

April 1, 2009

Representative Donald Lally, Chair
House Judiciary Committee
The Statehouse – Room 313
Providence, RI 02903

*Re: H.B. 5134 (Recording Custodial
Interrogations in Cases with Potential
Sentence of Life Imprisonment)*

Dear Representative Lally:

I am writing to express support for H.B. 5134 that would require complete electronic recording of custodial interrogations in cases with potential sentence of life imprisonment, because this has proved an effective, inexpensive and highly workable means of reducing the risk of erroneous convictions, protecting the rights of accused persons, assisting the work of careful and professional law enforcement investigators, and aiding later judicial determinations concerning the admissibility of these statements.

I am a Professor of Law at New England Law | Boston, in Boston, Massachusetts, where I have taught criminal law, procedure and evidence for thirteen years, before which I was a public defender for five and-a-half years in Nashville, Tennessee, where my work focused on homicide cases, juvenile cases and cases involving mentally ill defendants. I am also on the Boards of Trustees of the New England Innocence Project, a non-profit charitable trust which coordinates efforts to examine cases of persons in New England who claim they were wrongfully convicted and the Suffolk Lawyers for Justice, Inc., a non-profit organization that coordinates indigent defense by private bar advocates in Suffolk County, Massachusetts. Both organizations submitted an amicus brief in the Massachusetts Supreme Judicial Court in 2004 seeking a judicial rule that custodial interrogations be recorded. I drafted this brief. These comments reflect my own views.

In Massachusetts, the Supreme Judicial Court spent over thirteen years warning law enforcement that recording interrogations would improve courts' ability to determine the admissibility of confessions, provide more

reliable evidence, and might eventually be required. When the Court sought amicus briefs, law enforcement responded with a substantial brief including numerous affidavits swearing that requiring recording would eliminate confessions and allow dangerous criminals to go free. The Court examined studies of recording, including the 2004 Thomas Sullivan study you have been provided, and the 1992 Department of Justice-funded study by William Geller of the Police Executive Research Forum, and concluded that “despite initial apprehension and skepticism, law enforcement agencies overwhelmingly endorse the practice of recording interrogations once they have gained experience with it.”¹

It then ruled that if the state introduces an unrecorded statement produced by custodial interrogation or interrogation in a detention facility, the jury must be instructed “that the State’s highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant’s alleged statement with great caution and care.”²

The sky did not fall. Law enforcement agencies throughout the state chose to implement recording, and the District Attorneys Association is assisting by developing recommendations. A Task Force established by the Boston Police Department and the Suffolk County District Attorney’s office to examine a series of wrongful convictions in Suffolk County recommended, along with changes to the process for eyewitness identifications, that interrogations be recorded.³

One argument made in passing by the state concerned cost. The Court found:

[Cost] has not been identified as a significant obstacle to recording interrogations. To the extent that there are some police departments or law enforcement agencies that do not already have recording equipment, the cost of the equipment is minimal, and that cost is dwarfed by comparison to the costs of having officers spend countless

¹ *Commonwealth v. Valerio DiGiambattista*, 442 Mass 423, 443, note 20, 813 N.E.2d 516 (2004).

² *Id.*, 442 Mass at 447-48.

³ Suffolk County District Attorney’s Office, *Report of the Task Force on Eyewitness Evidence* (July 2004) (Recommendation 13: “Adopt a policy requiring the electronic recording of statements made by consenting suspects in custodial settings, and for that purpose providing professional quality recording equipment throughout the police department.”) Available at: <http://www.mass.gov/da/suffolk/docs/120904.html>.

hours testifying at hearings and trials in an attempt to reconstruct the details of unrecorded interrogations. . . . Again, law enforcement agencies with significant experience recording interrogations confirm that the benefits of the practice far outweigh the costs.⁴

Current cost estimates are available from some states now considering recording requirements. The 1992 study by William Geller found costs ranged from virtually nothing to \$60,000 in the Bronx, New York Police Department. Several cities, including Kansas City, Missouri, the District of Columbia and Huntington Beach, California, spent \$10,000 or less. Some, such as Denver, Colorado, adopted more elaborate taping systems and spent \$30,000.⁵ Since the early 1990's technology has improved, become less expensive and digital recording is now widely available.

In Broward County, Florida, the Ft. Lauderdale Police Department decided in February 2003 to record all homicide interrogations. Captain Bob Lamberti, head of the Criminal Investigation unit, reported video cameras and recording equipment were the only major expenses in outfitting interview rooms for videotaping.⁶ The Broward County Sheriff's Office shortly thereafter adopted recording, when it was shown that thirty-eight murder confessions in Broward County -- many taken by the Sheriff's Office -- had been rejected by authorities as false or tainted in the previous decade. The Sheriff's Office reported spending \$17,400 to equip three interrogation rooms at its headquarters with digital cameras and DVD recording devices, and \$7,000 on the first wave of training sessions for detectives.⁷

A 2005 Maryland bill, H.B. 46, that would require recording of interrogations in capital cases conducted at places of detention, had a fiscal note estimating costs of \$86,700.⁸ This included purchase of 92 VCRs, 2 monitors and mounting stations, 115 video camera, tapes, duplicating

⁴ 442 Mass. at 444, note 21.

⁵ WILLIAM A. GELLER, POLICE VIDEOTAPING OF SUSPECT INTERROGATIONS AND CONFESSIONS: A PRELIMINARY EXAMINATION OF ISSUES AND PRACTICES 81-83 (U.S. Dep't. of Justice, Aug. 7, 1992).

⁶ Wanda J. Demarzo and Daniel De Vise, MIAMI HERALD, *Ft. Lauderdale to Videotape all Homicide Interrogations*, Feb. 1, 2003. Available at <http://www.fadp.org/news/feb1.html>.

⁷ Michael Mayo, FT. LAUDERDALE SUN-SENTINEL, *Revealing Interrogation Secrets Is A Vital Expense*, 1B, Feb. 20, 2003.

⁸ Department of Legislative Services, Maryland General Assembly, Fiscal and Policy Note H.B. 46, Jan. 25, 2005. Available at: http://mlis.state.md.us/2005rs/fnotes/bil_0006/hb0046.pdf.

machines and tape recorders. Maryland has a population of approximately 5.56 million persons.⁹

A 2005 Kentucky bill, H.B. 242, that would require electronic recording of all custodial interrogations, found the fiscal impact on local governments “minimal to moderate.”¹⁰ The bill was subsequently amended to address only homicide cases. Kentucky has a population of approximately 4.15 million persons.¹¹

Finally, a 2005 study by a Special Committee on the Recordation of Custodial Interrogations created by New Jersey’s Supreme Court found that “for under a thousand dollars a video system can be installed recording onto VHS tape.”¹² The Committee was made up of judges, prosecutors, and representatives of police chiefs, the state bar, defense lawyers and a public defender.

Another argument sometimes advanced against a recording requirement for certain serious crimes is that an investigation initially believed to involve a non-recordable crime could be hampered if the case eventually develops into one covered by the recording requirement. H.B. 5134 provides, in these unlikely cases, for a means of admission. Even though Rhode Island courts have not adopted a constitutional “good faith” exception, H.B. 5134 does include a statutory “good faith” exception in R.I. G.L. Ch. 12-7-20.1(e)(iii) (“good faith police error including, *but not limited to*, failure to turn on the recording equipment or running out of tape”) (emphasis supplied).

H.B. 5134, in fact, proactively addresses several points that recording implemented by judicial decision does not always cover. The statute carefully ensures that the recording be “complete and authentic,” but provides various electronic means of recording as being sufficient. It also specifies that recorded voices material to in the interrogation must be identified. These are just the types of details that implementation of recording by judicial decision may leave unspecified. See David M. Siegel,

⁹U.S. Census Bureau, Annual Estimates of the Population for the United States, Table 1. Available at: <http://www.census.gov/popest/states/tables/NST-EST2004-01.pdf>.

¹⁰ Lynn Aubrey, Legislative Research Commission, Local Mandate Fiscal Impact Estimate, 2005 Regular Session. Available at: <http://www.lrc.ky.gov/record/05rs/hb242/lm.doc>.

¹¹U.S. Census Bureau, Annual Estimates of the Population for the United States, Table 1, *supra*.

¹²Report of the Supreme Court Special Committee on Recordation of Custodial Interrogations, April 15, 2005, p. 25. Available at: <http://www.judiciary.state.nj.us/notices/reports/cookreport.pdf>

A New Regime of Electronic Recording of Police Interrogations:
Commonwealth v. DiGiambattista, 442 Mass. 423 (2004), 89
MASSACHUSETTS LAW REVIEW 171, 177-81 (No. 4, Winter 2006).

Recording reduces the cost and increases the efficiency of law enforcement. It provides reliable, probative evidence of interrogations that reduces the need for suppression hearings and multiple police witnesses. Electronic recordings of what a defendant was asked and answered are far more accurate and durable than memories or hurried notes, and they preserve everything, even what then seems unimportant but what later may be essential. The cost of recording is a fraction of the cost of the award for a person wrongfully convicted on a false or coerced confession. The cost of recording custodial interrogations has not been prohibitive in police departments throughout the country; it has repeatedly been found a wise investment in criminal justice. I urge you to make it.

Sincerely,

A handwritten signature in black ink, appearing to read "David M. Siegel". The signature is fluid and cursive, with the first name "David" being the most prominent.

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