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**Report on the Electronic Recording of Police Interrogations
Submitted Jointly By
The American Bar Association Criminal Justice Section
and
The New York County Lawyers' Association**

INTRODUCTION

False confessions by suspects appear to be among the major causes of wrongful convictions within the criminal justice system. To reduce the number of convictions of innocent persons and ensure the integrity of the criminal justice process it is imperative to reduce the number of false confessions. Research indicates that about one-fourth of cases of conviction of innocent defendants have included, among other things, false confessions.¹ Such false confessions include a suspect's incorrect statements of involvement in any or all facets of the crime(s) being investigated. These incorrect statements by a suspect can mislead police, prosecutors, defense attorneys, judges and juries into focusing the case on the suspect, too often resulting in an erroneous conviction. An additional negative consequence is that the focus is away from the true perpetrator of the crime, too often resulting in that perpetrator's freedom to continue criminal activity.

¹ C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18 (1) (ABA) CRIMINAL JUSTICE 15 (Spring 2003). BARRY SCHECK, PETER NEUFELD & JAMES DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

Recent reports of innocent defendants convicted largely because of false confession have been followed by individuals and groups calling for electronically recording interrogations. The practice of electronically recording complete custodial interrogations has been on the increase both in this country and throughout the world. Statutes requiring the recording of interrogations in their entirety have been introduced in a number of legislatures and enacted in the District of Columbia and Illinois. Police departments are increasingly adopting electronic recording of complete interrogations, and those that have done so have found the practice beneficial to law enforcement. We believe it is time the practice of videotaping complete interrogations is mandated in all state and federal jurisdictions. ²

False Confessions

The overarching problem at in-court determinations of the falseness of the suspect's statements is the difficulty in recreating who said what, who did what, and what body language and facial expressions accompanied these statements and actions. While videotaping or audiotaping the interrogation does not do much to alleviate the problems at other stages of the criminal justice process, it does seem to be the best solution to the subsequent in-court determinations, as recognized by even the most conservative of researchers and analysts: "... there seems to be virtual unanimity among those who have reviewed the problem that videotaping interrogations is an effective solution to the false confession problem."³

However unlikely it may appear that an innocent person who has not been physically

² "Videotaping" shall encompass any electronic method of preserving an audio-visual record of the interrogation.

³ Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and*

coerced would confess to a crime, numerous false confessions have been documented. Various cases are collected and described in a 1997 law review commentary, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. Pub. Int. L.J. 719 (1997). A 1998 article by Ofshe and Leo, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in The Age of Psychological Interrogation*, 88 *Journal of Criminal Law and Criminology* 429 (1998), identified 34 confessions proven false through other evidence, and 18 confessions which appear false because of the lack of corroboration and the presence of exonerating evidence. Many sources report other apparently false confessions. *See, e.g.*, Scheck, Neufeld & Dwyer, ACTUAL INNOCENCE (2000); the case of Corethian Bell, “Cops Urged to Tape Their Interrogations,” *Chicago Tribune*, January 6, 2002;⁴ and four questionable confessions in Prince George’s County, Maryland, *see, Washington Post*, Feb. 1 and 12, 2002.

Certain interrogation techniques, designed to elicit a true confession from a suspect who denies culpability, can have the effect of inducing a false confession. These techniques are described in detail in Ofshe and Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *Denver University Law Review* 979 (1997). In essence, “interrogators manipulate the individual's analysis of his immediate situation and his perceptions of both the choices available to him, and of the consequences of each possible course of action. An interrogator's goal is to lead the suspect to conclude that confessing is rational and appropriate.” *Id.*, at 985. An innocent individual who is convinced that he will be arrested,

Alschuler, 74 DENVER UNIVERSITY LAW REVIEW 1123, 1132 (1997).

⁴ After a lengthy unrecorded interrogation, Bell’s confession was videotaped.

tried, and convicted, may rationally decide to confess if convinced that confessing may moderate punishment, terminate the interrogation or otherwise be of benefit. Innocent suspects can be convinced that they will be convicted by interrogators' false assertions that there is strong evidence against them. Such false assertions are legal and constitutional.⁵

During police interrogations, investigators try to determine what information is available to the suspect, manipulate his perception of his situation, and usually offer some form of incentive to get a confession.⁶ On the other end of the spectrum from positive incentives, police interrogators also may imply a wide variety of threats: "The modern equivalent to the rubber hose is the indirect threat communicated through pragmatic implication."⁷ Not surprisingly, one of the conclusions from the American Judicature Society's January 2003 Conference on Wrongful Convictions of the Innocent was that prosecutorial misconduct, including suggestive, coercive, or misleading theories as well as subconscious biases, is a primary systemic cause of wrongful convictions.

There are a number of categories of individuals who are particularly susceptible to aggressive interrogation techniques. Suspects who falsely confess to crimes and criminal activity that they did not commit are apt to be particularly vulnerable people, such as those who are intoxicated by alcohol or other drugs or those who are overly eager to *appear*

⁵ Police interrogation tactics can and do include intentional trickery; lying to the suspect about nonexistent evidence or incriminating statements by other suspects and witnesses; strongly suggesting known elements of the crime to the suspect; and implied promises of leniency or harshness stemming from the suspect's decision whether or not to confess. *See, generally* INBAU, FRED (ed.), *CRIMINAL INTERROGATION AND CONFESSIONS* (Aspen)(4th ed., 2001). While not necessarily clear violations of the suspect's legal rights, such interrogation tactics can result in false confessions. *See* Richard Ofshe & Richard Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *DENVER UNIVERSITY LAW REVIEW* 979, 1114 (1997).

⁶ Ofshe & Leo, *supra* note 3, at 1114-1115.

⁷ *Id.* at 1115.

cooperative. The largest category of falsely confessing suspects consists of those with mental deficiencies or unusual cultural backgrounds. Additionally, juveniles are a well-recognized group who tend to be unsophisticated in dealing with police interrogation tactics, more trusting of adult authority figures, and less informed about criminal law and the criminal justice process. Recent research also indicates that the race of the person being interrogated is correlated with eagerness to cooperate and the ability to avoid confusion and misinformation.⁸ This broad category of vulnerable and mentally impaired suspects may provide particularly unreliable statements in response to the isolation, fear, and intimidation of police interrogation settings, particularly if prompted by explicit or implied promises or threats such as being freed to go home or getting a better or worse result at trial.

Some scholars have attempted to compile a checklist to assess the trustworthiness of a confession. One, apparently prepared by Professor Saul Kassin,⁹ is as follows:

Consider the defendant's background: IQ, mental disability, personality, compliant personality, exhausted or terrified, etc.

Assess the circumstances of police questioning: length of interrogation, tactics employed, claims about existing evidence, express or implied threats or promises, offers to let them go home if they would confess, etc.

Was the confession the defendant's own statement or simply an acceptance of police suggestions? Did the defendant's statement lead to new evidence that the police did not know of prior to the defendant's statement?

Was it the defendant or the police who first stated key facts?

Any of these factors should cause heightened concern about the trustworthiness of a

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CYNTHIA K. LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (New York: New York University Press)(2003).

confession, but undoubtedly interrogations with none of the factors could nonetheless result in false confessions.

The Practice of Recording Confessions

In some jurisdictions, New York among them, substantial numbers of confessions are preserved on videotape. Interrogations are not. Under common current practice, subjects are interviewed by detectives and, if a major crime is admitted, a prosecutor will capture the confession on videotape. That videotape is available as evidence at trial, and is, of course, very convincing. We understand that every New York City precinct's detective bureau has at least a single set of videotaping equipment available. Audio-tape recording equipment is readily available at all precincts.

An ever-increasing number of jurisdictions record interrogations. A comprehensive study was published in March 1993, under the auspices of the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice. (Geller, *Videotaping Interrogations and Confessions*, DOJ HV 7635 .U548 G318 (1993)). It found that videotaping was used to some extent by one third of all police departments in jurisdictions with populations over 50,000. We have heard of no jurisdiction discontinuing recording of interrogations, and police departments continue to adopt the practice. For example, at the end of January 2003, the Fort Lauderdale Police Department announced its plan to videotape all homicide interrogations from start to finish. Interestingly, this department adopted the practice after studying other police agencies and concluding that "the advantages of taping far outweighed any perceived

⁹ See Welsh White, *False Confessions in Criminal Cases*, (ABA) CRIMINAL JUSTICE (Winter 2003) at 5.

disadvantages.”¹⁰

According to the Geller study, those jurisdictions that did videotape overwhelmingly found that videotaping improved the quality of police interrogations -- nearly 50% reported that it helped a lot and over 35% that it helped somewhat. The benefits included better preparation work by detectives, avoidance of distractions (typewriters, notebooks or extra personnel) at the interrogation, easy monitoring of interrogations by supervisors through closed-circuit television to assess performance, use of taped interrogations for training, and use of taped confessions to elicit a confession from suspected accomplices. In addition, as a result of videotaping, there were fewer allegations by defense attorneys of coercion or intimidation.

Prosecutors likewise “were in virtually unanimous agreement” that videotaping helped them assess the State’s case and prepare for trial, and also credited videotapes for providing details otherwise unavailable, including the suspect’s and officer’s physical condition and demeanor. While Minnesota requires electronic recording, but not necessarily videotaping, last year, Hennepin County Attorney Amy Klobuchar wrote, “At the time of the decision to require recording in Minnesota, most police and prosecutors in the state feared the new rule would make their jobs harder and undermine the cause of justice. But during the past eight years it has become clear that videotaped interrogations have strengthened the ability of police and prosecutors to secure convictions against the guilty. At the same time, they have helped protect the rights of suspects by ensuring the integrity of the criminal justice process.”¹¹

¹⁰ *Miami Herald*, Feb. 1, 2003.

¹¹ “Eye on Interrogations: How Videotaping Serves the Cause of Justice,” *Washington Post*, June 10, 2002. Hennepin County includes Minneapolis and 44 suburban

The Geller study quoted defense attorneys as more opposed to videotaping, because it gave the prosecutor a strategic edge, but defenders still found the tapes useful for “client control” and evaluating the case with the client, and occasionally useful in conveying non-verbal information.

The Geller study considered all videotaping, with one section discussing the distinction between taping full interrogations as opposed to “recaps.” It reported that full interviews averaged two to four hours, while recap interviews averaged 15 to 45 minutes. The study reported some extra costs in videotaping full interrogations because of the increased use of tape and extra transcription costs. The discussion of the favorable comments about videotaping by prosecutors and police officers did not distinguish between those who record only recaps and those who record complete interviews. In sum, the study found that 97% of departments that have ever videotaped suspects’ statements find the videotaping to be useful.

The Trend Toward Requiring Recording of Interrogations.

Recording interviews has been required by judicial opinion in Alaska since 1985¹² and Minnesota since 1994.¹³ The practice has been requested via suppression motion in numerous other jurisdictions, including New York State.¹⁴ State courts have responded that although recording complete interrogations would be a good idea, it was not required by due process and should be addressed by the legislature.

communities.

¹²*Stephan v. State*, 711 P.2d 1156 (1985).

¹³*State v. Scales*, 518 N.W. 2d 587 (1994).

Two United States' jurisdictions, the District of Columbia and Illinois, have recently enacted statutes requiring recording of full interrogations in certain crimes.¹⁵ There are at least five recent legislative proposals in the United States, in New York City, Maryland, Connecticut, Oregon and Missouri.¹⁶

The District of Columbia statute¹⁷ requires the Chief of Police to adopt a General Order requiring the police to “electronically record, in their entirety, and to the greatest extent feasible, interrogations of persons suspected of committing a dangerous crime or a crime of violence” if the interrogation is conducted in interview rooms that have recording equipment. Matters to be considered in the Order include when the suspect should be advised of the recording, what questioning on lesser crimes should be recorded, and how to ensure recording of interrogations in locations other than equipped interview rooms. The statute provides for maintaining relevant statistics and for reports, including an evaluation of the benefits of videotaping.

The Illinois statute¹⁸ provides that, in homicide cases, statements made as a result of custodial interrogation in a police station or place of detention are presumptively inadmissible if not electronically recorded. This presumption can be overcome by proof, by a preponderance of the evidence, that the statement was voluntary and reliable based on the

¹⁴ *People v. Owens*, 185 Misc. 2d 661 (Monroe Cty. 2000).

¹⁵ These statutes, like the decisions in Alaska and Minnesota do not specifically require videotaping.

¹⁶ New York City Council Int. No. 270; Conn. Raised Bill No. 539, LCO No. 2163 (2002); Missouri Senate Bill 231, 92nd General Assembly (2003); Oregon House Bill 2079 (2003). Maryland House Bill 407 (2002) was withdrawn.

¹⁷ D.C. Code §5-133.20.

totality of the circumstances. In addition, the State can use the statement after proving, by a preponderance of the evidence, any of the following exceptions:

- (i) the statement was made in open court, before a grand jury, or at a preliminary hearing;**
- (ii) the statement was not recorded because it was not feasible to do so;**
- (iii) the statement was voluntary and bears on the credibility of the defendant as a witness;**
- (iv) the statement was spontaneous and not in response to a question;**
- (v) the statement was made after routine questioning for processing;**
- (vi) the suspect requested that there be no recording, if the request is recorded;**
- (vii) the statement was made out of state;**
- (viii) the statement was made when the interrogator was unaware that a death had in fact occurred;**
- (ix) multiple suspects were questioned, and all available recording equipment was being utilized for other suspects; or**
- (ix) the statement was otherwise admissible under law.**

These two enacted statutes are cautious starts that may serve as a model for jurisdictions concerned that requiring recording in all cases will jeopardize prosecutions of the guilty or be unduly burdensome.

The Connecticut proposed bill provided that custodial interrogations at a police station, courthouse, correctional facility, community correctional center or detention facility shall be

¹⁸ Ill. Public Act 93-0517.

electronically recorded in their entirety when feasible, and directed the court to instruct the jury that it may consider any failure to record the interview in determining the reliability of a confession. The bill did not move out of committee, although a Connecticut General Assembly Commission has recommended that all formal interrogations of murder suspects be recorded, preferably on videotape.¹⁹

A Maryland bill, withdrawn shortly after it was introduced, did not allow questioning of violent crime suspects unless an attorney was present or the presence of an attorney was waived and the interview was videotaped.

The Oregon bill required electronic recording of felony interrogations conducted at a sheriff's office, police station, courthouse or detention facility, or anywhere else an adequate recording device was available. The statement would otherwise be inadmissible, subject to exceptions less extensive than those in the Illinois statute. The Missouri bill likewise required electronic recording of interrogations (not limited to felonies) in a similar list of facilities, and permitted admission of the statement into evidence if law enforcement officers had good cause not to tape the entire interrogation. The New York City Council bill simply required videotapes of all custodial interrogations, and required that the introduction in evidence of a confession be accompanied by the corroborating videotape.

Electronic Recording of Police Interviews Internationally

Recording of interviews is commonplace in a number of countries. It has been required in Great Britain since 1984. (Police and Criminal Evidence Act of 1984). In Australia, police interrogations must generally be tape recorded where practical, and, in Australian federal

¹⁹ *Hartford Courant*, Jan. 7, 2003, p. 10.

prosecutions, the Federal Crimes Act requires that where a contemporaneous recording cannot be made, there must be an electronic recording of the written statement being read back to the suspect, with the suspect given an opportunity to refute anything in the written record.²⁰

In Tasmania, Evidence Act 2001 §85a provides that in a prosecution of a serious offense, evidence of an admission is not admissible unless a videotape of the interview is available. This requirement may be avoided:

a) if the prosecution proves a reasonable explanation why there is no videotape and there is a videotaped interview of the defendant about the making and terms of the admission; or

b) the prosecution proves a reasonable explanation for the lack of either video tape; or

c) the court finds exceptional circumstances that justify admissibility.

A reasonable explanation is defined to include the impracticality of taping the admission when made, the unavailability of videotaping equipment while it was reasonable to detain the defendant, the defendant's refusal to consent to the videotaping, or an equipment malfunction.

Hong Kong, in a report to the United Nations Committee Against Torture under the Convention Against Torture, advised that the Hong Kong Immigration Department and the Customs and Excise Department, which have power to arrest and detain suspects, have been introducing tape recording and video recording of interviews as equipment becomes

²⁰ See Australia's Third Report under the International Covenant on Civil and Political Rights. March 1987 - December 1995, Art. 14 Par. 816.

available.²¹ Also in Hong Kong, a Law Reform Commission Report on the Procedure Governing the Admissibility of Confession Statements in Criminal Proceedings (July 2000)²² reported favorably on the greatly increased use of videotapes in interrogations since 1985, police satisfaction with the use of videotapes, and the decrease in challenges to the admissibility of confession statements as a result of videotaping. A group of 52 individuals and organizations commented on this Law Reform Commission Report, and their first suggestion was for the greater use of audio or videorecording of interviews.

Non-governmental and international organizations have many times suggested recording of interrogations as a safeguard of compliance with treaty obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights. For example, the United Nations Human Rights Committee, in its 64th Session, in response to the report submitted by Austria on its compliance with the International Covenant on Civil and Political Rights, recommended implementation of audio-recording of interrogations in all Austrian jurisdictions.²³ In 1998, the United Nations Special Rapporteur on Torture strongly recommended that the Spanish Government give serious consideration to video recording police interrogations as a means of protecting both detainees and law enforcement officers who

<http://www.law.gov.au/agd/Department/Publications/publications/ICCPR3/Welcome.html>

²¹ Report on the Hong Kong Special Administrative Region under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at <http://www.info.gov.hk/hab/paper/human1.htm>.

²² <http://www.info.gov.hk/hkreform/reports/rconfess-e.pdf>.

²³ <http://www1.umn.edu/humanrts/hrcommittee/austria1998.html>.

may be falsely accused of torture or ill-treatment.²⁴ The European Committee for the Prevention of Torture's ("CPT") 12th Annual Report noted the increased trend to electronically record police interviews:

The electronic (i.e. audio and/or video) recording of police interviews represents an important additional safeguard against the ill-treatment of detainees. The CPT is pleased to note that the introduction of such systems is under consideration in an increasing number of countries. Such a facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treatment. This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recording of police interviews also reduces the opportunity for defendants to later falsely deny that they have made certain admissions.²⁵

CONCLUSION

The benefits of recording interviews are obvious and the value of doing so has been widely recognized. Where the practice has been implemented, law enforcement organizations, even those initially opposed, have almost universally found the practice beneficial. Some law enforcement concerns, such as the exposure of interrogation tactics and the fear that some juries might find them unacceptable, should not be given any weight in a democratic and open society. Likewise, defense objections that defendants will lose some tactical advantage in raising claims of coerced confession should be given no weight if the reason the tactical advantage is lost is that clear evidence shows that there was no coercion. If the purpose of a

²⁴ UN Documents E/CN.4/1998/38.

²⁵ <http://www.cpt.coe.int/en/annual/rep-12.pdf>

trial is the determination of the truth, there can be no legitimate objection to a jury or the public learning the complete, relevant facts, and clearly the full course of an interrogation is relevant to the truthfulness, accuracy or voluntariness of a statement.

We appreciate that there are practical concerns. Even if each police department has a videotape-equipped interrogation room, the many cases involving multiple suspects would present difficulties or delays in videotaping each suspect's statement, and may require the purchase of additional video equipment. The need for a video camera operator in addition to the interrogator may increase the personnel burden. The minority view in the report of the Illinois Governor's Commission on Capital Punishment (April 15, 2002) argued that mandatory videotaping would put an "unacceptable burden on law enforcement" and "significantly lower the successful clearance rate in investigations of serious crime." It pointed out that in the early stages of an investigation, the police may not have a clear understanding of the case or even know who the suspects are. Videotaping the questioning of all interviewees would significantly slow many investigations. In addition, the minority pointed out the potential burdensome expense on law enforcement. Nevertheless, the minority still believed that videotaping should be encouraged and endorsed its use. We believe that the economic considerations cannot outweigh both the practical benefit to law enforcement and the increased confidence in the outcome of criminal prosecutions.

There are additional questions particular to videotaping rather than audiotaping interrogations. One study found a very strong correlation between a jury's determination that a statement was voluntary and the focusing of a videotaped statement exclusively on the subject, as compared to a tape showing both the subject and interrogator, an audio recording,

or a transcript. In one trial-simulation study, the conviction rate doubled when the tape was changed from an equal-focus confession to a suspect-focus confession.²⁶ It seems clear that videotaping should be done with a focus on both the suspect and the interrogator. A 1992 study from England expressed a preference for the videotaping to include both the suspect and the questioner, but also found a decrease in image quality from a picture including only the suspect.²⁷ That study also found a significant number of camera failures and problems with sound quality. All of these practical obstacles are susceptible to straightforward solution. It would be indefensible to hold justice hostage to administrative ignorance of basic recording procedures, especially in an age that offers simple technical methods to provide accurate and reliable information about important evidence of guilt or innocence.

We conclude that legislation or court rule should require videotaping of all custodial interrogations in their entirety. If it is not practicable to videotape an interrogation, it should be audiotaped in its entirety. The legislation or court rule should define the circumstances in which recording would be required, and should include questioning in police stations, courthouses, detention centers and any location where suspects are held for questioning or detention. It may allow for exceptions in circumstances where the production of a recording is not feasible, such as where the suspect refuses to be recorded, properly maintained recording equipment has malfunctioned, or equipment was for good reason unavailable. Legislation or

²⁶ Lassiter, Geers, Handley, Weiland and Munhall, *Videotaped Interrogations and Confessions: A Simple Change in Camera Perspective Alters Verdicts in Simulated Trials*, 87 *Journal of Applied Psychology* 867 (2002). *See, also*, Lassiter, *Illusory Causation in the Courtroom*, 11 *Current Directions in Psychological Science* 204 (2002).

²⁷ Baldwin, *Videotaping Police Interviews with Suspects -- An Evaluation* (Police

court rule should provide for appropriate remedies for non-compliance and should also provide meaningful disclosure of the recording to criminal defendants, destruction of the recording when criminal charges are dismissed, and preservation of the recording at least until the conclusion of all direct appeals.

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