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October 10, 2001

Honorable Cathy Patterson
Chairman, Judiciary Committee
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Suite 109
Washington, D.C., 20004

RE: Testimony Concerning Bill 14-3, "The Miranda Codification Act Of 2001."

Dear Chairman Patterson,

I am writing you in my capacity as the president of the District of Columbia Association of Criminal Defense Lawyers, (DCACDL), a local affiliate of the National Association of Criminal Defense Lawyers.¹ As our name implies, many of our members represent criminal defendants in the Superior Court of the District of Columbia; consequently, we are keenly interested in, and very supportive of, Bill 14-3, "The Miranda Codification Act Of 2001." The attached written comments² are intended to supplement the oral comments which I expect to be made, on behalf of our organization, by myself at your public hearing on Friday, October 12, 2001.

¹ The District of Columbia Association of Criminal Defense Lawyers is an organization dedicated to advancing justice and due process for the District's citizens accused of crime or other misconduct. Our membership includes private criminal defense lawyers as well as attorneys from the Public Defender Service and the Office of the Federal Public Defender. We are a non-partisan organization.

² We have provided the Committee with 20 copies of the statement, plus for the convenience of Councilmember Ambrose a special copy printed in 24 point Arial Black.

We hope you find these comments helpful. Thank you for your consideration.

Respectfully

Richard K. Gilbert

STATEMENT OF THE DISTRICT OF COLUMBIA ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS
IN SUPPORT OF BILL 14-3,
“THE MIRANDA CODIFICATION ACT OF 2001”

On behalf of the District of Columbia Association of Criminal Defense Lawyers, (DCACDL), I am pleased to appear before the Committee on the Judiciary to testify in support of Bill 14-3, “The Miranda Codification Act Of 2001.” In particular, we wish to focus on Section 3 of the Bill, which would require the police to make recordings, generally on videotape, of their complete interviews with people suspected of committing crimes. Requiring the entire interrogation process to be recorded, gives police officers an incentive to conduct their interrogations in accordance with accepted, and legal, practices, and failing in that, it would enable judges and juries to make a meaningful review of the conduct of the interrogation in order to determine whether confessions had been obtained through processes that cast doubt on their reliability. We believe that this would be a very important reform of the administration of justice in the District of Columbia whose time has come.³

Our comments are structured as follows. Because we believe the single most important value in this legislation is the prevention and detection of false confessions, by which innocent person can come to be convicted of crimes they did not commit, we first discuss the problem of false confessions in general. We then discuss the need for this legislation, first, how it can help prevent or at least detect false confessions, and secondly what other benefits to the courts, to the defendants, and to the police themselves, it may have. While we expect there to be opposition to this legislation, we believe it would be helpful to the Committee to understand the experience elsewhere in the country, and in other countries with a comparable common law jurisprudence, with recording interrogations.

I. The Problem of False Confessions

A. The Scope Of The Problem

One assumes that someone in their right mind would never confess to a serious crime they did not commit. From a purely statistical perspective that assumption is generally true; however, false confessions are surprisingly much more common than expected. In 1998 Professors Richard A. Leo and Richard J. Ofshe wrote an article in the *Journal of Criminal Law and Criminology*⁴ in which they studied 60 cases of questionable confessions. They identified 34 cases in which the confession was proven false, either because the person confessed to a crime that did not happen (for example, confessing to murdering a girlfriend who later turned up alive

³ The District of Columbia Association of Criminal Defense Lawyers would like to give special thanks to Mr. Anthony Partridge, Esq., an attorney retired from active practice who graciously volunteered his time to assist in researching and drafting these comments.

⁴ Richard A. Leo and Richard J. Ofshe, *The Consequences Of False Confessions: Deprivations Of Liberty And Miscarriages Of Justice In The Age Of Psychological Interrogation*, 88 *The Journal of Criminal Law and Criminology* 429 (1998)

and well), the suspect could not have physically committed the crime (for example, because he was in jail at the time), the true perpetrator was later identified and proven guilty, or the suspect was later exonerated by scientific evidence. They also identified 18 cases in which it was highly probable that the confession was false in that there was no other evidence to support the confession and all the other evidence in the case overwhelmingly pointed to innocence.

Barry Scheck, Peter Neufeld, & James Dwyer in their book Actual Innocence (2000), also reported on 62 cases in which convicted persons had been exonerated by DNA evidence, fifteen of which involved false confessions or admissions by the defendants that turned out to be false. Since the publication of the book, several other defendants who had confessed to crimes have also been exonerated by DNA evidence: Frank Lee Smith in Florida, who died of cancer in prison after 14 years on death row and was later exonerated (Miami Herald, 3/2/01); Jerry Frank Townsend also in Florida, exonerated after 22 years in prison (Miami Herald, 6/16/01); Christopher Ochoa in Texas, exonerated 13 years after the crime (Washington Post, 1/17/01 & 1/25/01)⁵; Earl Washington, Jr., in Virginia, exonerated after serving 18 years (New York Times, 2/11/01).

Closer to home, just this past June, the Washington Post ran a series of articles documenting four cases in which the Prince Georges County homicide squad had charged people with murder based on admissions or confessions that were later shown to be false. Three of these cases were in the last three years. The defendants in these cases have alleged their confessions were coerced through a variety of abuses by the interrogating officers, including denial of access to lawyers, denial of permission to leave even when there was no legal basis for detention, deprivation of sleep, and threats of violence.

Moreover, the problems are not limited to our neighbors in Maryland. Here in the District, Derrick Prillman confessed in September 1998 to murdering his father, a crime he had not in fact committed. Prillman, who had a mental disability, was interviewed for about eleven hours before the VCR was turned on to record his confession. He was subsequently indicted. In December 1999, the United States attorney moved to dismiss the case after another person was charged with the crime.⁶ (Legal Times, 10/9/2000)

Another recent case in the District involved the arrest of Thomas W. Minch in the murder of Eric Plunkett, the first of the Gallaudet murders. Minch was placed under arrest after he allegedly confessed to a detective during an interview conducted in the 5th District's interrogation room. The prosecutors dropped the charges within a day on the ground of insufficient evidence, and another suspect is currently pending trial for both murders. Apparently the detective's supervisors now question, in the absence of any contemporaneous recording, whether Minch even made a confession. (Washington Post, 4/22/01)

⁵ Sadly, Ochoa also falsely implicated a friend who was also convicted and later suffered permanent brain damage from a prison beating.

⁶ At the time, a motion to suppress Prillman's confession was pending. If the judge had had to decide the motion, she would have been compelled to do so without reliable information about what happened during those eleven hours. (Legal Times, 10/9/2000).

While we have no reliable way of knowing how many people are charged or convicted on the basis of false admissions or confessions, the cases in which the falsity has been demonstrated should serve as an alarm to police, prosecutors, and defense counsel. As Leo and Ofshe pointed out:

Because a confession is universally treated as damning and compelling evidence of guilt, it is likely to dominate all other case evidence and lead a trier of fact to convict the defendant. A false confession is therefore an exceptionally dangerous piece of evidence to put before anyone adjudicating a case. In a criminal justice system whose formal rules are designed to minimize the frequency of unwarranted arrest, unjustified prosecution, and wrongful conviction, police-induced false confessions rank among the most fateful of all official errors.⁷

B. How False Confessions Occur

Professors Ofshe and Leo have long studied the problem of false confessions, and in 1997 published an article in the *Denver University Law Review*⁸ which explained how a person might come to falsely confess in the context of modern police interrogation methods. The most popular model consists of two parts, first, the steps leading to an admission of guilt and, second, further questioning after the admission to more fully develop the narrative. They describe the process of eliciting the admission as usually consisting of two steps, first, a shifting of the suspect's mental state from confident to helpless, and second, actually eliciting the admission. In their article, they summarized the reasons why innocent people confess to police during interrogations as follows:

Contemporary American methods of interrogation have been developed for the purpose of influencing a rational person who knows he is guilty to rethink his initial decision to deny culpability and choose instead to confess. An interrogator strives to neutralize the person's resistance by convincing him that he is caught and that the marginal benefits of confessing outweigh the marginal costs. To accomplish this, interrogators manipulate the individual's analysis of his immediate situation and his perceptions of both the choices available to him, and of the consequences of each possible course of action. An interrogator's goal is to lead the suspect to conclude that confessing is rational and appropriate.

Psychological interrogation is effective at eliciting confessions because of a fundamental fact of human decision-making--people make optimizing choices given the alternatives they consider. Psychologically-based interrogation works effectively by controlling the alternatives a person considers and by influencing how these alternatives are understood. The techniques interrogators use have

⁷ Richard A. Leo and Richard J. Ofshe, *The Consequences Of False Confessions: Deprivations Of Liberty And Miscarriages Of Justice In The Age Of Psychological Interrogation*, 88 The Journal of Criminal Law and Criminology 429 (1998)

⁸ Richard J. Ofshe and Richard A. Leo, *The Decision To Confess Falsely: Rational Choice And Irrational Action*, 74 Denver University Law Review 979 (1997).

been selected to limit a person's attention to certain issues, to manipulate his perceptions of his present situation, and to bias his evaluation of the choices before him. The techniques used to accomplish these manipulations are so effective that if misused they can result in decisions to confess from the guilty and innocent alike. Police elicit the decision to confess from the guilty by leading them to believe that the evidence against them is overwhelming, that their fate is certain (whether or not they confess), and that there are advantages that follow if they confess. Investigators elicit the decision to confess from the innocent in one of two ways: either by leading them to believe that their situation, though unjust, is hopeless and will only be improved by confessing; or by persuading them that they probably committed a crime about which they have no memory and that confessing is the proper and optimal course of action.⁹

II. Need for the Legislation

A. The Current System In The District of Columbia

At the present time, we understand that the various locations where the officers of the Metropolitan Police Department (MPD) conduct interrogations of persons suspected of serious offenses are equipped with video recording capability. Nonetheless, we understand, from our collective experience defending such persons, that the police routinely interrogate those persons without recording the complete interrogation. It is often the case that a video camera is running during the entire interrogation, and that the interrogation is viewed on monitors by officers outside the interrogation room, who sometimes suggest questions to the interrogating officer, but the interrogation itself is not recorded. If a suspect makes damaging admissions, the police will usually conduct additional interrogation, after which the police will conduct a "recapitulation" interrogation that is recorded on videotape. If the suspect is charged, the videotape of this recapitulation interrogation is made available to prosecutors and ultimately to defense counsel. There is normally no other complete record available of the events of the interrogation which preceded the recapitulation interrogation.

In many cases in which defendants have confessed or made damaging admissions, the defendants will plead guilty, especially if a plea bargain is involved. However, that is not universally true. In cases which proceed to trial, there are almost always disputes in court about the conduct of the interrogation. If the police have taped the last portion of the confession, the dispute inevitably switches to the conduct of the police prior to the tape machine being turned on. Defendants frequently assert that they were not given Miranda warnings or that they were induced to confess as a result of abuse or threats. The interrogating officers generally testify that they read the defendant his rights and that the interrogation was conducted in a proper fashion, frequently in a friendly, conversational manner. As a consequence, the judge and, in some cases, the jury¹⁰ are then required to resolve what has been referred to as a swearing contest: to decide whose version of what went on in the interrogation room is accurate.

⁹ Richard J. Ofshe and Richard A. Leo, *The Decision To Confess Falsely: Rational Choice And Irrational Action*, 74 *Denver University Law Review* at pp. 985-86

¹⁰ While the trial judge rules on motions to suppress confessions on legal grounds, in the event the judge admits the confession, the defendant is entitled to have the jury informed about the circumstances of the interrogation so that they may independently judge its reliability. *See, Crane v. Kentucky*, 476 U.S. 683 (1986).

B. Preventing And Detecting False Confessions

The principal reason that these disputes occur is that we are not using readily available technology to make a record of what actually occurs in interrogation rooms. By requiring the entire interrogation process to be recorded, this bill would initially deter most police misconduct in the interrogation room. When confessions are obtained, recording will enable judges and juries to determine whether the confessions were obtained illegally or through processes that cast doubt on their reliability. It would represent a vast improvement over the swearing contests that now take place. We fully expect, that in most cases, the required tapes would probably confirm the propriety of the police behavior, and would eliminate the need for a suppression hearing. But in some cases the tapes might reveal that a confession or admission was made in circumstances that put its validity in doubt.

It should come as no surprise that Professors Ofshe and Leo have written that “(t)he risk of harm caused by false confessions could be greatly reduced if police were required to video- or audio-record the entirety of their interrogations.” (88 J. Crim. L & Criminology, p. 494). However the same suggestion has been made in Prince Georges County after the Washington Post series on false confession’s in that county. Legislation was proposed, and the Chief of Police agreed to work with the States Attorney in implementing the videotaping of confessions (Washington Post, 6/23/01, p. A25). Two experienced criminal justice experts, Glenn Ivey, a professor at the University of Maryland, and W. Louis Hennessy, the former chief of the MPD homicide division, also called for videotaping confessions (Washington Post, 6/24/01, p. B8).

C. Other Benefits

In addition to reducing the risk of false confessions, videotaping the entire interrogation has several other benefits. There is the question of whether a confession, even if true, was taken in violation of the Constitution, to include the giving of *Miranda* rights.¹¹ Videotaping would have two significant advantages in this situation. First, knowing that the interaction is being recorded in its entirety would give police officers an incentive to conduct their interrogations in accordance with constitutional requirements, to include giving *Miranda* warnings. Second, it would give courts the opportunity to make a meaningful review of the conduct of the interrogation. For example in *Davis v. United States*, 724 A.2d 1163 (D.C. 1998), *cert. denied*, 528 U.S. 1082 (2000), a bitterly divided District of Columbia Court of Appeals held that it was not impermissible for police to deliberately refuse to give a suspect his *Miranda* warnings before questioning him at length, eliciting an admission, then questioning him further. The police read the defendant his *Miranda* rights shortly before putting him on the videotape for final recorded confession. The issues in *Davis*, naturally, turned on the events of the earlier untaped interrogation. One detective testified for the government; Davis himself testified, and one detective was called by the defense. Not surprisingly, all three witnesses told different versions of what had transpired in the interrogation room. While it is impossible to say whether the legal result in *Davis* would have been decided differently had a complete record of the interrogation

¹¹ In *Dickerson v. United States*, 530 U.S. 428 (2000), a unanimous United States Supreme Court affirmed the viability of *Miranda* as a matter of constitutional law.

been made, it is certain that all the judges would have been able to decide this important constitutional question based upon what really happened and not on speculation or choosing sides in a three-way swearing contest.

Videotaping of complete interrogations would also have a powerful benefit even for those defendants who truthfully confess. The current practice of only videotaping the “finished” product often does a disservice to the defendant. In the first place, it almost never captures the true expressions of remorse which often motivate a guilty culprit to confess to a crime. Experienced detectives will tell you that the moment a suspect makes that first critical admission of guilt is often an emotionally charged moment; by the time the questioning is completed and the police are ready to videotape, the suspect will have often calmed down, become resigned to his fate. The affect of many suspects in the final videotape portion is often flat and unmoving; although the police may permit the suspect to state he is sorry for his crime, that statement is frequently less credible than would be the initial expression of remorse. In the *Davis* case, for example, the defendant had been handcuffed to the floor for several hours; during the videotaping the police allowed him to shift in the chair and place his feet up on the table in the interrogation room. Of course, this made a terrible visual impression, one of callousness and indifference, which was not typical of the overall interrogation.

In addition, the “finished” videotaped confession is often carefully scripted by the police; the emphasis is on producing admissions to be used to convict the suspect. Statements of the suspect which serve to mitigate his involvement are often omitted or glossed quickly over. Once again, to use the *Davis* case as an example, Davis admitted shooting someone who had stabbed him before, who had shot at him before, who immediately before the shooting had tried to borrow a gun to threaten (or shoot) Davis again, and who left promising to return. When Davis tried to tell about his history with the decedent on the videotape, the police cut him off. The police deliberately asked him no questions about the events immediately preceding the shooting, even though the subject had been covered in the untaped portions. Davis was fortunate that his counsel was able to elicit the facts about the night in question from a government witness and he was convicted, more appropriately, of second degree murder, not first degree murder. However, had the jury only known of the facts presented on the videotaped confession, such a result would likely not have occurred.

As the following section, detailing the experience with videotaping entire interrogations shows, this reform would also have several advantages for the police:

1. It would protect police officers from false allegations of misconduct.
2. It avoids losing potentially valuable information that a suspect says spontaneously and might not be willing to repeat subsequently after an opportunity to reflect.
3. It would relieve interrogating officers of the burden of taking detailed notes during interviews (assuming the officers take notes).

4. It would facilitate ongoing investigations by giving the department verbatim records that investigators can refer to. (This would have been very helpful in the Minch case described above.)

5. It would provide a tool that could be used for supervision and in-service training of officers who conduct interrogations.

6. By reducing the number of suppression hearings, it would reduce the amount of time that investigating officers are required to spend in court.

In short, we believe this bill should not be regarded as defendants' legislation. It is a balanced proposal that will improve the ability of the criminal justice system to make accurate decisions. In some cases, it will help defendants. In other cases, it will effectively foreclose claims that interrogations were conducted improperly. In all cases, it will enhance the search for truth.

III. Experience With Videotaping

A. National Institute of Justice Study

The most comprehensive study of videotaping is *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices -- A Report to the National Institute of Justice*. This study, completed in 1992, was conducted by William A. Geller, Associate Director of the Police Executive Research Forum, with financial support from the National Institute of Justice. Geller and his staff reviewed existing literature about videotaping, conducted telephone surveys of a large number of police agencies, and conducted site visits in 14 cities where it had been reported that police videotaped either confessions or entire interrogations.

None of the departments visited by Geller and his staff required videotaping. Most of them left the decision to the interrogating detectives. (p. 70) In some of them, videotaping was standard operating procedure for certain kinds of cases but not others. (p. 70). While many of Geller's findings do not distinguish between videotaping entire interrogations and videotaping only recapitulation interviews, he concluded that “[a]s a general proposition, police in each jurisdiction we visited were highly enamored of their own procedure, and had difficulty imagining why their counterparts elsewhere preferred taping either more or less of their interviews.” [133] He wrote that “Detectives who videotape entire stationhouse interviews . . . are perplexed at why detectives elsewhere would be willing to take the risk of losing potentially valuable information that a suspect says spontaneously and might not be willing to repeat subsequently on videotape after an opportunity to reflect on its potentially incriminating importance.” But “detectives and prosecutors accustomed to videotapes of recaps only cannot fathom how their counterparts elsewhere can elicit clearly incriminating statements from suspects when their taped discussions include myriad tangents and a host of exculpatory claims.” [134] (emphasis added). (Of course, it is just such exculpatory information, which may be true and which the jury would want to know, that gets “scripted out” of “finished” recapitulation videotapes.)

The bottom line seems to be that, in those jurisdictions that generally tape entire interrogations, the police in the field believe that is the way to go. There is no suggestion in Geller's report that the practice inhibits effective police work. Specifically addressing two concerns that have sometimes been mentioned, Geller found no evidence that videotaping entire interrogations results in educating criminals about interrogation "tricks of the trade," and he found that detectives who tape whole interviews do not believe that judges or jurors will be alarmed by observing "lawful, professionally accepted, aggressive or deceitful interrogation tactics." [115, 134]

B. Other States

1. Alaska

Since 1986, Alaska has had a requirement that police interrogations of suspects be electronically recorded. This requirement was imposed by the Alaska Supreme Court in the case of *Stephan v. State*, 711 P.2d 1156 (Alas. 1985), interpreting the due process clause of the state constitution. The court stated that electronic 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." [1159-60] Failure by the police to record the entire interrogation will generally result in exclusion of the defendant's statement.¹²

2. Minnesota

Minnesota has had a court-imposed recording requirement since 1994. In *State v. Scales*, 518 N.W. 2d 587 (Minn. 1994), the state supreme court imposed the requirement through the exercise of its supervisory power to insure the fair administration of justice. Quoting the Supreme Court of Alaska, the Minnesota court agreed that electronic 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." The court directed 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." [592] Statements obtained in violation of this requirement must be excluded if the violation is deemed to be "substantial."

Geller noted that in St. Paul, both audio and video recording are used. Videotape is always used in the most important cases, such as homicide cases. A source within the police department indicated that most officers have no quarrel with the recording requirement, and

¹² In August of 2001, I participated in a panel discussion on videotaping of interrogations with defense attorneys from both Alaska and Minnesota at a meeting of the National Association of Criminal Defense Lawyers. Both defense attorneys stated that the practice had become "second nature" to their police departments and that the police had come to see its advantages. In both states, the courts declined to exclude confessions when the police had sound reasons for being unable to record the interrogation.

many of them affirmatively like it. He quoted a homicide detective as having said that the Scales case was the best thing that ever happened to him.¹³

C. Other Common Law Countries

1. Halton Regional Police, Ontario, Canada

In 1983, the Law Reform Commission of Canada undertook a study on the use of video technology in the Canadian justice system. In 1984, the Commission recommended that an empirical study be undertaken to test the perceived advantages and disadvantages of recording police interrogations electronically. The result was a two-year pilot project with the Halton Regional Police Force in which video recording was used in one of Halton's three districts and another of the districts was used as a control. In the control district, videotaping was not used, and written statements were taken when suspects confessed.¹⁴ The salient findings of the evaluation were as follows:

1. A little under 5 percent of the suspects declined to be videotaped (and were interviewed without taping). Those who did not decline were not inhibited by the video camera. The presence of the camera did not stop suspects from admitting serious offenses or talking about other offenses of which they had knowledge.

2. Videotaping protects police against unwarranted allegations of misconduct. Suppression hearings, although not frequent in the district used as a control, virtually disappeared in the district that used videotapes.

3. Police interviewing techniques were improved as a result of videotaping. Officers were much more conscious of the need to be properly prepared before going into an interview.

4. An inexpensive system, employing no professional camera or lighting crews, was satisfactory. Routine transcription of the tapes was not necessary.

5. Police, prosecutors, and defense lawyers all regarded the introduction of videotaping as an improvement in the administration of justice.

Following the pilot project, the Halton Regional Police adopted videotaping as standard procedure. Current policy states that "The video taping of statements of persons who are the subject of a criminal investigation is mandatory. The only exception will be that the party being interviewed objects to the use of the video equipment or there is an equipment failure." The term "statements" is understood in the department to include anything a suspect says in an interview; hence, the requirement is that the entire interview be recorded. [Telephone interview with a detective.]

¹³ See note 10 above.

¹⁴ The region served by the Halton Regional Police is on Lake Ontario, about 30 miles west of Metropolitan Toronto. It covers about 365 square miles, and was reported in 1988 to comprise a blend of residential, light industrial, and rural areas. Its population was 275,000, and there were about 21,000 reported offenses per year. The force had 333 officers.

2. Great Britain

In Great Britain, tape recording of interviews with suspects held at police stations has been required since 1984 by the Police and Criminal Evidence Act of 1984. The Home Office was required by the act to issue an order requiring such recording and a “code of practice” governing such interviews. As revised in 1995, the code of practice generally requires the recording of interviews conducted at police stations of people suspected of having committed indictable offenses. The code does not require that the tape be a videotape.

In 1993, a Royal Commission on Criminal Justice filed a report covering a number of issues in the British criminal justice system. They reported that, “By general consent, tape recording in the police station has proved to be a strikingly successful innovation providing better safeguards for the suspect and the police officer alike.” [p. 26] Again, “(w)e received a great deal of evidence commending the introduction of audio tape recording of interviews of suspects in all indictable and ‘either way’ cases, which is more or less universally regarded as removing as completely as possible the scope for argument over what the suspect really said while in the interview room. We unreservedly welcome this advance.” [p. 39] A majority of the Commission declined to recommend a change from audio to video, however, expressing the view it might be fairer to suspects to focus on what was said rather than on the suspect's demeanor at a time when the suspect may be in “a state of semi-shock.” It was noted that police officers were more enthusiastic about video than were defense counsel. [40] (emphasis added)

3. Australia

It was reported in a 1998 law review article that three of the six Australian states had statutes governing videotaping of interrogations. [Westling & Waye, n. 236] These statutes generally apply when an investigating officer suspects or ought to suspect that a person has committed a serious offense, and generally require exclusion of an untaped admission. [p. 529] In recent years, the remaining states have adopted similar statutes. [Correspondence with Waye.] Although police accepted videotaping with some initial reluctance, the technology is now well accepted by police, prosecutors, judges, and defense counsel. The police are said to be particularly enthusiastic because the videos often provide very graphic evidence of guilt. [Correspondence with Waye.]

4. New Zealand

In 1990, the New Zealand police launched a six-month pilot project to test videotaping of police interviews with subjects. In June 1991, an evaluation of the pilot project was submitted. The evaluators reported that the vast majority of the officers in the pilot districts were very enthusiastic about videotaping and “would hate to revert to the old system.” [Takitimu & Schollum, p. 79] The officers found that videotaping saved time in interviewing, in the taking of notes, and in court time. [Exec. summary] The evaluators also reported an enthusiastic reception among the judges. [Do.] Although the evaluation included a questionnaire addressed to defense counsel, only 9 questionnaires were received from counsel who had in fact had experience with videotaped interviews. [p. 39]

In July 1991, the month following submission of the evaluation report, the Police Executive Committee approved the implementation of electronic recording procedures on a national basis. Detailed policy and procedural guidelines have been issued. The guidelines require that videotaping be used “at all locations where the necessary equipment is available” for interviews with persons suspected of committing an indictable offense. It appears that equipment is generally available at police stations. The New Zealand police have developed special recording equipment, including a tamper-proof time-date generator.

D. Summary of Experience

The phrase that comes to mind is, “Try it; you'll like it.” In those jurisdictions in which electronic recording of interviews is required, the policy has almost universal approval from the various participants in the criminal justice system. So far as one can learn from the reports, no one in any of these jurisdictions wants to go back to doing things the old way. In particular, although police are often skeptical when a taping requirement is first adopted, they tend to become its most enthusiastic supporters.

IV. Objections To Videotaping

A. Adversarial Objections

A number of reasons have been offered from time to time for rejecting videotaping. Most of them come down to a fear that effective interrogation will be impaired by the presence of the video camera in the interrogation room. Experience in jurisdictions that have taping requirements does not justify that fear, however. Suspects who are willing to talk will usually do so regardless of whether a camera is present, and, experience has also shown that having the entire videotaped actually leads to better interrogation as detectives realize they have to be better prepared before they commence.

Some police have voiced a concern that the language and demeanor of the police during interrogations will shock or offend jurors. It has been our experience that these concerns are unfounded. Jurors who sit on serious criminal trials are usually aware that life is not all gentle. Indeed they frequently hear foul language from witnesses recounting the events surrounding the crime, and they are often exposed to graphic depictions of violence in the form of crime scene photographs or autopsy photographs. The Committee should, in our view, be extremely concerned if the police assert they need secrecy to question suspects.

B. Administrative Objections

We anticipate the police may suggest that videotaping entire interrogations will “cost” too much. While we do not have the information to cost out the proposal, we strongly suspect that the additional cost generated by this legislation would be modest. Much if not most of the needed equipment is already in place; indeed, it is common in the District of Columbia already to have an operating camera in the room; it is only the VCR that is not turned on. Consequently, the major cost would be in the tapes themselves and their storage. Studies have shown that the cost

has not been prohibitive in other jurisdictions, even in those where taping equipment was not in place when the requirement was adopted.

V. Timing Of Disclosure

We suggest that the Committee delete the provision providing for disclosure to the defense 20 days before trial. A legitimate, documented confession is a powerful inducement to plead guilty. As such, logically it should be provided to the defense earlier, not later. In any event, as statements of the accused, such tapes would come under the existing provisions of Superior Court Criminal Rule 16 governing discovery. Trial judges have the discretion to control the timing of discovery; we suggest the Committee allow them to exercise their discretion in this area as well.

VI. Conclusion

Modern technology makes it possible to have accurate records of what gets said in interrogation rooms. What possible argument can there be for continuing to rely on the often conflicting statements of defendants and their interrogating officers? Why would you not choose to get rid of these conflicts by providing judges and jurors with an accurate record, particularly when the prospect of a false confession may be presented?

DCACDL strongly urges the Committee to report this bill favorably.

Richard K. Gilbert