COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. 09155

COMMONWEALTH OF MASSACHUSETTS

Appellee

v.

VALERIO DiGIAMBATTISTA

Defendant-Appellant

BRIEF OF THE ATTORNEY GENERAL, THE SECRETARY OF PUBLIC SAFETY, THE MASSACHUSETTS DISTRICT ATTORNEYS, AND THE BOSTON POLICE DEPARTMENT AS AMICI CURIAE

STATEMENT OF THE ISSUE

Whether this Court should mandate that all custodial interrogations at places of detention be electronically recorded where the cost to public safety in the Commonwealth in terms of lost information, evidence, and confessions outweighs any possible benefit that such an inflexible rule would provide.

STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

This Court has asked for supplemental briefing concerning whether it should promulgate a rule mandating "that a custodial interrogation of an accused, at least at a place of detention, be electronically recorded[1] before a statement by the accused as the result of the interrogation may be admitted in evidence...." Pursuant to Mass. R. App. P. 17, 365 Mass. 864 (1974), the Attorney General, the Secretary of Public Safety, the Massachusetts District Attorneys, and the Boston Police Department (the "amici") submit this amicus brief in support of the position that this Court should not adopt such a blanket requirement.

The Attorney General, as the chief law enforcement officer for the Commonwealth, as well as the remaining amici, have paramount interests in ensuring both that there exist adequate safeguards to protect those charged with crimes from unlawful, coercive interrogations and that law enforcement has the tools it requires to appropriately investigate and solve crimes, within the requirements of the law. An inflexible requirement that all custodial

---

[1]**The amici assume that the court intended "electronic recording" to mean either audio or video recordings.**

interrogations be electronically recorded will advance neither of these crucial public policy interests. In recognition of these interests, the amici submit this brief.

STATEMENT OF THE CASE

The amici incorporate by reference the Statement of the Case submitted by the Commonwealth in this appeal.

STATEMENT OF FACTS

The amici incorporate by reference the Statement of the Facts submitted by the Commonwealth in this appeal.

ARGUMENT

THIS COURT SHOULD NOT ADOPT AN INFLEXIBLE RULE REQUIRING THAT ALL CUSTODIAL INTERROGATIONS OCCURRING AT PLACES OF DETENTION BE ELECTRONICALLY RECORDED BEFORE SUCH INTERROGATIONS MAY BE ADMITTED INTO EVIDENCE, WHERE THE COST TO PUBLIC SAFETY OF IMPLEMENTING SUCH A RULE WOULD FAR EXCEED ANY BENEFIT IT WOULD CONVEY.

At the outset, the amici note that the Commonwealth already has extensively argued the legal bases which militate against creating a mandatory recording requirement in this case and the amici support those arguments. The amici's focus in this brief, however, is one of public policy, namely the harmful effect that any mandated recording rule would have on law enforcement's ability to solve crimes. Specifically, as argued below, the amici

believe that an electronic recording memorializing a suspect's statement is the best form of evidence of that statement. Indeed, recorded interview statements can provide valuable evidence for the defendant, for the Commonwealth, and for the case. Agreeing with that assessment, law enforcement officers who investigate serious crimes, such as homicides, already endeavor to use electronic recording whenever possible to memorialize suspect and witness statements. In addition, law enforcement training, while admittedly not uniform, generally encourages the use of electronic recording to varying degrees.

As detailed below, however, the significant costs to the Commonwealth in a rule mandating that all custodial interrogations at places of detention be electronically recorded would be two-fold: it would remove from members of law enforcement the single most critical tool that they must have to conduct effective interrogations, namely the ability to create a relationship of trust between the suspect and the investigator(s) conducting the interrogation; and it would result inevitably in the loss of meaningful evidence gained from such interrogations, including both confessions and exculpatory evidence. These two critical costs to

public safety alone, leaving aside significant other costs[2] and practical difficulties of implementing a mandatory recording rule, are far too high for public safety in the Commonwealth, especially when measured against any possible benefit that may obtain from such a blanket requirement. The amici accordingly urge the court to decline to adopt such an all-encompassing rule, which would remove from members of law enforcement the discretion they need in determining whether and when to record a statement.

---

[2]Specifically, as a number of the members of law enforcement who have filed affidavits with this brief note, the financial cost entailed with executing such a mandatory taping requirement will be substantial. For example, Boston Police Sergeant Detective Richard Ross notes that the facility at Area A1 simply lacks physical space that can be used as an interrogation area: "district A1's detectives conduct their business in shared common office space, which is not conducive to conducting taped interrogations because of the constant interruptions by the intercom system, phone calls, and people's comings and goings." Ross Aff., Ex. D at ¶¶ 10-11. Along with instances like this, where law enforcement may have to incur substantial capital expenditures, each department will need to deal with the costs to purchase and maintain equipment, to transcribe tapes, and to store generated tapes. Furthermore, it must be noted that a blanket recording rule would apply to small police departments which generally do not have tremendous resources to pay for such an undertaking. While cost alone may not generate sufficient concern regarding mandatory taping, the existence of serious cost issues certainly militates in favor of leaving this question to the Legislature, which can consider the financial cost as part of the decision concerning the need for such legislation.

I. CURRENT PRACTICES, TRAINING, AND ANECDOTAL EXPERIENCES DEMONSTRATE THAT A BLANKET ELECTRONIC RECORDING REQUIREMENT BOTH IS UNNECESSARY AND WOULD UNACCEPTABLY HINDER LAW ENFORCEMENT EFFORTS TO SOLVE CRIMES.

A. BLANKET RECORDING WILL UNACCEPTABLY HINDER EFFORTS TO SOLVE CRIMES.

A fundamental premise of effective questioning by law enforcement is that investigators must create a relationship of trust and establish a rapport with those they interview and/or interrogate[3] in an effort to solve crimes. It cannot be disputed that people simply do not talk to those whom they do not trust or those with whom they do not feel comfortable. Unless one takes the view that members of law enforcement should not talk to individuals who may have a connection to a crime, acceptance of this fundamental premise is necessary to a consideration of whether mandatory taping during interviews and/or interrogations at places of detention will further the interests of justice. A review of a sampling of the affidavits submitted by law enforcement

---

[3]This Court has limited its question to whether it should require that "custodial interrogations" be electronically recorded. Generally, it is understood that an interrogation is the questioning that occurs after a suspect has been provided the *Miranda* warnings. Because this brief takes the position that an electronic recording should not be used to record preliminary conversations with suspects, whether custodial or not, the terms "interview" and "interrogation" are both included here.

officers in support of this brief demonstrates the importance of this precept.

As Sergeant Detective Robert Merner of the Boston Police Department has stated:

> The art of interrogating suspects depends, in large part, on an investigator developing rapport and a feeling of comfort with the suspect so that the suspect wishes to speak freely....There is a gestational period in any interrogation during which time it is vital that the suspect feel sufficiently comfortable that he or she is willing to speak with investigators.

Affidavit of Robert M. Merner, ¶¶ 9, 11, attached as Exhibit A [hereinafter "Merner Aff."]. Other law enforcement professionals who have provided this Court with their experiences concur. See Affidavit of Boston Police Sergeant Detectives Robert Harrington and Daniel Coleman, ¶ 3, attached as Exhibit B [hereinafter "Harrington/Coleman Aff."] ("[T]he effectiveness of interrogations and interviews in eliciting information turns largely on the investigator's ability to connect with the suspect or witness on an emotional and/or psychological level"); see also Appendix of State Police Unit Comments, attached to Affidavit of Massachusetts State Police Colonel Thomas J. Foley, attached as Exhibit C, at page 4 [hereinafter "Foley Aff.," ¶ __] ("The biggest hurdle in conducting an effective interrogation is establishing rapport and trust with the

suspect. It is not unusual for this to take an hour or longer").

These members of law enforcement, who all agree on the benefit of memorializing a suspect's statement in an electronic recording when possible, also unanimously agree that developing this necessary trust relationship will be impossible if they are required to record the entirety of their interviews and/or interrogations in every case. For example, Sergeant-Detectives from the Boston Police Department's Homicide Unit note that many people are uncomfortable with being recorded and that by prematurely introducing the concept of recording into an interview, the investigator risks inhibiting the very interview/interrogation process which encourages the suspect to speak freely:

> In our experience, electronically recording initial interactions with suspects and witnesses would threaten most suspects' and witnesses' feeling of comfort and inhibit their willingness to speak with investigators....It is our practice to attempt to electronically record statements from all interrogated suspects and interviewed witnesses, when feasible. However, because it is important to psychologically connect and build trust with a suspect or witness at the outset of an interrogation or interview, it is not our unit's policy and practice to electronically record the entire interrogation or interview process, but rather to attempt to record a statement from the individual after he or she has been apprised of his or her rights (in the case of a suspect), has been interrogated or interviewed,

> and has shared with the detective whatever statement he or she wishes to make.

Harrington/Coleman Aff., Ex. B at ¶¶4, 5; see Affidavit of Boston Police Sergeant Detective Richard Ross, at ¶ 4, attached as Exhibit D [hereinafter "Ross Aff."] (no taping of complete interactions; tape causes those interviewed/interrogated to "shut down"); Merner Aff., Ex. A at ¶ 9 (taping initial interactions with suspects "inhibits willingness to speak freely and honestly"); Cf. *State* v. *James*, 678 A.2d 1338, 1360 (Conn. 1996) (in declining to condition admissibility of confessions on their being recorded, "a criminal defendant may be more forthcoming when speaking to the police without the presence of a tape recorder or video camera").

These experienced investigators note a number of reasons why suspects may "shut down" when faced with the prospect of having their statements recorded: (1) fear that a recording may appear on television or other medium in front of family and friends (Appendix to Foley Aff., at p. 1); (2) fear of reprisals from other individuals based on the information they provide being conveyed (Affidavit of Boston Police Detective Eric Bulman, at ¶¶ 7-8, attached as Exhibit E [hereinafter "Bulman Aff.,"]; Appendix to Foley Aff., at p. 2); (3) general intimidation with electronic devices and anxiety about being recorded (Appendix to Foley

Aff., at pp. 1, 3, 4, 5); (4) reluctance to contradict anything that has been said because of a belief that a "lie" has been caught on tape (Appendix to Foley Aff., at p. 5); (5) fear by those who are repeat offenders or have ongoing dealings with others who are engaged in crime, of being labeled a "snitch" (Harrington/Coleman Aff., Ex. B at ¶ 4; Merner Aff., Ex. A at ¶9; Affidavit of Boston Police Detective Fred Waggett, at ¶ 14, attached as Exhibit F [hereinafter "Waggett Aff."]; Bulman Aff., Ex. E at ¶ 7); (6) fear of displaying emotion that they would not want friends to hear (Harrington/Coleman Aff., Ex. B at ¶4); and (7) fear of information they provide about their worries about physical harm to self or family being heard by others (Harrington/Coleman Aff., Ex. B at ¶4). Seasoned investigators also note that a tape recording of the entirety of an interview/interrogation will not necessarily produce the most accurate or useful evidence in cases where individuals will "play" to the recorder or videotape, instead of presenting a truthful representation of themselves, a necessary component of effective interviews/interrogations. Waggett Aff., Ex. F at ¶ 13; Appendix to Foley Aff., at p. 4. Thus, it is readily apparent that mandating recording of every

interview/interrogation at a place of detention will result in the loss of valuable evidence necessary to solve crimes.

Furthermore, leaving aside the loss of valuable information caused by suspects whose statements will be altered due to the presence of a recording device, several experienced Commonwealth detectives estimate that anywhere between 50 to 60 percent of those suspects who are questioned refuse to have their statements recorded in any fashion. See Ross Aff., Ex. D at ¶ 6; Merner Aff., Ex. A at ¶ 14. "Indeed, many individuals volunteer, even before being asked if they are willing to be recorded, that they do not wish to be recorded." Ross Aff., Ex. D at ¶ 10. An inflexible rule that conditions the admissibility of a statement/confession on that confession being electronically recorded would result in a profound loss of countless statements, statements which often include not only probative, admissible evidence of an individual's guilt, but also exculpatory evidence that may demonstrate his or her innocence. That is a cost that simply is too much for the Commonwealth to bear.

Indeed, recent criminal cases here in the Commonwealth contain notable examples of individual suspects who were willing to make statements, but refused to have those statements taped. See generally Foley Aff., at ¶¶ 3-10;

Appendix to Foley Aff., at pp. 1-2. Just this month, this Court affirmed the first-degree murder conviction of an individual whose confession was the substantial evidence of his guilt and who "declined to have his statement audiotape recorded or videotape recorded, or to write it down himself." *Commonwealth* v. *Brum*, 441 Mass. 199 (2004). Most famously, the Jeffrey Curley murder was solved essentially through the admissions made by defendant Salvatore Sicari. Although Sicari expressed a willingness to give a statement to police, he refused to have his statement recorded. See Foley Aff., Ex. C at ¶ 10. Sicari's statements led to his and Charles Jaynes's arrests; they also led law enforcement officials to the discovery of Jeffrey Curley's body at the bottom of a body of water in Maine. *Id*. A mandatory taping requirement in this context would have been disastrous.

A recent Massachusetts State Police investigation into one of its own member's alleged criminal acts also would have been thwarted in the face of an inflexible rule that all interviews/interrogations be taped. Lt. Richard J. Schneiderhan, who the State Police investigated in 2000 based on allegations that he was providing sensitive law enforcement information to the Winter Hill Organization, staunchly opposed any effort to memorialize, even in writing, his interview with investigators. Foley Aff., Ex.

C at ¶ 6. As a result of the interview, which was memorialized in writing by investigators immediately afterward, the State Police obtained information that led to Schneiderhan's prosecution by the United States Attorney's Office for obstruction of justice and conspiracy. Foley Aff., Ex. C at ¶ 8.

Equally important, though less dramatic than the above examples, is the fact that a blanket taping requirement will close off information that would lead investigators to other investigative avenues, including information tending to exculpate one suspected of committing a particular crime. It is a fact that Commonwealth investigators have gleaned through many years of police work that, while such interviews and interrogations seldom lead to confessions, "the statements obtained from suspects are far more frequently statements that include inculpatory evidence in the form of false alibis or inconsistent statements, or exculpatory evidence such as valid alibis." Ross Aff., Ex. D at ¶ 13. See Harrington/Coleman Aff., Ex. B at ¶ 9 (same); Merner Aff., Ex. A at ¶¶ 6-7 (same).

It is also important to recognize that interviews and interrogations are frequently used by law enforcement officers to gather intelligence concerning the commission of unsolved and/or future crimes, particularly when dealing

with gang violence. See Bulman Aff., Ex. E at ¶ 3; Waggett Aff., Ex. F at ¶ 9. This information is then shared with other police units to solve other violent crimes. See Bulman Aff., Ex. E at ¶ 3. Considering the importance of such interviews/interrogations to the work of policing in the Commonwealth, and the frequent reluctance of suspects to give recorded statements, an inflexible recording rule will certainly have an exceptionally deleterious effect on law enforcement.

This anecdotal evidence is supported by at least one study, discussed further in section II below, which demonstrates the problem of lost evidence and information. Specifically, a recent study conducted concerning taped interrogations in Alaska and Minnesota, both of which have a recording requirement, demonstrated that confession rates vary widely based upon whether the suspect was aware that the interaction was being recorded. Jayne, "Empirical Experiences of Required Electronic Recording of Interviews and Interrogations on Interrogators' Practices and Case Outcomes" (the "Jayne Report").[4] The confession rates for suspects who were aware that they were being taped were only 52 percent of the rates for those who were unaware that they

[4]Unfortunately, at this date, the Jayne article has not been published. The Attorney General's office obtained an unpublished draft. See Exhibit G attached.

were being taped. See Jayne Report, Ex. G at p. 6. Because members of law enforcement in Alaska and Minnesota are not required to inform suspects that they are being recorded, they have not yet observed the "loss of evidence" effect.[5] As discussed below, however, because "secret recording" in Massachusetts is either not possible or untenable, the loss of valuable information will be an inevitable side effect of a mandatory recording rule here in the Commonwealth.

The Supreme Court of Alaska, which created a recording requirement as a constitutional due process right, addressed the concern about the "chilling effect" that such a requirement would have on the information obtained by law enforcement by noting that under extant law in Alaska, "there is no constitutional requirement that the suspect be informed that the interview is being recorded." *Stephan* v. *State*, 711 P.2d 1156, 1162 n.20 (1985). Furthermore, neither Texas's nor Minnesota's "wiretap" statute prohibits police secret recording if conducted with "one party" consent. *State* v. *Olkon*, 299 N.W.2d 89, 102-103 (Minn. 1980); *State* v. *DeShay*, 645 N.W.2d 185, 195 (Minn. App. 2002); *Kissiar* v. *State*, 628 S.w.2d 243, 246 (Tex. App.

---

[5]Such an effect may begin to be observed with greater frequency, however, once suspects become aware that their statements may be secretly recorded.

1982); *Hernandez* v. *State*, 938 S.W.2d 503, 505-506 (Tex. App. 1997).[6]

Certainly there is a surface appeal to the notion that a suspect who is unaware that he or she is being recorded will not "shut down." In Massachusetts, however, such secret recordings are not possible. As this Court has noted, "[t]he secret transmission or recording or oral communications without the consent of *all* parties is generally proscribed by [the wiretap statute]." *Commonwealth* v. *Blood*, 400 Mass. 61, 66 (1987) (emphasis

---

[6]Although Illinois formerly allowed a party to record secretly but not transmit a conversation with another, *People* v. *Herrington*, 645 N.E.2d 957, 958-959 (Ill. 1994), the eavesdropping statute was amended in 1994 to prohibit such recording. *People* v. *Nestrock*, 735 N.E.2d 1101, 1107 (Ill. App. 2000). The Commission on Capital Punishment appointed in 2000 by then Illinois Governor George H. Ryan recommended amendment of the statute "to permit police taping of statements without the suspects' knowledge or consent in order to enable the videotaping and audiotaping of statements as recommended by the Commission." Report, at 29, April 15, 2002 (http://www.idoc.state.il.us/ccp.) Illinois has adopted, by statute, mandatory electronic recording, where "feasible," of custodial interrogation of "the accused" in places of detention. 725 Ill. Comp. Stat. 5/103-2.1, effective July 18, 2005. The statute specifically makes an exception for a suspect "who requests, prior to making the statement, to respond to the interrogator's questions only if an electronic recording is not made."

A recent District of Columbia statute requiring implementation of procedures for electronic recording in its equipped "interview rooms" of interrogations of persons "suspected of committing a dangerous crime or a crime of violence," also contemplates secret recording. D.C. Code ' 5-133.20(c)(1).

original). The wiretap statute, G.L. c. 272, § 99, precludes the "one-party consent" interceptions permitted in other states unless the law enforcement officer who provides the consent is investigating a designated offense "in connection with organized crime as defined in the preamble." G.L. c. 272, § 99(B)(7). "Organized crime" is defined as "a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services." G.L. c. 272, § 99(A). Accordingly, the practical effect of a "just don't disclose" rule in the Commonwealth would be that a police officer might be able to secretly tape in some circumstances, but would be required to obtain the suspect's consent before taping in others.[7] The officer thus would have to be sure that he could establish that the offense being investigated was part of "organized crime" under the wiretap statute.

Even assuming that the wiretap statute would be amended to permit one-party consent for the taping of all interviews/interrogations, however, such "secret recording"

---

[7]This of course is so only if one assumes that a suspect has no reasonable expectation of privacy during a custodial interrogation. If such a reasonable expectation of privacy were found to exist, then Article 14's prohibition of such interceptions without a *Blood* warrant where one or more parties to the communication has a reasonable expectation that his words are not being recorded, and has not waived any Article 14 protection, would come into play.

ultimately would have the same deleterious effect on the trust relationship that law enforcement needs to create in these situations. Specifically, just as soon as the "word" is out that investigators secretly tape all interviews/interrogations, the information "shut down" described by the investigators here will be given full effect. Under the recently amended discovery rules promulgated by this Court, it will be apparent to the suspect that his or her statement has been taped, where it will be subject to discovery after arraignment. See Mass. R. Crim. P. 14 (as amended 2004). As particularly described by those investigators who investigate gang violence, the mistrust of authority and the very real fear of retribution for talking to law enforcement among gang members, as well as those who deal with them, cannot be overstated. Yet, creating that trust relationship with those involved with youth violence in urban areas is critical to obtaining general intelligence about such groups' activities, which in turn can lead to information that can solve crimes and prevent future violence. Permitting investigators who work with these groups to secretly tape their interviews/interrogations with such individuals will, in the end, provide no benefit. A rule mandating taping in all circumstances simply will leave investigators without the

main policing tool they need--the ability to build trust with suspects and witnesses, trust that can be used by the investigators to gain information in an effort to solve crimes and to prevent future violence. The amici accordingly urge the court not to promulgate such a rule.

B. AN INFLEXIBLE RULE MANDATING THAT ALL INTERVIEWS/INTERROGATIONS BE RECORDED IS UNNECESSARY IN THE COMMONWEALTH.

One cannot but conclude that an inflexible rule requiring electronic recording of all interviews/interrogations is unwise, if the extreme cost to the Commonwealth in terms of public safety that such a taping rule would impose is measured against any possible benefit to be gained by it. As already noted, the amici, along with those who have provided affidavits to the court, believe that a recording that memorializes a statement/confession is the best evidence of that statement/confession. Indeed, investigators, exercising their discretion, already use recording to the extent that it is feasible in their investigations. As discussed above, however, investigators do not generally record their preliminary communications with suspects because of the chilling effect that premature recording has on their ability to create an environment where the suspect will speak freely. A review of methods which investigators use

when recording statements demonstrates that such recordings provide more than adequate assurances that the suspect's statement is voluntary and reliable.

For example, some investigators routinely ask suspects if they are willing to provide a taped statement near the end of their initial interview/interrogation, explaining that a taped statement will provide the suspect with an opportunity to create an accurate record of their position. Ross Aff., Ex. D at ¶ 5; Merner Aff., Ex. A at ¶ 12. If a suspect agrees to make a taped statement, the investigator can include information concerning the time, date, and location of the interview, as well as the people present for the interview. Before the statement is given, the investigator can ask the suspect on tape to confirm whether he was provided with *Miranda* warnings, whether he understood them, and whether he waived them. The investigator can also ask on tape whether any promises, rewards, or inducements were offered to the suspect for his statement. After such preliminary remarks are recorded, the suspect can repeat the essential elements of the statement he has just provided to the investigator "off tape." An investigator may then play back the tape and the suspect is given an opportunity to "add further statements to correct any misstatements or misimpressions on the tape." Ross Aff., Ex. D at ¶ 5. The

recording practices described by the affiants illustrate that recording summary statements at the conclusion of a non-recorded pre-interview can provide a clear window through which to view whether a suspect's statement is voluntary and reliable. In addition, as is argued by the Commonwealth in its brief, the other ample safeguards that exist within the Commonwealth's criminal justice system to ensure that suspects' statements are obtained within the bounds of the law.

The question is whether there exists a problem in the Commonwealth concerning police interrogations that justify the costly measure being considered by this Court. Given current practices in the Commonwealth, the amici believe that an inflexible rule mandating recordings for all interviews/interrogations would be unwise given its extensive concomitant costs. In addition, there is no record from which this Court can conclude that the Commonwealth has a widespread problem of investigators obtaining "false confessions."[8] Moreover, as is discussed below, academic research does not lead to the ineluctable conclusion that taping all interrogations will adequately address

[8] Indeed, undersigned counsel is not aware of any conviction in the Commonwealth in recent history which was obtained by a "false confession."

generalized concerns about the voluntariness or truth of confessions. Under all the circumstances, the amici urge the court not to adopt such a blanket requirement.

II. ACADEMIC RESEARCH CONCERNING FALSE CONFESSIONS AND THE POSSIBLE BENEFICIAL EFFECTS OF ELECTRONIC RECORDING DOES NOT SUPPORT SUFFICIENTLY THE CREATION OF A RULE IN THIS COMMONWEALTH MANDATING TAPING IN ALL CASES.

Richard Ofshe proposes that if he distributed ten confessions he has selected, five true and five false, that everyone in the audience could sort them accurately. Ofshe, "I'm Guilty if You Say So," Convicting the Innocent, Donald S. Connery, ed., at 95 (1996). See Gail Johnson, "False Confessions and Fundamental Fairness: the Need for Electronic Recording of Custodial Interrogations," 6 B.U. Pub. Int. L.J. 719, 720 (1997) ("According to Ofshe, 'the difference between a true and a false confession is glaringly obvious when you see them side by side'"). The leading proponents of modern police interrogation practices disagree. "Perhaps in the theoretical world the task of distinguishing between true and false confessions is obvious. However, in the real world tens of thousands of hours are spent each year during suppression hearings [and trials] to resolve that very issue." Fred E. Inbau, John E. Reid, Joseph Buckley, & Brian C. Jayne, Criminal

Interrogation and Confessions, 411 (4th Ed., 2004 printing)(“Inbau, Reid, et al.”).

In reality Richard Ofshe, partnered with Richard Leo, purports that the injustice of convicting the innocent by “false confession” could be ended if police were taught how to conduct proper interrogations. In their view, mandatory recording is a key to enforcement of better interrogations, and as a tool for “experts” to distinguish the true confession from the false. Critics warn that mandatory recording imposes both financial costs and reduction in “clearance of cases.” They also doubt the claim that “experts” are significantly more able to detect false confessions when allowed to review recorded interviews.

What is it that Leo and Ofshe claim? Paul G. Cassell summarized their oft-cited article, “The Decision to Confess Falsely: Rational Choice and Irrational Action,” 74 Denv. U. L. Rev. 979 (1997) (see, e.g., Commonwealth v. DiGiambattista, 59 Mass. App. Ct. 190, 196 n.4 (2003); Commonwealth v. Scoggins, 439 Mass. 571, 577 (2003)): “After developing a detailed psychological model of the decision to confess (with fascinating and generally unavailable insights into what really happens during modern policy interrogation), they conclude with policy proposals. Based on the premises that ‘false confessions still occur

regularly,' that psychological police interrogation tactics are 'apt to cause an innocent suspect to confess,' and that false confessions are 'likely to cause the wrongful conviction and imprisonment of an innocent person,' Ofshe and Leo recommend a series of reforms: including judicial screening of the 'reliability' of confessions, greater police training to avoid eliciting false confessions, and videotaping of police interrogations." Cassell, "Balanced Approaches to the False Confession Problem," 74 Denv. U. L. Rev. 1123, 1125 (1997).

Cassell stressed that the recommendations "hinge directly on the empirical claim that certain police tactics are apt to produce false confessions leading to miscarriages of justice," but "the empirical linchpin for their proposals is simply missing." Id. at 1125-1126. Cassell reviewed Leo's and Ofshe's promised "empirical support" that appeared as "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation," 88 J. Crim. L. & Criminology 429 (1998), a "study of sixty cases of alleged police-induced false confessions" made "in the post-Miranda era."[9]

[9] Hugo Adam Bedau and Michael Radelet produced a broader report on 350 capital trials during the twentieth century that resulted in the conviction of persons "believed to be innocent." "Miscarriages in Justice in Potentially Capital Cases," 40 Stan. L. Rev. 21-179 (1987). With Stephen

Cassell, “The Guilty and the ‘Innocent’: An Examination of Alleged Cases of Wrongful Conviction from False Confessions,” 22 Harv. J.L. & Pub. Pol’y. 523, 524-525 (1999). Leo and Ofshe declared that “in twenty-nine of these cases the false confession resulted in the wrongful conviction of an innocent person;” Cassell developed serious doubts about their assertion. Cassell, 22 Harv. J.L. & Pub. Pol’y. at 524-525.

Cassell reviewed “primary sources,” such as court records and transcripts, not newspaper accounts used by Leo and Ofshe, as available for eighteen of the twenty-nine cases, and concluded “that at least 9 of the [18] cases [he could review] were misclassified by Leo and Ofshe [as wrongful convictions of the innocent] and that a further 9 appeared to be undisputed wrongful convictions.” Cassell, 22 Harv. J.L. & Pub. Pol’y. at 538, 587, n.392. Cassell remarked the Leo and Ofshe “technique” for identifying false confessions “induced by police interrogation” in fact

---

Markman, Paul Cassell replied and identified “serious flaws” in the methodology of the Bedau-Radelet effort to confirm the innocence of these defendants. See Cassell, 22 Harv. J.L. & Pub. Pol’y. at 537, citing Markman & Cassell, “Protecting the Innocent: A Response to the Bedau-Radelet Study,” 41 Stan. L. Rev. 121, 126-140 (1988).

Inbau, Reid, et al. note, nonetheless, that only 49 of the 350 convictions reviewed in the Bedau-Radelet study involved allegedly false confessions. Inbau, Reid, et al., Criminal Interrogation and Confessions, 4th Ed., at 412.

carries an unacceptable “rate of error,” at best “barely better than one would expect from flipping a coin,” should it be assumed Leo and Ofshe correctly classified the remaining eleven. Cassell, 22 Harv. J.L. & Pub. Pol’y. at 588-590.

Cassell alerts courts that “expert testimony might in theory be justified on interrogation conditions that might produce false confessions,” but “it is not at all clear that acceptance [within the relevant scientific community] of conclusions about false confessions yet exists given the preliminary nature of false confession research.” Cassell, 22 Harv. J.L. & Pub. Pol’y. at 589. He shares the opinion of Saul M. Kassin, “himself a leading researcher on the subject of false confessions,” who wrote that “the current empirical foundation may be too meager to . . . qualify as a subject of ‘scientific knowledge’ according to” Daubert. Id., citing Kassin, “The Psychology of Confession Evidence,” American Psychologist (1997), at 221, 231.

Inbau, Reid, et al. characterize studies such as Leo & Ofshe and Bedau & Radelet as “anecdotal reports,” “useful to demonstrate that something can happen,” and capable of “emotional appeal to the uninformed audience.” The studies by definition lack any attempt to measure or state the frequency of such outcome and make no effort to “control for

dependent or independent variables to help ascertain what may have caused or influenced a particular finding," "that these false confessions were caused by the 'illegitimate use of psychological methods of interrogation.'" Inbau, Reid, et al., at 442-443.

This Court should be wary of basing rule-making on uncertain empirical data. Cassell is concerned with first understanding the frequency of miscarriages caused by false confession, because it has not been determined that the recommendations for changing interrogation practices will have only the intended impact. Cassell reasons that the "cure" may be more harmful to the interests of justice than the "disease." "The available empirical evidence provides reason to believe that today the innocent are more at risk from restraints on police that hinder their efforts to obtain truthful confessions [that free the innocent from false allegations] than from the lack of additional protections against the comparatively rare risk of false confessions." Cassell, 22 Harv. J.L. & Pub. Pol'y. at 589. There is a need for reliable data on the cause of undetected false confessions. This statement indicates the double-edge of the issue: how are false confessions caused, and how do false confessions evade detection by police, prosecutors, defense counsel, judges, juries, and other experts.

Whether police should be required to tape interrogations at places of detention in their entirety is a question that should not be answered without evaluation of alternative ways of preventing or detecting false confessions at each step of the criminal process. "We need not engage in such an untested approach to preventing wrongful convictions [as proposed by Leo and Ofshe] if other mechanisms reliably can separate the guilty from the innocent." Cassell, 22 Harv. J.L. & Pub. Pol'y. at 598.

Inbau, Reid, et al., identify "surveys" as "the best source of raw data on the effects of the interrogation process because they have the potential of reporting what actually happens in the real world of interrogation. . . . If survey data are collected in a random and representative manner, this offers the greatest possible insight on factors that are important to consider within real-life confessions." Id. at 445, 446.

The National Institute of Justice ("NIJ") published a study in 1993 on the impact of videotaping interrogations prepared by William A. Geller, "Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices." The NIJ survey involved 334 local police agencies, and extrapolated that some 2,400 of the 14,000 agencies nationally (17%) "were

using video technology to document at least some suspect oral statements to interrogators" by 1990. NIJ report ch. 2 at 18-22; ch. 4, at 53. Only 38% of these select agencies reported using videotape more than 15 times in 1989. NIJ ch. 4, at 57, fig. 2. Sampling of representative agencies suggested that more than half the time videotaping occurred, the recorded interrogation related to a homicide investigation. NIJ report ch. 4, at 60-64.

This practice, of taping the most serious investigations, in the main, is consistent with the report that most agencies produced fifteen or fewer recorded interrogations per year. It also served to meet one "hypothesis" of the advocates of recording, that "false confessions are most likely to occur in a small but significant category of cases - high-profile cases in which the police have no suspects other than the one who is subjected to interrogation." Welsh White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions," 32 Harv. C.R.-C.L. L. Rev. 105, 133, n.195 (1997). Leo and Ofshe make the same observation. Leo & Ofshe, "Missing the Forest for the Trees: A response to Paul Cassell's 'Balanced Approach' to the False Confession Problem," 74 Denv. U. L. Rev. 1135, 1139-1140 (1997).

The NIJ survey asked why agencies chose not to record interrogations at all: one consideration was cost (interview space must be remodeled to improve recording capabilities, storage space must be prepared, equipment and tapes must be maintained, tapes must be duplicated for court and perhaps transcribed, and impact on personnel costs must be addressed). NIJ report ch. 4 at 71-73, 81-87, ch. 5 at 98.[10] Some agencies were concerned that a practice of selectivity, taping some but not all interrogations, opened the door to a greater risk of impeachment of officers than not taping. NIJ report ch. 5 at 99-103.

Inbau, Reid, et al., commented that Geller's survey for the NIJ did not report "whether these [local police] agencies videotaped the interrogation or only the confession that resulted after the suspect had been persuaded to tell the truth in a private setting, without being videotaped." Criminal Interrogation and Confessions, at 394. Actually NIJ related that 48% of such agencies "self-reported" that they record the "entire" stationhouse inter-rogation, but NIJ expressed doubt: "we are nevertheless somewhat skeptical of the survey finding." NIJ report ch. 4, at 65-66. "Deciding whether to use a videotaped medium to document the

[10] Connecticut considered the financial burdens of compliance as one reason to reject mandatory recording. State v. James, 678 A.2d at 1360.

interrogation process involves a number of important issues that have not been specifically resolved through research. . . . [T]he positive influence that these agencies report may reflect the fact that the videotaped confessions were not random or representative. A blanket ruling that all confessions be videotaped may result in a different finding." Inbau, Reid, et al., at 395 (emphasis in original).

The NIJ survey included comments from investigators, prosecutors, and defense counsel on their preferences whether to record "the entire interrogation" or only to prepare a "recap" after the suspect has committed to confession. NIJ report ch. 5, at 133-140. Certain comments reflected concern that the interrogating officer would be asked to explain interview tactics in court under more pointed cross examination than is possible when only a written statement is prepared. Others doubted that the sometimes lengthy and winding course of the interrogation would convey "clearly incriminating statements." This survey did not address uncertainties such as whether mandated recording of interrogations lessen suspects' cooperation in the interview process.[11]

[11] Cassell questioned this study's methodology ("reported only qualitative assessments:" opinion of officers about impact) and doubted the validity of its assertion that only

Brian C. Jayne, one of the authors of Inbau, Reid, et al., Criminal Interrogation and Confessions, 4th Ed., completed a survey in September, 2003 of interrogations conducted over two years by 112 "Reid technique" officers in Alaska and Minnesota (chosen because of their states' requirement for electronic recording). Id. at 397 n.23, 446, n.32 (the "Jayne Report").[12] The surveyed officers reported nearly 3,200 "confessions" as a result of "accusatory interrogations," each interrogation "presumably" conducted in the manner often challenged by Leo and Ofshe.

28.3% of the officers believed that recording caused suspects to be "less willing to talk." Cassell & Hayman, "Police Interrogation in the 1990s," 43 UCLA L. Rev. 839, 896-897 (1996). See NIJ report ch. 5 at 106.

Cassell's own survey of about 200 cases in Salt Lake County, Utah (which included suspects who were not interrogated or who refused) identified that portion the officers chose to record, and "found nothing suggesting that recording has an inhibiting effect." 43 UCLA L. Rev. at 898-899. Cassell cautioned that his report did not "control for variables" that may have "biased" this result: "it may be possible that the police particularly wanted confessions in the cases that they were taping. If police are more often successful when interrogating seriously, . . . and if police more often tape interrogations when they are serious, then our methodology could produce a spurious correlation between recording and interrogation success." 43 UCLA L. Rev. at 898.

[12]As noted above, the Jayne article, "Empirical Experiences of Required Electronic Recording of Interviews and Interrogations on Interrogators' Practices and Case Outcomes, has not been published, and Inbau, Reid, et al., (2004) printing does not summarize all its findings. The Attorney General's Office obtained an unpublished draft. See Exhibit G.

Id. at 446.[13] Inbau, Reid, et al., does report of the Jayne report that "only 18" of the confessions obtained were suppressed for any reason, whether for a *Miranda* violation, a failure to comply with the recording requirements, or a finding of involuntariness arising from the interrogation technique. Id. at 446, n.31.

Inbau, Reid, et al., conclude, in answer to their academic critics: "When the focus of research is on actual police interrogation practices, as opposed to anecdotal accounts of possibly false confessions or laboratory fabrications of 'police interrogations,' survey results indicate that the vast majority of confessions obtained through interrogation are non-coercive and held to be admissible as evidence." Id. at 446.

Inbau, Reid, et al., also report the impact of using a "visible" recording device on the rate of confessions: without "visible" recording, interrogations resulted in confessions at a rate of 82 per cent; if the device were "visible," "the confession rate dropped to 43 [per cent]." Id. at 397 n.23 (Jayne report). This empiric observation confirms what those who conduct interrogations "in the field" have long asserted.

---

[13] The report adds that over 3900 other confessions were obtained during "nonaccusatory interviews." Jayne at 2, 7.

These rates suggest two conclusions. First, the "success rate" of those who apparently recorded interrogations secretly, or at least discretely, matched the success rate reported generally by those trained in the same "Reid technique." "It is important to note that even the most experienced and skilled investigators achieve a confession rate of about 80 percent." Inbau, Reid, et al., at 364. This also suggests that the conduct of the trained interrogator is not influenced by knowledge that every word and tone can be reheard by defense counsel and the court. This experience is contrary to the expectation of some advocates of a recording requirement, a conclusion Cassell also drew in his study in Salt Lake County. 43 UCLA L. Rev. at 899, n.284. See, e.g., White, 32 Harv. C.R.-C.L. L. Rev. at 153-154; Gail Johnson, 6 B.U. Pub. Int. L.J. 719, 744, 751 (1997); Albert Alschuler, "Constraint and Confession," 74 Denv. U. L. Rev. 957, 971-972 (1997). Moreover, this experience should allay doubts that interrogators can achieve a high rate of success without overreaching; the availability of recordings in Minnesota and Alaska did not result in a significant rate of suppression. Inbau, Reid, et al., at 364.

The second conclusion to be drawn from the survey is that the "drop-off" in the "success rate" is significant,

perhaps prohibitive, when the suspect is made aware that the interrogation is being recorded. "It is plausible that the recording equipment itself could serve as a reminder to the suspect that statements could be used again later, and would inhibit the suspect from talking at all." Cassell, 43 U.C.L.A. L. Rev. at 899. Certainly, as discussed *supra*, the sight of a recording device will remind some suspects that their statements may be heard in venues other than the courtroom.

The drop-off is consistent with the teaching of Inbau, Reid, et al. "The principal psychological factor contributing to a successful interview or interrogation is privacy - being alone with the person during the questioning." Inbau, Reid, et al., 51, 55. "When initially eliciting an oral confession, it is important that the investigator be the only one in the room with the suspect. The presence of any other persons may discourage suspects from giving details about their actions." Id. at 371-372. "[T]ypically once a suspect begins to confess, he will continue to do so unless the investigator becomes abrasive, offends the suspect by an impertinent attitude, or violates the suspect's privacy by bringing additional people into the

interview room or equipment to electronically record the conversation." Id. at 370.[14]

Inbau, Reid, et al., continue: "An investigator should always be mindful of the fact that when a criminal offender is asked to confess a crime, a great deal is being expected of him. First of all, it is not easy for anyone to 'own up' to wrong-doing of any kind. Furthermore, in a criminal case, the suspect may well be aware of the specific serious consequences of telling the truth." Id. at 354.

Connecticut, which rejected mandatory recording for several reasons, observed that "a criminal suspect's knowledge that an interview with the police will be recorded might limit his or her willingness to speak with the police." State v. James, 678 A.2d at 1360. Mandated recording, even if conducted in secret, will in every instance be required to be disclosed after arraignment (see Mass.R.Crim.P. 14, as amended 2004), and the fact of

[14] The text also instructed interrogators about care in avoiding distracting note-taking: "The investigator should take a written note following each response the subject offers. It is important to establish this pattern at the outset of the interview so that the subject does not attach any significance to the investigator's note taking. Conversely, if an investigator only takes sporadic notes during the course of an interview, the suspect will wonder why the investigator decided to write down a particular response and may become guarded and hesitant to offer further information." Inbau, Reid, et al., at 72.

recording during custodial interrogation will not remain an effective secret to the public for long. Perhaps for this reason police in states where recording is mandated have on a case by case basis elected to dispel the suspicion that secret recording may occur by disclosing the practice of recording at the start of interrogation. See Inbau, Reid, et al., at 397 n.23 (Jayne Report).

III. ANY RULE REGARDING ELECTRONIC RECORDING WOULD NEED TO REFLECT CURRENT REALITIES FACING THE COMMONWEALTH'S LAW ENFORCEMENT COMMUNITY.

The amici reiterate their view that there be no court rule that limits the decisions of law enforcement officers whether and when to record custodial interrogations. That said, any rule that this Court may promulgate concerning recording would need to accommodate the realities facing investigators in the Commonwealth. First, unlike the situation that exists in a number of other jurisdictions that have a taping rule, investigators here must to inform suspects that they are being recorded and obtain their consent. Because of the detrimental effect that "visible recording" will necessarily have on the ability of investigators to gain evidence and information, any rule that would mandate recording of some kind would have to make an exception for the estimated 50 to 60 percent of suspects

who will not consent to having their statements taped.

An exclusionary rule precluding the admission of non-recorded statements would inappropriately hamstring law enforcement in its efforts to do its work by the mere expedient of a suspect's refusal to have his statements recorded. Moreover, other methods, such as written or acknowledged statements or summaries, which have been regularly admitted to prove the content of interrogation, must continue to be admissible. There should be no rule requiring the officer to select "the best means available" to "preserve" the interview or interrogation. Where the interrogating officer determines, from established experience, that raising the issue whether to record with the subject would impair the investigator's ability to establish and maintain the "trust" necessary to conduct an effective interview/interrogation, absence of a recording should be excused.

As discussed above, a number of investigators in the Commonwealth who oppose a blanket rule which would require them to tape all custodial interrogations already engage in the practice of recording a suspect's repetition of his statement, in much the same way as they memorialize a suspect's statement in writing. A rule that would mandate recording before evidence of a statement or confession can

be admitted, however, would exclude otherwise proper testimony about a suspect's oral confession based essentially on an irrebuttable or conclusive presumption that unrecorded statements are unreliable. The Commonwealth should not establish such a presumption. Indeed, states that require recording generally have not created such a presumption.[15] See 725 Ill. Comp. Stat. 5/103.2.1(f), effective July 18, 2005 ("The presumption of inadmissibility of a statement made by a suspect at a custodial interrogation at a police station or other place of detention may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances"); Texas C.C.P. Art. 38.22, § 3(c) (recording requirement in "subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was

[15]New Hampshire adopted by "supervisory rule" a requirement that before a recording of a custodial interrogation be admitted into evidence, it must be complete. *State* v. *Barnett*, 789 A.2d 629, 631, 632-633 (2001). The court did not adopt a broad exclusionary rule, instead holding that failure to make a complete recording did not bar introduction of the statement (but not the incomplete recording) "subject to the usual rules of evidence." *Id*. at

committed").

As is argued in the Commonwealth's brief, existing safeguards suffice to ensure the reliability of confessions, safeguards which obviate the need for this Court to promulgate any sort of mandatory recording rule. It has been and will always remain the burden of the Commonwealth to persuade a jury beyond a reasonable doubt that the defendant's extrajudicial confession is consistent with guilt.[16] Hence, the burden is on the Commonwealth to show that the witness or witnesses to the defendant's confession are credible, and, pursuant to our special rule of "humane practice," that the defendant's confession was voluntary. The trial judge does instruct the jury with care on the Commonwealth's burden and the role of the jury to determine credibility. The trial judge could deliver a further instruction on the subject of defendant's statements during custodial interrogation that alerts the jury to considerations specific to evaluating the reliability of such statements, much as is common with evidence of eyewitness identification. See White, *Confessions in Capital Cases*, 2003 U. Ill. L. Rev. 979, 994, 1025 ("in

---

632-633.

[16] This burden does not include any expansion of the Forde corroboration rule, as is discussed below.

seeking to improve fact-finding in police interrogation cases, [do not] overlook the need to provide the jury with information that will assist it in assessing interrogation practices' potential for producing false confessions").

This instruction is unlike that which may be given to support a *Bowden* argument that an inference be drawn unfavorably to the Commonwealth where the police failed to take certain steps. Rather, the proposed instruction should ask the jury to consider the circumstances under which the defendant made the statement, its duration, the defendant's condition, his capacity to exercise his rights, and whether the absence of details or inconsistencies in details are justified.[17] See J. Vincent Aprile II, *Convicting the Innocent: An Instructional Issue,* in Criminal Justice 50, 51 (Winter 2004).

There is no record from which to conclude that the Commonwealth has a widespread problem of "false confessions" among mentally sound suspects. Several commentators argue that requiring recording can be limited to custodial

[17]A Kansas court has observed that often recordings of interrogation must be redacted before being played to the jury in order to exclude, for instance, comments during interrogation on the credibility of the defendant or other witnesses. *State* v. *Elnicki*, 80 P.3d 1190, 1194-1196 (Kan. App. 2003). The recording could include matters about other crimes or activities prejudicial to the defendant at trial. Redaction, of course, undercuts consideration of the totality

interrogations of those suspects who appear particularly susceptible to questioning due to their mental incapacity, without unduly jeopardizing the needs of interrogation. "At least where the government is seeking to introduce a mentally handicapped defendant's police-induced confession in a capital case, the safeguards designed to protect against the admission of untrustworthy confessions need to be strengthened." Welsh White, *Confessions in Capital Cases*, 2003 U. Ill. L. Rev. 979, 1002.[18] Such a rule, they argue, would be narrowly tailored, to cover only those "suspects who suffer from such severe mental disorders as to cause them to be inherently unreliable sources of information...[,]" because in the absence of such severely diminished mental capacity, "the causal relationship between false confessions and underlying psychopathology becomes much less clear." Inbau, Reid, et al., at 431.

This Court should not take this step and impose a narrower rule. A mandate to record will elevate one issue (created by rule and not directly probative) at a motion

---

of the circumstances.

[18]In White's view, "a defendant shall be classified as mentally impaired when his mental history, including I.Q. tests, examination by mental health experts, and other relevant information, indicate that there is a substantial likelihood that the defendant will be unable to understand or to be concerned about the consequences of making an incriminating statement to police." *Id*.

hearing conducted to determine voluntariness, and will give that issue absolute and underserved importance. Proof of an individual's capacity at the moment of interrogation will become secondary to the simple but inappropriate question, is there a recording. It should be for the police and prosecutors to decide how to meet its burden, in this Commonwealth, of showing admissibility beyond a reasonable doubt.

Finally, the Court seeks comment whether the rule of *Forde* should be changed to require "some corroborative evidence that the accused was the perpetrator of the crime, or independent evidence of the trustworthiness of the confession, or be modified in some other fashion." The rule should not be changed, but juries could receive, as described above, more complete instruction about their consideration of confessions. Leo and Ofshe link corroboration with training police interrogators: "all could be trained to elicit more reliable confessions." *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 1119. "[I]f police were trained to make certain that all confessions included detailed descriptions of the crime and thereby produced a basis for evaluating their internal reliability and the possibility of locating new corroborating evidence, guilty

defendants would be more likely to plead out. . . ." *Id*. at 1120. Modification of *Forde* would not be more beneficial than more follow-up investigation of what interrogations elicit.

Paul Cassell, in *The Guilty and the 'Innocent': An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 Harv. J.L. & Pub. Pol'y, 523, 590-602 (1999), offers an extended rebuttal of any corroboration rule that may be proposed. He questions where to draw the line between reliable confession and fully corroborated confession, and doubts whether "the case against *jury* evaluation of alleged false confessions has yet [been] convincingly made." *Id*. at 593-594, 601 (emphasis added).[19] See Robert R. Barton, *The Code Means What It Says: Revisiting the Admissibility of Corroborated Unwritten Custodial Statements*, 26 Tex. Tech L. Rev. 779, 795-810 (1995) (collecting Texas caselaw on scope of corroboration

[19]Kentucky, in rejecting mandatory recording, "disagree[d] with the appellants' contention that fundamental fairness cannot be ensured by a trial court's resolution of factual disputes regarding custodial interrogations on the basis of testimony from the persons involved. . . . We are not persuaded that determinations of admissibility traditionally made by trial courts are inherently untrustworthy or that independent corroboration of otherwise competent testimonial or documentary evidence regarding the existence and voluntariness of a confession is necessary. . . ." *Brashers* v. *Commonwealth*, 25 S.W.3d 58, 62 (Ky. 2000).

of details). Rather than a rule that the trial judge exclude confessions that lack internal detail and consistency with the other evidence, such corroboration rules should focus on informing the factfinder to consider whether details are present, are corroborated, and why details may be false, incomplete, or withheld.

Inbau, Reid, et al., caution that:

> [i]t is not reasonable to require that everything a suspect includes in his confession represent the absolute and complete truth, but rather that his admission of criminal involvement be factual. Individuals who are not involved in actual criminal interrogations may fail to understand why a guilty suspect would tell the truth about committing a crime but would withhold other information related to his crime or even lie as to certain aspects of the crime.

Id. at 434. They teach that the suspect may be embarrassed by acknowledging certain details, or may intend to protect accomplices, or family or friends, or may be unwilling to implicate himself in related or similar crimes. *Id*. at 435-439. "The requirement that a confession perfectly match the crime scene, victim's account, or be completely accurate in every detail would invalidate most confessions. Rather, a balance of interests must be achieved wherein the court, when deciding the trustworthiness of a confession, considers the totality of the circumstances surrounding the confession." *Id*. at 441. The amici urge this Court to

allow the executive branch to continue to improve police practice and with an eye not only to solving cases but to securing justice.

CONCLUSION

For the foregoing reasons, this Court should decline to adopt an inflexible rule that all custodial interrogations which occur at places of detention be electronically recorded before they may be admitted into evidence.

Respectfully submitted,

THOMAS F. REILLY
ATTORNEY GENERAL

CATHRYN A. NEAVES
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2557
BBO #556798

ROBERT J. BENDER
Assistant District Attorney
Courthouse Room 220
Two Main Street
Worcester, Massachusetts 01608
(508) 757-2786
BBO #037000

Dated: March, 2004