STATE OF WISCONSIN
I N S U P R E M E C O U R T
Case No. 02-3423

In the Interest of Jerrell C. J.,
A person under the age of 17:

STATE OF WISCONSIN,
Petitioner-Respondent,
v.
JERRELL C. J.,
Respondent-Appellant-Petitioner.

NONPARTY BRIEF OF THE WISCONSIN INNOCENCE PROJECT OF THE FRANK J. REMINGTON CENTER, UNIVERSITY OF WISCONSIN LAW SCHOOL, ET AL.

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TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

It is counter-intuitive to imagine confessing to a crime one did not commit. But it is becoming increasingly clear that people do just that, and with alarming frequency. Indeed, false confessions are emerging as one of the leading causes of wrongful convictions. Of the 146 known postconviction DNA exonerations in the past 15 years, 36 or nearly 25% have involved false confessions. Benjamin N. Cardozo School of Law, *The Innocence Project, at* http://www.innocenceproject.org. These cases reveal that current psychological interrogation techniques are a major contributing factor to the false confession problem. *See* Leo & Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations*, 88 J.Crim.L. & Criminology 429, 472-496 (1998).

Take, for example, the case of Christopher Ochoa, who was exonerated in 2001 with assistance from the Wisconsin Innocence Project after almost 13 years in a Texas prison for a rape and murder he did not commit. Despite his innocence, Ochoa confessed after police subjected him to two grueling days of interrogations in which they tricked him into believing they had evidence that would convict him, yelled at him, and threatened him with abuse by other inmates and, ultimately, the death penalty. Findley & Pray, *Lessons from the Innocent*, 47 Wisconsin Academy Review No.4 (Fall 2001) at 34. DNA testing ultimately proved that Ochoa was innocent, and that another man, who had gone on to victimize other innocent women, was the actual perpetrator.

When psychological interrogation techniques are applied to children, the risk of false or coerced confessions is

magnified. The Central Park Jogger case in New York, in which five teenage boys falsely confessed to a sexual assault, only to be exonerated thirteen years later by DNA evidence, is only one in a long parade of false confessions involving children. Drizin & Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C.L.Rev. 891, 944-45, 968-70 (March 2004).

The problem is not unique to Texas or New York. In Milwaukee, Katrina French falsely confessed to the murder of a 13-month-old boy in 2002, after she was interrogated six times from 11:15 p.m. until 7:15 a.m. Charges were eventually dismissed when authorities acknowledged French's innocence. Doege, *Homicide Charges in Infant's Death Dropped*, Milwaukee Journal-Sentinel (January 15, 2002) at http://www.jsonline.com/news/metro/jan02/12902.asp. In Cudahy in 1995, Ronald Paccagnella falsely confessed to the murder of an elderly woman, only to be exonerated after ten months in jail when a friend of the true murderer came forward. Doege, *Strong Conviction*, Milwaukee Journal-Sentinel (July 24, 2003), at http://www.jsonline.com/lifestyle/people/jul03/157471.asp.

It was in this context that the court of appeals in this case declared, "it is time for Wisconsin to tackle the false confession issue." Ct. App. Op. ¶32.

Amici believe that the most important step this Court can take to address this problem is to require that all custodial interrogations of suspects in a place of detention be electronically recorded—from beginning, including during *Miranda* warnings, to end. If Christopher Ochoa's interrogation had been recorded, police either would have been deterred from engaging in the abusive tactics that

coerced his confession, or those tactics—and the fact that police fed Ochoa each of the facts that made his six-page, single-spaced confession sound so convincing—would have been exposed. Likewise, if the Central Park Jogger case interrogations had been taped in their entirety (only the final confessions were taped), the lengthy process that led the youths to confess would have been revealed, and those wrongful convictions might have been avoided.

Recording protects not only the accused; it also produces powerful evidence that can help convict the guilty, prevents baseless motions to suppress, encourages guilty pleas, and protects police from false claims of misconduct. Recording also helps courts determine the truth.

While *amici* believe that this protection should be extended to *all* custodial interrogations of suspects, this case offers this Court an opportunity to begin by addressing the problem in a measured way, requiring it first in one of the circumstances where it is needed most—custodial interrogations of juveniles.

ARGUMENT

ELECTRONIC RECORDING SHOULD BE MANDATED FOR ALL CUSTODIAL INTERROGATIONS OF JUVENILES.

A. Recording is a "best practice" reform whose time has come.

To date, two states—Alaska and Minnesota—have adopted an electronic recording requirement by court decision. *See* ***Stephan v. State***, 711 P.2d 1156 (Alaska 1985); ***State v. Scales***, 518 N.W.2d 587 (Minn. 1994). Police and

prosecutors in those states have become outspoken proponents of recording. *See* Amy Klobuchar, *Eye on Interrogations; How videotaping serves the cause of justice*, Washington Post (June 10, 2002).

Other courts are considering the issue as well. Recently, the New Jersey Supreme Court established a committee to study the use of electronic recording of custodial interrogations. ***State v. Cook,*** 847 A.2d 530, 546-47 (N.J. 2004). The Massachusetts Supreme Court is also now deciding whether to mandate recording of custodial interrogations. ***Commonwealth v. Valerio DiGiambattista***, SJC 09155, at http://www.state.ma.us/courts/courtsandjudges/courts/supremejudicialcourt/9155amicus_digiambattista.html.

Other jurisdictions are taking a new look at recording as well. In Illinois, numerous false confessions led the legislature to mandate recording in homicide cases. 20 ILCS 3930/7.2. Maine has followed suit. 25 MRSA 2803-B (2004). False confession scandals in Prince Georges County, Maryland,[1] and Broward County, Florida,[2] led authorities there to adopt new taping policies. In Milwaukee, Katrina French's false confession led District Attorney E. Michael McCann to suggest that Milwaukee police start taping interrogations. Doege, *Prosecutor backs taping interrogations*, Milwaukee Journal-Sentinel (May 6, 2002), at http://www.jsonline.com/news/metro/-may02/41209.asp.
Recently, the ABA called on legislatures and courts to mandate recording. ABA House of Delegates Report 8-A

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[1] Witt, *Prince George's Police to Install Video Cameras,* Washington Post, Feb.1, 2002, at B4.

[2] DeMarzo and DeVise, *Judge Overturns Conviction in Murder of Broward Deputy*, Miami Herald, March 20, 2003, at 1A.

(February 2004) at http://www.abanet.org/leadership/2004/dailyjournal.

Experiences in Minnesota, Alaska, and hundreds of other jurisdictions that now record demonstrate that the benefits to the criminal justice system greatly outweigh the costs, both real and perceived. *See* Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations* (Summer 2004), at http://www.law.northwestern.edu/depts/clinic/wrongful/Causes/CustodialInterrogations.htm (identifying 238 police jurisdictions that record). The time has come for this Court to adopt a recording requirement in this state.

B. An electronic recording requirement is essential to the accurate and efficient functioning of the courts and the criminal justice system.

Electronic recordings provide courts with accurate and reliable evidence. Courts are routinely called upon to determine the admissibility of confessions, with all the attendant complexity that determination involves. Without a contemporaneous record of the interrogation, judges are forced to rely on the biased recollections of suspects and law enforcement officials to reconstruct what occurred inside the interrogation room. As the Alaska Supreme Court has noted, "[t]he result, then, is a swearing match between the law enforcement official and the defendant, which the courts must resolve." ***Stephan***, 711 P.2d at 1161.

Electronic recording enables judges to conduct nuanced reviews to resolve admissibility issues, and permits juries to determine whether a suspect's purported confession was reliable. *See, e.g.*, ***State v. Hoppe***, 2003 WI 43, 261 Wis.2d 294, 661 N.W.2d 407 (recording enabled Court to note

that suspect's "voice was slurred and that he spoke slowly with long pauses," and that at times he appeared to be hallucinating). Simply put, recording advances the truth-finding process. Donovan & Rhodes, *The Case for Recording Interrogations*, The Champion 13 (December 2002).

After surveying law enforcement agencies nationwide, Thomas Sullivan, former United States Attorney for the Northern District of Illinois and Co-Chair of Illinois Governor Ryan's Commission on Capital Punishment, observed:

> A contemporaneous electronic record of suspect interviews has proven to be an efficient and powerful law enforcement tool. Audio is good, video is better. ... Recordings prevent disputes about officers' conduct, the treatment of suspects and statements they made. Police are not called upon to paraphrase statements or try later to describe suspects' words, actions, and attitudes. Instead, viewers and listeners see and/or hear precisely what was said and done, including whether suspects were forthcoming or evasive, changed their versions of events, and appeared sincere and innocent or deceitful and guilty.

Sullivan, *supra*, at 6.

Courts spend an inordinate amount of time determining *Miranda* and voluntariness issues. This case alone has generated three days of trial, four days of postconviction hearings, and two appeals, none of which would have occurred had law enforcement officials recorded the interrogation. The trial judge repeatedly remarked that he wished he had a videotape of the interrogation (50:109, 113). Electronic recordings drastically reduce the time courts spend on these issues. "Experience shows that recordings dramatically reduce the number of defense motions to

suppress statements and confessions." Sullivan at 8.

The Wisconsin judicial system already requires recording of depositions, trials, and appellate arguments. Custodial interrogations are at least as—probably more—important, given that the outcome of a case is usually sealed once police obtain a confession. *Cf.*, ***United States v. Wade***, 388 U.S. 218, 224 (1967)("today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality").

Recording also protects police from spurious claims of misconduct. As the Alaska Supreme Court noted, recording protects "the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics." ***Stephan***, 711 P.2d at 1161. Suspects are unable to contradict an objective record of the interrogation. *See* Sullivan at 8.

Recording also improves the quality and professionalism of law enforcement interrogations. Police report that "[r]ecordings permit detectives to focus on the suspect rather than taking copious notes of the interview. When officers later review the recordings they often observe inconsistencies and evasive conduct which they overlooked while the interview was in progress." Sullivan at 10. Recordings make it "unnecessary for detectives to struggle to recall details when writing reports or testifying about past interviews…." *Id*. at 12. Many agencies that record use the recordings for training purposes. *Id*. at 16. And recording deters officers who might be inclined to engage in improper tactics or misstate what was said. *Id*.

C. Fears about recording are unwarranted.

Recording has a track record that demonstrates that fears about recording are unfounded. The fears include:

- *Suspects who know they are being recorded will refuse to talk to police.*

"[S]cores of veteran detectives have found these fears to be unfounded." Sullivan at 20. Even if suspects are aware that they are being recorded, "when interviews get underway any initial hesitation fades and suspects focus attention on the subject of their interview." *Id.; see also, Policy Review*, International Association of Chiefs of Police and National Law Enforcement Policy Center (1998)(finding "little conclusive evidence" that recording makes suspects less willing to talk; indeed, police who recorded "were able to get more incriminating information from suspects on tape than they were in traditional interrogations")(quoted in Sullivan at 22). In fact, police find that recording can make suspects more cooperative because interrogators do not need to take notes during the interrogation. According to a detective in Arizona, for example, "the absence of notes frequently makes the subject more at ease and does not alert him/her to key phrases which may be of special interest at a later time." Sullivan at 11.

Where a suspect does refuse to speak while being recorded, there is a simple remedy: Every jurisdiction permits police to turn off the recording device and continue with the interview. *See* ***Stephan***, 711 P.2d at 1162; ***State v. Lee***, No. Co-98-1135, 1999 WL 227394, at*2 (Minn. Ct. App. May 22, 2001); 725 ILCS 5/103-2.1(e)(vi). Sullivan's survey of law enforcement concludes that "[n]one of the hundreds of

detectives we spoke with regarded this procedure to be an impediment to obtaining suspects' cooperation." Sullivan at 21.

- *Requiring recording will lead to suppression of confessions based on technicalities and escape of the guilty.*

Again, experience does not support this concern. Every jurisdiction that requires recording excuses the failure to record when that failure was occasioned by good faith error or equipment malfunction or where the violation was insignificant or the contents of the interrogation were not in dispute. *See, e.g.*, ***State v. Schroeder***, 560 N.W.2d 739, 740-41 (Minn. Ct. App. 1997); ***State v. Miller***, 573 N.W.2d 661, 674-75 (Minn. 1998); ***Bright v. State***, 826 P.2d 765, 773-74 (Alaska Ct. App. 1992); 725 ILCS 5/103-2.1(e); American Law Institute's Model code of Pre-Arraignment Procedure (1975)(calling for mandatory recording, but providing for suppression only for "substantial" violations, determined, in part, by "the extent to which the violation was willful"). Recording is not required if not feasible, or if failure to record was due to inadvertent error or oversight.

- *Recording is too expensive.*

Although there are costs involved with recording, the benefits and savings outweigh the costs. Costs include start-up expenses for purchasing equipment, setting up interrogation rooms, and training officers. Sullivan at 23. On-going costs include tape purchases, tape storage, and transcription fees. *Id*.

Most of these costs can be minimized. Although high-tech digital video systems are best, inexpensive alternatives

exist for cash-strapped departments. Many Minnesota and Alaska police departments, for example, rely on inexpensive hand-held micro-cassette tape recorders. *See, e.g.*, ***State v. Munson***, 594 N.W.2d 128, 133 (Minn. 1999). Although transcripts can add expense, they are needed only when disputes about an interrogation or confession arise.

The savings can be enormous, both from fewer suppression motions and trials, and less civil litigation. Christopher Ochoa and his codefendant together settled lawsuits for $14.3 million against the City of Austin, Texas, because police coerced Ochoa's false confession. Kertscher, *Wrongly imprisoned man wins $5.3 million settlement*, Milwaukee Journal-Sentinel (December 8, 2003), at http://www.jsonline.com/news/state/dec03/191269.asp. Videotaping likely would have prevented that miscarriage of justice, and its attendant cost.

In sum, Sullivan reports that "[i]n the many conversations we had with police across the country, very few mentioned cost as a burden, and none suggested that cost warranted abandoning recordings." *Id*. at 24.

D. This court should order recording either as a matter of due process or in the exercise of its superintending authority.

The Alaska Supreme Court in ***Stephan*** relied upon the Alaska constitution's due process clause to mandate recording. The Court held that recording "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." 711 P.2d at 1159. *See also* Christopher Slobogin, *Toward Taping*,

1 OHIO ST.J.CRIM.L. 309 (2003).

Although Wisconsin has interpreted the due process clauses of the state and federal constitutions to be "substantially equivalent," ***State v. Vanmanivong***, 261 Wis.2d 202, ¶29 fn.7, 661 N.W.2d 76 (2003), this Court has also said that it "will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin … require[s] that greater protection of citizens' liberties ought to be afforded." ***State v. Doe***, 78 Wis.2d 161, 172, 254 N.W.2d 210 (1977).

Alternatively, this Court, like the Minnesota Supreme Court in ***Scales***, has the superintending authority to ensure the reliability of evidence introduced in the courts in this state. The Wisconsin Constitution grants this Court "superintending and administrative authority over all courts." Wis. Const. art. VII, §3(1). This provision gives this Court the "inherent power to adopt those statewide measures which are absolutely essential to the due administration of justice in the state." ***State v. Kading***, 70 Wis.2d 508, 518, 235 N.W.2d 409 (1975). This is "a power that is indefinite in character, unsupplied with means and instrumentalities, and limited only by the necessities of justice." ***Arneson v. Jezwinski***, 206 Wis.2d 217, 225, 556 N.W.2d 721 (1996).

Although this Court has authority over the courts, and not the other branches of government, it has authority to adopt the recording requirement because it is a rule of admissibility governing proceedings in court. The rule does not make it illegal for police to interrogate without recording; the rule simply provides that, with appropriate exceptions, when the state offers evidence created by state authorities themselves

during an interrogation, the state must produce the best evidence reasonably possible.

Although this Court exercises its superintending authority cautiously, the Court has used it to impose rules governing judicial proceedings. *E.g.,* ***In the Interest of N.E.***, 122 Wis.2d 198, 199, 361 N.W.2d 693 (1985)(waiver of juvenile statutory jury trial right); ***In re Grady***, 118 Wis.2d 762, 776, 348 N.W.2d 559 (1984)(time limits for court decisions).

Plainly, this Court has authority to adopt rules governing the admissibility of evidence, including rules that affect the nature of police investigations. Although not expressly relying upon its superintending authority, the Court has, for example, fashioned rules governing the admissibility of polygraph evidence. *E.g.,* ***State v. Dean***, 103 Wis.2d 228, 244, 307 N.W.2d 628 (1981).

Indeed, in ***State v. Armstrong***, 110 wis.2d 555, 329 N.W.2d 386 (1983), the Court adopted recording as one of the criteria to consider before admitting hypnotically refreshed testimony. The Court wrote: "To aid the trial court in determining whether the hypnotic session was characterized by undue suggestiveness, we suggest that the judge review the session with guidelines similar to the ones set out below in mind." *Id*. at n.23. Guideline number 4 provided: "*All contact between the [hypnotist] and the subject should be videotaped from beginning to end*." *Id*. (emphasis added). Although the Court did not specifically cite its superintending authority, and did not mandate recording absolutely, the decision makes clear that this Court has the authority to regulate the flow of evidence in the lower courts, including by regulating the nature of evidence developed and presented by

law enforcement.

The Court should invoke that authority here.

CONCLUSION

For these reasons, this court should require that police officers videotape all custodial interrogations of juvenile suspects in their entirety, consistent with the rules adopted by the Minnesota and Alaska Supreme Courts.

Dated this 6th day of August, 2004.

Respectfully submitted,

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I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2979 words.

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