SUPREME COURT NO. 13-134
POLK COUNTY CASE NO. FECR 255964

IN THE SUPREME COURT OF IOWA

STATE OF IOWA

Plaintiff-Appellee,

v.

GABRIEL AVILA

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE MICHAEL D. HUBBERT, HONORABLE RICHARD G. BLANE

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF IOWA IN SUPPORT OF DEFENDANT-APPELLANT

RITA BETTIS
Counsel for Amicus Curiae
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3988
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org

RANDALL WILSON
Counsel for Amicus Curiae
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3576
FAX: (515) 243-8506
EMAIL: randall.wilson@aclu-ia.org

CERTIFICATE OF FILING

I, Rita Bettis, hereby certify that I will file eighteen (18) copies of the attached brief with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on July 8, 2013.

Rita Bettis

RITA BETTIS
Counsel for Amicus Curiae
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3988
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org

CERTIFICATE OF SERVICE

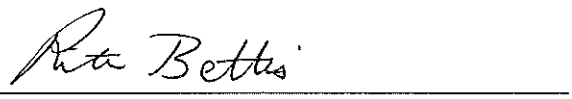
I, Rita Bettis, hereby certify that on July 8, 2013, I served a copy of the attached brief on all other parties to this appeal by mailing one (1) copy thereof to the respective counsel for said parties at the following addresses:

Attorney for Appellee:

Iowa Attorney General
Criminal Appeals Division
Hoover State Office Building, 2nd Floor
1305 E. Walnut
Des Moines, Iowa 50319

Attorney for Appellant:

Thomas J. Berg
Berg, Rouse, Spaulding, & Schmidt, P.L.C.
2423 Ingersoll Avenue
Des Moines, Iowa 50312



RITA BETTIS
Counsel for Amicus Curiae
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3988
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Iowa Court of Appeals

Other Jurisdictions

Constitutional and Statutory Provisions

Regulation

Other Authorities

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization made up of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Iowa, founded in 1935, is its statewide affiliate. Together, the two organizations work in the courts and legislature to safeguard the rights of all citizens. In particular, the ACLU and its Iowa affiliate are committed to ensuring that due process protections for the criminally accused are scrupulously honored. Because the facts of this case highlight the important role of electronic recording of custodial interrogations when feasible to assist the trier of fact in determining the substance, reliability, and voluntariness of confessions, its proper resolution is a matter of substantial concern to the ACLU of Iowa and its members.

ARGUMENT

I. INTRODUCTION

On appeal, this Court is asked to decide whether law enforcement should be required to electronically record custodial interrogations when the use of such technology is feasible, either through the Due Process Clause of the Iowa Constitution or by virtue of this Court's supervisory authority. In conjunction, this case calls for this Court to decide what remedy a district court should normally impose when, as in this case, law enforcement elects not to utilize readily available electronic recording equipment during a custodial interrogation. For the reasons set

forth below, this Court should instruct the lower courts to exclude evidence obtained in violation of the requirement to record custodial interrogations, and in the alternative, to require appropriate instructions to the jury.

This Court has already recognized the importance of electronic recording of custodial interrogations to assist the court in its assessment of the voluntariness of a confession, in protecting the rights of the accused, and in insulating law enforcement officers from meritless claims of improper tactics. *State v. Hajtic*, 724 N.W.2d 449, 454–56 (Iowa 2006). Following that case, the Iowa Attorney General advised law enforcement that "the *Hajtic* decision should be interpreted as essentially requiring this practice." Tom Miller, *Cautions Regarding Custodial Issues*, 39 Iowa Police J. 15, 15 (2007). At that time, the Iowa Department of Public Safety implemented guidelines requiring the electronic recording of custodial interrogations conducted in detention facilities. *Id.* As of 2009, in addition to the state Department of Public Safety, virtually all of Iowa's medium and larger law enforcement bodies appear to have policies or standard practices of electronically recording custodial interrogations.[1] The agents

[1] At least 27 law enforcement subdivisions in Iowa reported that they "currently record a majority of custodial interrogations": Altoona Police Department, Ames Police Department, Ankeny Police Department, Arnolds Park Police Department, Benton County Sheriff, Bettendorf Police Department, Cedar Rapids Police Department, Council Bluffs Police Department, Davenport Police Department, Des Moines Police Department, Fayette County Sheriff, Iowa City Police Department, Johnson County Sheriff, Kossuth County Sheriff, Linn County Sheriff, Marion Police Department, Marshalltown Police Department, Muscatine Police Department, Nevada Police Department, Parkersburg Police Department, Polk County Sheriff, Pottawattamie County Sheriff, Sioux City Police Department, Vinton Police

involved in this case stated that it is standard procedure to record custodial interrogations. (Trial Transcript, p. 495, ln. 1-3, (App. at ___.) Last year, this Court reaffirmed its admonition in *Hajtic*, while distinguishing custodial from noncustodial interrogations. *State v. Madsen*, 813 N.W.2d 714, 722 (Iowa 2012) ("[B]ecause noncustodial interrogations occur under a variety of circumstances, we decline at this time to adopt a per se rule requiring electronic recording).

This case demonstrates the need for further clarification from this Court making such a per se rule in the case of *custodial* interviews. If the decision of the district court is upheld in this case, police will be free to choose which custodial interrogations to record, and which to conduct in unreviewable secrecy. This arbitrariness in pretrial procedures creates an untenable invitation for abuse, creating an incentive to dispense with electronic recording in exactly those cases where such recording is essential. Here, the interrogation in question took place in a room in the Polk County Jail outfitted with the necessary recording equipment, following a previous inadmissible interrogation on the scene, and for which a dispute exists as to whether a valid Miranda waiver was received. (Trial Transcript p. 445, ln. 8-10, 16-25; Suppression Transcript, vol. 2, p. 32, ln. 20-24). This Court should reverse the district

---

Department, Waterloo Police Department, Waverly Police Department, Woodbury County Sheriff. Thomas P. Sullivan and Andrew W. Vail, *Recent Developments: The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law*, 99 J. Crim. L. & Criminology 215, 230 (2009) [hereinafter Sullivan, *Recent Developments*].

court's denial of Defendant's Motion to Suppress the information obtained during the Polk County custodial interrogation ordered September 4, 2012, and remand.

II. AS A MATTER OF DUE PROCESS UNDER THE IOWA CONSTITUTION, POLICE MUST ELECTRONICALLY RECORD CUSTODIAL INTERROGATIONS WHEN FEASIBLE

The Due Process Clause of the Iowa Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. I, § 9. "Due process requires fundamental fairness in a judicial proceeding." *In re Det. of Morrow*, 616 N.W.2d 544, 549 (Iowa 2000). While the language of the Iowa Constitution is similar to the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, "interpretations of the federal Due Process Clause are not binding . . . when we are called upon to determine the constitutionality of Iowa statues challenged under our own due process clause." *State v. Bower*, 725 N.W.2d 435, 441 (Iowa 2006).

State due process claims under Article 1, section 9 of the Iowa Constitution may arise under *categorical* fundamental fairness doctrine or *individual* totality of the circumstances test. *See State v. Becker*, 818 N.W.2d 135, 163 (Iowa 2012). *Amicus* submits both arguments herein. A categorical due process violation occurs when law enforcement selectively or arbitrarily fails to electronically record a custodial interrogation when recording is routine and readily available. Additionally, in this case, under the totality of the circumstances, defendant suffered a due process violation.

A. The failure to electronically record custodial interrogations when feasible is a categorical due process violation, compromising the reliability of confession evidence and defendant's access to a fair trial.

The Iowa Supreme Court recognizes the evolving nature of due process. *See Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999)("Due process protections . . . should not ultimately hinge upon whether the right sought to be recognized has been historically afforded. Our constitution is not merely tied to tradition, but recognizes the changing nature of society.") (*citing Redmond v. Carter*, 247 N.W.2d 268, 273 (Iowa 1976) ("Constitution is not fixed."). The Alaska Supreme Court recognized the evolving nature of due process in finding a due process right to electronic recording under its state constitution. *Stephan v. State*, 711 P.2d 1156, 1161-62 (Alaska 1985) ("The concept of due process is not static; among other things, it must change to keep pace with new technological developments. . . . The police already make use of recording devices in circumstances when it is to their advantage to do so.") Notably, the Alaska Supreme Court found a state due process right to electronic recording, and adopted an exclusionary rule remedy for noncompliance, in light of the failure of law enforcement and lower courts to implement the clearly expressed caution in earlier Alaska Supreme Court cases:

> Such recording is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible. We reach this conclusion because we are 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.

Stephan, 711 P.2d at 1159-60 (internal citations omitted.)

Since this Court decided *Hajtic*, across the state and country, a flurry of activity has occurred. To date, 18 states and the District of Columbia require that custodial interrogations be recorded in felony investigations, either through court decisions, court rules, or statutes.[2]

The Eighth Circuit has long ago recognized the value of electronic recording to protect the accused and assist in the ascertainment of truth:

> [A] video tape is protection for the accused. If he is hesitant, uncertain, or faltering, such facts will appear. If he has been worn out by interrogation, physically abused, or in other respects is acting involuntarily, the tape will corroborate him in ways a typewritten statement would not. Instead of denying a defendant his rights, we believe it is a modern technique to protect a defendant's rights. . . . If a proper foundation is laid or the admission of a video. . . .We suggest that to the extent possible, all statements of defendants should be so preserved.

Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972).[3] Other federal Courts of Appeal have declined to find a due process right to electronic recording of custodial

---

[2] Thomas P. Sullivan, *Focus: A Compendium of Law Relating to the Electronic Recording of Custodial Interrogations*, 95 Judicature 212, 213 (March/April 2012)[hereinafter Sullivan, *Compendium*]. The jurisdictions requiring electronic recording by Court ruling are: Alaska, Indiana, Minnesota, New Jersey, Massachusetts, and New Hampshire. Jurisdictions requiring electronic recording by statute are: Connecticut, District of Columbia, Illinois, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oregon, Texas, and Wisconsin. Sullivan, *Compendium* at 213; Sullivan, *Recent Developments*, *supra* note 1, at 216-217. *See also* Alan M. Gershel, *A Review of the Law in Jurisdictions Requiring Electronic Recording of Custodial Interrogations*, 16 Richmond J. L. & Tech. 9 (2010).

interrogations under the U.S. Constitution.[4] However, the Iowa Supreme Court is not hindered in its ability to find, as the Alaska high court did, that the Due Process Clause of the Iowa Constitution is more protective of liberty interests than the U.S. Constitution. *See DeSimone v. State*, 803 N.W. 2d 97, 102 n.3 (Iowa 2011); *see also State v. Clark*, No. 1-695/10-0511, 2011 WL 5515221 (Iowa Ct. App. Nov. 9, 2011).

The Iowa Supreme Court "may construe the Iowa Constitution differently than its federal counterpart, despite the provisions containing nearly identical language and being structured generally with the same scope, import, and purpose." *State v. Kooima*, *3___ N.W.2d ___, 2013 WL 3238574 (Iowa 2013) (citing *State v. Pals*, 805 N.W.2d 767, 771-72, 781-83 (Iowa 2011)("noting our more stringent application of state constitutional provisions than federal caselaw applying nearly identical federal counterparts."); *State v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009); *Varnum v. Brien*, 763 N.W.2d 862, 879 n.6 (Iowa 2009)("we have jealously guarded our right to employ a different analytical framework under the state equal protection clause as well as to

---

[4] *See United States v. Torres-Galindo*, 206 F.3d 136, 144 (1st Cir. 2000)(defendant failed to articulate any impropriety or an argument of Fifth Amendment violation); *United States v. Toscano-Padilla*, No. 92-30247, 1993 U.S. App. LEXIS 15411, at *5 (9th Cir. June 16, 1993); *United States v. Zamudio*, No. 99-2256, 2000 U.S. App. LEXIS 8235 (10th Cir. Apr. 26, 2000); *United States v. Yunis*, 859 F.2d 953, 961 (D.C. Cir. 1988). *See also* Roberto Iraola, The Electronic Recording of Criminal Investigations, 40 U. Rich. L. Rev. 463, 472 n. 53 (2006) (explaining that a number of state courts finding no *federal* due process claim to electronic recording of custodial interrogations rested on interpretations of U.S. Supreme Court opinions in *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988) and *California v. Trombetta*, 467 U.S. 479 (1984), a line of cases in which the Court rejected claims that it violated Due Process to fail to preserve potentially exculpatory evidence, unless a defendant could show police were acting in bad faith.

independently apply federally formulated principles.") (citations omitted); *and Zaber v. City of Dubuque*, 789 N.W.2d 634, 654 (Iowa 2010). *See also State v. Baldon III*, 829 N.W.2d 785 (Iowa 2013) (examining independence of state constitutional protections of civil liberties in the context of search and seizure law).

"Procedural due process protections act as a constraint on government action that infringes upon an individual's liberty interest, such as the freedom from physical restraint." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 240 (Iowa 2002). "Due process entitles a defendant to certain minimal basic procedural safeguards..." *State v. McMullin*, 421 N.W.2d 517, 519 (Iowa 1988). The Court will invalidate an evidentiary rule on state due process grounds upon showing that it "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, which define the community's sense of fair play and decency." *State v. Becker*, 818 N.W.2d 135, 150-51 (Iowa 2012). This conception undertakes to include both our historical understandings of fundamental fairness, and our evolving understanding of a defendant's right to a fair trial. *Id.* at 150-51 (discussing *State v. Cox*, 781 N.W.2d 757 (Iowa 2010), and the importance of evidentiary rules on the presumption of innocence as illustration).

Voluntariness and freedom from coercive interrogation techniques are central to due process under the state constitution. *See State v. Bowers*, 661 N.W.2d 536, 541 (Iowa 2003) (Voluntariness is assessed under totality of the circumstances test, examining whether defendant's will is overborne or capacity for self-determination is

critically impaired.). *See also State v. Payton*, 481 N.W.2d 325, 328-29 (Iowa 1992) (Voluntariness determined in consideration of defendant's age, prior experience in criminal justice system, use of deception, ability to understand and respond to questions, duration of interrogations, defendant's physical and emotional reactions, use of physical punishment, including sleep or food deprivation.). Voluntariness as a prerequisite to reliability goes back to British and American common law. *See, e.g., Hopt v. Utah*, 110 U.S. 574 (1884) (adopting the common-law voluntariness test) *and Brown v. Mississippi*, 297 U.S. 278 (1936) (voluntariness essential to due process).

The advent of DNA testing provides ample illustrations of the unreliability of confessions when no method to examine the circumstances of their production is available. The Innocence Project, in examining the more than 290 wrongful convictions subsequently overturned by DNA evidence nationwide, found that over 25 percent involved false confessions.[5] Similarly, in Illinois, 15 of 45 (one third) discovered wrongful convictions for murder involved false confessions including instances of authorities fabricating confessions.[6] False confessions—whereby a person admits to a crime that she did not commit—can be produced through the same factors involved in involuntary confessions: real or perceived intimidation, threatened

---

[5] Innocence Project, *Fact Sheet: False Confessions & Recording of Custodial Interrogations, available at* www.innocenceproject.org/Content/314PRINT.php)(last visited July 3, 2013)

[6] Rob Warden, Center on Wrongful Convictions, *The Role of False Confessions in Illinois Wrongful Murder Convictions Since 1970* (2003), *available at* www.law.northwestern.edu/depts/clinic/wrongful/FalseCofessions2.htm.

or actual force by law enforcement, promises of leniency or threats of harsher punishments for failure to confess, misleading or untrue statements as to the existence of incriminating evidence, suspect exhaustion, stress, hunger, addiction related withdrawal, and cognitive deficiencies. *Id. See also Blackburn v. Alabama*, 361 U.S. 199, 206 (1960); *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (a confession obtained by direct or implied promises is involuntary).

The United States Supreme Court has recently recognized that "there is mounting empirical evidence that these pressures [of custodial police interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed. *Corley v. United States*, 556 U.S. 303, 2009 WL 901513 at *16 (2009). Indeed, a venerable library of psychological and criminological research spanning at least twenty years establishes how routine interrogation techniques produce false confessions, even following Miranda warnings, and recommends reforms mandating electronic recording.[7]

---

[7] *See, e.g.,* Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. Am. Acad. Psychiatry L. 332 (2009); Kassin, Drizin et. al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. Human Behav. 3 (2009); Richard E. Leo and Kimberly D. Richman, *Mandate the Electronic Recording of Police Interrogations*, 6 Crim. & Public Policy 4 (2008), *available at* http://ssrn.com/abstract=1141335; Thomas P. Sullivan et. al, *The Case for Recording Police Interrogations*, 34 Litigation 3 (American Bar Assn 2008); Thomas P. S. Sullivan, *The Faces of Wrongful Conviction Symposium: The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, 37 Golden Gate U. L. Rev. 175 (2006) [hereinafter Sullivan, *The Time Has Come*]; Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. Crim. L. & Criminology 1127 (2005); Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the*

While the general public often has difficulty understanding why a defendant would confess to a crime she did not commit, the reality of false confessions is well documented and known throughout the justice system.[8] False confessions often result from "contamination." Contamination is the transfer of details about a crime from interrogator to suspect that can corroborate a false confession:

> The problem of contamination in false confession cases usually arises during interrogation itself, when the interrogator pressures a suspect to accept a particular account of the crime story – one that usually squares with the interrogator's preordained theory of how the crime occurred. The interrogator uses leading questions, deliberately or inadvertently, to suggest specific facts about the crime to the suspect, which are then parroted back in the form of a confession. The presence of these types of specific facts in the suspect's confession lends it credibility and creates an all-important illusion of corroboration.

See Laura H. Nirider, Joshua A. Tepfer and Steven A. Drizen, *Combating Contamination in Confession Crimes. Convicting the Innocent: Where Criminal Prosecutions Go Wrong by Brandon L. Garret*, 79 Univ. Chicago L. Rev. 837, 845-853 (2012) (book review).

Reliability and Voluntariness of Confessions, 52 Drake L. Rev. 619 (2004); Richard Leo & Richard Ofshe, *The Consequence of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429 (1998); Richard Ofshe and Richard Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979 (1997); Welsh W. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105 (1997); Saul M. Kassin & Karyln McNall, *Police Interrogations and Confessions: Compliance, Internalization, and Confabulation*, 7 Psychol. Sci. 125, 126-27 (1996).

[8] *See, e.g.*, Rob Warden, Center on Wrongful Convictions, *The Role of False Confessions in Illinois Wrongful Murder Convictions Since 1970* (2003), *available at* www.law.northwestern.edu/depts/clinic/wrongful/FalseCofessions2.htm.

It is the duty of the defense attorney to evaluate confessions for contamination:

> Examining whether police fed facts to a suspect is a simple task that can be enormously fruitful—but is not always possible. . . ***[T]he review of an interrogation for fact-feeding is almost impossible in the absence of an electronic recording of the interrogation in its entirety.*** Many jurisdictions record only the suspect's final statement, in which the suspect delivers a story of guilt in response to investigators' open-ended questions—a story that has often been rehearsed, sometimes for hours, before the recorder was turned on.

Id. at 853 (emphasis added). Yet when a recording of the entire interrogation exists, including the interview preceding the confession itself, defense counsel has the opportunity to identify instances of contamination that may have produced a false confession. *Id.*

Whether custodial interrogations are properly electronically recorded also directly impacts the trial court's ability to ensure a fundamentally fair trial through access to effective assistance of counsel, and the ability to present a robust defense.[9] Although claims that effective assistance of counsel and the meaningful opportunity to present a complete defense arise under the Sixth Amendment to the U.S. Constitution, both the U.S. Supreme Court and the Iowa Supreme Court rely on the Due Process Clause alone in deciding issues related to these rights. *State v. Simpson*, 587 N.W.2d 770, 771 (Iowa 1998) *and State v. Williams*, 207 N.W.2d 98, 104 (Iowa 1973) (right to present defense and right to effective assistance of counsel are essential

[9] *See* Wayne T. Westling, *Something is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. Marshall L. Rev. 537, 537 (2001).

to a fair trial.). The failure to electronically record custodial interrogations impacts both the right against self incrimination and right to counsel. These guarantees are weakened for those whose interrogations are shrouded in secrecy, as police accounts are the sole, uncorroborated[10] record of whether these rights were invoked.

Even though this Court's admonition to electronically record custodial interrogations was made clear in *Hajtic*, criminal defendants do not enjoy uniform

---

[10] An Alaska Court of Appeals judge recognized this tension and the value of video recording:

> ...[Miranda] claims invariably produce a swearing contest in which defendants claim that they were not afforded their constitutional rights and police officers claim that they were. Since defendants are interrogated in custody, isolated from anyone other than police officers, they cannot provide independent corroboration of their own testimony regarding what occurred during the interrogation. In a sense then, a tape recording provides an objective means for evaluating what occurred during interrogation. It also provides the defendant with a means of "cross-examining" his confession. . . . The importance of such a tape recording lies in the fact that trial courts and appellate courts tend to trust police officers' recollections of what occurred at the expense of the criminal defendant's account. Thus, in the absence of a tape recording, the prosecuting authorities invariably win the swearing contest. The heavy burden of providing compliance established by *Miranda* becomes, in practice, no burden at all.

Harris v. State, 678 P.2d 397, 414 (Alaska Ct. App. 1984) (J. Singleton, concurring in part and dissenting in part) (citation omitted), *overruled by Stephan v. State*, 711 P.2d 1156 (Alaska 1985). *See also* Welsh S. White, *Miranda's Waning Protections: Police Interrogation Practices After Dikerson* (U. Mich. Press 2001) at 192. Commentators continue to question the common practice of holding the uncorroborated officer's testimony alone to satisfy the due process voluntariness requirement. *See, e.g.*, Yale Kasimar, *Limit Police Secrecy*, Nat'l L. J., June 9, 2003 at 43.

access to the vital protections electronic records provide. Electronic recording of custodial interrogations helps protect against the known susceptibilities of interrogations conducted in secret: involuntary, false, or unreliable incriminating statements, and subsequent inability to effectively assert at trial that evidence obtained in violation of the right to counsel. The need for a per se rule mandating electronic recording to remedy this categorical due process infirmity is evident.

B. The failure to electronically record custodial interrogations in this case violated defendant's right to due process under individualized totality-of-the-circumstances analysis.

The failure to electronically record defendant's custodial interrogation in this case also comprises a due process violation under the individualized analysis. As a best practice emerges and becomes routine, widespread, and standardized, any departure or variance from that practice inherently calls into question the circumstances and rationale of the decision to depart from the normal course. Videotaping custodial interrogations has become so routine that selective non-recording in a situation when recording is as easy as pressing a button becomes inherently problematic. Videotaping custodial interrogations avoids exactly what has occurred in this case: a dispute, among other things, as to whether a valid Miranda waiver was obtained. (Trial Transcript p. 445, ln. 16-25; Suppression Transcript, vol. 2, p. 32, ln. 20-24). The un-counseled interview is further called into question because it followed a prior illegal

interrogation in the defendant's hotel room and produced a nearly identical confession. (Suppression Ruling, p. 8). Its admission hinged on the Judge's finding that a valid Miranda waiver was obtained, over the objections on the defendant, based on the Judge's assessment of the agents' superior credibility. (Reconsider Ruling, p. 4) (citing *Elstad*, 490 U.S. 298 (1985): "[A] suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warning.").

Thus, this case demonstrates the arbitrariness and fundamental unfairness of the current system and the resulting need for this Court to establish a per se rule of electronic recordation to ensure uniformity and a baseline level of protection for individual defendants. In a believability contest between law enforcement agents and a criminal defendant, it is far-fetched to imagine that defendant's credibility will be judged to match that of his interrogators. *See Harris*, 678 P.2d at 314. If a videotape record is made, all that is necessary for the defendant is to refer to the tape; but if, as here, no such record is made, law enforcement may misremember or confuse key details, or, certainly more rarely, intentionally deceive.

The inherent problem with an *unenforceable* guideline intended to protect defendants and the ability to find the truth among competing accounts is that such impunity invites deviation from the guideline in order to conceal the truth. We do not and will never know whether a valid Miranda warning was given. In fact, it may be the case that none of the parties involved actually remember themselves. (Trial Transcript

p. 494, ln. 21-22). But we do know that in this case, the key to discerning whether a miscarriage of justice occurred due to the admission of an involuntary or false confession is forever unavailable, for the simple reason that agents failed to hit "record."

Agents Austin and Bassett, as agents of the Department of Public Safety, Division of Narcotics Enforcement, (Trial Transcript p. 295, ln. 16-19, and p. 371, ln. 13-14), were governed by the state guidelines to electronically record custodial interrogations at detention facilities. They conducted the custodial interrogation in question at the Polk County Jail, (Trial Transcript p. 494, ln.1-6), which too, employs a practice of videotaping all custodial interrogations.[11] Agent Bassett acknowledged that it was standard procedure to videotape custodial interrogations. (Trial Transcript, p. 495, ln. 1-3). Electronic recording equipment was available in the facility where Avila was interrogated at the push of a button, (Trial Transcript, p. 357. Ln. 45-p.359, ln. 10). As a result of that decision—either arbitrarily or strategically made—the trial court lacked easily produced documentation that the taint of the prior unlawful interrogation was purged. A review of the record evidences the importance of his confession to his conviction. As a matter of Due Process, this Court should reverse the trial court's decision to admit that confession into evidence and remand.

[11] *See* Sullivan, *Recent Developments*, *supra* note 1, at 230.

III. THE COURT MAY REQUIRE THAT CUSTODIAL INTERROGATIONS BE ELECTRONICALLY RECORDED WHEN FEASIBLE PURSUANT TO ITS SUPERVISORY AUTHORITY

This Court may decline to decide whether the Due Process Clause of the Iowa Constitution requires that custodial interrogations be electronically recorded when feasible and still require the practice pursuant to its supervisory authority to secure fair justice to parties. This power, also rooted in the common law, is made express in the Iowa Constitution:

> The supreme court ... shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state.

Iowa Const. art. V, § 4, *amended by* Iowa Const. amend. 21, § 1. The Court has invoked this authority in the context of questions of discovery and admissibility of evidence. *See, e.g., State v. Gates*, 306 N.W.2d 720, 725-26 (Iowa 1981) ("in exercising their supervisory authority, trial courts must strike a careful balance between the interest in economizing discovery and the rights afforded criminal defendants.") *See also State v. McKinney*, 756 N.W.2d 678, 680 (Iowa 2008) *and State v. McKinney*, 743 N.W.2d 550, 552 (Iowa 2008) ("We posses constitutional powers to issue writs to, and exercise supervisory and administrative control over other judicial tribunals.")(internal quotations omitted); *State v. Davis*, 493 N.W.2d 820, 822 (Iowa 1992) (invoking supervisory authority where uniform application of sentencing statute in question was of statewide importance); *State v. Iowa Dist. Court for Johnson Co.*, 750 N.W.2d 531 (Iowa

2008); *See also Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564 (Iowa 1976) (Supreme Court granted review pursuant to its supervisory authority in matter of considerable public importance).

This is the path to mandatory electronic recording that all state Supreme Courts, aside from Alaska, have taken. In *State v. Scales*, the Minnesota Supreme Court determined that custodial interrogations should be recorded pursuant to its supervisory authority over the fair administration of justice. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (cited in *Hajtic*, 724 N.W.2d at 455). The Minnesota Supreme Court reasoned that "[t]he 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.* It created a clear mandate and remedy for noncompliance:

> 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. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial.

Id. at 592.

In 2001, New Hampshire followed Minnesota's approach, finding its own supervisory powers allowed it to impose a unique rule requiring that if police record a suspect's interrogation, they must record the complete interrogation. *State v. Barnett*,

789 A.2d 629, 630-33 (N.H. 2001). In 2004, the Massachusetts Supreme Court, similar to Iowa, expressed a preference for recording of interrogations, but provided for cautionary jury instructions to be given in absence of recording. *Commonwealth v. DiGiambattista*, 813 N.W.2d 516, 533-34 (Mass. 2004). In 2005, the New Jersey Supreme Court adopted a rule mandating electronic recording for custodial interrogations following a court decision a year prior, and providing for jury instructions upon noncompliance. *State v. Thomahl Cook*, 179 N.J. 533 (New Jersey 2004) *and* Supreme Court of New Jersey, Administrative Determination Re: Report of the Special Committee on Recordation of Custodial Interrogations (2005) (discussed in more detail *infra*). Most recently, in 2009, the Indiana Supreme Court amended its rules of evidence to require custodial interrogations in detention facilities be electronically recorded, with failure to record resulting in suppression unless the government proves, by clear and convincing evidence, one of a number of delineated exceptions. Randall T. Shephard, Chief Justice of Ind., *Order Amending Rules of Evidence*, No. 94S00-0909-MS-4 (2009) and Ind. R. Evid. 617(a) (effective Jan. 1, 2011), *available at* www.in.gov/ilea/files/Evidence_Rule_617.pdf.

Electronic recording of custodial interrogations is not only vital to protecting the rights of the accused; as this Court first recognized in *Hajtic*, videotaping custodial interrogations provides invaluable information to the fact-finder in furthering the truth-seeking process. *Madsen*, 813 N.W. at 721-22 (quoting *People v. Kladis*, 960

N.W.2d 1104, 1110 (Ill. 2011). Proper electronic recording[12] of both interviewer and the accused "objectively document[s] what takes place by capturing the conduct and the words of both parties." *Id.* That stands in stark contrast to the scenario of parsing competing accounts of the circumstances and substance of a confession from the accused and law enforcement agents.

Additionally, proper videotaping prevents or quickly resolves disputes regarding officer misconduct or abuse of the accused, enhances confidence in law enforcement, and promotes the reliability of the outcome of criminal prosecutions. The Alaska Supreme Court highlighted these advantages of video recording of custodial interrogations, aside from the protection offered to a criminal suspect:

> The recording of custodial interrogations is not, however, a measure intended to protect only the accused; a recording also protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics. A recording, in many cases, will aid law enforcement efforts, by confirming the content and the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated. In any case, a recording will help trial and appellate courts to ascertain the truth.

Stephan, 711 P.2d at 1161.

---

[12] Innocence Project, *supra* note 5. When the video camera is fixed only upon the suspect, jurors tend to disregard the appearance of the interrogator and conclude the confession was freely given. *Id.*

Consistent with this prediction, some nearly three decades later, law enforcement experiences with electronic recording practices are positive.[13] For those few Iowa police departments which do not yet possess video or audio recording capabilities, the start up requirements are not unduly burdensome.[14] As much as video recording protects criminal suspects in custody from coercive techniques, it also provides to law enforcement and prosecutors high quality, highly reliable incriminating evidence at trial. The Justice Project, *Electronic Recording of Custodial Interrogations: A Policy Review* *8 (2007), *citing* Sullivan, *Police Experiences* at 19. *See also*

---

[13] Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 1 Northwestern U. Sch. L. Center on Wrongful Convictions (2004), *available at* www.law.northwestern.edu/wrongfulconvictions/Causes/CustodialInterrogations.htm [hereinafter Sullivan, *Police Experiences*]; Sullivan, *Compendium*, *supra* note 2, at 213. Sullivan, reporting on his nine year study of the practice, and interviews with more than 600 law enforcement officers, stated last year that "Although it may seem an exaggeration, we have yet to encounter a single officer from a recording department who, given the option, would elect to return to making handwritten notes during interviews, followed by type-written summary reports." *Id. See Also* Sullivan, *Recent Developments*, supra note 1, at 220 n.24. The International Association of Chiefs of Police, the American Federation of Police and Concerned Citizens, the National District Attorneys Association (NDAA), and American Bar Association advocate electronic recording, as do the American Judicature Society, American Law Institute, Center for Policy Alternatives, Constitution, Innocence, and Justice Projects, and the National Association of Criminal Defense Lawyers. Sullivan, *Compendium*, *supra* note 2, at 215.

[14] The financial burdens are allayed in several ways. First, the technology required for electronic recording "continues to improve and becomes cheaper and easier to use." Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. Marshall J. Computer & Info. L. 771, 797 (2005), noting that (at that time) "Basic stationhouse and handheld video cameras can now be purchased for as little as one hundred fifty dollars, and sophisticated recording equipment can be obtained for a few thousand dollars." Federal and state dollars has also been made available for police departments to update their recording equipment. *Id.*

Lisa C. Oliver, *Mandatory Recording of Custodial Interrogations Nationwide: Recommending a New Model Code*, 39 Suffolk U. L. Rev. 263, 280-83 (2005) (dispelling the myths against recording, including pointing out that worries that defendants would 'clam up' or be 'chilled' if recorded were not borne out by experience.)

Ample research supports a finding that the arbitrary or deliberate failure to electronically record a custodial interview, when such recording was feasible, constitutes a denial of due process under the Iowa Constitution. However, should this Court decline to decide the case on those grounds, it may still impose a feasible electronic recording requirement. Given this Court's prior admonition to record custodial interrogations that went unheeded in this case, and the widely recognized and broad-spanning value of electronic recording of custodial interrogations to securing fair justice to *all* parties, this Court should exercise its constitutionally enshrined supervisory authority to issue a per se rule that custodial interrogations be videotaped normally, and audiotaped when videotaping is unavailable, from start to finish, including necessary *Miranda* warnings and waivers, or face exclusion, and with limited exceptions for exigent circumstances, unknown equipment failure, and spontaneous outbursts.

IV. THE APPROPRIATE REMEDY FOR FAILURE TO ELECTRONICALLY RECORD A CUSTODIAL INTERROGATION WHEN FEASIBLE IS EXCLUSION

The requirement of electronic recording of custodial interrogations, when feasible, is ultimately without force or meaning without an appropriate remedy for non-compliance.[15] Both the Minnesota and Alaska Supreme Courts adopted an exclusionary rule. *See State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) *and Stephan v. State*, 711 P.2d 1156, 1160 (Alaska 1985). Notably, the Alaska Supreme Court adopted an exclusionary rule remedy as a result of the failure of law enforcement and lower courts to implement the clearly expressed preference in earlier Alaska Supreme Court

---

[15] The American Bar Association's policy on tape recording and/or video recording of all custodial interrogations recognizes the centrality of providing an appropriate remedy for noncompliance:

> RESOLVED, That the American Bar Association urges all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to audiotape the entirety of such custodial interrogations. FURTHER RESOLVED, That the American Bar Association urges legislatures and/or courts to enact laws or rules of procedure requiring videotaping of the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to require the audiotaping of such custodial interrogations, and to provide *appropriate remedies for noncompliance.*

American Bar Assn., *Report to the House Delegates* (Feb. 2004), *available at* www.abanet.org/leadership/2004/recommendations/8a.pdf (emphasis added).

cases that custodial interrogations be electronically recorded when feasible. *Stephan*, 711 P.2d at 1159-60.

Exclusion not only best protects defendants from the improper influence of unlawful confessions at trial, it is entirely consistent with traditional exercise of the judicial function:

> Separation of Powers analysis . . . ignores the fact that Miranda originated with the courts, not the legislature, and that the exclusionary rule is presumed to be a judicial device, not a Constitutional or legislative mandate, and that the courts historically have fashioned remedies to preserve and protect Constitutional rights. Moreover, recording statements is more than a public policy issue, it is a question of fundamental fairness, otherwise known as due process.

Daniel Donovan & John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 Mont. L. Rev. 223, 242 (2000). Given the inherently suspect nature of a failure to record when recording is standard procedure and readily available, the failure of law enforcement to heed this Court's prior admonition, and the sheer number and importance of the rights of the accused that are implicated by a failure to record, the proper prophylactic remedy is exclusion.

V. AT MINIMUM, DEFENDANTS ARE DUE A JURY INSTRUCTION AS TO THE CREDIBILITY OF INFORMATION RESULTING FROM CUSTODIAL INTERROGATIONS WHERE LAW ENFORCEMENT ELECTS NOT TO ELECTRONICALLY RECORD WHEN SUCH RECORDING IS FEASIBLE

Only the imposition of an exclusionary rule will fully protect defendants. However, in the alternative, this Court may take a less protective stance while still affirmatively underscoring the importance of electronic recording. The Supreme

Courts in both New Jersey and Massachusetts have instituted cautionary jury instructions to remedy noncompliance with mandatory recording.[16] In 2004, the Massachusetts high court held that a jury should be instructed that "the State's highest court has expressed a preference that interrogations be recorded whenever practicable," and that, if a defendant claims involuntariness, "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." *Commonwealth v. DiGiambattista*, 813 N.W.2d 516, 533-34 (Mass. 2004).

The New Jersey Supreme Court adopted Rule 3:17, *Electronic Recordation*, providing for audio or video recording of interrogations concerning a delineated number of crimes comprising of violent felonies, when feasible, starting from the *Miranda* warning and continuing through the conclusion of the interview. Supreme Court of New Jersey, *Administrative Determination Re: Report of the Special Committee on Recordation of Custodial Interrogations* (2005). The rule makes exceptions for spontaneous statements, statements made in response to booking questions, where the suspect does not consent to a recording, and interviews for less serious crimes. *Id.* The remedy for noncompliance are detailed jury instructions as to the rules requiring custodial interrogations be electronically recorded, the purpose of those rules, and to

[16] *See also* Sullivan, *The Time Has Come, supra* note 7, at 176.

weigh with great caution the credibility of information without the benefit of a recording. *Id.*

The requirements, exceptions, and jury instructions provided by Court rules are consistent with statutes passed by both Wisconsin in 2007 and Nebraska in 2008. Wis. Stat. Ann. § 972.115 (West 2011); Neb. Rev. Stat. § 29-4504 (West 2011). Sullivan and Vail have suggested model language for cautionary instructions that highlight for the jury the reliability difficulties inherent in information from unrecorded interrogations:

> The law of this state required that the interview . . . was to be electronically recorded, from beginning to end. The purpose of this requirement is to ensure that you juror will have before you a complete, unaltered, and precise record of the circumstances under which the interview was conducted, and what was said and done by each of the persons present. . . .
>
> Because the interview was not electronically recorded as required by our law, you have not been provided the most reliable evidence as to what was said and done by the participants. You cannot hear the exact words used by the participants, or the tone or inflection of their voices.
>
> Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that what was said and done has been accurately reported by the participants, including testimony as to statements attributed by law enforcement witnesses to the defendant.

Sullivan, *Recent Developments*, at 226.

CONCLUSION

Amicus ACLU of Iowa respectfully requests this Court reverse the decision of the district court on the issue of admissibility of information stemming from the Polk County Jail interrogation on May 1, 2012 on due process grounds and issue a holding

clarifying that all custodial interrogations be electronically recorded when feasible, requiring exclusion upon failure to record. In the alternative, *amicus* respectfully requests that this court exercise its supervisory and administrative authority to require the same. Finally, in the alternative to adopting an exclusionary rule, *amicus* requests that this Court provide guidance to the lower courts as to appropriate cautionary jury instructions in the event of failure to record.

RITA BETTIS, AT#0011558
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3988
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org

RANDALL WILSON
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3576
FAX: (515) 243-8506
EMAIL: randall.wilson@aclu-ia.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(*g*)(1) or (2) because:

[x] this brief contains 6,987 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1) or

[ ] this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(2).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(*e*) and the type-style requirements of Iowa R. App. P. 6.903(1)(*f*) because:

[x] this brief has been prepared in a proportionally spaced typeface using Garamond in 14 point, or

[ ] this brief has been prepared in a monospaced typeface using MS Word 2007 with _____ characters per inch and _____ style.

Rita Bettis

RITA BETTIS
Counsel for Amicus Curiae
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3988
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org