

**SUPREME COURT
OF THE
STATE OF CONNECTICUT**

S.C. 17773

STATE OF CONNECTICUT

V.

JULIAN J. LOCKHART

**BRIEF OF AMICUS CURIAE
(WITH APPENDIX ATTACHED)**

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STATEMENT OF THE ISSUE

SHOULD THIS COURT FOLLOW THE LEAD OF OTHER STATES AND REQUIRE RECORDATION OF STATEMENTS OR, IN THE ALTERNATIVE, REQUIRE CAUTIONARY JURY INSTRUCTIONS WHERE STATEMENTS ARE NOT RECORDED?

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SECTION 67-7 STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Innocence Network is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The thirty-eight members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, and Australia.¹ The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

¹ The member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in the Defense 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 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 Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Ohio Innocence Project, Pace Post Conviction Project (New York), Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University-Justice Brandeis Innocence Project (Massachusetts), Texas Center for Actual Innocence, Texas Innocence Network, Wesleyan Innocence

The work of the Network advocates have helped to expose the problem of false confessions as a major source of wrongful convictions. False confession evidence has played a role in many of the cases in which Network advocates have been involved. The Network advocates' extensive experience in false confession cases has led it to call for a variety of reforms in criminal cases, including mandatory electronic recording of interrogations from the *Miranda* warnings to the end.

Accordingly, the Innocence Network will write to encourage the Court to follow the lead of the highest courts in Alaska, Minnesota and New Jersey by requiring police officers in Connecticut to electronically record custodial interrogations of felony suspects. In the alternative, the Innocence Network will encourage this Court to follow the lead of the highest courts in Massachusetts and New Jersey by exercising its supervisory power to encourage police officers in Connecticut to electronically record custodial interrogations of suspects, and provide for cautionary jury instructions regarding unrecorded custodial confessions.

Project (Texas), and Wisconsin Innocence Project.

THIS COURT SHOULD FOLLOW THE LEAD OF OTHER STATES AND REQUIRE RECORDATION OF STATEMENTS OR, IN THE ALTERNATIVE, REQUIRE CAUTIONARY JURY INSTRUCTIONS WHERE STATEMENTS ARE NOT RECORDED.

A. Introduction.

This case presents the Court with an opportunity to institute a reform that will greatly enhance the fairness and accuracy of Connecticut's criminal justice system. The Innocence Network supports Mr. Lockhart's lawyers in urging this Court to require law enforcement officers in Connecticut to make electronic recordings of questioning of suspects that take place in a police facility, from the *Miranda* warnings to the end of the interviews, unless there is a legitimate excuse for not recording. In the alternative, we urge the Court to require cautionary jury instructions about suspects' non-recorded custodial statements.

A ruling to this effect will help assure that the guilty are convicted and the innocent protected, without placing an undue burden on law enforcement personnel. It will benefit police, prosecutors and courts, and protect innocent suspects. It will promote the accuracy of the state's criminal justice system, and at the same time result in significant savings of time and expense, for example: by dramatically reducing pretrial motions to suppress and increasing pleas of guilty, by protecting honorable law enforcement officers from false accusations of improper conduct during closed-door interrogations of suspects, and from accusations that they are misstating or concealing what occurred; by helping to avoid abuse, prosecution and potential wrongful convictions of innocent suspects; by exposing and thus preventing conduct by errant officers who engage in improper tactics in jailhouse interviews, or who deliberately misstate what occurred; by presenting to trial judges and juries precisely what was said and done in closed questioning sessions, rather than having the facts filtered through testimonial recollections of witnesses, which inevitably involves forgetfulness, inaccuracies, and biases; by taking advantage of significant savings of judicial time and effort at both the trial and appellate levels in dealing with disputes about what occurred during unrecorded interviews; by reducing the risk of civil claims by those who have made confessions later shown to be false; and by enhancing public confidence in the integrity of the state's law enforcement community and its criminal justice system.

In the alternative, we urge the Court to reverse and remand this case to the trial court for a new trial, with directions that the jury be given cautionary instructions about the inherent dangers in relying on testimonial summaries as to what occurred during the unrecorded interview of Mr. Lockhart.

B. A brief explanation of the author's research.

During the past five years, my associates and I have sought to identify and speak with representatives of police and sheriff departments in the United States in which recordings are made of custodial interviews. I undertook this research on my own, independent of any organization or firm, with assistance of associate lawyers and paralegals from my law firm.¹ We have now spoken with representatives of over 525 departments, in every state, whose departments record a majority of their custodial interviews, *Miranda* to the end, on a voluntary basis. We have also spoken with officers who record as a result of court rulings (currently Alaska, Massachusetts, Minnesota and New Jersey) and statute (currently Illinois, Maine, New Mexico, North Carolina, Wisconsin and the District of Columbia).

The responses we have received are amazingly consistent: detectives and supervisors from small, medium and large police and sheriff's departments describe electronic recordings (audio, video or both) of custodial interviews as a powerful law enforcement tool. We have yet to speak with an officer from a department that records who said he or she would prefer to revert to non-recorded interviews.²

¹ My interest in this subject began when I served as co-chair of the Illinois Governor's Commission on Capital Punishment (2000-02). Authors of articles on this topic argued that recordings of station house interrogations were necessary to prevent officers from abusing prisoners and/or committing perjury about what occurred. My belief was and is that the vast majority of law enforcement officials do not abuse prisoners or lie on the witness stand. My associates and I undertook to speak directly with detectives and supervisors who record complete custodial interviews. We began with a list of ten departments, called them, asked them about their experiences, and for leads to others that record custodial interviews. Our current list appears at Appendix A1- A6.

² Verbatim quotations are reproduced in *Center on Wrongful Convictions Special Report: Police Experiences with Recording Custodial Interrogations*, 6-17 (2004) available at <http://www.jenner.com/policestudy>; *The Police Experience: Recording Custodial Interrogations*, 28 *Champion* 24, 25-27 (2004); *Recording custodial interrogations: The*

We have heard negative responses, but they inevitably come from departments that have not recorded custodial interviews, consisting of hypothetical predictions of disastrous consequences.³ For example, in the February 14, 2003 report of a survey of police departments conducted by the Connecticut General Assembly's Office of Legislative Research, the only objection noted (other than cost⁴) was (page 1) "that suspects would be reluctant to talk with a video camera rolling since they knew everything they said would be recorded and heard in court." Departments that record on a regular basis tell us this is not a problem. Most states, including Connecticut,⁵ permit surreptitious police recordings of custodial interviews. Nevertheless, many departments in those states disclose their intention to record, or place the equipment in plain view. We have consistently been told that most suspects who realize the interview is to be recorded make no objection, and pay no attention to the equipment; in practice, the "clam up" concern has not been a problem. But if and when a suspect objects to a recording, the detective records the refusal, stops the machine, and reverts to making handwritten notes and typing a summary report.

We have also received expressions of support from prosecutors and defense lawyers, as well as trial and appellate court judges. Apart from guilty suspects who are recorded voluntarily waiving their rights and making confessions or damaging admissions, electronic recording of custodial interviews has proven to be a tremendous benefit to all participants and all aspects of criminal justice systems.

A cautionary note: In instances in which a recording mandate has been proposed or imposed, whether by statute or court order, initial resistance is commonly encountered from

Police Experience, 52 *The Federal Lawyer* 20, 20-22 (2005); *The Case for Recording Police Interrogations*, 34 *A.B.A. Litigation*, 30, 34-35 (2008).

³ We have analyzed the objections commonly raised to recording custodial interviews in a number of articles: *The Case for Recording Police Interrogations*, *supra* at 35-36; *Electronic Recording of Custodial Interrogations*, 19 *The Chief of Police* 17, 19 (2005); *Police Experiences with Recording Custodial Interrogations*, 88 *Judicature* 132, 135-36 (2004). One of those concerns, relating to cost and available finances, particularly for preparing transcripts, has been mentioned by officers with recording experience.

⁴ A number of officers from recording departments have said the cost of transcribing taped recordings has presented a problem.

⁵ CT Gen. Stat. Sec. 53a-187(a)(2) permits recording ("mechanical overhearing") of a conversation with the consent of any one of the parties to the conversation.

law enforcement personnel, which may well be the case here in Connecticut. This initial opposition invariably turns to enthusiastic support after they discover the resulting benefits.

C. Three means to the end.

It makes no practical difference whether this Court rules that custodial recordings from the *Miranda* warnings to the end, are required by the Connecticut Constitution, or are imposed through this Court's exercise of its supervisory power. The result will be the same --a great leap forward for the fairness and accuracy of the Connecticut criminal justice system, and substantial savings to those involved, including this Court. We also suggest an alternate means -- that the Court reverse and remand the case with instructions that the trial judge give cautionary instructions to the jury about the inherent dangers in relying on un-recorded testimony concerning what occurred during the custodial interview of Mr. Lockhart, compared to an electronic recording which the police could have made but did not.

(1) Supervisory powers.

Through exercise of this Court's supervisory authority over the Connecticut criminal justice system, the Court may direct that electronic recordings be made of custodial interviews that take place in detention facilities. Examples of the Court's invocation of this authority in similar contexts are contained at pages 58 to 60 of Mr. Lockhart's brief. This case presents an issue that goes to the heart of the Connecticut criminal process, hence to the exercise of this Court's supervisory powers.

We ask the Court to consider the reasoning of other state supreme courts that have invoked supervisory powers to require recordings of custodial interviews:

- In *State v. Scales*, 518 N.W.2d 587 ((Minn. 1994), the Supreme Court of Minnesota held, "in the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention." The Court explained, "[w]e are persuaded ... that the recording of custodial interrogations 'is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel,

his right against self incrimination and, ultimately, his right to a fair trial' [quoting from *Stephan v. State*, 711 P2d 1156, 1159–60 (Ala. 1985)]. We are disturbed by the fact that law enforcement officials have ignored our warnings [in two prior opinions]." Id. at 592.

• In 2004, in *State v. Cook*, 847 A.2d 530 (N.J. 2004), the Supreme Court of New Jersey adopted a different approach to the use of its supervisory powers. After a careful review of cases, statutes and law review articles; id at 540-547; the Court said:

We believe that the criminal justice system will be well served if our supervisory authority is brought to bear on this issue and we will exercise that authority mindful of the various interests involved. Accordingly, we will establish a committee to study and make recommendations on the use of electronic recordation of custodial interrogations.

Id. at 547.

In October 2005, pursuant to the Committee's recommendations,⁶ the New Jersey Supreme Court adopted new Rule 3:17, which provides in Part (a):

Unless one of the exceptions set forth in paragraph (b) are present, all custodial interrogations conducted in a place of detention must be electronically recorded when the person being interrogated is charged with [enumerated felonies].

Paragraphs (b) and (c) contain exceptions to the recording requirement. Paragraph (d) provides that the trial court may consider failure to record in determining admissibility of an unrecorded statement. The Court left it to the trial judge to decide whether unrecorded statements may be admitted into evidence.

• Three years ago, in *In re Jerrell*, 699 N.W.2d 110 (Wis.2005), the Supreme Court of Wisconsin, after reviewing relevant holdings and literature that emerged on this subject after the Minnesota Supreme Court's ruling in *Scales*, *supra* at 119-123, and the many benefits to all concerned when custodial interviews are recorded, said, "...we also exercise our supervisory power to insure the fair administration of justice. All custodial interrogation of juveniles in future cases shall be electronically recorded where feasible, and without exception when questioning occurs at a place of detention" (Id. at 123). The Court

⁶ The committee's report dated 4/15/05 (appendices omitted), is set forth at A8--A63. On 5/30/07, after Rule 3:17 was adopted, the committee made a report on implementation.

explained why it decided not to await legislation : "we agree with the court of appeals that 'it is time for Wisconsin to tackle the false confession issue' and take appropriate action so that the youth of our state are protected from confessing to crimes they did not commit." (Id.) Soon after this ruling, the Wisconsin legislature enacted a mandatory recording statute applicable to suspects of all ages. Wis. Stat. §§ 968.073; 972.115 (2005).⁷

(2) The Due Process Clause.

Through application of the Connecticut state Constitution's Due Process Clause, the Court may direct that electronic recordings be made of custodial interviews. This subject, including this Court's contrary ruling in *State v. James*, 237 Conn. 390, 432-33 (1996), are discussed at length in Mr. Lockhart's brief, Part II D, pages 26 to 58, and needs no further explication here. Among the many state reviewing courts which have been asked to adopt this ruling, only the Supreme Court of Alaska, more than 20 years ago, has held that its state constitutional Due Process Clause mandates electronic recording of custodial interviews. The Chief of Police of the Anchorage Police Department, and officers from various Alaska departments, have spoken to us with verve about the benefits they have received from recorded interviews.

(3) A cautionary jury instruction.

In the alternative, the Court should direct the trial judge to give cautionary instructions to the jury about the failure of the police to make a complete electronic recording of Mr. Lockhart's custodial interrogation. Paragraph (e) of New Jersey Supreme Court Rule 3:17, referenced above, contains comprehensive jury instructions, to be given as to any unrecorded statements admitted into evidence. They are an accurate description of the differences between testimony concerning what occurred, compared to electronic recordings of the events, and the grave risks involved in relying on testimony of unrecorded

⁷ In response to the Supreme Court of Iowa's statement in *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006), that the Court "encouraged" the practice of recording custodial interviews, the state Attorney General wrote in the Iowa State Police Association's publication that his office "believes that the *Hajtic* decision should be interpreted as essentially requiring this practice." The author has been told by a member of the Attorney General's staff that statewide recording is now underway in Iowa.

interviews, often the single most important evidence in the case. Rule 3:17(e) provides:

Where there is a failure to electronically record an interrogation, you have not been provided with a complete picture of all of the facts surrounding the defendant's statement and the precise details of that statement. By way of example, you cannot hear the tone or inflection of the defendant's or interrogator's voices, or hear first hand the interrogation, both questions and answers, in its entirety. Instead you have been presented with a summary based upon the recollections of law enforcement personnel.

Furthermore, in considering whether or not an oral statement was actually made by the defendant, and if made, whether it is credible, you should receive, weigh, and consider this evidence with caution as well, based on the generally recognized risk of misunderstanding by the hearer, or the ability of the hearer to recall accurately the words used by the defendant. The specific words used and ability to remember them are important to the correct understanding of any oral communication because the presence, or absence, of a single word may substantially change the true meaning of even the shortest sentence.

The author of this brief has spoken recently with the Deputy Attorney General of New Jersey, who said that initial funding problems have been resolved, and that he believes all state's law enforcement agencies are making electronic recordings of custodial interviews during investigations of suspects involving crimes specified in Rule 3:17.

There is a direct analogy to this Court's ruling in *State v. Ledbetter*, 275 Conn. 534, 575-580 (2005), in which an "interest in mitigating the risks of misidentification in courts of this state," led the Court, pursuant to its supervisory authority, to order trial courts to give a special instruction to juries if the administrator of an eyewitness identification procedure "failed to instruct the witness that the perpetrator may or may not be present in the procedure." The reasons that impelled the Court to act are equally compelling here. The Supreme Court of New Jersey pointed out in the instructions mandated by Rule 3:17 that failure to make electronic recordings leaves the jury with a record that is far less reliable record of what occurred compared to testimonial accounts of custodial interviews. The police have the option and ability to record custodial interviews; the suspect has no control over the process (if the suspect declines to be interviewed while being recorded, the police may proceed without recording). Just as in *Ledbetter*, relating to eyewitness identifications,

jurors should be specifically and forcefully warned about the inferiority of evidence provided by testimonial descriptions rather than precise transcripts that the police were capable of preparing. Another case on point is *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004), in which the Supreme Judicial Court of Massachusetts was presented with an unrecorded confession obtained under questionable circumstances, including trickery, minimization, suggestion of the defendant's need for counseling, and false statements about available evidence of the defendant's guilt. *Id.* at 519-528. The Court held that the prosecution had not met its burden to prove beyond a reasonable doubt that Mr. DiGiambattista's confession was voluntary, and therefore it was reversible error to deny his motion to suppress its introduction into evidence. *Id.* at 519-528. Having disposed of the merits of the case, the court went on to discuss the question whether electronic recordings of custodial interviews were required by the Massachusetts Constitution. The court said:

The issue, however, is not what we 'require' of law enforcement, but how and on what conditions evidence will be admitted in our courts. We retain as part of our superintendence power the authority to regulate the presentation of evidence in court proceedings. The question before us is whether and how we should exercise that power with respect to the introduction of evidence concerning interrogations.

* * *

We are not, however, satisfied with the status quo, which amounts only to repeated pronouncements from the court about the potential benefits of recording interrogations. Just as we have advised judges of the significance they may attach to the lack of a recording when deciding motions to suppress, we believe it is appropriate to provide juries with that same advice.

Id. at 531-32.

The court explained why an unrecorded statement of a custodial interview presents the fact finder with "a woefully incomplete and inherently unreliable version of what everyone recognizes as critical evidence in the case. ... The failure better to preserve this critical evidence in the first place, a failure that is often attributable to the strategic decision of the interrogating officer, merits the fact finder's express consideration. The court then ordered that when the prosecution offers into evidence the defendant's unrecorded

custodial confession or statement taken in a place of detention, the jury is to be instructed:

the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.

Id. at 533-34.

The court reversed the conviction and remanded the case to the trial court.

Following this ruling, the Massachusetts Attorney General and the District Attorneys Association wrote in the September 2006 *Justice Initiative Report*: "Law enforcement officers shall, whenever it is practical, and with the suspect's knowledge, electronically record all custodial interrogations or suspects and interrogations of suspects conducted in places of detention." The author has been informed by a representative of the MA District Attorney's Association that making electronic recordings of custodial interviews is an accepted statewide police practice.

(4) Whether this issue should be dealt with by the legislature rather than this Court.

In the past, this Court and other state supreme courts have expressed a preference for custodial recordings, but have declined to act on the basis that the legislature and not the courts should decide whether or not a statewide requirement should be mandated.⁸ But as the previous discussion reveals, the highest courts of Alaska, Massachusetts, New Jersey, and Wisconsin have written thoughtful opinions explaining why their responsibility for their state's court systems, and the reliability of evidence introduced, caused them to act without waiting for legislative action, just as this Court did in the *Ledbetter* case. For example, in the *Cook* Case, the Supreme Court of New Jersey said:

The judiciary bears the 'responsibility to guarantee the proper administration of justice... and, particularly, the administration of criminal justice.' ... Our courts thus

⁸ See cases cited in Mr. Lockhart's brief, notes 13 and 14, pp.37-38.

have the 'independent obligation...to take all appropriate measures to ensure the fair and proper administration of a criminal trial.'...Where such appropriate measures are available, they should be employed to the fullest extent feasible to enhance the fairness of proceedings. *State v. Cook, supra*, 847 A.2d at 546.

There is a growing recognition among state high courts of the importance of securing unbiased, indisputable evidence about what occurred during custodial interviews, which is easily obtainable when they are conducted in controlled settings in police facilities. As the Supreme Judicial Court of Massachusetts put it, the issue is "how and on what conditions evidence will be admitted in our courts." *DiGiambattista, supra*, 813 N.E.2d at 531.) The Wisconsin Supreme Court came to the same conclusion in *Jerrell, supra*, rejecting the State's argument that "the debate over electronic recording should occur in legislative chambers.": The Court held: "Plainly this court has authority to adopt rules governing the admissibility of evidence...this court can regulate the flow of evidence in state courts, including the nature of the evidence developed and presented by law enforcement." *Jerrell, supra*, 699 N.W.2d at 121.

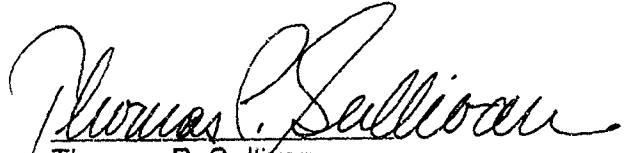
It is the responsibility of this Court, and within its powers, to insure that the best evidence obtainable is presented about these often dispositive events in Connecticut trial court criminal trials. Electronic recordings are easily within the ability of state law enforcement. We submit there is no principled reason for this Court to postpone action.⁹

(5) Conclusion.

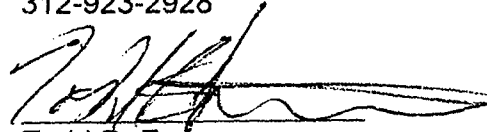
Although those representing the State in this case may not realize it, this Court will be doing them a favor, and dramatically advance the cause of achieving a better criminal justice system for Connecticut, by requiring complete electronic recordings of custodial interviews of suspects in major felony investigations.

⁹ To avoid future litigation, the Court may consider specifying (1) which criminal investigations require recordings, (2) the locations in which recordings are required, (3) what circumstances will excuse recordings, and (4) the consequences flowing from unexcused failures to record. Precedents for these matters may be found in the opinions cited above, in the recording statutes which have been adopted, cited in Mr. Lockhart's brief, page 34, note 11, as well as the author's model code appended to Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins, supra*, 95 Journal of Crim. Law and Proc. 1127, 1141-44 (2005); Code reproduced at A64 - A67.

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