup>4</sup> *See Commonwealth v. Diaz*, 422 Mass. 269, 273 (1996) (recognizing “the time may come when recording in places of detention, at least, will be mandatory if a statement obtained during custodial interrogation is to be admissible”); *Commonwealth v. Fernandez*, 427 Mass. 90, 98 (1998) (warning “at some time, such a [recording] requirement may be appropriate”); *Commonwealth v. Ardon*, 428 Mass. 496, 498 (1998) (commenting “we have suggested that at some time, such a requirement may become appropriate”); *Commonwealth v. Larkin*, 429 Mass. 426, 438 (1999) (noting failure to record an interrogation may be raised by defense to cast doubt upon the voluntariness of a confession); *Commonwealth v. Pina*, 430 Mass. 66, 70 n.8 (1999) (“again decline to go beyond our prior pronouncements” regarding recording as a matter of law); *Commonwealth v. Burgess*, 434 Mass. 307, 314 (2001) (observing “the electronic recording of interrogations is helpful”); and *Commonwealth v. Groome*, 435 Mass. 201, 219 n.26 (2001) (“reiterate[ing] that “[p]olice officials should be . . . warned that the time may come when recording . . . will be mandatory . . .”).

to impose duties on law enforcement, under the Declaration of Rights, “in order to actualize the abstract right[s] . . . prescribed by *Miranda v. Arizona*.” *Commonwealth v. Mavredakis*, 430 Mass. 848, 860 (2000) (duty to inform suspect of attorney’s efforts to contact him under Massachusetts constitution) (internal quotations and citations omitted). Establishing a rule to ensure a fair trial and protect basic rights and the system’s ability to make accurate judgments is not judicial fiat; it is the essence of the judicial function.

Two American jurisdictions, Alaska and Minnesota, together have thirty years of successful experience requiring recording of custodial interrogations. *See Stephan v. State*, 711 P.2d 1156, 1158-59 (Alaska 1985) (failure to electronically record custodial interrogation conducted in a place of detention violates due process); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (all custodial interrogation must be electronically recorded when occurring at a place of detention to ensure the fair administration of justice). They recommended recording for five and six years respectively before being forced to require it.<sup>5</sup> The New Jersey Supreme Court is presently considering adoption of an electronic recording requirement. *See State of New Jersey v. Tomahl Cook*, N.J. Sup. Ct., Docket No. 53, 778 (Oral Arg. Nov. 5, 2003 (transcript attached, *see* Appendix)).<sup>6</sup>

This Court has acknowledged recording would not be unduly burdensome

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<sup>5</sup> *See* §IV.A., *infra*

<sup>6</sup> Michael Booth, *Appellate Watch: Court To Police: Go to the Videotape -- Recording Interrogation May Become A Condition for Admitting Confessions*, 174 N.J. LAW JOURNAL 469, Nov. 10, 2003. “During oral arguments in a murder case last Wednesday, the state Supreme Court left little doubt it would announce a new rule requiring police to videotape interrogations as a condition for admissibility of confessions at trial. Indeed, the justices signaled that the issue is not whether interrogations and confessions should be videotaped, but when in the course of an investigation the recording should begin.”

or difficult for law enforcement to implement.

The cost of the equipment and its operation is minimal. The machinery is not difficult to use. A recording speaks for itself literally on questions concerning what was said and in what manner. Recording would tend to eliminate certain challenges to the admissibility of defendants' statements and to make easier the resolution of many challenges that are made.

*Commonwealth v. Diaz*, 422 Mass. 269, 273 (1996). Courts nationwide have recognized what this court has recognized, and have strongly recommended recording even when they hold their state or the federal constitutions do not require it.<sup>7</sup> In fact, as one court candidly admitted, "to the best of our knowledge, no court in any jurisdiction has ever concluded that the tape recording of custodial

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<sup>7</sup> See *State v. Godsey*, 60 S.W.3d 759, 772 (Tenn. 2001) ("There can be little doubt that electronically recording custodial interrogations would reduce the amount of time spent in court resolving disputes over what occurred during the interrogation. As a result, the judiciary would be relieved of much of the burden of resolving these disputes. In light of the slight inconvenience and expense associated with electronically recording custodial interrogations, sound policy considerations support its adoption as a law enforcement practice."); *People v. Raibon*, 843 P.2d 46, 49 (Colo. Ct. App. 1992) ("[T]he recording of an interview with either a suspect or a witness, either by audiotape or otherwise, may remove some questions that may later arise with respect to the contents of that interview. For that reason, it may well be better investigative practice to make such a precise record of any interview as the circumstances may permit"); *State v. Kekona*, 886 P.2d 740, 745-46 (Hawaii 1994) ("[H]aving an electronic recording of all custodial interrogations would undoubtedly assist the trier of fact in ascertaining the truth.... A recording would be helpful to both the suspect and the police by obviating the "swearing contest" which too often arises when an accused maintains that she asserted her constitutional right to remain silent or requested an attorney and the police testify to the contrary. A recording would also "help to demonstrate the voluntariness of the confession, the context in which a particular statement was made and of course, the actual content of the statement."). A cogent summary of recording's benefits was provided in *Stoker v. State*, 692 N.E.2d 1386, 1390 (Ind. App. Ct. 1998):

Nevertheless, although we impose no legal obligation, we discern few instances in which law enforcement officers would be justified in failing to record custodial interrogations in places of detention. Disputes regarding the circumstances of an interrogation would be minimized, in that a tape recording preserves undisturbed that which the mind may forget. In turn, the judiciary would be relieved of much of the burden of resolving disputes involving differing recollections of events which occurred. Moreover, the recording would serve to protect police officers against false allegations that a confession was not obtained voluntarily. Therefore, in light of the slight inconvenience and expense associated with the recording of custodial interrogations in their entirety, it is strongly recommended, as a matter of sound policy, that law enforcement officers adopt this procedure.

interrogations in places of detention would be detrimental; rather, the justification, as in the present case, for rejecting such a duty is solely that it is not a constitutional requirement.” *Stoker v. State*, 692 N.E.2d 1386, 1390, n.10 (Ind. App. Ct. 1998).

**D. Current law ignores the ubiquity of recording and sacrifices accuracy and legitimacy for prosecutorial and police discretion.**

The law created by asking the police to record what they do is unwise at best and illegitimate at worst. Police, investigating a first degree murder case where neither physical evidence nor eyewitnesses implicate the defendant, can employ three officers to interrogate an intoxicated defendant whom they know to be a drinker, and can decide not to preserve the details of the interrogation even when audiovisual recording equipment is readily available. *See Commonwealth v. Pina*, 430 Mass. 66, 71-72 (1999). If one officer even chooses to make notes of his interview with the defendant, he can destroy them with impunity.<sup>8</sup> *Id.* at 71 n.11. Testimony inevitably produces inconsistency. *Id.* at 70 n.9 (noting testimony by officer called by defense at retrial “could have been viewed . . . as inconsistent with his testimony [when called by state] at the first trial”).

This jurisprudence harms everyone except the police. The defendant may argue to the judge and the jury that such actions reflect a lack of voluntariness, inadequate advice of rights, or an invalid waiver, *see id.* at 69-72, *and see also Diaz, supra* at 279, but must do so without the best evidence. The judge must de-

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<sup>8</sup> In *Commonwealth v. Pina*, the police also “inexplicably” destroyed the notes from an interview with the sole witness who reported the defendant had made an incriminating statement. 430 Mass. at 69 n.7.

termine voluntariness, and the adequacy of advice and the validity of a waiver, but without the best evidence. The jury must determine voluntariness, but without the best evidence. This is unnecessary and worse.

The effect of not recording is something far more pernicious than simply reducing the efficiency and accuracy of these determinations at trial. The inference that the police have something to hide corrodes the legitimacy and credibility of the process, because contemporaneous records of routine transactions and events are a fact of life outside the interrogation room. Literally millions of customer service phone calls are recorded every day for “quality-assurance purposes,”<sup>9</sup> thousands of surveillance cameras record transactions in banks and convenience stores throughout the country, and yet the statement responsible for an individual’s incarceration for life without parole may – or may not be – recorded at the sole, unfettered, and utterly unreviewable, discretion of an investigator. As two members of this Court recently noted:

[w]e hold [police] officers to this higher standard of conduct, fully confident that, in most cases, they will meet that standard, and there is no ‘implicit’ suggestion to the contrary . . . . It is the recognition of the potential for abuse of power that has caused our society, and law enforcement leadership, to insist that citizens have the right to demand the most of those who hold such awesome powers.

*Commonwealth v. Hyde*, 434 Mass. 594, 613 (2001) (Marshall, C.J., dissenting).

**E. Fifteen Massachusetts exonerations since 1990 is enough.**

Who would not question the legitimacy of a criminal justice system that

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<sup>9</sup> Chuck Salter, *This Call is Being Recorded . . . for More than you Think*, 78 FAST COMPANY 34 (January 2004) (“[Call recording firm NICE Systems] claims to provide call-recording software to 67 of the *Fortune* 100 companies and says its customer-service centers capture about 40 million calls a day.”) (Italics in original).

hides its practices and then gets it wrong? Much has happened since this Court called for recording custodial interrogations besides the fact that another American jurisdiction has adopted a recording requirement.<sup>10</sup> Since the emergence of DNA testing (a period roughly comparable to this Court's call for the recording of interrogations), the Innocence Project has identified twenty cases – 14% of the total number of DNA exonerations – where a defendant whose conviction rested in part on a confession was subsequently exonerated through DNA testing.<sup>11</sup> Given the traditional weight accorded a defendant's confession, this is an alarmingly high figure. Leading scholarship places the share of erroneous convictions that involve a false confession at between 14-25%.<sup>12</sup> Professors Drizin and Leo identify thirty-eight cases following this pattern.<sup>13</sup> Interrogation techniques have adapted to evolving legal standards with the result that the erroneous confession – once thought exclusively the product of the kind of “third degree” that may now be rare – remains a stubborn problem. Social psychology tells us:

Psychologically-based interrogation works effectively by controlling the alternatives a person considers and by influencing how these alternatives are understood. The techniques interrogators use have been selected to limit a person's attention to certain issues, to

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<sup>10</sup> In *State v. Scales*, 518 N.W.2d 587 (Minn. 1994), the Minnesota Supreme Court adopted a recording requirement in the exercise of its general superintendence over lower courts. This Court also has this authority. MASS.GEN.LAW Ch. 211, §3 provides in relevant part: “The supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, . . . and it may issue such . . . rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration . . . .”

<sup>11</sup> Benjamin N. Cardozo School of Law, *The Innocence Project*, at <http://www.innocenceproject.org/causes/falseconfessions.php> (visited March 21, 2004).

<sup>12</sup> Steven Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 893, 905-6 (2004 forthcoming)(documenting and analyzing over 125 confessions proven to be false)

<sup>13</sup> Richard Leo and Steven Drizin, *Proven False Confession Cases* (available at [http://www.innocenceproject.org/docs/Master\\_List\\_False\\_Confessions.html](http://www.innocenceproject.org/docs/Master_List_False_Confessions.html)) (visited March 20, 2004).

manipulate his perceptions of his present situation, and to bias his evaluation of the choices before him. The techniques used to accomplish these manipulations are so effective that if misused they can result in decisions to confess from the guilty and innocent alike. Police elicit the decision to confess from the guilty by leading them to believe that the evidence against them is overwhelming, that their fate is certain (whether or not they confess), and that there are advantages that follow if they confess. Investigators elicit the decision to confess from the innocent in one of two ways: either by leading them to believe that their situation, though unjust, is hopeless and will only be improved by confessing; or by persuading them that they probably committed a crime about which they have no memory and that confessing is the proper and optimal course of action.<sup>14</sup>

Defendants' out of court statements are traditionally admissible because we think they are reliable, since innocent people would never make statements that might incriminate them. The evidence of exonerations contradicts this comfortable assumption. An opportunity to observe and listen to how a defendant is questioned would assist juries and judges in assessing the accuracy and voluntariness of his answers far more than would hearing an interested police officer's after the fact description of this process.

Just since 1990, there have been *fifteen* exonerations of wrongfully convicted persons in Massachusetts.<sup>15</sup> With a single exception,<sup>16</sup> all of these convic-

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<sup>14</sup> Richard Ofshe & Richard Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENVER U. L.REV. 979, 985-6 (1997).

<sup>15</sup> See Stanley Z. Fisher, *Convictions Of Innocent Persons In Massachusetts: An Overview*, 12 B.U. PUB. INTEREST L.J. 1 (2002), Tables A & B (noting eleven convictions vacated since 1990, six of which involved exonerations that were "officially undisputed," while five were "Vacated Under Circumstances Raising Strong Doubts About Factual Guilt"). Since the publication of this article, four more individuals have been exonerated. These include Shawn Drumgold, see Dick Lehr & Mac Daniel, *89 Conviction Invalidated, Inmate Drumgold Walks Free DA To Reopen Tiffany Moore Murder Case*, THE BOSTON GLOBE, Nov. 7, 2003, B.2., Dennis Maher, see John Ellement & Dick Lehr, *Man Imprisoned On Rape Charges Freed DNA Evidence Clears Defendant*, THE BOSTON GLOBE, April 4, 2003, B. 4, Stephan Cowans, and Anthony Powell, Jonathan Saltzman, *Inmate's Exoneration Renews Calls For An "Innocence" Panel*, THE BOSTON GLOBE, March 9, 2004, A.1.

<sup>16</sup> Dennis Maher.

tions had been affirmed by the courts of this Commonwealth.<sup>17</sup> These cases demonstrate the urgency of requiring that the mostly reliable evidence be employed in guilt determination process.

While none of the Massachusetts cases to date has involved a confession found to be actually made yet false, two of them did involve alleged “confessions” discovered by the police at the last minute. Neither of these “confessions,” by defendants later exonerated through DNA testing, was recorded.<sup>18</sup> Although these are simply fabricated confessions, rather than “false confessions,” they would be virtually impossible to offer with a recording requirement.

Commentators have been calling for recording of custodial interrogations for over three decades.<sup>19</sup> They have noted the anomaly of not recording custodial interrogations. “With this truism [that civil depositions must be recorded to be admissible] about interrogation in civil cases in mind, it is stunning that we do not

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<sup>17</sup> See Stanley Z. Fisher, *Convictions Of Innocent Persons In Massachusetts*, *supra*. In addition to the cases cited therein, see *Commonwealth v. Shawn Drumgold*, 423 Mass. 230 (1996); *Commonwealth v. Stephen Cowans*, 52 Mass. App. Ct. 811 (2001), and *Commonwealth v. Anthony Powell*, 638 N.E. 2d (1994). There have been nine exonerations in Massachusetts achieved through DNA evidence: Marvin Mitchell (1997); Eric Sarsfield (2000); Neil Miller (2000); Kenneth Waters (2001); Charles Rodriguez (2001); Angel Hernandez (2001); Dennis Maher (2003); Stephen Cowans (2004); and Anthony Powell (2004).

<sup>18</sup> According to Professor Fisher, in the case of Marvin Mitchell, who was exonerated by DNA evidence, there was “testimony that Mitchell had spontaneously confessed to wearing pink pants on the day of the rape” and the victim had identified the perpetrator as wearing “pinkish pants.” *Id.* at 20. Eric Sarsfield, exonerated through DNA evidence of a rape for which he served years in prison, was convicted in part through evidence of an alleged unrecorded confession he made. “Prosecutors also were allowed to impeach the defendant’s testimony with an inculpatory statement that he allegedly made to a police officer in September 1986. The officer did not submit his report of this statement to the prosecutor until the week before trial, ten months after the statement was allegedly made.” *Id.* at 23, n.96.

<sup>19</sup> See, e.g., James P. Barber & Philip R. Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017, 1020-26, 1040 (1974); Yale Kamisar, *Foreword: Brewer v. Williams--A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 238-43 (1977); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENV. L.J. 1, 45 (1970); Roger J. Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 678 (1966).

require verbatim transcripts of criminal interrogations, where the stakes are so much higher, access to information about psychological pressures so much more important, and legal representation (of either party) so much less likely.” Christopher Slobogin, *Toward Taping*, 1 OHIO STATE J. CRIM.L. 309, 316-17 (2003). *See also*, Daniel Donovan & John Rhodes, *Comes A Time: The Case For Recording Interrogations*, 61 MONTANA LAW REVIEW 223 (2000).

One of the most persistent critics of the *Miranda* regime has concluded:

Recording confessions also promises to be effective in preventing not only physical coercion but also in detecting, if not preventing, other fine points of coercion as well. In this regard, it is interesting that some of the most detailed assessments of voluntariness have come in cases of recorded interrogations, which permitted judges to parse implicit promises and threats made to obtain an admission. Recording also allows a review of police overbearing that might not be revealed in dry testimony. Taping is thus the only means of eliminating “swearing contests” about what went on in the interrogation room.

Videotaping also promises to offer more effective protection against the more esoteric problem of false confessions induced by noncoercive police questioning. A complete record of the proceedings promises to be the most effective means of identifying such cases.<sup>20</sup>

**II. THE RECORDING REQUIREMENT MUST SPECIFY VIDEOTAPING OF ALL QUESTIONING, INCLUDING ADVICE AND WAIVER OF RIGHTS, AS A MANDATORY PRECONDITION FOR THE ADMISSION OF ANY STATEMENT PRODUCED BY CUSTODIAL INTERROGATION MADE AT A DETENTION OR LAW ENFORCEMENT FACILITY, AND ANY SUCH STATEMENT MADE ELSEWHERE UNLESS NOT FEASIBLE.**

**A. Recording is feasible at facilities controlled by law enforcement.**

There is no excuse for the failure to record an interrogation conducted in a

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<sup>20</sup> Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 N.W. UNIV.L.REV. 387, 488 (1996).

detention or law enforcement facility. Ten years ago, a study performed by the Police Executive Research Forum for the U.S. Department of Justice estimated 16.4% of the nation's police and sheriff's departments already videotaped at least some interrogations.<sup>21</sup> *See also* §IV.D., *infra*. According to an expert with over twenty years experience setting up and operating a video interrogation program in the Bronx, New York District Attorney's office, the cost to "construct one complete interview setup, including playback equipment and top-of-the line editing equipment, is . . . slightly more than the cost of one police car and certainly less than a police officer's salary."<sup>22</sup> Videotaping equipment is apparently sufficiently available for the Commonwealth's law enforcement agencies to use it to record booking procedures *Commonwealth v. Maylott*, 43 Ma.App.Ct. 516, 519 (1997) (booking videotape properly admitted to show "appearance and behavior" of OUI defendant who claimed he was tired) and crime scenes, *see Commonwealth v. Andrade*, 422 Mass 236 (1996) (two videotapes of crime scene), and to forego its use for interrogations. *See Commonwealth v. Burgess*, 434 Mass. 307, 314 (2001) (videotaping equipment at state police barracks not used); *Commonwealth v. Pina*, 430 Mass. 66, 71-72 (1999) (same, at police station).

**B. Recording must include the defendant's entire interaction with the police to enable effective judicial review of voluntariness.**

The recording requirement must extend to all statements, inculpatory or

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<sup>21</sup> William A. Geller, *Videotaping Interrogations and Confessions* 1, NATIONAL INSTITUTE OF JUSTICE NCJ139962 (March 1993) (copy attached, *see* Appendix) (hereinafter "NIJ *Videotaping Interrogations*"). According to the study, nearly a third of police departments serving jurisdictions over 50,000 persons already videotaped at least some interrogations. Percentages of Departments videotaping and the Populations they served were: Under 10,000: 12.2%, 10,000-24,999: 28.9%, 25,000-49,999: 25.9%, 50,000-99,999: 31.8%, 100,000-249,999: 32.4%, and 250,000 and Above: 34.5%. *Videotaping Interrogation*, *supra*, at 2, Exhibit 1.

<sup>22</sup> NIJ *Videotaping Study*, *supra*, at 9.

not, produced by custodial interrogation, to any interaction between officers and the suspect that would qualify as interrogation, and must include recording of both the advice of *Miranda* rights and any waivers thereof. This Court has already recognized problems posed by an incompletely recorded statement produced by custodial interrogation, *Commonwealth v. Fernette*, 398 Mass. 658, 665 (1986), as have the two other American jurisdictions with a recording requirement. *See Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985) (“To satisfy this due process requirement, the recording must clearly indicate that it recounts the entire interview. 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.”) *And see State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (“all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded”). Complete recording is essential under the “totality of the circumstances” test, and it is both intelligible and feasible for law enforcement to implement and the judiciary to enforce because it relies upon existing jurisprudence governing the requirement for *Miranda* warnings and waivers for the admission of statements that are the product of custodial “interrogation.” *See Commonwealth v. Torres*, 424 Mass. 792, 796-97 (1997), citing *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

The experience of police departments who videotape interrogations is instructive. According to the NIJ Study, approximately half (48%) of the departments that taped at least some interrogations in 1992 taped the entire stationhouse

interrogation.<sup>23</sup> The police benefit from this thorough approach. “[E]ven if one ignores the dimension of fairness in the investigative process[, i]nformation that seems unimportant at the time . . . may prove very useful at trial.”<sup>24</sup>

**C. The recording requirement must be for video, or video and audio taping, rather than audio taping alone.**

The recording requirement must specify that the recording be video (or video and audio) rather than solely audio taped. Videotape shows a defendant’s demeanor, body language, and any physical interaction of the defendant and officers. A videotape can also provide evidence of a defendant’s behavior that is probative of aspects of their state of mind, such as intoxication or the lack thereof.

Videotaping equipment is already widely available to law enforcement. “A 2001 study by the International Association of Chiefs of Police found that 80% of the 207 responding American law enforcement agencies have deployed some sort of closed-circuit television and that another 10% will soon do so.” Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and The Right To Anonymity*, 72 MISS. L. J. 213, 221 (2002). In rating the effectiveness of its uses, fifty-six percent of agencies who responded reported it was “most effective” in the interrogation room.<sup>25</sup>

Videotaping is also more effective for law enforcement than other means of recording. Departments videotaping confessions reported they were “much

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<sup>23</sup> Geller, Videotaping Study, 65-66.

<sup>24</sup> *Id.*, at 66.

<sup>25</sup> International Association of Chiefs of Police, Executive Brief, The Use of CCTV/Video Cameras in Law Enforcement, Executive Summary, March 2001, at 4, Figure 1, available at <http://www.theiacp.org/documents/pdfs/Publications/UseofCCTV.pdf>.

more convincing” (64.8%) or “somewhat more convincing” (22.2%) than confessions that were recorded through either audio or written documentation.<sup>26</sup>

**D. Recording must extend to all custodial interrogations outside detention or law enforcement facilities, unless not feasible, if it is to be meaningful.**

Both U.S. jurisdictions adopting a recording requirement recognize that in certain circumstances recording may not be feasible, and that despite the best efforts of responsible law enforcement officers, events beyond their control sometimes intervene. In Minnesota, the failure to record a custodial interrogation results in exclusion of the statement if the violation is “substantial.” Substantiality is determined on a case-by-case basis. *See Scales*, 518 N.W.2d at 592.

The determination of whether a violation is substantial is made on a case-by-case basis, considering all relevant circumstances, including the extent of the deviation from lawful conduct, the willfulness of the violation, the extent to which the violation would lead the defendant to misunderstand his legal rights, the extent to which the violation influenced the defendant’s decision to make the statement, and the extent to which exclusion of the statement will prevent other violations.

*Id.* Eliminating the recording requirement outside of detention or law enforcement facilities would vitiate it, by providing an easy route to undermine it, and be no better than the current situation.

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<sup>26</sup> William A. Geller, *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices* 108-109, NATIONAL INSTITUTE OF JUSTICE, NCJ 139584 (August 7, 1992).

**III. RECORDING WILL ENSURE THE ENFORCEMENT OF CRITICAL RIGHTS PROTECTED BY THE MASSACHUSETTS AND FEDERAL CONSTITUTIONS, AS WELL AS BY COMMON LAW, AND WILL IMPROVE THE ACCURACY AND EFFICIENCY OF JUDICIAL DETERMINATIONS.**

- A. The Declaration of Rights, and Massachusetts common law, require greater proof of a confession’s reliability than does the Federal constitution through stricter enforcement of the voluntariness standard, and recording will implement these requirements.**

A recording requirement as a precondition to the admissibility of a statement produced by custodial interrogation is consistent with this Court’s careful interpretations of the Massachusetts Constitution, common law, and its supervisory authority, that together establish a higher standard for accuracy, reliability and lawfulness of confessions than does the federal constitution as set forth below.

Massachusetts Rule	Federal Rule
Trial court must hold hearing <i>sua sponte</i> if evidence places confession’s voluntariness in issue. <i>Commonwealth v. Harris</i> , 371 Mass. 462, 470-71 (1976).	Trial judge must conduct <i>voir dire</i> to determine voluntariness given evidence confession or admission may have been involuntary. <i>Jackson v. Denno</i> , 378 U.S. 368, 376 (1964).
Burden of proof for voluntariness of a statement beyond a reasonable doubt. <i>Commonwealth v. Tavares</i> , 385 Mass. 140, 150-52 (1982).	Burden of proof for voluntariness of a statement merely preponderance of the evidence. <i>Lego v. Twomey</i> , 404 U.S. 477, 489 (1972).
Burden of proof of valid waiver of <i>Miranda</i> rights beyond a reasonable doubt. <i>Commonwealth v. Day</i> , 387 Mass. 915, 920-21 n. 10 (1983) (under supervisory authority).	Burden of proof of valid waiver of <i>Miranda</i> rights merely preponderance of the evidence. <i>Colorado v. Connelly</i> , 497 U.S. 157, 168 (1986).
Jury must determine voluntariness, beyond a reasonable doubt, whenever a live issue at trial. <i>Commonwealth v. Tavares</i> , 385 Mass. 140, 149-50 (1982) (common law).	No federal analogue.

Videotape recordings of custodial interrogations will provide judges vital evidence to ensure a statement is not admitted that is the product of having overborne the defendant's will in violation of due process, and with which to ensure that the defendant's rights against compelled self-incrimination and to the assistance of counsel are protected. They will assist jurors in implementing the humane practice doctrine. Finally, video recording will protect due process by preserving evidence that could assist the defendant at trial. Recording is not a panacea, but rules of evidence and practice are established based upon their demonstrable value in the great run of cases. When law enforcement chooses not to record statements that are the product of custodial interrogations (or chooses to record only certain statements), the quality of justice suffers.

**B. Recording will make the inherently fact-specific determination of voluntariness more accurate and more efficient.**

For 150 years, in order to ensure the reliability of confessions, this Court has steadfastly recognized and discharged its obligation to ensure that statements produced by custodial interrogation are voluntary.

The ground on which confessions made by a party accused, under promises of favor, or threats of injury, are excluded as incompetent, is, not because any wrong is done to the accused, in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him, without regard to their truth, in order to obtain the promised relief, or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted.

*Commonwealth v. Morey*, 1 Gray 461, 67 Mass. 461, 462-63 (1854) (Shaw, C.J.).

*See also Commonwealth v. Taylor*, 5 Cushing 605, 59 Mass. 605, 609-610 (1850)

(excluding defendant's statement to deputy sheriff where the deputy promised in-

fluence would be used to help defendant if he made statements favorable to the prosecution). Since the United States Supreme Court's application of the Fourteenth Amendment's due process clause to custodial interrogation, more recent cases have examined not only a confession's reliability but also whether "the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatorial and not an inquisitorial system – a system in which the state must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers v. Richmond*, 365 U.S. 534, 540 (1961).

The means of undermining the voluntariness of a statement made during custodial interrogation are infinite, because there is no "easy acid test" of voluntariness, *Commonwealth v. Mahnke*, 368 Mass. 662, 680 (1975), thus the evaluation of voluntariness is inherently fact-specific. "The task is to ascertain whether this *particular* defendant's will was overcome by the *particular* pressures exerted upon him." LIACOS, et al, HANDBOOK OF MASSACHUSETTS EVIDENCE 583, § 9.2 (7<sup>th</sup> ed. 1999).

Recording will assist both trial and appellate judges. Trial judges, whose subsidiary findings of fact concerning the circumstances of the questioning necessarily turn on credibility, will be aided as the sole witnesses to an interrogation are typically the police and the defendant. *See, e.g., Commonwealth v. Monteiro*, 396 Mass. 123 (1985) (noting trial judge entitled to accredit police testimony concerning circumstances of questioning and warnings over that of defendant). Appellate judges, who must review these findings for "clear error" and the correctness of the

ultimate findings and conclusions of law *de novo*, *Commonwealth v. Fernette*, 398 Mass. 658, 663 (1986), will be aided in these tasks. Just as the *Miranda* warning card may be introduced to establish the terms of the warning given a defendant,<sup>27</sup> an authenticated copy of the tape could simply be entered, and it would provide reliable, highly probative evidence, without reducing the evidence currently available through live testimony. *See Commonwealth v. Brady*, 380 Mass. 44, 48-49 (1980) (recognizing that where evidence of a “substantial claim of involuntariness” has been produced, trial court must hold hearing to determine voluntariness of confession even if counsel does not request it).

The degree to which an electronic recording can be a “helpful tool in evaluating the voluntariness of confessions”<sup>28</sup> is dramatic. In *Commonwealth v. Fernette*, 398 Mass. 658 (1986), for instance, the trial court heard the defendant and five police officers testify in a suppression hearing, as well as approximately 100 tape-recorded minutes of his 127 minute custodial interrogation. Despite finding the defendant had been hiding outside under a piece of plastic outside for eight hours, had eaten very little or nothing the day before his interrogation, and was extremely tired from having spent the night before in a tree, *id.*, at 663, it

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<sup>27</sup>*Commonwealth v. Rendon-Alvarez*, 48 Mass.App.Ct. 140, 141 (1999), citing *Commonwealth v. Ayala*, 29 Mass.App.Ct. 592, 595-596 (1990); *Commonwealth v. Mitchell*, 47 Mass.App.Ct. 178, 181 (1999) (“As those decisions advise, better practice called for putting the card in evidence.”) This Court has recognized the analogous benefits in evidentiary efficiency and accuracy from a contemporaneous record of what was read to the defendant.

We commend the police practice followed in this case of reading the *Miranda* warnings from a card. We believe that much of the trial time now spent in trying to establish exactly what warning was given to a suspect or defendant could be saved if he were also given a copy of the card to be kept by him. We also approve the practice of admitting a police copy of the card in evidence. No useful purpose is served by testing on the witness stand the officer’s ability to recite accurately from memory the *Miranda* warnings he read.

*Commonwealth v. Lewis*, 374 Mass. 203, 204-5 (1978) (citation omitted).

<sup>28</sup> *Commonwealth v. Fryar*, 414 Mass. 732, 742, n.8 (Mass. 1993).

could conclude his statement was voluntary by assessing his manner of speech on the tape. *Id.*, at 664. While this Court observed “the better practice is to leave the tape recorder on during the entire interview, including silences of the defendant, emotional displays by the defendant, or casual conversation among the participants in the interview, so that the fact finders, whether judge or jury, are better able to assess the totality of circumstances,” *id.* at 665, it too could conclude the statement was voluntary. Nuanced review was possible because the interrogation was taped. *See also Commonwealth v. Gaboriault*, 493 Mass. 84, 89 & n.5 (2003) (trial court’s “extremely thorough and well-reasoned findings . . . [b]ased on the videotape recording of the defendant before, during, and after his statement, and also on witness testimony . . .,” and on a videotape of defendant’s booking, supported conclusions that warnings and waiver were proper and confession by defendant of “somewhat below average intelligence” was voluntary); *Commonwealth v. Bousquet*, 407 Mass. 854, 867 (1990) (“officers’ accounts of the confession, which are corroborated by the videotape, are highly indicative of a voluntary confession” by sixteen year old defendant who claimed he had ingested mes-caline and marihuana before interrogation); *Commonwealth v. Parker*, 402 Mass. 333, 341 (1988) (advice of rights, valid waiver and voluntariness all supported by videotape of statements); *Commonwealth v. Felice*, 44 Mass.App.Ct. 709, 712 (1998) (although “issue a close one,” taped interrogation enabled court to conclude confession by “depressed, highly emotional, and agitated” defendant, who was undergoing outpatient mental health treatment and had difficulty signing *Miranda* waiver, nevertheless voluntary).

**C. Recording will assist judicial and lay fact finders in complying with the humane practice doctrine.**

A recording requirement will assist both courts and juries in ensuring compliance with the common law “humane practice” doctrine, under which the jury must independently find voluntariness.

Our “humane practice” requires that “when statements amounting to a confession are offered in evidence, the question whether they were voluntary is to be decided at a preliminary hearing in the absence of the jury. If he [the judge] is satisfied that they are voluntary, they are admissible; otherwise, they should be excluded. If the judge decides that they are admissible, he should then instruct the jury not to consider the confession if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant.

*Commonwealth v. Tavares*, 385 Mass. 140, 149-50 (1982) (citations omitted). If judges experienced in voluntariness determinations would benefit from a contemporaneous record, surely juries would as well.

**D. Recording will ensure protection against compelled self-incrimination and the denial of the assistance of counsel.**

A recording requirement will help ensure that no one shall be “compelled to accuse, or furnish evidence against himself,” MA. DECL. OF RIGHTS, Pt. I, Art. 12, by aiding the accuracy and efficiency of determinations that advice of rights was provided and that a valid waiver was given. A “rule so fundamental as to require little elaboration,” *Commonwealth v. Bennett*, 2 Ma. App. Ct. 575, 579 (1974), this Court has repeatedly explained Article 12 “provide[s] a broader protection against compelled self-incrimination than does the Fifth Amendment.” *Commonwealth v. Burgess*, 426 Mass. 206, 217 (1997). *See, e.g., Commonwealth v. Mavredakis*, 430 Mass. 848, 859 (2000) (“The history of Art. 12, and our prior

interpretations of its self-incrimination provisions, also lead to the conclusion that Art. 12 provides greater protection than the Federal Constitution does.”); *Attorney Gen. v. Colleton*, 387 Mass. 790, 795- 796 (1982) (citing *Emery's Case*, 107 Mass. 172, 181 (1871), and recognizing that Art. 12 may limit some law enforcement techniques).

Similarly, once a defendant either is presented with counsel or invokes the right to counsel, the Commonwealth must demonstrate either that he then waived the right or that any statements preceded its invocation. *Commonwealth v. Mavredakis*, 430 Mass. 848, 861 (2000). Imposing a recording requirement, after a decade of calling for it, is “only another way of saying that the rights listed in the *Miranda* case are substantively meaningful.” 430 Mass. at 860. A contemporaneous electronic recording, showing the time, would simplify this inquiry.

**E. Recording will ensure a fundamentally fair trial, by preserving material evidence and making it available to both the defendant and the Commonwealth.**

When the only party who can collect evidence doesn't, it might as well have destroyed it. Without a recording requirement, the police choose when to record, and the choice not to record a custodial interrogation deprives the defendant of impartial and reliable evidence concerning his interrogation and his statement. It would surely violate due process if the Commonwealth searched for fingerprints at the scene of a crime and discarded those that did not match the defendant.

The contemporaneous record of a custodial interrogation is sui generis. Only the Commonwealth can collect it, and there is only one chance to do so. It

has unique constitutional significance, as it is regulated by three textual provisions of both the state and federal constitutions (self-incrimination, counsel and due process). The defendant can only establish this evidence by subjecting himself to cross-examination or relying on the Commonwealth's (typically professional) witnesses. If the Commonwealth conducts a forensic test that consumes all the physical evidence, and fails to photographically document the evidence and test processes, exclusion of the test results is an appropriate remedy. *Commonwealth v. Shippis*, 399 Mass. 820, 837 (1987) (explaining that a "better practice" would have been to photograph because "[a]ny culpability of the Commonwealth arises in the failure to photograph each step of the test procedure"). The failure to record custodial interrogations is no different.

The basis for a due process violation is the "reasonable possibility, based on concrete evidence rather than a fertile imagination, that access to the [destroyed material] would have produced evidence favorable to his cause." *Commonwealth v. Neal*, 392 Mass. 1, 12 (1984). The "reasonable probability" that a recording would have been exculpatory made out whenever the Commonwealth chooses not to record a custodial interrogation but offers testimony concerning the defendant's statement. This is the inference from the failure to record. *See Commonwealth v. Diaz*, 422 Mass. 269, 273 (1996).

Under this Court's balancing test for a due process claim from destruction of evidence, failing to record a confession offered by the Commonwealth must violate due process. *See Commonwealth v. Willie*, 400 Mass. 427, 430 (1987). The Commonwealth is culpable, as only it can have made the recording, and

when the Commonwealth offers a defendant's statement made during custodial interrogation, a recording demonstrating the conditions under which it was made is by definition "material." The potential prejudice to the defendant from the failure to record is severe, as he must subject himself to cross-examination to establish these facts, and however able his memory or effective his testimony, it is hardly likely to be as effective or as credible as a contemporaneous record. Considering the factors this Court then examines, the actions of the Commonwealth can only be described as bad faith. Even if this practice does not amount to bad faith, a showing of bad faith is not required in order to establish a due process violation from the destruction of or failure to preserve evidence. *Commonwealth v. Henderson*, 411 Mass. 309, 309-11 (1991).

**IV. BOTH AMERICAN JURISDICTIONS WITH A RECORDING REQUIREMENT ADOPTED IT AFTER LAW ENFORCEMENT REFUSED TO DO SO VOLUNTARILY, AND ITS VALUE IS EMBRACED BY ALL MEMBERS OF THE CRIMINAL JUSTICE SYSTEM.**

For more than a decade, two U.S. jurisdictions, Alaska and Minnesota, have required an electronic recording as a condition for the admission of statements that are the product of custodial interrogation.<sup>29</sup> Their combined experiences of operating with a recording requirement total nearly thirty years, and demonstrate that: 1) recording will not happen through persuasion; 2) recording

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<sup>29</sup> Two other jurisdictions, Texas and Illinois, statutorily require that some part of interrogations be recorded. Under TEX. CODE OF CRIM. PRO., art. 38.22, § 3 (Vernon's 2003), only the confession itself must be recorded, and this may be either in writing or electronically. See George E. Dix, *Texas "Confession" Law and Oral Self-Incriminating Statements*, 41 BAYLOR L. REV. 1 (1989). Under a new Illinois law, that will come into effect in July 2005, law enforcement officers must tape all interrogations in homicide cases. Steve Mills, *Law Mandates Taping of Police Interrogations*, CHI. TRIB., July 18, 2003, §1, at 1.

must be adopted in a uniform, comprehensive fashion; 3) recording would be comparatively easy to implement in Massachusetts; and strongly suggest that 4) once implemented, recording of custodial interrogations will benefit judges, jurors, prosecutors, defendants and police.

**A. The Alaska and Minnesota rules were implemented, in a comprehensive way, after years of law enforcement’s refusal to follow judicial recommendations.**

**1. The Alaska Rule: An unexcused failure to electronically record custodial interrogation conducted in a place of detention violates due process, and statements so obtained are generally inadmissible.**

In 1985, Alaska became the first U.S. jurisdiction to implement a recording requirement for custodial interrogations. It did so after five years of attempting to persuade law enforcement to adopt the practice voluntarily. The Alaska Supreme Court had first “advise[d] 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.” *Mallott v. State*, 608 P.2d 737, 743 n.5 (Alaska 1980) (citations omitted). As did this Court, the Alaska Supreme Court cited with approval the Uniform Rules of Criminal Procedure, Rule 243 (10 U.L.A. 57) (1974). *Id.* Nevertheless, this advice went unheeded. *See McMahan v. State*, 617 P.2d 494, 499 n.11 (Alaska 1980), *cert. denied*, 454 U.S. 839 (1981) (“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.”); *In re S.B. v. State*, 614 P.2d 786, 790 n.9 (Alaska 1980) (“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 from which the circumstances of a confession or other waiver of *Miranda* rights may be ascertained.”)

After five years of having its clear recommendations ignored, the Alaska Supreme Court was forced to determine the appropriate remedy for the failure to electronically record custodial interrogations. Recognizing that the remedial inquiry presented yet another layer of case-specific issues, the Court held that “recording is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible.” *Stephan v. State*, at 711 P.2d 1156, 1158-59 (Alaska 1985) (holding that the unexcused failure to electronically record a custodial interrogation violated a suspect’s right to due process under the Alaska Constitution). (The Alaska Constitution’s due process provision guarantees simply: “No person shall be deprived of life, liberty, or property without due process of law.” ALASKA CONST. art. I, § 7.)

While the Alaska Supreme Court found recording was required by the due process provision of the Alaska constitution, it noted that “recording, in such circumstances, is now 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.” *Stephan*, 711 P.2d at 1159-60. Recording became a constitutional rule adopted to protect enumerated constitutional rights, just as the *Miranda* warnings have become a “constitutional rule.”

*Dickerson v. United States*, 530 U.S. 428, 444 (2000).

The Alaska rule set forth in *Stephan* identifies specifically what must be

recorded and when. It makes clear that the recording must include the advisement of rights, and it must “clearly indicate that it recounts the entire interview. 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.” *Id.* at 1162.

If a custodial interrogation conducted at a detention facility is not fully recorded, then the state must convince the court by a preponderance of the evidence that recording was not feasible under the circumstances, and in such cases the “failure to record should be viewed with distrust.” *Id.* at 1162-63. The remedy for the failure to record is exclusion.

To the extent that Alaska’s recording requirement enforces the Alaska constitution’s protection against compelled self incrimination, this prohibition in Article I, sec. 9 of the Alaska constitution (“No person shall be compelled in any criminal proceeding to be a witness against himself”) is, if anything, textually narrower than the guarantee in Part I, Art. 12 of the Declaration of Rights. (“No subject shall be . . . compelled to accuse, or furnish evidence against himself.”) The Alaska Constitution’s prohibition is interpreted, as is Article 12, more broadly than the Fifth Amendment. *See Scott v. State*, 519 P.2d 774, 783-86 (1974) (holding that requiring pretrial disclosure of names, addresses and statements of defendant’s alibi witnesses constituted compelled self-incrimination, although requiring notice of alibi defense did not). A more expansive interpretation of a broader provision should necessarily provide at least as much protection.

**2. The Minnesota Rule: All custodial interrogation, including any information about rights, waivers thereof**

**and all questioning shall be electronically recorded where feasible and must be recorded when occurring at a place of detention in order to ensure the fair administration of justice, and substantial failures to do so result in exclusion of the resulting statements.**

Minnesota's Supreme Court implemented a recording requirement in 1994, pursuant to its supervisory authority over lower courts. *See State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994). The Minnesota Supreme Court, as has this Court, first tried recommending to law enforcement that interrogations be recorded as a means of enabling judicial review. *See State v. Robinson*, 427 N.W.2d 217, 224 (Minn. 1988); *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991). These recommendations were ignored for six years. Then the Minnesota Supreme Court chose to act. It recognized, as had the Alaska Supreme Court, that a recording requirement would

provid[e] a more accurate record of a defendant's interrogation and thus will reduce the number of disputes over the validity of *Miranda* warnings and the voluntariness of purported waivers. In addition, an accurate record makes it possible for a defendant to challenge misleading or false testimony and, at the same time, protects the state against meritless claims. Recognizing that the trial and appellate courts consistently credit the recollections of police officers regarding the events that take place in an unrecorded interview, the [Alaska] court held that recording "is now 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." A recording requirement also discourages unfair and psychologically coercive police tactics and thus results in more professional law enforcement.

*Scales*, 518 N.W.2d at 591 (Minn. 1994) (citations omitted).

**B. Law enforcement agencies who must record discover its benefits.**

Law enforcement officials in these jurisdictions express support for the recording requirement. Anchorage's police chief, Walt Monegan, has explained,

“It actually aids police to recall minutiae an officer can’t recall off the top of his head or some seemingly insignificant fact that might loom large as a case unfolded.” Leonard Post, *Illinois to Tape Questioning: It Gets Mostly Good Reviews in 2 States* 25 NATIONAL LAW JOURNAL 46, P1 (2003). Rick Zimmermann, a Minneapolis, Minnesota, homicide detective sergeant explains, “It’s been a great tool. We used to have to go to court all the time on *Miranda* or whether we threatened a suspect, but now it’s rare that it’s contested. It’s amazing.” *Id.* The NIJ Survey found “a striking 97 percent of all departments that have ever videotaped suspects’ statements continue to find such videotaping, on balance, to be useful.” NIJ, *Videotaping Interrogations*, supra at 10.

**C. Massachusetts is at least as geographically feasible a jurisdiction for the operation of a recording requirement as either Alaska or Minnesota.**

Massachusetts’ much smaller<sup>30</sup> and more compact geography, and its much higher population density,<sup>31</sup> mean locations for custodial interrogation will be at least as available as they are in Alaska or Minnesota. Massachusetts also has a higher per capita rate of law enforcement officers than either state,<sup>32</sup> so as-

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<sup>30</sup> According to the U.S. Census office website, the Commonwealth’s land area is about 1/10th that of Minnesota’s and 1/100th that of Alaska’s. Minnesota: 79, 610 square miles, Alaska: 571, 951 square miles, and Massachusetts: 7,840 square miles. See GCT-PH1-R. Population, Housing Units, Area, and Density (geographies ranked by total population): 2000; Data Set: Census 2000 Summary File 1 (SF 1) 100-Percent Data.

<sup>31</sup> The populations of these three jurisdictions as of 2000 were: Minnesota: 4,919,479, Alaska: 626,932, and Massachusetts: 6,349,097. See <http://factfinder.census.gov> (last visited March 15, 2004). The population densities of these jurisdictions, in persons per square mile of land area, were: Minnesota: 61.8, Alaska: 1.1, and Massachusetts: 809.8. See Table GCT-PH1-R., supra

<sup>32</sup> According to the U.S. Department of Justice Census of State and Local Law Enforcement Agencies for 2000, Massachusetts has 372 full-time employees of law enforcement agencies per 100,000 residents, while Minnesota has only 258 per 100,000 residents, and Alaska has 343 per 100,000 residents. The disparity in officer density remains when only law enforcement employees who respond to calls are considered. Massachusetts has 186 per 100,000 residents, while Minnesota has only about 2/3 as dense a force, at 117 per 100,000 residents, and Alaska has 164 per

suming detention and law enforcement facilities are sited near population, locations for convenient recording of custodial interrogations are thus on average much closer to more of the population than in either Alaska or Minnesota.

**D. The national and international experience of jurisdictions that adopt a recording requirement is overwhelmingly positive for all participants in the criminal justice system – including law enforcement.**

Law enforcement agencies that videotape interrogations find it aids their work. See William A. Geller, *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices*, NATIONAL INSTITUTE OF JUSTICE, NCJ 139584 (August 7, 1992).<sup>33</sup> This nationwide study of the use, effect and attitudes toward videotaping of interrogations surveyed a geographically distributed sample of law enforcement agencies. Extrapolating from these data, the authors estimated “about 2,400 law enforcement agencies in the country were using video technology to record at least some suspect oral statements to interrogators as the 1980’s drew to a close[, and a]nother 2,900 [out of a total of about 14,000 agencies in the country] planned to start doing so in the near future.” *Id.* at 53. The researchers conducted field interviews at fourteen jurisdictions that reported videotaping interrogations.

Far from being a hindrance to interrogations, “[t]he vast majority of surveyed agencies that videotape interviews believed that videotaping has led to im-

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100,000 residents. Bryan A. Reaves and Matthew J. Hickman, Table 4, *State and Local Law Enforcement Employees, by State, June 2000: Census of State and Local Law Enforcement Agencies, 2000*, BUREAU OF JUSTICE STATISTICS BULLETIN, NCJ194066 (October 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cslea00.pdf> (last visited March 15, 2004).

<sup>33</sup> The conclusions of this report were then summarized in a “Research in Brief” paper, William A. Geller, *Videotaping Interrogations and Confessions*, NATIONAL INSTITUTE OF JUSTICE NCJ139962 (March 1993)) (copy attached, see Appendix).

provement in police interrogations.” NIJ *Videotaping Interrogations* at 5. Although departments studied variously reported cost and lack of need as reasons not to do it, once departments did begin taping interrogations, they overwhelmingly supported it. Although the Study found “60 percent of American police agencies which [videotape interrogations] report that their detectives initially disapproved of or had mixed feelings about the practice,” 103 Videotaping Study, after several years of experience, however, “74.5% of the agencies said that currently their detectives generally expressed approval of the practice.” *Id.* The “bottom line” analysis of videotaping: “A striking 97 percent of all departments in the nation which are videotaping either confessions or full interrogations find videotaping ‘very useful’ (65.8%) or ‘somewhat useful’ (31.3%).” 152 Videotaping Study.

Recording a defendant’s statements to law enforcement, as well as a defendant’s behavior, can often be invaluable to the prosecution. *See Commonwealth v. Serino*, 436 Mass. 408, 412 (2002) (noting defendant’s audio taped phone call to police and the videotape of his booking disproved the need for the trial court to have *sua sponte* held a voluntariness hearing “even though the judge had before him evidence that the statements may have been made involuntarily because the defendant was intoxicated”). A recording can irrefutably establish a valid waiver and the voluntariness of a statement that without such a complete record would appear inadmissible. *See, e.g., Commonwealth v. James*, 427 Mass. 312, 315 (Mass. 1998) (seventeen year old defendant’s videotaped response of “nope” when asked if he wanted to make a statement did not invalidate his

waiver, or the voluntariness of his subsequent statement, notwithstanding his lack of experience with the criminal justice system, when the trial court and the Supreme Judicial Court could review the tape and observe the tenor of questioning, absence of coercive tactics and his readiness to answer).

Since October 31, 1984, the law of the United Kingdom (England, Wales, Scotland and Northern Ireland) has required the recording of all interrogations conducted in a police station. Police and Criminal Evidence Act (PACE), 1984, §60. Under “Codes of Practice”,<sup>34</sup> once a decision has been made to arrest someone, “they may not be interviewed about the relevant offense except at a police station or other authorized place of detention.” CODE C, CODE OF PRACTICE FOR THE DETENTION, TREATMENT AND QUESTIONING OF PERSONS BY POLICE OFFICERS, §11.1 (Revised Edition, Effective 1 April 2003) (hereinafter “Code C”). An “interview” is the “questioning of a person regarding their involvement or suspected involvement in a criminal offense” which requires a warning of rights (or a “caution,” similar to the *Miranda* warnings). *Id.*, sec. 11.1A. “Tape recording shall be used at police stations for any interview: (a) with a person cautioned . . . in respect of any indictable offense.” CODE E, CODE OF PRACTICE ON TAPE RECORDING INTERVIEWS WITH SUSPECTS, §3.1(a) (Revised Edition, Effective 1 April 2003) (hereinafter “Code E”). While the PACE Codes have initially required audiotaping, a nationwide pilot program of videotaping was begun in

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<sup>34</sup> The codes of practice are promulgated under the aegis of the Police and Criminal Evidence Act 1984 (Eng.) by the Home Secretary. The latest version is available at <http://www.homeoffice.gov.uk/crimpol/police/system/pacecodes.html>.

May 2002.<sup>35</sup>

The practice under PACE requires the tape recording of the entire interaction between the police and the suspect.<sup>36</sup> All information concerning the participants in the interview, the time, date and place, and the warning of rights must be recorded.<sup>37</sup> As to whether this approach could be implemented in the Commonwealth, it should be borne in mind that the *entire regulatory scheme* for tape recording of all custodial interviews, including the rules of the Code, and “Notes for Guidance” explaining the rules, for *a whole country of over 60 million persons*,<sup>38</sup> runs ten pages. *See* CODE E (copy attached, see Appendix).

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<sup>35</sup> CODE OF PRACTICE F, CODE OF PRACTICE ON VISUAL RECORDING WITH SOUND OF INTERVIEWS WITH SUSPECTS (copy attached, *see* Appendix).

<sup>36</sup> Code E, §4.3.

When the suspect is brought into the interview room the interviewer shall, without delay but in the suspect’s sight, load the recorder with clean tapes and set it to record. The tapes must be unwrapped or opened in the suspect’s presence.

<sup>37</sup> *Id.*, sec. 4.4(a)-(e).

<sup>38</sup> CIA, World Factbook, 2003, at <http://www.cia.gov/cia/publications/factbook/geos/uk.html#People> (visited March 22, 2004).

## CONCLUSION

For the foregoing reasons, Amici Suffolk Lawyers for Justice, Inc. and the New England Innocence Project respectfully urge the Court to adopt a requirement, pursuant to Art. 12 of the Declaration of Rights, that statements produced by custodial interrogation at a detention or law enforcement facility be excluded from trial, unless they were videotaped in their entirety, including the advice and any waivers of rights, as well as all questioning, and that statements produced by custodial interrogation be similarly excluded unless the Commonwealth can demonstrate that recording was not feasible beyond a reasonable doubt.

Respectfully submitted,

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**APPENDIX OF AMICI CURIAE**

Oral Argument in *State of New Jersey v. Tomahl Cook*, No. 53,778 (Nov. 5, 2003), Supreme Court of New Jersey.....1

William A. Geller, *Videotaping Interrogations and Confessions*, NATIONAL INSTITUTE OF JUSTICE, NCJ139962 (March 1993).....31

United Kingdom, Selected CODES OF PRACTICE UNDER POLICE AND CRIMINAL EVIDENCE ACT 1984 (Codes E & F in their entirety)..... 43