No. SU-2008-0292

RHODE ISLAND SUPREME COURT

State of Rhode Island
v.
Tracey Barros

BRIEF OF AMICUS CURIAE THE INNOCENCE NETWORK

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*In accordance with Rule 16(h) of the Supreme Court Rules of Appellate Procedure, the Innocence Network has received consent to file this brief from the parties in the above-captioned matter. The signed written consents are being filed concurrently with this brief.

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INTEREST OF AMICUS CURIAE

The Innocence Network ("the Network") is an association of organizations that provide pro bono legal and investigative services to prisoners for whom evidence discovered post-conviction provides conclusive proof of innocence. The fifty-two members of the Network represent hundreds of prisoners in their innocence claims in all 50 states and the District of Columbia, as well as internationally.[1]

Drawing on its extensive experience with wrongful convictions, the Network advocates for the reform of the criminal justice system in order to prevent future wrongful convictions.

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[1] The member organizations include the New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), Alaska Innocence Project, Arizona Justice Project, Association in the Defence of the Wrongly Convicted (Canada), California & Hawaii Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Griffith University Innocence Project (Australia), Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project at UVA School of Law, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender, State of Delaware, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post Conviction Project (New York), Pennsylvania Innocence Project, Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University Justice Brandeis Innocence Project (Massachusetts), The Sellenger Centre (Australia), Texas Center for Actual Innocence, Texas Innocence Network, The Reinvestigation Project of the New York Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), the Wesleyan Innocence Project, and the Wisconsin Innocence Project.

The Network is dedicated to redressing the causes of wrongful convictions and improving the accuracy and reliability of the criminal justice system.

False confessions have played a central role in a disturbing number of the cases in which prisoners represented by the Network's members have been exonerated. Accordingly, the Network has devoted extensive resources to studying the problem of false confessions and advocating for reforms aimed at minimizing the number of wrongful convictions they cause. The Network has concluded that one of the most effective and practical means of preventing wrongful convictions that arise from false confessions is to require that custodial police interrogations (from *Miranda* warnings onward) be recorded in their entirety.

The Network's brief will detail the problem posed by false confessions, including their surprising frequency and toxic effect on judicial proceedings, and will ask this Court to follow the lead of the highest courts in states such as Alaska, Minnesota, and New Hampshire, by requiring that custodial police interrogations be recorded in their entirety.

INTRODUCTION

As the United States Supreme Court recently stated, "'custodial police interrogation, by its very nature, isolates and pressures the individual,' and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States*, 129 S. Ct. 1558, 1570 (2009) (quoting *Dickerson v. United States*, 530 U.S. 428, 435 (2000) and citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891, 906-07 (2004)). It is in this context that this Court is called upon to decide whether the failure to preserve an evidentiary record of interrogations amounts to a denial of due process pursuant to the Rhode Island State Constitution or, in the alternative, necessitates redress through the Court's inherent supervisory authority to ensure the fair administration of justice in judicial proceedings.

The Network's experience with exonerations has shown that false confessions present a grave problem for the justice system and that action by this Court is necessary in order to ensure that innocent people are not convicted. Specifically, the Network has found that: (1) false confessions occur with alarming frequency, and they result in the conviction of innocent people; (2) the judicial process is currently ill-equipped to discover the falsity of these confessions, primarily because it lacks an accurate record of the custodial interrogation that culminates in the confession; and (3) the mandatory recording of interrogations represents an effective and unproblematic solution.

While it may seem unfathomable that anyone would confess to a crime he did not commit, the Network's experience has increasingly shown that false confessions do occur, and with disturbing regularity. To date, post-conviction DNA testing has exonerated 240 innocent people.[2] Astonishingly, thirty-eight of these wrongly convicted defendants had falsely confessed to the crimes for which they were subsequently exonerated.[3]

False confessions are generally not the result of outright coercion or any improper acts on the part of the police, but an unfortunate byproduct of common and well-intentioned interrogation techniques. Police interrogations are specifically aimed at inducing severe stress in the hopes of overcoming defenses and procuring a confession. Although such tactics often do convince guilty suspects to confess, experience has shown that innocent people will confess to crimes they did not commit under these circumstances as well.

Three factors, in particular, have been shown to increase the likelihood of an innocent

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[2] The Innocence Project Home Page, http://www.innocenceproject.org (providing tally of post-conviction DNA exonerations in the United States) (last visited July 14, 2009).

[3] *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. (forthcoming 2009) (manuscript at 1) (attached as Appendix A to this brief).

person confessing to a crime they did not commit: excessively long interrogations, the presentation of false incriminating evidence, and the promise of leniency. Isolated for hours and accused of the most heinous crimes, suspects are led to believe that there is overwhelming evidence against them, that their denials will not be believed, and that they will be punished more severely if they do not confess to the crime. The DNA exonerations prove that, under such intense pressure, some individuals will falsely confess in order to avoid a battle which they have been made to believe they cannot win.

Unfortunately, even if an innocent suspect immediately recants, it is extraordinarily difficult for him or her to prove the falsity of the confession. Confessions are the most potent type of evidence admissible at trial: "[T]he introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained."[4] Once a confession is given, a defendant's innocence is unlikely to be believed, even if other exculpatory evidence exists. As many of the DNA exonerations illustrate, confessions often cause the police to cease their investigation, leaving facts unsubstantiated and inconsistencies unresolved. At evidentiary hearings, trials, and appeals, judges and juries are reluctant to believe that defendants would make statements against their own interest if they were not true. As was the case in many of the DNA exonerations, this reluctance is often bolstered by the fact that the confessions contain non-public facts about the crime—facts which often were unintentionally fed to the defendants by police.

In the case of the thirty-eight exonerees, their innocence was resolved only after traditional judicial avenues had been exhausted and only because there happened to be DNA evidence available to prove their innocence. However, nearly all of the exonerees had contested

[4] EDWARD W. CLEARY ET AL., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 148, at 316 (2d ed. 1972).

the validity of their confessions, pointing to circumstances surrounding their interrogations that led them to confess. If believed, these claims could have undermined the reliability of their confessions, resulting in the suppression of the statements or the creation of reasonable doubt. However, with no record of the interrogations, as defendants, the exonerees were left to fight a credibility battle with the state—a fight that they predictably lost. In these cases, as is surely true of many others, the innocent defendants' inability to present objective evidence from their interrogations prevented the courts from discovering the falsity of their confessions.

The only way to ensure that false confessions are discovered is to provide the triers of fact with an objective and accurate record of how the confessions were obtained. Only a full recording of an interrogation can definitively reveal whether or not there is evidence indicating the confession might be false, including details about: the duration of the interrogation, the state of mind of the defendant, the defendant's knowledge of key facts, and any promises made by the police. Perhaps most crucially, a recording will show whether the defendant independently volunteered key facts about the case or whether, as was true for of many of the exonerees, the defendant was only able to provide a confession consistent with the other evidence from the crime after several tries and with the often unintentional prompting of the police.

The benefits of recording extend beyond the interests of the defendant. An enormous amount of judicial and police resources are spent every year litigating motions to suppress confessions based on conflicting accounts of what occurred during the preceding interrogations. Recordings of interrogations could resolve these claims more efficiently, and could prevent many from being brought at all. Law enforcement also benefits from recording interrogations—indeed some of the strongest proponents of recording are police officers themselves. One comprehensive survey of officers has revealed that, although officers were initially apprehensive

that recording would have a negative impact on their ability to elicit information from suspects, virtually all police officers that have been required to record interrogations have concluded that their fears were unfounded and that the system benefits from keeping an accurate and unassailable record of what occurs during interrogations. Aware of these benefits, 450 police departments across the country—including the Rhode Island State Police—have adopted their own recording policies and procedures.

Acknowledging the serious problem posed by false confessions, sixteen states and the District of Columbia have adopted requirements relating to the mandatory recording of custodial interrogations. Of particular note, the highest courts in Alaska, Minnesota, New Hampshire, and Wisconsin have all relied upon their supervisory powers or notions of due process to require that interrogations be recorded in their entirety. These courts came to the same conclusion that we ask this Court to reach: where the State can, literally with the flip of a switch, preserve an accurate record of the evidence that will be used against a defendant at trial, its failure to do so amounts to an unnecessary and inexcusable denial of justice.

ARGUMENT

I False Confessions Result in the Conviction of Innocent People

A Incidence and Representative Examples of False Confessions

i The Incidence of False Confessions

History is filled with instances of proven false confessions.[5] While society has always regarded these occurrences as deplorable, it was assumed that they were exceedingly rare. As

[5] *See* Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 502-03 (2006) (noting infamous historical examples of confessions that were conclusively proven false, including England's *Perry's Case* (1660) and the U.S. case of Jesse and Stephen Boorn (1819), where the confessions were only proven false because the supposed murder victims were found alive).

increased study has been devoted to the issue, however, a different picture has come to light. Over the last two decades, scholars have identified at least 250 instances where people confessed to crimes they did not commit.[6] Of these cases, the DNA exonerations provide the most compelling sample because of the unassailable reliability of these exonerations, the full judicial records available for analysis, and the meticulous post-exoneration investigations of these cases. Of the 240[7] individuals exonerated because of DNA evidence, 38 of them—approximately 16%—had falsely confessed to the rapes and murders for which they were convicted.[8] These thirty-eight represent just the tip of the iceberg, however, as the DNA exonerations are a unique subset of cases in which: (1) conclusive DNA evidence happened to be available; (2) the crimes were serious enough to merit close scrutiny; and (3) those convicted were fortunate enough to have public interest organizations and attorneys track down physical evidence and prove their innocence. Thus, while the DNA exonerations reveal that a substantial proportion of erroneous convictions result from false confessions, the actual number of people that have been convicted due to false confessions is undoubtedly much higher.

The significant incidence of false confessions has been corroborated by interviews with law enforcement officials. In a survey of 631 police officials, the officers estimated that roughly 5% of innocent people confess to crimes they did not commit when subjected to interrogation.[9]

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6 RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 243 (2008) (surveying the literature identifying proven cases of false confessions).

7 The Innocence Project Home Page, at http://www.innocenceproject.org (last visited July 14, 2009).

8 Garrett, *supra* note 3 (manuscript at 1).

9 Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. & HUM. BEHAV. 381, 392-93 (2007).

ii Representative Examples

Each of the thirty-eight DNA exonerees that were convicted as a result of false confessions gave their confessions after interrogations that were lengthy but generally legal in nature.[10] In the wake of the confessions, thirty-two of these individuals were convicted after a full trial, while six others pleaded guilty.[11] As would be expected, where the cases went to trial, the confessions played a central role.[12] Despite the fact that the veracity of the confessions was contested at each of the trials, and often during subsequent appeals, the defendants' claims were not believed. Each of the thirty-eight exonerees served years or decades in prison before they were exonerated through the use of DNA evidence. Once discovered, the DNA evidence conclusively established the exonerees' innocence and, in twenty-five cases actually inculpated another individual.[13]

Statistics tell only part of the story. The gravity of the problem is best illustrated by taking a closer look at just a few representative cases where false confessions led to wrongful convictions:

a Central Park Jogger Defendants[14]

Perhaps the most well-known recent example of false confessions came in the "Central Park Jogger" case. *See People v. Wise*, 752 N.Y.S.2d 837 (NY Sup. 2002). On April 19, 1989, a woman was brutally raped and beaten while jogging in New York City's Central Park. Five

10 *See* Garrett, *supra* note 3 (manuscript at 10-11).

11 *Id.* at 9.

12 *Id.* at 12.

13 *Id.* at 7-8.

14 *See* Profile of Antron McCray, http://www.innocenceproject.org/Content/208.php (last visited July 14, 2009).

teenagers who had committed other crimes in the park that night confessed to the rape after twenty-eight hours of detention and interrogation. Consistent with its practice, the police recorded only the teenagers' incriminating statements, and not the extended interrogation that preceded them.

The confessions differed from one another on "virtually every major aspect of the crime" and were inconsistent with key facts known about the attack. *McCray v. City of New York*, No. 03 Civ. 9685, 2007 WL 4352748, *5 (S.D.N.Y. Dec. 11, 2007) (quoting the District Attorney's Affirmation regarding its 2002 motion to vacate the convictions).[15] Nonetheless, they played a central role at the trials.[16] On the strength of the confessions, each of the defendants was convicted, and despite four separate appeals, the convictions were upheld. *Id.* at *7. The defendants spent between five and eleven and half years in prison. They were not exonerated until 2002, twelve years after their convictions, when a prisoner named Matias Reyes admitted that he alone had raped and assaulted the victim. Subsequent DNA testing not only excluded the defendants, but also incriminated Reyes. Reyes had, in fact, raped another woman in Central Park just days before the crime occurred and police had been aware of his existence. However, because they had already obtained confessions from the five teenagers, they had never connected the crime to Reyes.

A recording of the entire interrogation would have corroborated the defendants' claims that certain elements of their prolonged interrogations caused them to falsely confess. A recording would have shown the court that police falsely told the defendants that there was fingerprint evidence incriminating them. It would also have shown that that the police falsely

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[15] *See also* Garrett, *supra* note 3 (manuscript at 37).

[16] *Id.* at 24. At trial, the prosecution emphasized that the confessions contained certain key non-public facts about the crime.

told at least one defendant that he had been implicated by another.[17] Finally, a recording would have shown that the defendants were led to believe they would be treated as witnesses, not defendants, and could go home after their confession.[18]

b Byron Halsey[19]

On the night of November 14, 1985, Byron Halsey was driven into town by a neighbor, Clifton Hall, and dropped off with friends. When Halsey returned home that night, his two children were missing. The children's bodies were found the next morning; they had been sexually assaulted and murdered. Immediately, the police had two separate suspects: Halsey and Hall. Halsey was subjected to thirty hours of interrogation during the forty hour period after the bodies were discovered. Ultimately, he confessed to the crime. As a result of Halsey's confession, the police stopped their investigation of Hall. At Halsey's trial, the confession played a key role. Although Halsey's lawyers contested the veracity of the confession and that witnesses corroborated Halsey's alibi, Halsey was convicted of murder and given two life sentences plus twenty years. It was not until 2006 that DNA testing proved Halsey's innocence. The testing also implicated Clifton Hall who had committed three more violent sexual attacks during the period when he should have been in prison.[20] In 2007, Halsey was released after spending nineteen years in prison.

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17 *See* Nadia Soree, Comment, *When The Innocent Speak: False Confessions, Constitutional Safeguards, and The Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 194 (2005).

18 *See id.*

19 *See* Profile of Byron Halsey, http://www.innocenceproject.org/Content/690.php (last visited July 14, 2009).

20 *See* The Innocence Project, Press Release: After 19 Years in Prison for One of the Most Heinous Crimes in NJ History, Byron Halsey Is Proven Innocent through DNA (May 15, 2007), available at http://www.innocenceproject.org/Content/583.php.

Had a recording of Halsey's interrogation been available, it would have revealed that he initially gave incorrect responses with regard to every key fact of the crime, including the manner of death and the location of the bodies.[21] It would have also confirmed what Halsey's interrogators would only admit after his exoneration—that many of his answers were incoherent and that he seemed to be in a trance, likely indicating a compromised mental state caused by the violent deaths of his two children.

c Earl Washington[22]

In June 1982, Rebecca Lynn Williams was raped and murdered. A year later, Earl Washington was arrested for a different crime. After two days of questioning, Washington confessed to five crimes, including Williams's murder. Four confessions were deemed not credible, because of their inconsistencies with the crimes and the failure of the witnesses to identify him. However, despite similar inconsistencies, police accepted Washington's confession to Williams's murder. Although forensic testing at the crime scene had revealed a rare plasma protein that Washington did not possess, the forensic report was amended after he confessed (without further testing) to state that the tests were inconclusive.

The confession took center stage at trial. The prosecution focused upon the fact that the confession included non-public facts about the crime. Washington was convicted on the strength of the confession, despite physical evidence pointing to his innocence.

Washington was sentenced to death and came within nine days of execution. It was only with the help of prisoners' rights advocates that Washington obtained DNA testing proving his

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21 *See id.*

22 *See* Profile of Earl Washington, http://www.innocenceproject.org/Content/282.php (last visited July 14, 2009).

innocence. He was freed in 2000 after spending eighteen years in jail.

None of Washington's interrogation was recorded. A recording of the interrogation would have revealed that he could not initially give correct answers with regard to the victim, the crime scene, or the attack. For example, he falsely confessed that he had stabbed the victim two or three times when the victim had, in fact, been stabbed thirty-eight times. Only after a fourth attempt at a rehearsed confession did the police accept his statement and have it memorialized in writing. Years later, one of his interrogators admitted that the non-public facts – which made Washington's confession appear credible – were likely fed to him unintentionally during the interrogation.[23]

d Christopher Ochoa[24]

In 1988, Nancy DePriest was raped and murdered at the Austin, Texas Pizza Hut where she worked. Police interrogated two other Pizza Hut employees, Christopher Ochoa and Richard Danziger. After being interrogated, Ochoa agreed to confess and testify against Danziger. While Ochoa's incriminating statements were recorded, other portions of the interrogation were not. In 1989, Ochoa pleaded guilty and Danziger was convicted at trial.

Years later, Achim Marino, a prisoner serving three life sentences, admitted that he alone had raped and murdered De Priest. Police reopened their investigation and DNA testing confirmed that neither Ochoa nor Danziger committed the crime. In 2002, both men were exonerated, after spending thirteen years in prison.

Had the police recorded Ochoa's interrogation in its entirety, it would have been clear

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[23] *See* Garrett, *supra* note 3 (manuscript at 22-24).

[24] *See* Profile of Christopher Ochoa, http://www.innocenceproject.org/Content/230.php (last visited July 14, 2009).

that he actually knew very little about the crime. When Ochoa would get a detail about the crime wrong, the police would stop recording and would not resume until after he had been coached with regard to that particular detail.[25] A recording would also have revealed that Ochoa was threatened with the death penalty if he did not confess. Ochoa recalls the police stating: "You're going to get the needle. You're going to get the needle for this. We got you."[26] A clear record of such threat could have revealed early on that Ochoa may have confessed in order to avoid this most severe sentence.

These examples represent a small fraction of the individuals that have been exonerated after having been convicted as the result of false confessions. The stories surrounding the remaining exonerations are equally compelling and remarkably similar in detail.[27]

B Why False Confessions Occur

While some false confessions certainly result from improper or coercive interrogation techniques, the DNA exonerations illustrate that many are procured by legal techniques that do not involve outright coercion or brutality. Confessions by innocent people are an unfortunate but inevitable byproduct of the psychological pressures inherent in any modern American interrogation. *See Corley v. United States*, 129 S. Ct. 1558, 1570 (2009). Interrogation is not used as a tool for determining guilt or innocence;[28] "[r]ather, the singular purpose of American

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25 *See* Garrett, *supra* note 3 (manuscript at 29).

26 *Id.* (manuscript at 11-12) (citing the transcript of Richard Danziger's trial).

27 *See* http://www.innocenceproject.org/know/Search-Profiles.php?check= check& title=&year Conviction=&yearExoneration=&jurisdiction=&cause=False+Confessions+%2F+Admissions&perpetrator=&compensation=&conviction=&x=36&y=1 (detailing the stories of each of the 38 exonerees) (last visited July 14, 2009).

28 *See* NATHAN J. GORDON & WILLIAM L. FLEISHER, EFFECTIVE INTERVIEWING AND INTERROGATION TECHNIQUES 27-29 (2002).

police interrogation is to elicit incriminating statements . . . ; it is intentionally structured to promote isolation, anxiety, fear, powerlessness, and hopelessness."[29]

Interrogations in the United States often follow some form of the Reid Technique, pioneered in the 1940s.[30] The technique begins with isolating a suspect in order to increase his anxiety and desire to escape.[31] The suspect is then subjected to periods of direct and forceful accusations of guilt.[32] These accusations are often bolstered by incriminating evidence, real or manufactured, and refusals to accept alibis and denials.[33] After the suspect has been shown that the police are convinced of his guilt, the interrogators offer sympathy and moral justification in an attempt to minimize the crime and lead the suspect to see confession as an expedient means of escape.[34] Suspects are commonly made to believe that confession will lead to more lenient or favorable treatment.[35] Trickery and deceit are considered "unavoidabl[e]"[36] and "indispensable"[37]

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29 Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 911 (2004).

30 *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Falsely Confess: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 983 n.20 (1997) (noting influence of Reid Technique); Saul M. Kassin, *Psychology of Confession Evidence,* AM. PSYCHOL. 221, 222 (1997) (same).

31 Saul M. Kassin & Gisli H. Gudjonsson, *True Crimes, False Confessions: Why Do Innocent People Confess to Crimes They Did Not Commit?*, SCI. AM. MIND 29 (June 2005). *See also* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 51-52 (4th ed. 2001).

32 INBAU, *supra* note 31, at 212-23.

33 *Id.* at 218-19, 427-28.

34 *Id.* at 244-45.

35 Drizin & Leo, *supra* note 29, at 912 (noting common use of "tactics that are designed to lull a suspect into believing that the magnitude of the charges and the seriousness of the offense will be downplayed or lessened if he confesses"); *see also* Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communications Promises and Threats by Pragmatic Implication,* 15 L. & HUM. BEHAV. 233, 235 (1991) (describing use of implied promises of leniency in police interrogations).

in the interrogation process.

Three particular elements often present in modern interrogations have been identified as "red flags" or risk factors for causing false confessions: prolonged periods of interrogation, the presentation of false evidence, and implied promises of leniency or favorable treatment.

The vast majority of police interrogations last from thirty minutes to two hours.[38] However, interrogations that result in false confessions generally last much longer. One study has found that more than 80% of the interrogations resulting in false confessions lasted for more than four hours, and 50% lasted for more than twelve.[39] This is not surprising. As the intense experience drags on, stress and fatigue can have a debilitating effect[40] and innocent people are made to capitulate, feeling that the only way to end the ordeal is to agree with the officers.[41]

The presentation of false evidence by the interrogators, designed to make guilty suspects feel as though their conviction is inevitable and that confession is their best option, has proven to

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36 FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSION 216 (3d ed. 1986).

37 *Id.* at 319.

38 *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. OF CRIM. L. AND CRIMINOLOGY 266, 279 (1996) (noting more than 70% of interrogations in sample were less than an hour and only 8% were longer than 2 hours); Kassin, *supra* note 9, at 384 (noting modal duration ranged from 20 minutes to an hour).

39 The study reported that 16% of interrogations leading to false confessions lasted less than six hours; 34% between six and twelve; 39% between twelve and twenty-four; 2 % between forty-eight and seventy-two hours; and 2 % between seventy-two and ninety-six hours. *See* Drizin & Leo, *supra* note 29, at 948.

40 *See* Ofshe & Leo, *supra* note 30, at 998.

41 *See* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. REV. 105, 143-44 (1997).

have an equally compelling impact upon innocent individuals.[42] Indeed, many of the DNA exonerees have cited the futility they felt when presented with false evidence as a significant factor in their decision to confess.[43]

Finally, implied promises of leniency and other promises of favorable treatment have played a key role in known false confessions.[44] Explicit promises of leniency by police are forbidden under U.S. law. *See Bram v. U.S.*, 168 U.S. 532, 542-543 (1897).[45] However, implied promises of leniency are a staple of modern American interrogations.[46] Interrogators imply that confessing will lead to a more favorable sentencing outcome than would result in the face of continued denials.[47] This may be done in a multitude of ways. One tactic is for police to minimize the nature of the crime. Interrogators "suggest to suspects that their actions were spontaneous, accidental, provoked, peer pressured, drug induced, or otherwise justifiable by

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42 *Id.* at 145-47. *See also* Kassin & Gudjonsson, *supra* note 31, at 26 (noting that the presentation of false evidence contributes to false confessions); Ofshe & Leo, *supra* note 30, at 1008-41 (describing "devastating" effect of presenting false evidence, especially fabricated scientific evidence); Garrett, *supra* note 3 (manuscript at 44) (noting that false evidence ploys have been shown to increase the risk of false confessions and had been used in a number of the DNA exonerees' cases); Drizin & Leo, *supra* note 29, at 969, 982, 991 (citing examples of proven false confessions induced by false evidence ploys).

43 Garrett, *supra* note 3 (manuscript at 44-45).

44 *Id.* (manuscript at 44).

45 It should be noted, however, that the Supreme Court has recently cast doubt on the continued validity of the *Bram* decision. *See Arizona v. Fulminante*, 499 U.S. 279, 285 (1991) (noting in dicta that "*Bram* . . . under current precedent does not state the standard for determining the voluntariness of a confession").

46 *See* Kassin & McNall, *supra* note 35, at 234.

47 Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. IN L., POL. & SOC. 189, 204-07 (1997).

external factors."[48] By minimizing the crime, suspects are led to infer that they will be treated leniently if they confess to the more palatable interpretation of the crime.[49] No matter how it is accomplished, however, the message is the same: the justice system will be convinced of the suspect's guilt and the only real decision is whether or not to confess and thereby receive more favorable treatment. The examples discussed above make clear that the implied benefits of confessing can be powerful motivators, whether the benefit be avoidance of the death penalty[50] or simply the ability to go home after the interrogation is over.[51]

C False Confessions Resulting From Unrecorded Interrogations are Unlikely to be Discovered

After a defendant admits to committing a crime, the confession "cast[s] a long shadow" over his treatment in the criminal justice system.[52] A confession is viewed as the most powerful

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48 Saul M. Kassin, *The Psychology of Confessions*, 4 ANN. REV. L. & SOC. SCI. 193, 202 (2008).

49 *Id.* at 202-203; Ofshe & Leo, *supra* note 47, at 206; *see also* Kassin & McNall, *supra* note 35, at 241; Melissa B. Russano, et al., *Investigating True and False Confessions Within A Novel Experimental Paradigm*, 6 PSYCHOL. SCI. 481, 485 (2005).

50 *See* discussion of Christopher Ochoa *supra* pp. 12-13.

51 *See* discussion of the Central Park Jogger defendants *supra* pp. 8-10.

52 Leo, *supra* note 38, at 298.

and reliable form of evidence,[53] invariably convincing participants at all levels of the justice system of the defendant's guilt.[54]

The presumed evidentiary weight given to confessions makes it very difficult for false confessions to be discovered. Prior to trial, they alter the behavior of the police,[55] causing them to stop their investigation and not pursue potentially exculpatory evidence.[56] For example, in the DNA exonerations discussed above, police ignored some of the confessions' glaring inconsistencies[57] and stopped investigating other key suspects once a confession had been tendered.[58] Confessions are presumed to be so reliable that they can actually taint other evidence, making it even more difficult for an innocent defendant to prove their innocence.[59] The ability of confessions to influence other forms of evidence has been confirmed in the laboratory setting. In one experiment, it was shown that informing latent fingerprint experts that

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53 *See* Ofshe & Leo, *supra* note 47, at 193 ("[C]onfession evidence is likely to be treated as enormously damning and as persuasive as any evidence that can be brought against a defendant."); *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. OF CRIM. L. AND CRIMINOLOGY 429, 440-41 (1998)

54 Ofshe & Leo, *supra* note 47, at 193 ("Confession creates a virtually irrebutable presumption of guilt among criminal justice functionaries, who, like most Americans, rarely question the veracity of self-incriminating statements.").

55 *See* Garrett, *supra* note 3 (manuscript at 34); Leo & Ofshe, *supra* note 53, at 440-41; Drizin & Leo, *supra* note 29, at 922.

56 Ofshe & Leo, *supra* note 47, at 193; Leo & Ofshe, *supra* note 53, at 440.

57 *See* discussion of the Central Park Jogger defendants *supra* pp. 8-10; discussion of Earl Washington supra pp. 11-12; discussion of Christopher Ochoa *supra* pp.12-13.

58 *See* discussion of the Central Park Jogger defendants *supra* pp. 8-10; discussion of Byron Halsey *supra* p. 10-11.

59 *See, e.g.*, discussion of Earl Washington *supra* pp. 11-12; Profile of Barry Laughman, http://www.innocenceproject.org/Content/197.php (last visited July 14, 2009).

a suspect had confessed or, in the alternative, had an alibi, caused a 17% change in their fingerprint identifications[60] Another experiment revealed confessions to have an even greater impact upon eyewitness identifications, where approximately half of the study's participants changed their identifications and incriminated a suspect once he confessed.[61]

At trial, the presumed evidentiary weight of confessions continues to have a decisive effect. Innocent defendants have few means to demonstrate the falsity of their confessions. Unless their interrogation was recorded, they are left to wage a credibility battle against the often conflicting accounts of the police. As several courts have noted, these credibility determinations are nearly always resolved in favor of the State. *See In re Jerrell C.J.*, 699 N.W.2d 110, 122 (Wis. 2005); *State v. Scales*, 518 N.W.2d 587, 591 (Minn.1994); *Stephan v. State*, 711 P.2d 1156, 1158 & n.6 (Alaska 1985). A recent analysis of DNA exonerees' efforts to suppress their confessions reveals that the courts readily admitted all of them, often despite significant indicia of involuntariness.[62] Once a false confessor's case gets to a jury, they have

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60 Itiel Dror & David Charlton, *Why Experts Make Errors*, 56 J. OF FORENSIC IDENTIFICATION 600, 610 (2006). Six latent fingerprint experts were presented with pairs of prints from a crime scene. The prints came from an actual crime for which the experts had previously made a match or exclusion judgment. The prints were accompanied either by no extraneous information, an instruction that the suspect had confessed (suggesting a match), or an instruction that the suspect was in custody at the time of the crime (suggesting an exclusion). The misinformation produced a change in approximately 17% of the experts' previously correct judgments.

61 Lisa E. Hasel & Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?*, 20 PSYCHOL. SCI. 122, 123-24 (2009).

62 *See* Garrett, *supra* note 3 (manuscript at 46-47).

an 80% chance of conviction.[63] Confession evidence is viewed as being so dispositive that it often outweighs even strong factual evidence of a suspect's innocence.[64]

An innocent defendant's effort to prove the falsity of their confession is made harder by the fact that the confessions often contain non-public facts about the crime that supposedly only the perpetrator would have known.[65] The vast majority of the confessions tendered by the DNA exonerees contained non-public details about the crimes.[66] Judges often cited this fact when deciding to admit contested confessions, and the prosecution often seized upon this during the exonerees' trials.[67] However, now that we know these confessions were false, it is clear that the exonerees must have been supplied these non-public facts by the police, either intentionally or, more likely, unintentionally.[68] This has been confirmed by officers who, after the confessions they elicited proved false, acknowledged that they must have accidentally fed the suspects details during their attempts to obtain confessions.[69]

An innocent defendant is no more likely to prove the falsity of his or her confession on

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63 Drizin & Leo, *supra* note 29, at 961.

64 Leo & Ofshe, *supra* note 53, at 478.

65 *See* Garrett, *supra* note 3 (manuscript at 12-16).

66 *Id*.

67 *Id*. (manuscript at 24-25, 53).

68 *Id.* (manuscript at 21).

69 *Id.* (manuscript at 21, 24). Ironically, the inclusion of incorrect information in exonerees' confessions has also proven that information is conveyed to suspects during interrogations. For example, one of the DNA exonerees, Earl Washington stated in his confession that he had removed the victim's "halter top"; the victim had not been wearing a halter top and the discrepancy could not be explained. It was not until years later that it was discovered that an initial police report had erroneously described the victim as wearing a halter top, suggesting that officers conveyed that information to Washington during their interrogation. *Id.* (manuscript at 30).

appeal.[70] Appellate courts often defer to the lower court's findings that the confessions were voluntary and reliable.[71] In Rhode Island, the trial justice's findings of historical fact may be appealed to this Court, but they are entitled to deference and will not be overturned unless clearly erroneous. *See State v. Monteiro*, 924 A.2d 784, 790-91 (R.I. 2007) (upholding trial justice's findings of fact, made based on conflicting testimony as to whether defendant was promised a light sentence in exchange for his confession). That standard, combined with the difficulty of proving the circumstances surrounding an unrecorded confession,[72] imposes a considerable barrier to obtaining post-conviction relief.[73]

II The Electronic Recording of Custodial Interrogations Minimizes the Risk of Convicting Innocent Defendants While Imposing Little Cost on the State

Police interrogations remain the most mysterious and opaque part of the criminal justice system; the confessions that emerge from them represent a very small and carefully selected portion of all of the information exchanged between the police and suspects. When the reliability of confessions is called into question, courts are left to discern the truth with little information aside from the often contradictory accounts of the parties to the interrogation. *See Stephan v. State*, 711 P.2d 1156, 1161 (Alaska 1985) (citing *Miranda v. Arizona*, 384 U.S. 436, 449 (1966). Human memory is frail, and no party to an interrogation, be they a police officer or a defendant, can be expected to accurately and completely recount all of the details of that interrogation. Recording obviates the need for them to do so. All parties—defendants, judges,

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70 *Id.* (manuscript at 53).

71 *Id.* (manuscript at 53-54).

72 *See* Leo & Ofshe, *supra* note 53, at 455 (noting that the high standard for proving a confession is false is "established innocence").

73 Garrett, *supra* note 3 (manuscript at 54).

juries, prosecutors, and the police—benefit from having an unassailable record of interrogations. Most importantly, for innocent defendants, recording dramatically increases the likelihood that evidence suggesting the falsity of their confessions will be discovered. For the police and the courts, recordings provide a clear record with which frivolous claims attacking the validity of confessions can be easily dismissed.

A Benefits to Defendants

Without a recording, courts are forced to rely upon recollections of parties that often differ as a result of forgetfulness, bias, and perception. *See Stephan*, 711 P.2d at 1161 ("Although there are undoubtedly cases where the testimony on one side or the other is intentionally false, dishonesty is not our main concern. Human memory is often faulty—people forget specific facts, or reconstruct and interpret past events differently."). Differences in the accounts of what occurred during interrogations are inevitable. Given that the conflicting accounts will almost always be resolved in favor of the police, recording represents the only real avenue for innocent defendants to present to the court evidence from the interrogations substantiating their claims that their confessions were false. Only a full recording can provide a true picture of such factors as: the duration of the interrogation, the state of mind of the defendant, the defendant's knowledge of key facts, and any promises or threats made by the police.

Perhaps most crucially, recordings demonstrate whether non-public facts incorporated into the confession were volunteered without prompting by the defendant or were inadvertently provided by police.[74] As noted above, this issue is particularly important, as the incorporation of

[74] For a discussion of contamination of confessions, see *supra* notes 65-69 and accompanying text.

such facts tends to increase the perceived reliability of the confessions. In twenty-two of the exonerees' cases, police officers denied under oath that they had disclosed to the defendants any of the non-public facts appearing in the confessions. We now know that these facts must have been conveyed by the police; indeed, after the exonerations, some officers acknowledged that likelihood.[75] There is no reason to believe that these officers lied to the court; rather, the mistakes were more likely due to a simple failure to correctly remember who said what during the intense interrogation process.[76] Nonetheless, the absence of a nefarious motive does not diminish the grave nature of such errors. In the case of the exonerees, the erroneous assertions made by the police significantly contributed to their convictions. If the courts had been able to review a recording of the interrogations, instead of having to rely upon the recollections of the police, these convictions may have not occurred. Writing about his own experience inadvertently feeding facts to a suspect and provoking a false confession, Jim Trainum, a twenty-five year police veteran, has advocated persuasively for mandatory recording, noting that it was only the ability to go back to a videotape of the interrogation that prevented him from "making a horrible mistake" and convicting an innocent person.[77]

B Benefits to Judges and Juries

Of course, the courts also benefit from the availability of a complete, objective, and accurate basis to evaluate the reliability of confessions. In the case of innocent defendants, a

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[75] *See supra* note 23 and accompanying text.

[76] *See* Garrett, *supra* note 3 (manuscript at 21).

[77] *See* Jim Trainum, *I Took A False Confession -- So Don't Tell Me It Doesn't Happen!* (Sept. 20, 2007), at http://www.camajorityreport.com/index.php?module=articles&func=display&ptid=9&aid=2306. *See also* Jim Trainum, *Get It On Tape: A Suspect's False Confession to a Murder Opened an Officer's Eyes,* L.A. TIMES, Oct. 24, 2008, at A23.

recording allows the court to ensure that such individuals are not wrongfully convicted, without having to rely upon the word of a self-interested defendant. Conversely, as has been noted by the courts that have adopted recording requirements, a recording will also allow the courts to efficiently dismiss frivolous claims attacking the validity of confessions. *See Stephan v. State*, 711 P.2d 1156, 1160-62 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994); *In re Jerrell C.J.*, 699 N.W.2d 110, 122 (Wis. 2005) ("[A]n accurate record will reduce the number of disputes over *Miranda* and voluntariness issues . . . Currently, courts spend an inordinate amount of time and resources wrestling with such slippery matters."). Indeed, the mere existence of a recording may reduce the burden placed on the court by baseless suppression motions. While guilty defendants currently have every motive to allege coercion, *Miranda* violations, and other inappropriate police conduct, they would be less likely to bring non-meritorious motions if a complete recording of the interrogation exists, since the accuracy of such recordings cannot be credibly challenged. *Id.*

C Benefits to the Police

Recordings also reduce the amount of time police officers must spend in court defending their interrogation practices and thereby reduce costs to police departments. As the courts have noted, when police are required to testify, recordings give officers the benefit of a complete record to confirm their accounts. *See In re Jerrell C.J.*, 699 N.W.2d at 122 ("[R]ecording will protect the individual interest of police officers wrongfully accused of improper tactics. Suspects will be unable to contradict an objective record of the interrogation."); *Stephan*, 711 P.2d at 1161 ("A recording, in many cases, will aid law enforcement efforts, by confirming the content and voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated.").

D Complete Absence of Countervailing Burdens

In 2004, Thomas P. Sullivan, a former United States Attorney for the Northern District of Illinois, presented the results of a multi-year study of police experiences with recording interrogations.[78] After interviewing hundreds of police officers, Sullivan found that "[v]irtually every officer with whom [he] spoke, having given custodial recordings a try, was enthusiastically in favor of the practice."[79]

Sullivan's study found that the primary concerns that had been expressed prior to adoption of recording requirements—cost of implementation and the potential for a "chilling effect" on suspects—have generally proven unfounded.[80] The cost of recording equipment and training is very slight, and is offset by the reduction in litigation and settlement costs. *See Stephan*, 711 P.2d at 1162. Furthermore, recording has not been found to affect police officers' ability to obtain cooperation, admissions, and confessions.

Sullivan notes that the additional fear espoused by some officers prior to their adoption of recording requirements—that judges and juries might be offended if they saw interrogation techniques—should not be given weight by this Court.[81] Although certain interrogation tactics, such as shouting, foul language, and deception, might be considered offensive by some judges and juries, they should not prevent the use of recording. As Sullivan states, "We expect police to give complete and truthful testimony, including candid descriptions of what occurred during

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78 *See* Thomas P. Sullivan, Northwestern University Law School, Center on Wrongful Convictions, *Police Experiences With Recording Custodial Interrogations* (2004), *available at* http://www.jenner.com/policestudy.

79 *Id*. at 6.

80 *Id*. at 19-24.

81 *Id*. at 22.

custodial interrogations."[82] A video recording will only reveal for certain what the court should already know.

Expressed concerns over extraordinary circumstances that may prevent recording have also proved unfounded.[83] Where suspects decline to talk to the police if recorded, the police can proceed with an unrecorded interrogation, so long as the suspect's refusal itself was recorded. Similar exception can be made where recording is impracticable, for technological or other reasons.

III The Court Should Require that Custodial Interrogations be Recorded in Full

In the light of the problems posed by false confessions and the solution presented by mandatory recording, sixteen states and the District of Columbia have implemented either judicial or legislative requirements regarding the recording of custodial interrogations.[84] In addition, more than 450 police and sheriff departments across the country have adopted their own recording policies and procedures.[85] In fact, the Rhode Island State Police recently

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82 *Id.* at 22-23.

83 *Id*. at 24-25.

84 Fifteen of these states (Alaska, Illinois, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, and Wisconsin) and the District of Columbia have either mandated recording, limited admissibility of unrecorded interrogations or provided for cautionary jury instructions. *See* State Laws Requiring Recorded Interrogations, http://www.innocenceproject.org/news/ LawView3.php (last visited July 14, 2009). Iowa has taken a less firm approach. *State v. Hajtic,* 724 N.W.2d 449, 456 (Iowa 2006) (encouraging police to record interrogations); Tom Miller, *From the Attorney General: Cautions Regarding Custodial Issues,* 39 IOWA POLICE JOURNAL 15 (Spring 2007) (state Attorney General announcing that his office "believes that the *Hatjic* decision should be interpreted as essentially requiring [recording].").

85 JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW 2 (Oct. 1, 2007); *see* List of Departments with Recording Requirements as of 06/19/2009, maintained by Thomas P. Sullivan (attached as Appendix B to this brief).

established policies that mandate the recording of custodial interrogations in all non-narcotics-related capital cases.[86]

This Court has both the imperative and the authority to impose a similar requirement in the case at hand. As was true in the Appellant's case, the police often choose only to record the culminating moment of an interrogation – the confession. The confession is videotaped for the precise reason that an electronic recording holds greater evidentiary weight with judges and juries than a mere testimonial account. No record is kept of what occurred during the hours of interrogation leading up to the confession. As a result of this practice, the State is guaranteed a higher quality of evidence. While the State can prove its accusations of guilt by relying upon a persuasive recording of a defendant's self-incriminating statements, the defendant is deprived of any evidence from the interrogation that could undermine the reliability of those statements. The Network urges the Court to find that this failure to preserve potentially exculpatory evidence amounts to a denial of due process or, in the alternative, that it necessitates redress through the Court's inherent supervisory powers to ensure the fair administration of justice in judicial proceedings.

A Due Process

The first court to impose a recording requirement was the Alaska Supreme Court in *Stephan v. State*, 711 P.2d 1156, 1159-60 (Alaska 1985). There, the court held that recording custodial interrogations in their entirety is a requirement of due process, because it is "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." *Id*. The court reasoned that "an electronic recording . . . protects the defendant's constitutional rights, by

[86] *See* R.I. State Police General Order 77A(b)4.

providing an objective means for him to corroborate his testimony concerning the circumstances of the confession." *Id.* at 1161. The Alaska court characterized the requirement as a simple issue of evidence preservation, noting that recording interrogations in their entirety is the only means to keep an accurate and complete record by which the nature of a confession may be judged, and that there is no legitimate rationale supporting the failure to record interrogations. *Id* at 1160.

The reasoning in *Stephan* is persuasive and should be adopted by this Court. As discussed above, the evidentiary disadvantage created by the failure to preserve a record of an interrogation is nearly insurmountable. It was this inability to present potentially exculpatory evidence that led to the conviction of each of the DNA exonerees. The lesson of these cases is simple: the failure to record the custodial interrogations that precede confessions prevents innocent individuals from adequately defending themselves at trial and represents a deprivation of due process. [87]

[87] The Supreme Court of the United States has not decided whether the failure to record custodial interrogations amounts to a denial of due process. However, even if a failure to record does not amount to a violation of due process under the United States Constitution, it may still amount to a due process violation under the Rhode Island Constitution. The Rhode Island Constitution has long been interpreted as providing greater protections than the United States Constitution *See e.g.*, *State v. Vinagro*, 433 A.2d 945, 946, 949 (R.I. 1981) (noting that the contours of the right to a jury trial are not coterminous with the right under the federal constitution); *State v. Von Bulow*, 475 A.2d 995, 1019 (R.I. 1984) (finding search and seizure protection greater under Rhode Island State Constitution than federal Constitution); *Pimental v. Dep't of Transp.*, 561 A.2d 1348, 1353 (R.I. 1989) (finding drunk driving checkpoints a violation of state constitution, even though 4th Amendment would likely not block their use). Furthermore, Rhode Island's Due Process Clause itself was specifically intended by its drafters to provide greater protections than those available under the U.S. Constitution. The drafters of the 1986 Due Process Clause explicitly stated that their "goal [was to provide] better protection for individual rights and liberties." R.I. Constitutional Convention, Report of the Citizens Rights Committee on Individual Rights, 86-00032, 86-00171, 86-00206, 86-00238, at 2, 4 (Jan. 1986).

B The Court's Supervisory Powers

Even if this Court does not find that the failure to record custodial interrogations amounts to a denial of due process under the Rhode Island State Constitution, the Court has "broad supervisory authority" pursuant to which it may "fashion remedies that will serve the ends of justice." *New Harbor Vill., LLC v. Town of New Shoreham Zoning Bd. of Rev.*, 894 A.2d 901, 907 (R.I. 2006); *Capital Properties v. R.I.*, 749 A.2d 1069, 1069 (R.I. 1999); G.L. 1956 (1997 Reenactment) §8-1-2. As the State's unjustifiable failure to record custodial interrogations unnecessarily deprives defendants and the courts of potentially crucial evidence, it is incumbent upon the Court to use these powers to remedy the problem.

This approach was taken by the Supreme Courts of Minnesota and New Hampshire. These courts found that while the failure to record custodial interrogations did not constitute a violation of due process, it amounted to a distinct harm that needed to be remedied by the courts nonetheless. *Scales*, 518 N.W.2d at 592; *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2002). Those courts held that they had a responsibility to "ensure the fair and equitable presentation of evidence at trial," and they exercised their supervisory powers to ensure that custodial interrogations were recorded in their entirety. *Id.*; *Scales*, 518 N.W.2d at 592.

In the past, this Court has used its powers to remedy similar harms. In *State v. De Lomba*, for example, the Court was confronted with the "constitutionally obnoxious dilemma" faced by parole violators when their parole violation hearings were held prior to criminal trials on the underlying charges. *State v. De Lomba*, 370 A.2d 1273, 1274 (R.I. 1977). In such a system, alleged parole violators were confronted with the choice of either not testifying at their violation hearings or testifying and thereby facing the risk that their testimony would be used against them at their criminal trials. *Id.* The Court exercised its supervisory powers to fashion an appropriate remedy, requiring the State to either end the practice of holding violation hearings

prior to criminal trials or grant defendants immunity for their testimony at violation hearings. *Id.* at 1276. The Court agreed with De Lomba's argument that "the unfairness of the current practice, even if not so severe as to rise to the level of a constitutional deprivation, is nevertheless so real and substantial that it calls for action by [the Court] on public policy grounds and in furtherance of [its] responsibility to assure a sound and enlightened administration of justice." *Id.* at 1275.[88] The reasoning employed in *De Lomba* applies with even greater force here.

C The Court Should Craft an Exclusionary Rule

The best way to ensure that the destructive influence of false confessions is minimized is to craft an exclusionary rule that prevents evidence of a confession from being introduced unless the preceding custodial interrogation was recorded in its entirety.[89] As discussed above, such a rule provides innocent defendants with a vital piece of potentially exculpatory evidence, while

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[88] The *De Lomba* court chose to impose these requirements after the legislature refused to act and remedy the harm. *De Lomba*, 370 A.2d at 1275. This Court bears a similar duty here. The Rhode Island legislature is well aware of the dangers and hardships occasioned by a failure to record interrogations. Despite the fact that the General Assembly has considered a number of bills that would have mandated the recording of interrogations, it has failed to codify any such requirement. It is thus the responsibility of this Court to ensure that justice is fairly administered by requiring the exclusion of evidence gained from interrogations where the State, without an excuse, failed to record the interrogations in their entirety.

[89] Exclusionary rules have been established by the highest courts in states such as Alaska, Minnesota, and New Hampshire. Other courts have opted for more limited remedies. The Massachusetts Supreme Court, for example, has held that that where custodial interrogations are not recorded, defendants are entitled, on request, to a cautionary jury instruction stating that unrecorded statements should be weighed with "great caution and care." *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004). For its part, after establishing a committee to examine the issue, *see State v. Cook*, 847 A.2d 530, 547 (N.J. 2004), the New Jersey Supreme Court promulgated a rule which requires a cautionary jury instruction and allows courts to consider the lack of a recording in their admissibility determinations. N.J. R. CT. 3:17.

imposing no significant burden upon law enforcement.

Crafting this type of remedy is an evidentiary matter squarely within the purview of this Court. An exclusionary rule does not make it illegal for the police to interrogate without recording. The rule simply provides that, with appropriate exceptions, when the State seeks to introduce evidence of the results of an interrogation, it must be able to provide a complete and accurate record of that interrogation. Given the distinct threat to the fair administration of justice posed by the State's current practice, such a remedy is both necessary and proper.

IV Conclusion

For the reasons stated herein, the Court should require that custodial interrogations be recorded in their entirety.

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