

SUPREME COURT OF THE STATE OF NEW JERSEY  
DOCKET NO. 53, 778

STATE OF NEW JERSEY,            )  
  )  
    Plaintiff-Respondent)      CRIMINAL ACTION  
  )  
v.                                        )  
  )  
THOMAHL COOK,                    )  
  )  
    Defendant-Petitioner)      APP. DIV. DKT. NO. A-5166-99T4

January 10, 2003

Honorable Chief Justice and  
Associate Justices of the  
Supreme Court of New Jersey  
P.O. Box 970  
Trenton, New Jersey 08625

Re: State v. Thomahl Cook  
Docket No. 53,778

**LETTER-BRIEF IN SUPPORT OF MOTION FOR  
LEAVE TO PARTICIPATE AS AMICI CURIAE**

Your Honors:

The Center on Wrongful Convictions of Northwestern University School of Law and the Innocence Project at Cardozo School of Law submit this letter in lieu of a formal brief in support of their motion, filed in accordance with R. 1:13-9, for leave to participate as amici curiae in this matter.

## PRELIMINARY STATEMENT

The Center on Wrongful Convictions of Northwestern University School of Law's Bluhm Legal Clinic in Chicago, Illinois ("CWC") was founded in 1998 as an outgrowth of work done by Lawrence Marshall, the CWC's Legal Director, in representing clients facing the death penalty in Illinois, and the Clinic's Executive Director Rob Warden, whose work as an investigative journalist helped expose scores of innocent men who had been wrongfully convicted in Illinois. Together, Professor Marshall and Mr. Warden have played a role in nine of the thirteen cases in Illinois in which innocent men were sentenced to death. Their work, and the work of many others, contributed to the decision of Governor George M. Ryan to declare a moratorium on the death penalty in Illinois until the problems that led to the wrongful convictions could be identified and remedied.

The CWC is dedicated to identifying and rectifying wrongful convictions and other serious miscarriages of justice. The Center has three components: representation, research, and public education. Center faculty and staff, cooperating outside attorneys and Bluhm Legal Clinic students, investigate possible wrongful convictions and represent imprisoned clients with claims of actual

innocence. The research and public education components focus on developing initiatives that raise public awareness of the prevalence, causes, and social costs of wrongful convictions and promote substantive reform of the criminal justice system.

The Innocence Project at the Benjamin N. Cardozo School of Law was created by Barry C. Scheck and Peter J. Neufeld in 1992. It was set up as and remains a non-profit legal clinic. This Project only handles cases where post-conviction DNA testing of evidence can yield conclusive proof of innocence. As a clinic, students handle the case work while supervised by a team of attorneys and clinic staff.

DNA testing has been a major factor in changing the criminal justice system. It has provided scientific proof that our system convicts and sentences innocent people -- and that wrongful convictions are not isolated or rare events. Most importantly, DNA testing has opened a window into wrongful convictions so that we may study the causes and propose remedies that may minimize the chances that more innocent people are convicted.

As one of the forerunners in the field of wrongful convictions, the Innocence Project has grown to become much

more than the "court of last resort" for inmates who have exhausted their appeals and their means. Together with Northwestern University School of Law's Center on Wrongful Convictions, the Innocence Project is now helping to organize The Innocence Network, a group of law schools, journalism schools, and public defender offices across the country that assist inmates trying to prove their innocence whether or not the cases involve biological evidence which can be subjected to DNA testing. The Innocence Project consults with legislators and law enforcement officials on the state, local, and federal level, conduct research and training, produce scholarship, and propose a wide range of remedies to prevent wrongful convictions while continuing their work to free innocent inmates through the use of post-conviction DNA testing.

The work of both the CWC and the Innocence Project has helped to expose the problem of false confessions as a major source of wrongful convictions. According to data collected by the Innocence Project and posted on its website, false confession evidence has played a role in 27 of the first 114 DNA exonerations. Thirty-six of the first 114 DNA exonerations involved homicides and false confessions played a role in nearly two-thirds of these

cases. The Innocence Project has been directly involved in many of these cases, including the New Jersey false confession case of John Dixon, a man who pled guilty in July of 1991 to raping and robbing a woman at gun point in 1991. He served ten years of his forty-five year sentence before DNA evidence proved his innocence.

False confession evidence has also played a role in many of the cases in which the CWC has been involved. Seven of the 13 cases of innocent men who were sentenced to death were tainted by false confession evidence. Ronald Jones, Gary Gauger, Rolando Cruz, and Alejandro Hernandez each gave - or were said to have given - false statements implicating themselves in murders they did not commit. Joseph Burrows was convicted on the basis of the false and coerced confession of co-defendants Ralph Frye, who was also innocent, and Verneal Jimerson and Dennis Williams (as well as their co-defendants Kenneth Addams and Willie Rainge, who were not sentenced to death) were convicted, in part on the false and coerced testimony of Paula Gray.<sup>1</sup>

The work of the CWC and the Innocence Project has led us to call for one reform which could go a long way towards

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<sup>1</sup> For more information about the cases of the 13 exonerated Illinois death row inmates, see

eliminating the problem of coerced and false confessions - videotaping of custodial police interrogations. Representatives of both the CWC and the Innocence Project have testified before local, state, and national commissions and task forces in support of this much-needed reform, and we have also drafted model legislation in this area. We are seeking to leave to appear as amici and to file a brief in the case of Thomahl Cook in support of the argument made by Mr. Cook's appellate defense counsel that the New Jersey Supreme Court should require that law enforcement officers electronically record custodial interrogations of suspects.

We respectfully disagree with the reasoning of those who assert that this is a matter for the legislature to resolve rather than the courts. Courts play a central role in regulating and evaluating evidence; legislatures do not. *Miranda* originated with the courts, not the legislature and the exclusionary rule is a judicial device, not a constitutional or legislative mandate. Moreover, as the United States Supreme Court has recognized "due process," that amorphous concept that "comports with the deepest

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<http://www.law.nwu.edu/depts/clinic/wrongful/exonerations/Illinois.htm>

notions of what is fair and right and just"<sup>2</sup> is a fluid concept that evolves over time and it is the province of courts to tailor the concept of due process to changing times:

But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise by those whom the Constitution entrusted with the unfolding of the process. Fully aware of the enormous powers thus given the judiciary and especially its Supreme Court, those who founded this Nation put their trust in a judiciary truly independent - in judges not subject to the fears or allurements of a limited tenure and by the very nature of their function detached from passing and partisan influences.<sup>3</sup>

These are changing times. As a result of the increased accessibility of DNA evidence, more and more innocent men - men who confessed or pled guilty to brutal

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<sup>2</sup> *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950)(Frankfurter, J.) (dissenting).

and heinous crimes - are walking out of prison after serving lengthy prison terms for crimes they did not commit. Even more men and women who falsely confess to crimes they did not commit are being exonerated by DNA evidence *before* their cases are brought to trial. Yet, DNA evidence is only available in a fraction of cases; in other cases where it was collected, the samples have been long destroyed or have degraded over time. The DNA exonerations are only the "tip of the iceberg" of the false confession problem.

In the wake of these injustices and potential future miscarriages of justice, it is incumbent upon the courts to make sure that our criminal justice system is accurate, fair, and just when it comes to confession evidence. We ask that the New Jersey Supreme Court follow the lead of its sister courts in Alaska and Minnesota and require that police officers in New Jersey electronically record all custodial interrogations of suspects.

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<sup>3</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J. concurring).

## ARGUMENT

### I. THE QUESTION OF WHETHER THIS COURT SHOULD CREATE A RULE REQUIRING THAT LAW ENFORCEMENT OFFICERS ELECTRONICALLY RECORD CUSTODIAL INTERROGATIONS OF SUSPECTS MUST BE EVALUATED IN LIGHT OF THE NEW UNDERSTANDINGS ABOUT THE SOURCES OF WRONGFUL CONVICTIONS, PARTICULARLY FALSE CONFESSIONS, WHICH HAVE BEEN REVEALED BY DNA EXONERATIONS

As of December 20, 2002, DNA testing has freed 122 wrongfully convicted, *innocent* men from the prospect of years behind bars, and, in some cases, has given those condemned to death another chance at life.<sup>4</sup> These 122 exonerations exemplify the frailties of our criminal justice system; they provide hard proof that our system - once thought to be relatively fail proof - does wrongfully convict innocent people and does so at an alarming rate.

Ultimately, these 122 DNA exonerations have opened our eyes to the faults of our system, and, in the process, have uncovered the causes of wrongful convictions. These causes include, but are not limited to: misidentification, jailhouse snitches, junk science, corrupt or shoddy police work, incompetent defense attorneys, and prosecutorial misconduct.<sup>5</sup> Perhaps the most intriguing, and certainly the

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<sup>4</sup> See Benjamin N. Cardozo School of Law, *The Innocence Project*, at <http://www.innocenceproject.org> (as of Dec. 20, 2002).

<sup>5</sup> Benjamin N. Cardozo School of Law, *supra* note 2, at <http://www.innocenceproject.org/causes/index.php>.

most controversial cause of wrongful convictions, is false confessions.<sup>6</sup>

Confessions, unquestionably, have a remarkably potent effect on juries, and hold an extraordinary power as evidence of guilt. After all, most people find it difficult to believe that a man or woman would confess to a crime in which they played no part. However, recent high profile false confession cases, such as the case of the infamous Central Park Jogger Five, have begun to educate Americans about the realities of false confessions and the unjust deprivations of liberty that such confessions engender.

Ultimately, the problem of false confessions is systemic. In 1996, a National Institute of Justice study on 28 wrongful conviction cases revealed at least six cases in which self-incriminating statements, "dream visions," or outright confessions played a prominent role in securing a wrongful conviction.<sup>7</sup> In 1998, Richard Ofshe and Richard Leo studied 60 wrongful conviction cases, all of which involved dubious confessions that were later proven false by either scientific evidence, the true perpetrator's

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<sup>6</sup> *Id.* at

<http://www.innocenceproject.org/causes/falseconfessions.php>.

<sup>7</sup> Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice (1996).

capture, or by the lack of corroborating evidence.<sup>8</sup> More recent statistics gathered by the Innocence Project show that out of the 36 DNA exonerations in the United States that involved murder, two thirds of those cases involved convictions based on false confessions or incriminating statements.<sup>9</sup> Moreover, 27 of the first 111 post-conviction DNA exonerations also involved false confessions or admissions.<sup>10</sup>

Exonerations in false confession cases have pinpointed current psychological interrogation techniques as a contributing factor to the false confession problem. Whether appropriately applied or not, these techniques regularly coerce some innocent people—often those who are intoxicated, have severe drug problems, are mentally impaired, or who are young and ignorant of the law—into making incriminating statements or giving full-fledged confessions.<sup>11</sup> For example, two of the Illinois death

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<sup>8</sup> See generally 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. CRIM. L. & CRIMINOLOGY 429 (1998).

<sup>9</sup> Innocence Project, *supra* note 2, at <http://www.innocenceproject.org/causes/falseconfessions.php>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* For other interesting and informative studies on the role of false confessions in wrongful convictions, please see Jim Dwyer et al., *supra* note 3; Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); see also Northwestern University School of Law, *Center on Wrongful Convictions*, at

penalty exonerations - the infamous case of the Ford Heights Four and the lesser-known case of Joseph Burrows - turned on coerced and false confessions of borderline mentally impaired individuals.<sup>12</sup> Other suspects confess out of a fear of physical harm; one such suspect, Ronald Jones of Illinois, falsely confessed to raping and murdering a young mother only after being repeatedly beat about the head and punched in the stomach. Finally, some suspects confess simply because they are afraid to die-police

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<http://www.law.northwestern.edu/wrongfulconvictions/> (last visited Nov. 28, 2002).

<sup>12</sup> Northwestern University School of Law's Center on Wrongful Convictions has played a role in nine cases of wrongful conviction that involved false confessions generated by questionable interrogation techniques. Please see the cases of Joseph Burrows, Rolando Cruz, Gary Gauger, Paula Gray (and the Ford Heights Four), Alejandro Hernandez and Ronald Jones which are documented on the website of the Center for Wrongful Convictions at

<http://www.law.northwestern.edu/wrongfulconvictions/>.

In the case of the Ford Heights Four, police questioned Paula Gray, who was only 17 and borderline mentally retarded, over two nights in motels before she confessed to playing a part in the horrific murder of a young man and the rape-murder of his young girlfriend. Ms. Gray implicated Kenneth Adams, Verneal Jimerson, Willie Rainge, and Dennis Williams in the murders. All were later exonerated by DNA evidence. See Northwestern University School of Law, *supra* note 10, at

<http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Gray.htm>. Ms. Gray, who was charged with the murder as an accomplice when she recanted her testimony against the Ford Heights Four, was recently pardoned by Governor George M. Ryan. Douglas Holt and Steve Mills, *Ford Heights Four Figure Pardoned*, Chicago Tribune, November 15, 2002, Metro, at 1,7. Joseph Burrows was convicted of brutally murdering an 88-year-old man based upon the confession of Ralph Frye, a mildly retarded man who later recanted and stated that police had intimidated him into falsely confessing and implicating Burrows. Burrows was released after the real killer was arrested. See *id.* at

officers convince highly suggestive and scared individuals that if they cooperate and plead guilty, they will be sure to avoid the death penalty at trial.<sup>13</sup>

Ultimately, "police-induced false confessions arise when a suspect's resistance to confession is broken down as a result of poor police practice, overzealousness, criminal misconduct and/or misdirected training."<sup>14</sup> Almost all police interrogations take place at the stationhouse in small, cramped, windowless rooms with no phones, sparse furnishings, and few other potentially distracting items. After a brief rapport building period during which the Miranda warnings are administered, detectives suddenly accuse the suspect directly of committing the crime. The suspect's denials are ignored and each time the suspect tries to assert his innocence, officers interrupt such assertions. Detectives are trained to make the evidence against a suspect seem overwhelming (maximization) and are permitted to deceive suspects about the strength of the case against them, including such lies as telling a suspect that he failed a lie detector test. If such techniques still fail to produce a confession, detectives rely on a

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<http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Burrows.htm>.

<sup>13</sup> Innocence Project, *supra* note 2, at

<http://www.innocenceproject.org/causes/falseconfessions.php>.

<sup>14</sup> Richard A. Leo & Richard J. Ofshe, *supra* note 7, at 440.

technique called minimization. Minimization involves offering a suspect a face-saving excuse for committing the crime or a less morally culpable explanation for how the crime was committed ("we don't think you meant to do this, we think it was an accident, or self-defense, or provoked"). These techniques are aimed at getting the suspect to conclude that cooperation may bring leniency or freedom, a conclusion which, when reached, often leads the innocent suspect as well as the guilty suspect to confess.<sup>15</sup>

The reality of the false confession problem has imposed real costs upon our justice system. To begin with, false confessions have cost American citizens millions in civil rights claims resulting from wrongful convictions based upon false confessions; in Illinois alone, such claims have cost Cook and DuPage Counties over \$39 million.<sup>16</sup> Dubious

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<sup>15</sup> Richard A. Leo & Richard J. Ofshe, *The Decision to Confess Falsely, Rational choice and irrational Action*, 74 Denv. L. Rev. 979 (1997)

<sup>16</sup> In 1985, Rolando Cruz and Alejandro Hernandez were wrongfully convicted of a brutal-rape murder after police officers testified that, during interrogation, Cruz and Hernandez had "confessed" to details of the crime that only the killer would have known. After DNA cleared both Cruz and Hernandez of the crime in the early 1990's, they (along with Stephen Buckley, a third defendant who had been charged with the crime) filed a civil rights claim in federal court. DuPage County ultimately paid out \$3.5 million to settle the claim. See Northwestern University School of Law, *supra* note 10, at <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/cruz.htm>.

In the infamous Ford Heights Four case, Cook County paid over \$36 million to settle civil lawsuits filed by Verneal Jimerson, Dennis Williams, Willie Raigne and Kenneth Adams after each were

confessions have also undermined public faith in the police and have threatened the quality of criminal justice in America. Moreover, the false confession problem has greatly increased the work of trial courts; judges and juries are repeatedly asked to examine a defendant's claims of false confession, and thus, are often forced to sit through days of an unenlightening contest of "he said . . . she said." Appellate courts are then inundated with appeals and forced to reevaluate the trial court's troubles with the false confession question. Most importantly, the reality of false confessions has cost lives. First, it has cost the lives of the innocent men and women who languish in prison until their names are cleared; and, second it has cost the lives of innocent citizens who met their fate with the real criminals allowed to go free on another's false confession.<sup>17</sup>

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wrongfully convicted of a brutal double-murder based upon the coerced, false confession of another defendant, Paula Gray. See *id.* at <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Jimerson.htm>.

<sup>17</sup> For example, in the case of the Central Park Jogger, five teenage boys confessed to a gruesome rape and beating that the Manhattan District Attorney, Robert M. Morgenthau, recently concluded they, in all likelihood, did not commit. After the five tendered their confessions, the case was closed, the boys were tried and convicted, and sentenced to lengthy prison terms. While police and prosecutors focused their attention on convicting the boys, the real perpetrator, Matias Reyes, was allowed to roam free. Between April and August of 1989, when Reyes was finally caught, he had raped three other women in the

The New Jersey appellate court rejected the arguments for electronic recording of interrogations advanced by Mr. Cook's counsel, in part, because the large majority of states Supreme Courts which have addressed this issue to date have refused to mandate electronic recording. Although it is true that only the Alaska Supreme Court, see *State v. Stephan*, 711 P.2d 1156 (Alaska 1985), and the Minnesota Supreme Court, see *State v. Scales*, 518 N.W.2d 587, 590 (Minn. 1994), have embraced this much-needed reform, and twenty three other states have declined to require that custodial interrogations be tape-recorded, see *Stoker v. State*, 692 N.E.2d 1386, 1389 (Ind. Ct. App. 1998), none of the states that have rejected a taping requirement examined the issue in light of the DNA revolution and the number of false confessions which DNA has exposed.

It is against this backdrop of wrongful convictions based on false confessions that we, the Innocence Project and the Center on Wrongful Convictions at Northwestern University School of Law, ask this Court to consider requiring that New Jersey police officers videotape interrogations in

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area around Central Park, and raped and murdered a fourth. See Jim Dwyer & Kevin Flynn, "Prosecutor Seeks Dismissal of Convictions in '89 Jogger Case," *The New York Times*, Dec. 5, 2002.

their entirety. This common sense reform would undoubtedly aid the criminal justice system in weeding out the false confessions from the true, and, consequently, lessen the cases of wrongful conviction. "The practice of recording creates an objective and exact record of the interrogation process that all parties-police, prosecutors, defense attorneys, judges, juries-can review at anytime."<sup>18</sup> Such an objective record will undoubtedly help to increase the accuracy of convictions at the trial level. Increased accuracy at the trial level will, presumably, decrease the number of criminal appeals involving confession issues, thereby lessening the workloads of the already overburdened appellate courts. Moreover, videotaped interrogations may help restore waning public faith in both the police and in our criminal justice system; such a reform would help our police minimize the occurrence of false confessions, therefore increasing the chances that justice has been served upon the correct individual and that the actual perpetrator is not free to commit more crimes. Most importantly, however, videotaping interrogations will aid in the search for truth by conclusively establishing the guilt of a defendant or by exonerating the innocent. Below,

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<sup>18</sup> Richard A. Leo & Richard J. Ofshe, *supra* note 7, at 494.

we outline some possible remedies for this Court to consider.

## II. REMEDYING THE PROBLEM OF FALSE AND COERCED CONFESSIONS: ELECTRONIC RECORDING OF INTERROGATIONS AND OTHER SOLUTIONS

The Court's first and best option is a requirement that interrogations be electronically recorded under the due process clause of the New Jersey Constitution and to create an exclusionary rule when police officers have no good excuse for failing to tape interrogations. This is the path that was taken by the Alaska Supreme Court in *State v. Stephan*, 711 P.2d 1156 (Alaska 1985).

In *Stephan v. State*, the Alaska Supreme Court held that under the due process provision of the Alaska State Constitution,<sup>19</sup> video recording of interrogations is required when the interrogation takes place in a detention facility and recording is feasible.<sup>20</sup> 711 P.2d 1156, 1159 (Alaska 1985). In *Stephan*, the Court considered two consolidated but unrelated cases. In both cases the defendants made inculpatory statements while a video or

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<sup>19</sup> "No person shall be deprived of life, liberty, or property without due process of law. Alaska Const. art. I, § 7.

<sup>20</sup> The feasibility of taping Mr. Cook's interrogation was not an issue in this case. Here, the Investigator readily acknowledged that a tape-recorder was available for his use and that it was his standard practice to tape-record interrogations; in fact, of

audio recorder memorialized part, but not all, of the interrogation. The Court stated that it was "convinced that recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination and ultimately his right to a fair trial." *Id.* at 1159-60. In support of its holding the court cited several factors such as eliminating the "swearing match," protecting police officers "wrongfully accused of improper tactics," and preventing the admission of false confessions. *Id.* at 1161. The Court imposed an exclusionary rule where law enforcement could not provide an excuse for their failure to record an interrogation. *Id.* at 1163-65. The Court believed that such a rule "provides crystal clarity to law enforcement agencies, preserves judicial integrity, and adequately protects a suspects constitutional rights." *Id.* at 1164-65.

Second, this Court could follow the lead of the Minnesota Supreme Court in *State v. Scales*, 518 N.W.2d 587, 590 (Minn. 1994) and impose an interrogation recording requirement under the broad supervisory powers of state Supreme Courts to insure the fair administration of

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the approximately 25 homicide confessions he had taken, Cook's was the only one he did not record.

justice. In *State v. Scales*, the defendant appealed a jury conviction of two counts of first-degree murder and one count of second-degree murder. Instead of following Alaska and using the due process clause of their state constitution, the Minnesota Supreme Court invoked their "supervisory power to insure the fair administration of justice" and held that "all custodial interrogations 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." *Id.* at 592. The Court stated that like the *Stephan* Court, "we 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.'" *Id.* The court held that if law enforcement fails to record statements a suspect made during an interrogation, the statements may be suppressed at trial. *Id.*

Third, if this Court is not yet prepared to require electronic recording, it should at least encourage law enforcement agents to videotape interrogations and warn them that their failure to do so may lead the Court to

impose such a requirement in future cases. In *Scales* the court referred to two cases where they had previously discussed their strong desire that law enforcement record interrogations. See *State v. Robinson*, 427 N.W.2d 217, 224 n.5 (Minn. 1988) (noting that factual disputes about a defendant's constitutional rights would be "obviated" if conversations between police interrogators and defendants were recorded); *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991) (stating that the court "urge[d] that law enforcement officers use those technological means at their disposal to fully preserve those conversations and events preceding the actual interrogation" and warned that " the court will look with great disfavor upon further refusal to heed [their] admonitions"). The Alaska Supreme Court had a similar line of cases preceding their decision in *Stephan*. See, *Mallott v. State*, 608 P.2d 737, 743 n.5 (Alaska 1980) (advising Alaska law enforcement that as part of their duty to preserve evidence "it is incumbent upon them to tape record, where feasible, any questioning and particularly that which occurs in a place of detention"); *S.B. v. State*, 614 P.2d 786 (Alaska 1980) (stating that "[i]n future cases, it will be a great aid to the trial court's determinations and our own review of the record if an electronic record of the police interview with the

defendant is available from which circumstances of a confession or other waiver of Miranda rights may be ascertained"); *McMachan v. State*, 617 P.2d 494, 499 n.11 (Alaska 1980). In New Jersey, a similar statement would send a message to legislators, alert law enforcement to the court's preference for videotaped interrogations, and lay the groundwork for a court-crafted videotaping rule in the event that law enforcement fails to comply. Such a warning might also spur the legislature into action on this issue.

Finally, a smaller step forward would be to hold that the failure to record creates an adverse inference for suppression purposes and necessitates a special jury instruction that any unrecorded confessions be viewed with distrust unless the entire interrogation that precedes the confession is recorded. See, Daniel Donovan and John Rhodes, *The Case For Recording Interrogations*, THE CHAMPION, December 2002, at 12-19.<sup>21</sup> New Jersey courts have

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<sup>21</sup> The State of Illinois Report of the Governor's Commission on Capital Punishment (2002), recommended the following jury instruction in the event that law enforcement failed to record an interrogation. The italicized statements would be added to the jury instruction when the defendant's statement was not recorded:

You have before you evidence that the defendant made a statement relating to the offenses charged in the indictment. It is for you to determine [whether the defendant made the statement and, if so] what weight should be given to the statement. In determining the weight to be given to a statement, you should consider all the circumstances under which it was made. You *should pay particular attention to whether or not the*

created cautionary instructions pertaining to a jury's consideration of specific kinds of evidence. For example, in *State v. Kociolek*, the Court addressed the reliability of an inculpatory statement made by the defendant to a witness. 23 N.J. 400, 421-423, 129 A.2d 417 (N.J. 1957). The *Kociolek* Court stated that "in view of the generally recognized risk of inaccuracy and error in communication and recollection of verbal utterances and misconstruction by the hearer," the jury should be instructed to "receive, weigh and consider such evidence with caution." *Id.* at 421. In *State v. Hampton*, 61 N.J. 250, 272, 294 A.2d 23 (N.J. 1972), the Court held that the trial court shall determine the admissibility and voluntariness of a statement with respect to the precepts of *Miranda*. However, the *Hampton* Court also instructed courts that if the statements were found legally admissible, juries still had to be provided with an instruction granting them the discretion to reject the credibility of those statements.<sup>22</sup> *Id.* New Jersey courts have crafted jury instructions for other similarly

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*statement is recorded and if it is, what method was used to record it. Generally, an electronic recording that contains the defendant's actual voice or a statement written by the defendant is more reliable than a non-recorded summary.*

<sup>22</sup> The *Hampton* rule has since been codified in N.J. R. E. 104(c). The rule states that: "[i]f the judge admits the statement the jury shall not be informed of the finding that the statement is

suspect forms of evidence. See, e.g., *State v. Fertig*, 143 N.J. 115, 127, 668 A.2d 1076 (N.J. 1996) (hypnotically refreshed testimony); *State v. Gross*, 121 N.J. 1, 16-17, 577 A.2d 806 (N.J. 1990) (prior inconsistent statements); *State v. Green*, 86 N.J. 281, 291-94, 430 A.2d 914 (N.J.1981) (identifications); *State v. Begyn*, 34 N.J. 35, 54, 167 A.2d 161 (N.J. 1961) (accomplice testimony).

As demonstrated by the first section of this motion, a defendant's confession is not infallible evidence. A videotaping requirement would help alleviate the evidentiary concerns that have been raised by the phenomenon of false confessions. There can be no more reliable way to preserve a confession than to require that law enforcement officers electronically record the confession and the interrogation which precedes it. If the Court merely expressed a desire that interrogations be recorded, law enforcement and legislators might respond. In any case, juries must be made aware that when police can record interrogations and choose not, the confession is an inferior form of evidence – one that should be examined with a more skeptical eye. Any one of these solutions would be a marked improvement over the current system which

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admissible but shall be instructed to disregard the statement if it finds that it is not credible." *N.J.R.E* 104(c).

embroils the appellate and trial courts in trying to ascertain the truth from speculative swearing contests between officers and suspects, a process which is heavily weighted in factor of law enforcement and which, as a result, gives them no incentive to change police practices in this area.<sup>23</sup>

### CONCLUSION

WHEREFORE, for all of the reasons set forth above, the motion should be granted and the Innocence Project and the Center on Wrongful Convictions at Northwestern University School of Law should be permitted to participate as amici curiae in the review of this matter, to file a more detailed brief, if necessary, and to present oral argument.

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<sup>23</sup> The issue of whether New Jersey police should record custodial interrogations is especially relevant in light of the recent Appellate Court decision in *State v. Free*, 351 N.J. Super. 203, 798 A.2d 83 (N.J. Super. Ct. App. Div. 2002). In *Free*, the court reversed a pretrial ruling in favor of the defendant that allowed a social psychologist to give expert testimony on police interrogations and false confessions. The court held that testimony on coerced confessions given by a Ph.D. in psychology was not admissible expert testimony because it was not "scientifically reliable" and would not "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 220. *Free's* precedent constrains a defendant's ability to inform the jury with respect to the increasing body of information regarding false confessions. The court ought to balance that handicap by implementing a videotaping requirement. By doing so, expert assistance will be unnecessary because the jury will be able to draw their own conclusions by actually watching the interrogation.

Respectfully submitted,

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