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April 25, 2019

Rules Committee
Washington State Supreme Court
P.O Box 40929
Olympia, WA 98504-0929

Via email: supreme@courts.wa.gov

Dear Members of the Court:

I write in support of the following amendments to CrR 3.7, 3.8, 3.9, 4.7, and 4.11.

The proposed changes to the rules regarding discovery bring our rules into conformity with the law as it presently exists. The controlling cases are *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Other cases describe the extent of the prosecutor's obligations.

- The disclosure requirements set forth in *Brady* apply to a prosecutor even when the knowledge of exculpatory evidence is in the hands of another prosecutor. *Giglio v. United States,* 405 U.S 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government.")

- A *Brady* violation may also occur when the Government fails to turn over evidence that is "known only to police investigators and not to the prosecutor." *Youngblood v. West Virginia,* 547 U.S. 867, 870, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006) (quoting *Kyles v. Whitley,* 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

- This obligation includes the duty to turn over to the defense "all material information casting a shadow on a government witness's credibility." *United States v. Bernal-Obeso,* 989 F.2d 331, 333-34 (9th Cir, 1993).

- This obligation includes any criminal act committed by the witnesses that law enforcement knows about- whether or not that act has resulted in a conviction. *United States v. Price,* 566 F.3d. 900, 912 (9th Cir. 2009).

- Where, , the federal prosecutors have state police working on their behalf, *Kyles* requires federal prosecutors "to learn of any favorable evidence known to others acting in the government's behalf," including any local police acting on its behalf in the investigation. *Carriger v. Stewart,* 132 F.3d 463, 479-80 (9th Cir. 1997).

- Even inadmissible evidence can be material under *Brady,* if it could have led to the discovery of admissible evidence." See *Paradis v. Arave,* 240 F.3d 1169, 1180 (9th Cir. 2001).

- And prosecutor also is bound by the ethics of his office to inform the appropriate authority of information acquired ***after trial*** that casts doubt upon the correctness of the conviction. *Imbler v. Pachtman,* 424 U.S. 409, 427 n. 25 (1976).

No doubt *Brady* places a burden on the State - but it is not one imposed by a clarifying amendment to Washington's court rules. It is one imposed by the United States Supreme Court under the Fourteenth Amendment to the United States Constitution. Thus, it is troubling to me that prosecutors from around the State argue that the proposed clarification in CrR 4.7(4) is "totally unworkable " or "unreasonable." This already the law. The comments demonstrate there is confusion about the prosecutors' obligations. This signals a compelling need to clarify in our court rules to reflect the scope of the prosecutor's constitutional duties.

The proposed rules regarding interrogations should also be adopted because they enhance the reliability of the evidence presented at trial. I have particular experience with false confessions. At least three of my former clients falsely "confessed" to Washington State law enforcement. See *State v. Doris Green, State v. Simmers* and *State v. Bradford.* Ms. Green confessed as a part of the notorious Wenatchee Sex Ring investigations. In those cases, Officer Robert Perez wrote numerous "confessions" from defendants, many of whom had intellectual disabilities. Had those "confessions" been recorded, many innocent people would not have been imprisoned.

Ted Bradford falsely confessed to rape. *State v. Bradford,* 95 Wash. App. 935, 978 P.2d 534 (1999). Through the later efforts by the Innocence Project NW, DNA testing revealed that Mr. Bradford was not guilty. See *In re Bradford,* 140 Wash. App. 124, 165 P.3d 31 (2007). He was exonerated.

Ian Simmers – then age 16 - falsely confessed to premeditated murder and served more than 20 years in prison. *State v. Simmers*, 95 Wash. App. 1049 (1999). This spring, new DNA tests obtained by his counsel, Maureen Develin, exonerated him. See the attached report from the National Registry of Exonerations.

In my view, all three of these miscarriages of justice could have been avoided if the interrogations were recorded.

There is nothing radical about recording interrogations. Many states already have such a requirement. And, in 2014, after more than a century, the FBI finally adopted a policy establishing a presumption that "the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA) the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the United States Marshals Service (USMS) will electronically record statements made by individuals in their custody. " See Attached Harvard Law Review Article. Moreover, as the article points out, the new policy was driven by studies that demonstrated that "recording does not cause suspects to refuse to talk" and the fact that there are numerous benefits to both the State and the defense that favor requiring the recording of custodial interrogations. The proposed rules changes are justified and reflect the modern approach to police investigations.

I thank the Court Rules Committee for its kind attention to my comments.

Sincerely,

Suzanne Lee Elliott

Suzanne Lee Elliott
Attorney at Law

Attachment I

A PROJECT OF THE UNIVERSITY OF CALIFORNIA IRVINE NEWKIRK CENTER FOR SCIENCE & SOCIETY,
UNIVERSITY OF MICHIGAN LAW SCHOOL & MICHIGAN STATE UNIVERSITY COLLEGE OF LAW

IAN SIMMERS

Other Exonerations with False Confessions

On Saturday, March 11, 1995, women hiking on the Burke-Gilman Trail along the Sammamish River near Bothell, Washington, discovered the body of 35-year-old Rodney Gochanour. He had been stabbed several times in the back and slashed on the chin.

On March 15, 1995, police arrested 16-year-old Ian Simmers and a 14-year-old friend for a series of acts of vandalism that involved the shooting of a flare gun they took from a boat moored in the river near the trail. The boat caught fire and was destroyed. In addition, several fires caused about $5,000 damage to a nearby King County Parks Department restroom.

Police said that during questioning about the arsons, the 14-year-old implicated Simmers in Gochanour's murder.

On March 20, 1995, Simmers was charged with first-degree murder. Detectives said Simmers had confessed to murdering Gochanour after waiting along the trail on the night of March 10, 1995 to attack and rob someone. When Gochanour walked by as he headed home from a tavern, detectives said, Simmers stabbed him six times in the back and once in the face, bending the knife in the attack.

Subsequently, Simmers was charged with multiple accounts of burglary and arson. Police said he was responsible for a series of boat and yacht burglaries at Bothell marinas. One boat was burned and another was stolen. A total of 32 boats were burglarized, police said. In addition, Simmers was charged with setting fire to the park restroom and a park shed.

In March 1996, Simmers went to trial as an adult in King County Superior Court. No physical or forensic evidence linked him to the crime. Blood on the knife recovered from the scene did not come from Simmers. A pair of boots by the river that police said may have left boot prints near Gochanour's body did not belong to Simmers.

The prosecution's case was based primarily on the confession and the testimony of Kevin Olsen, who was in the King County Jail in a cell adjacent to Simmers before the trial. Olsen testified that Simmers, speaking through a crack in the wall between their cells, said he told Gochanour, "I finally found someone who has the shoes I wanted in my size and you're wearing them."

Olsen testified that Simmers said after the attack, he removed Gochanour's shoes and threw them into the river.

Olsen admitted that he had numerous prior convictions, including burglary, drug possession, and forgery. He said he had been an informant in about a dozen cases, including another murder trial.

Olsen claimed that Simmers told him he gave wrong details in his confession in an attempt to mislead police. Olsen testified that he took notes as Simmers was talking, and that he reported the conversation to police because "It just made me sick inside that someone would act like that."

Defense attorney John Hicks questioned Olsen's claim that he had not

State:	Washington
County:	King
Most Serious Crime:	Murder
Additional Convictions:	
Reported Crime Date:	1995
Convicted:	1996
Exonerated:	2019
Sentence:	46 years and 8 months
Race:	White
Sex:	Male
Age at the date of crime:	16
Contributing Factors:	False Confession, Perjury or False Accusation, Official Misconduct
Did DNA evidence contribute to the exoneration?:	Yes*

received any benefits for his testimony, but Olsen maintained he had not received any favorable treatment.

Simmers was in special education classes due to attention deficit disorder. He also had a serious inhalant abuse problem, and had abused alcohol and other drugs. Hicks noted that Simmers had been interrogated for about 10 hours and had been driven to the trail before detectives recorded his final statement.

According to notes from the detectives of the interrogation prior to the recording, Simmers made numerous false statements. He told them that he had previously killed 13 people, and that he suffered a bruise on his abdomen from where Gochanour struck him during the struggle. His description of the knife did not match the knife found at the scene. He said that the murder occurred on Saturday night, March 11, even though the body was discovered on that Saturday afternoon and the time of death was said to be just after before 1 a.m. Simmers initially said the crime occurred in Woodinville—nearly three miles from the murder scene.

Simmers's physical description of Gochanour as a "bum" was also incorrect and his statement that he stabbed the victim six times was wrong—there were eight holes in Gochanour's clothing.

In addition, although Simmers said he was wearing the same clothes he was wearing at the time of the murder, Gochanour's blood was not found on them—despite the bloody nature of the crime.

Detectives testified that they were trained in the Reid technique of interrogation. They falsely told Simmers that the 14-year-old had confessed and told police where to find the knife. They also falsely told Simmers that physical evidence linked him to the murder.

Simmers's family testified that he was at home on the night of the murder, and that their home was 20 miles from the scene of the crime. Simmers did not have access to the family car or have a bicycle. His mother said it was "absolutely impossible" that Simmers could have left the home late on the night of March 10 and returned after midnight would her knowing. Simmers's stepfather testified that no one could return to the home without the family dogs raising a ruckus that would wake the entire house.

Nonetheless, on March 28, 1996, the jury convicted Simmers of first-degree murder. He was sentenced to 46 years and eight months in prison.

Simmers later filed a motion for a new trial after discovering that Olsen, the jailhouse informant, had falsely testified when he said he received no benefits. Months after Simmers was convicted, Olsen testified as an informant for the prosecution in an unrelated case. In that case, the defense attorneys obtained extensive information about Olsen's past criminal conduct from the Washington Department of Corrections. This information revealed at least five additional instances of Olsen's criminal conduct that the prosecution had not disclosed to Simmers's defense.

At a hearing on the motion, the State also agreed that in the month before Simmers went to trial, police reports existed showing that Olsen was under investigation for crimes involving fraud, stolen property, and passing a bad check. In addition, Olsen volunteered at the hearing that he had received about $200 from Crime Stoppers for providing information about Simmers. All of this undisclosed information could have been used to impeach Olsen's testimony, Simmers's defense argued.

The motion for a new trial was denied. The judge ruled that the information would not have made a difference—the jury would have convicted Simmers anyway.

In May 1999, the Court of Appeals of Washington upheld the conviction as well as the ruling denying Simmers a new trial.

In January 2016, Simmers sought a reduction in his sentence and release. He was granted a hearing before the Indeterminate Sentence Review Board, which has the authority to review and reduce sentences imposed on defendants under the age of 18 who were convicted as adults. However, the board declined to reduce his sentence or release him.

On behalf of Simmers, attorney Maureen Devlin contacted Steven Drizin, one of the nation's leading experts in false confessions and a professor at Northwestern University's Pritzker School of Law. Drizin reviewed the confession as well as the police reports and trial transcript. He concluded there were serious concerns that the confession was false.

Drizin noted that Simmers's intellectual shortcomings, substance abuse

problems, and youth left him particularly vulnerable to the detectives. Drizin noted that the Reid interrogation technique was responsible for numerous false confessions.

In addition, in the years since detectives interrogated Simmers, considerable research had shown that adolescents were particularly vulnerable to confessing falsely.

Devlin received Drizin's report in May 2017 and provided it to the King County Prosecutor's office with a request that the case be reinvestigated. The ensuing review by the prosecution included DNA testing of the knife, as well as fingernail clippings from Gochanour. The tests revealed a mixture of DNA that excluded Simmers and Gochanour.

On February 19, 2019, Devlin filed a motion for a new trial and at the same time, the prosecution also filed a motion requesting that Simmers's conviction be vacated.

Devlin cited Drizin's review and criticism of the confession. "In the more than two decades since Mr. Simmers was arrested, there has been a sea change in understanding about adolescent brain development and the causes and consequences of false confessions," Devlin's motion said. "Little or none of this information was available at the time to police, prosecutors, defense attorneys, judges or juries in confession cases."

The motion noted the lack of evidence linking Simmers to the crime, as well as the new evidence undercutting the credibility of the jailhouse informant and the DNA test results. "Taken together," it stated, "this would cast significant doubt on the only remaining bit of evidence against Mr. Simmers: the custodial statement. A jury hearing this new evidence would be unlikely to find (the) statement to be a valid 'confession' and would be likely to acquit."

The prosecution motion, filed by Carla Carlstrom, senior deputy King County prosecuting attorney, said, "The State has not and does not agree that the defendant is innocent of the crime or that he was wrongly convicted."

However, the prosecutor conceded that Simmers was entitled to a new trial. As a result, "given the difficulty in retrying this case decades after the crime, the fact that the defendant was 16 years old at the time of the murder and that the defendant has served over 23 years in confinement, the State has determined that a new trial would not be in the interests of justice."

The prosecution motion revealed that during an interview, Simmers told prosecutors that he overheard detectives discussing the case during his interrogation. From that, he learned details of the crime that he repeated to the detectives, and his statements were interpreted as showing knowledge only the killer would have. The surviving detective denied this occurred, the motion added.

On February 26, 2019, the motions were granted and Simmers's conviction was vacated. The charge was dismissed and he was released.

The prosecution said the DNA profile obtained from the most recent testing was not suitable for submission to the FBI DNA database.

– Maurice Possley

Report an error or add more information about this case.

Posting Date: 4/8/2019

ABOUT THE REGISTRY

The National Registry of Exonerations is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law. It was founded in 2012 in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law. The Registry provides detailed information about every known exoneration in the United States since 1989—cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence. The Registry also maintains a more limited database of known exonerations prior to 1989.

CONTACT US

We welcome new information from any source about exonerations already on our list and about cases not in the Registry that might be exonerations.

- Tell us about an exoneration that we may have missed
- Correct an error or add information about an exoneration on our list
- Other information about the Registry
- Sign up for our Newsletter

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Attachment II

RECENT ADMINISTRATIVE POLICY

CRIMINAL PROCEDURE — CUSTODIAL INTERVIEWS — DEPARTMENT OF JUSTICE INSTITUTES PRESUMPTION THAT AGENTS WILL ELECTRONICALLY RECORD CUSTODIAL INTERVIEWS. — Dep't of Justice, *New Department Policy Concerning Electronic Recording of Statements* (2014).

Since 2003, the number of states requiring law enforcement officers to electronically record some or all interviews conducted with suspects in their custody has grown from two to at least twenty-two.[1] Until recently, the U.S. Department of Justice (DOJ) has resisted this trend; under its previous policy, the DOJ's three chief investigative agencies — the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) — rarely recorded custodial interviews.[2] However, on May 22, 2014, the DOJ announced a substantial change in its policy, creating a presumption that FBI, DEA, ATF, and United States Marshals Service (USMS) agents will electronically record[3] custodial interviews.[4] This policy change is an important step in the right direction, reflecting a growing movement that has recognized the benefits of recording interviews; however, the new policy puts in place little express accountability for failure to comply with the presumption. Since experience with state and local recording policies suggests that programs without enforcement mechanisms are often undermined by ineffective and inconsistent application, the DOJ should ensure strong enforcement of the internal accountability

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[1] *See* THOMAS P. SULLIVAN, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, COMPENDIUM: ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS (2014), https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=33287&libID=33256 [https://perma.cc/CGW9-7YAH] (including Alaska, Arkansas, California, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oregon, Texas, Vermont, Wisconsin, and the District of Columbia).

[2] *See* Thomas P. Sullivan, *The Department of Justice's Misguided Resistance to Electronic Recording of Custodial Interviews*, FED. LAW., July 2012, at 62, 63.

[3] Electronic recording refers to both audio and video recording. However, the new DOJ policy, as well as most state laws, prefers video to audio recordings, *see, e.g.*, Memorandum from James M. Cole, Deputy Att'y Gen., to Assoc. Att'y Gen. et al. 2 (May 12, 2014), http://s3.documentcloud.org/documents/1165406/recording-policy.pdf [http://perma.cc/59MM-E4DE] [hereinafter DOJ Memorandum], because "videos illustrate the gestures, facial and body movements of the participants that cannot be fully and precisely reproduced . . . by audio recordings," Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1306 (2008).

[4] Press Release, Dep't of Justice, Attorney General Holder Announces Significant Policy Shift Concerning Electronic Recording of Statements (May 22, 2014), http://www.justice.gov/opa/pr/attorney-general-holder-announces-significant-policy-shift-concerning-electronic-recording [http://perma.cc/9G5Z-B3BJ].

measures in its policy, and Congress should be prepared to step in with statutory enforcement mechanisms if needed.

The federal government is relatively late to the game on promoting electronic recordings of custodial interviews. Reformers have been calling for more accurate record keeping during interrogations since the 1930s, and decades later state supreme courts began to heed their advice.[5] In 1985, the Alaska Supreme Court became the first state high court to require recording when it held recording a suspect's interrogation to be a requirement of state due process.[6] The Minnesota Supreme Court also imposed a recording requirement in 1994,[7] and a handful of state supreme courts have similarly instituted rules on recording interviews in recent years.[8] In 2003, Illinois became the first state to pass a statute mandating recording when it required police to electronically record custodial interrogations in homicide investigations.[9] At least fifteen states and the District of Columbia have followed Illinois and passed laws requiring recording under certain circumstances,[10] and several police departments across the country have individually created their own policies promoting or requiring recording.[11]

Before the recent shift, the DOJ's position was that custodial interviews generally should not be recorded. The major federal law enforcement agencies strongly resisted recording interrogations, citing fears that recording would interfere with rapport building, lay juries and judges would misinterpret acceptable interviewing techniques as improper, and the implementation would be logistically difficult.[12] These concerns led agencies to erect barriers to electronic recording and to rely instead on note-taking and agent memory. For example,

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5 RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 292–93 (2008).

6 Stephan v. State, 711 P.2d 1156, 1159–60, 1164 (Alaska 1985).

7 State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

8 *See, e.g.*, ARK. R. CRIM. P. 4.7; IND. R. EVID. 617; N.J. CT. R. 3:17.

9 725 ILL. COMP. STAT. 5/103-2.1 (2012); *see also* Monica Davey, *Illinois Will Require Taping of Homicide Interrogations*, N.Y. TIMES (July 17, 2003), http://www.nytimes.com/2003/07/17/national/17VIDE.html.

10 *See* CAL. PENAL CODE § 859.5 (West Supp. 2014); CONN. GEN. STAT. § 54-10 (2013); D.C. CODE §§ 5-116.01 to .03 (2012); ME. REV. STAT. ANN. tit. 25, § 2803-B (2007); MD. CODE ANN., CRIM. PROC. §§ 2-402 to 2-403 (LexisNexis 2008); MICH. COMP. LAWS SERV. §§ 763.7–.11 (LexisNexis Supp. 2014); MO. REV. STAT. § 590.700 (Supp. 2012); MONT. CODE ANN. §§ 46-4-406 to -411 (2013); NEB. REV. STAT. §§ 29-4501 to -4508 (2008); N.M. STAT. ANN. § 29-1-16 (LexisNexis Supp. 2013); N.C. GEN. STAT. ANN. § 15A-211 (West 2013); OHIO REV. CODE ANN. § 2933.81 (LexisNexis 2010); OR. REV. STAT. § 133.400 (2013); TEX. CODE CRIM. PROC. ANN. art. 38.22 (West 2013); 2014 Vt. Acts & Resolves 1113; WIS. STAT. § 972.115 (2011–2012).

11 For an overview of police departments currently recording custodial interviews, see SULLIVAN, *supra* note 1.

12 *See* Memorandum from FBI Office of the Gen. Counsel to All Field Offices et al. 3 (Mar. 23, 2006), http://www.nytimes.com/packages/pdf/national/20070402_FBI_Memo.pdf [http://perma.cc/9WJ9-HF7A] [hereinafter FBI Memorandum] (outlining the FBI's reasons for objecting to recording procedures); Sullivan, *supra* note 3, at 1301–02 (same for the DEA and ATF).

the FBI's standard procedure was for an agent to take notes during the interview and later compile a summary known as a Form 302.[13] The Agency had an exception to this practice that allowed recording if the Special Agent in Charge (SAC) "deem[ed] it advisable."[14] In all but the three largest FBI field offices, there is one SAC who runs the entire office.[15] Therefore, although the FBI claimed that its policy allowed "flexibility" in deciding when to record interviews,[16] internal DOJ analysis suggests that the policy actually inhibited agents' ability to exercise discretion regarding whether or not to record their own interviews, and created a "heavy presumption" against recording.[17]

Recent developments, however, expose the shortcomings of the DOJ's previous policy. After decades of experience on the state level with recording policies, many of the FBI's concerns about recording interviews have been proven false. For example, numerous studies have shown that "recording does not cause suspects to refuse to talk, fall silent, or stop making admissions."[18] And even where the concerns may prove well-founded, exceptions to recording requirements can easily address the problem; for instance, an exception could be granted for technological difficulties.[19] Moreover, some juries have met unrecorded interrogations with increasing skepticism in recent years, as evolving technology has also led to heightened expectations for "scientific" evidence.[20] And exonerations based on DNA evidence have sparked a

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[13] *See, e.g.*, United States v. Azure, No. CR-99-30077, 1999 WL 33218402, at *1 (D.S.D. Oct. 19, 1999). This discussion and the literature on this topic primarily focus on the FBI because FBI agents constitute the majority of the DOJ's law enforcement officers. *See* Brian A. Reaves, *Federal Law Enforcement Officers, 2008*, BUREAU JUST. STAT. BULL., June 2012, at 3. Additionally, recording policies generally do not affect USMS officers because they rarely conduct interviews seeking confessions from suspects. *See* Sullivan, *supra* note 3, at 1301 n.11. And while less is known about the recording policies of the ATF and DEA prior to the recent policy shift, as recently as 2006 both agencies opposed both a mandatory recording policy and a pilot program exploring the benefits of recording, *id.* at 1301–02, and there is no reason to believe that either agency's practices on recording custodial interviews differ greatly from the FBI's.

[14] FBI Memorandum, *supra* note 12, at 3.

[15] *See* THOMAS H. ACKERMAN, FBI CAREERS 19 (3d ed. 2010).

[16] FBI Memorandum, *supra* note 12, at 3.

[17] *See* Sullivan, *supra* note 3, at 1301 n.14; Julie Renee Linkins, Note, *Satisfy the Demands of Justice: Embrace Electronic Recording of Custodial Investigative Interviews Through Legislation, Agency Policy, or Court Mandate*, 44 AM. CRIM. L. REV. 141, 158 (2007) ("Anecdotes suggest that few interrogations actually get recorded, with agents preferring to rely on traditional note taking, summarization, and signed sworn statements.").

[18] LEO, *supra* note 5, at 303.

[19] *See, e.g.*, DOJ Memorandum, *supra* note 3, at 3.

[20] *See* Kristian Bryant Rose, *Of Principle and Prudence: Analyzing the F.B.I.'s Reluctance to Electronically Record Interrogations*, 9 OKLA. J.L. & TECH., no. 64, 2013, at 18 (noting how "assumptions about the availability and propriety of technology" could lead to increased suspicion from jurors when presented with unrecorded confessions).

change in public perception of the likelihood of false confessions and wrongful convictions.[21]

The DOJ's new policy, which went into effect on July 11, 2014, flips its previous presumption against recording to one in favor of it. Agents no longer need to obtain supervisory approval to record interviews: FBI, DEA, ATF, and USMS agents are now expected to electronically record statements of individuals suspected of any federal crime in their custody when in a "place of detention with suitable recording equipment."[22] The recording should begin when the suspect enters the interview room and should continue throughout the entirety of the interview with recording equipment in plain view or hidden.[23] Any decision not to record an interview that falls under the presumption should be documented and made available to the U.S. Attorney and reviewed as part of periodic assessments of the policy.[24] The DOJ also encourages agents to record in situations not covered by the presumption, such as interviews conducted with persons not in custody or not within a place of detention.[25]

However, the memo carves out four exceptions. First, the presumption does not apply if the interviewee agrees to give a statement on the condition that it is not recorded.[26] Second, the agent and prosecutor may decide not to record an interview conducted for the purpose of gathering information related to public safety or national security.[27] Third, an interview need not be recorded if it would not be "reasonably practicable," for example, because of an "equipment malfunction, an unexpected need to move the interview, or a need for multiple interviews in a limited timeframe exceeding the available number of recording devices."[28] Fourth, the SAC and U.S. Attorney may overcome the presumption in favor of recording if they believe there is a "significant and articulable law enforcement purpose" to do so.[29] Significant-

21 *See* LEO, *supra* note 5, at 295.

22 DOJ Memorandum, *supra* note 3, at 2. "Place of detention" is defined as "any structure where persons are held in connection with federal criminal charges where those persons can be interviewed" and includes federal, state, local, and tribal law enforcement facilities. *Id.* "Suitable recording equipment" means "an electronic recording device deemed suitable by the agency for the recording of interviews that . . . is reasonably designed to capture electronically the entirety of the interview." *Id.*

23 *Id.* at 3.

24 *Id.*

25 *See id.* at 1.

26 *Id.* at 3.

27 *Id.* This exception refers to *New York v. Quarles*, 467 U.S. 649 (1984), *see* DOJ Memorandum, *supra* note 3, at 3, in which the Supreme Court held that *Miranda* warnings are not required before "police officers ask questions reasonably prompted by a concern for the public safety." *Quarles*, 467 U.S. at 656.

28 DOJ Memorandum, *supra* note 3, at 3.

29 *Id.* The DOJ notes that "[t]his exception is to be used sparingly." *Id.*

ly, the DOJ makes clear that the policy does not "create any rights or benefits, substantive or procedural, enforceable . . . by any party against the United States."[30]

The DOJ's new presumption in favor of recording custodial interviews represents a significant improvement compared to the Department's previous procedure. There are numerous reasons to record custodial interviews — benefiting both defendants and law enforcement — and under the new policy, federal agents will record far more interrogations than before. However, additional enforcement mechanisms may be needed to realize this new presumption's many benefits. The DOJ should bolster the internal accountability measures in its policy to increase compliance and promote consistency across the department. Additionally, Congress should be prepared to pass a federal statute if the courts are needed to check the wide discretion that agents and prosecutors have under the current scheme.

The benefits of recording custodial interviews are numerous — including increased reliability and efficiency — and largely uncontested today. Most importantly, recording makes it easier for judges to identify false confessions by allowing them to bypass the interpretation of the agent taking notes and writing the report, providing judges with a more objective means of assessing the veracity of a defendant's confession.[31] In a study on exonerations in the United States between 1989 and 2003, researchers found that 15% of exonerated defendants had confessed to crimes they had not committed.[32] Electronic recording cannot entirely remedy the problem, but recorded interviews have already led some judges to suppress confessions that, while questionable on tape, would likely have been admitted without a recording.[33] Recording custodial interviews may also lead to greater efficiency and

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[30] *Id.* at 1–2.

[31] *See* Gail Johnson, Commentary, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 735 (1997). *But see* Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1356–58 (2010) (arguing that videotapes of interrogations shot from the viewpoint of the police create a strong bias against the suspect that may do more harm than good); Linkins, *supra* note 17, at 160 ("[S]ome caution may be warranted because recordings might introduce emotional biases into jury decision making.").

[32] Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544 (2005).

[33] For example, in *State v. Jeffrey*, No. 03-16977A (Fla. Cir. Ct. Oct. 16, 2006) (order granting motion to suppress statement), the court suppressed the defendant's statement based on a videotape of the confession, which showed the defendant parroting back the detective's questions as his "confession" and ending his statement by asking if he "did it right." *Id.* at 15–16. Judge Pineiro went on to note that before this case he did not believe it was necessary to "tape the entirety of a defendant's interrogation," but that based on his experience he came "to believe that, regardless of the practicality, [videotaping] might be imperative." *Id.* at 17.

reduced costs.[34] When recording, interviewers no longer have to worry about taking notes and can focus instead on conducting the interview.[35] Moreover, recording statements results in fewer suppression motions and quicker resolutions of those suppression motions that are litigated.[36]

However, a policy that strongly encourages recording interrogations may not be enough; state and local recording policies without enforcement mechanisms have often been inconsistently applied. For example, in 2006, the Iowa Supreme Court strongly encouraged law enforcement officers to record custodial interviews.[37] Shortly afterward, the Iowa Attorney General announced that he considered the decision to require recording, and the Iowa Department of Public Safety (DPS) adopted a general policy that required electronic recording of all custodial interviews.[38] But a 2011 survey found that, while most Iowa agencies recorded at least occasionally, only about half followed the DPS policy and recorded in all situations.[39] Additionally, due to budgetary constraints, policies without enforcement mechanisms can be stalled while police resources are focused on higher priorities. For example, in 2012, New York City implemented a policy to videotape interrogations for murder, sex crimes, and felony assaults.[40] But a year later, only 28 out of more than 76 detective squads even had an interview room set up with recording equipment, and only two of those were recording homicide interrogations.[41]

Although the federal context is distinct,[42] the DOJ should still guard against uneven application of its new policy by ensuring strong internal accountability mechanisms. Already, agents are required to document "[any] decision not to record any interview that would oth-

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[34] *See* LEO, *supra* note 5, at 302 (explaining that the "front-end costs" of purchasing and installing recording equipment "will be repaid many times over by the savings in the time and resources of police, prosecutors, judges, and jurors").

[35] *See* Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 88 JUDICATURE 132, 134 (2004) (observing that suspects are more nervous and speak less when officers write copious notes during an interview).

[36] Major Edward W. Berg, *Videotaping Confessions: It's Time*, 207 MIL. L. REV. 253, 268 (2011).

[37] *See* State v. Hajtic, 724 N.W.2d 449, 456 (Iowa 2006).

[38] *See* Brian R. Farrell & Sara K. Farrell, Essay, *Watching the Detectives: Electronic Recording of Custodial Interrogations in Iowa*, 99 IOWA L. REV. BULL. 1, 10–11 (2013). The DPS policy made clear that it did not create any statutory or constitutional rights or remedies for a failure to record. *Id.* at 11 n.75.

[39] *Id.* at 13.

[40] James C. McKinley Jr. & Joseph Goldstein, *Confession in 'Baby Hope' Killing Was Taped, but the Interrogation Was Not*, N.Y. TIMES, Oct. 23, 2013, http://www.nytimes.com/2013/10/24/nyregion/police-didnt-tape-baby-hope-questioning.html.

[41] *Id.*

[42] The smaller number of law enforcement officers in a single command structure may ameliorate or eliminate the problems seen on the state level with implementing recording policies.

erwise presumptively be recorded under" the new policy,[43] but it is unclear exactly what is required in this documentation. Simple notification is a good first step, but interpreting the requirement to involve a detailed explanation of why the presumption was violated would increase compliance. Empirical research suggests that law enforcement officers who know they must explain their actions to a third party make fewer mistakes.[44] Moreover, the more detailed the justification required, the less likely officers will act without good reason.[45] The policy also indicates that supervisors should periodically review documentations of noncompliance.[46] That is a good start, but expanding this requirement to include releasing noncompliance information to the public would increase transparency.[47] This information could then be used to determine whether the DOJ's self-policing is adequate.

If internal accountability measures prove insufficient to compel compliance with the recording presumption, external accountability measures may become necessary. The policy makes extremely clear that it does not confer on defendants any right to have one's interview recorded.[48] And because there is no constitutional right to have one's interrogation electronically recorded, to compel recording would require a federal statute.[49] Fortunately, several state statutes mandating

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[43] DOJ Memorandum, *supra* note 3, at 3.

[44] *See* Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 66 (2010).

[45] *Id.*

[46] *See* DOJ Memorandum, *supra* note 3, at 3.

[47] Releasing information on noncompliance broken down by exception would also go a long way toward assuaging (or confirming) the fears about the exceptions rendering the rule useless that many commentators expressed when the new policy was announced. *See, e.g.*, Harvey Silverglate, *DOJ's New Recording Policy: The Exceptions Swallow the Rule*, FORBES (June 2, 2014, 12:14 PM), http://www.forbes.com/sites/harveysilverglate/2014/06/02/dojs-new-recording-policy-the-exceptions-swallow-the-rule [http://perma.cc/8UZL-KPUB].

[48] *See* DOJ Memorandum, *supra* note 3, at 1–2. This lack of external accountability is not unique to this policy. The paragraph explaining that the policy is for "internal Department of Justice guidance" only is boilerplate language used in many DOJ policies. *See, e.g.*, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.150(A) (1997), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.150 (using similar language in policy laying out principles of federal prosecution); Memorandum from James M. Cole, Deputy Att'y Gen., to All United States Attorneys 4 (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [http://perma.cc/4VJX-WZUT] (using similar language in memorandum giving guidance on marijuana enforcement). However, it is beyond the scope of this discussion to assess the sufficiency of DOJ accountability in general. For an overview of problems with and possible solutions for DOJ guidelines, see Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167 (2004).

[49] Although the Supreme Court has not addressed the issue, every federal circuit to confront the question has held that due process does not require the recording of custodial interrogations. *See, e.g.*, United States v. Meadows, 571 F.3d 131 (1st Cir. 2009); United States v. Boston, 249 F. App'x 807 (11th Cir. 2007); Brown v. McKee, 231 F. App'x 469 (6th Cir. 2007); United States v. Tykarsky, 446 F.3d 458 (3d Cir. 2006); United States v. Williams, 429 F.3d 767 (8th Cir. 2005); United States v. Montgomery, 390 F.3d 1013 (7th Cir. 2004); United States v. Huber, 66 F. App'x

the recording of custodial interviews have been passed in the last decade and can provide guidance. State policies generally have one of three enforcement methods: exclusion, presumed involuntariness, or jury instructions. In exclusion states, if an interview was not recorded and no statutory exceptions apply, the statement will not be admissible.[50] In presumed involuntariness states, an unrecorded statement will be subject to the rebuttable presumption that it was involuntary, and therefore not admissible, unless the government overcomes the presumption by proving the statement was voluntarily given.[51] In jury-instruction states, the prosecution may present evidence from custodial interviews that, in violation of the statute, have not been recorded, but the court will instruct the jury about the legal requirement to record statements.[52] Any of these three options would provide federal agents with greater incentives to record their interviews than the current policy.

If federal law enforcement officers are not held to account for their decisions not to record, the DOJ's step in the right direction might not go as far as it could or should go to promote reliability and efficiency in criminal proceedings. To give the policy its best chance of effective implementation without outside interference, the DOJ should ensure strong enforcement of its policy's internal accountability and make information on noncompliance public. If internal measures prove inadequate, Congress should be prepared to enact formal, external accountability mechanisms to incentivize compliance and limit the harm of violations.

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123 (9th Cir. 2003); Trice v. Ward, 196 F.3d 1151 (10th Cir. 1999); United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988). Courts only have a duty to enforce agency policies when the Constitution or federal law requires policy compliance. *See* United States v. Caceres, 440 U.S. 741, 754–55 (1979).

[50] *See, e.g.*, IND. R. EVID. 617 ("[E]vidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made . . . except upon clear and convincing proof of any one of the following [exceptions] . . . .").

[51] *See, e.g.*, D.C. CODE § 5-116.03 (2012) ("Any statement of a person accused of a criminal offense . . . obtained in violation of [the statute requiring custodial interviews to be recorded] shall be subject to the rebuttable presumption that it is involuntary. This presumption may be overcome if the prosecution proves by clear and convincing evidence that the statement was voluntarily given.").

[52] *See, e.g.*, OR. REV. STAT. § 133.400(3)(a) (2013) ("If the state offers an unrecorded statement . . . [and] is unable to demonstrate, by a preponderance of the evidence, that an exception . . . applies, upon the request of the defendant, the court shall instruct the jury regarding the legal requirement [to record custodial interviews] and the superior reliability of electronic recordings when compared with testimony about what was said and done."). Federal judges already have the discretion to inform jurors that unrecorded statements are less accurate and reliable; a jury-instruction recording statute would simply make mandatory what is currently discretionary. *See* Sullivan, *supra* note 3, at 1332–33.

Tracy, Mary

From: Hinchcliffe, Shannon
Sent: Thursday, April 25, 2019 1:00 PM
To: Tracy, Mary
Subject: FW: Comment to Proposed Rules
Attachments: Ltr to Supreme Court Rules Committee 4.25.19.pdf

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From: Suzanne Elliott [mailto:suzanne@suzanneelliottlaw.com]
Sent: Thursday, April 25, 2019 12:57 PM
To: AOC DL - Rules Comments <RulesComments@courts.wa.gov>
Subject: Comment to Proposed Rules

See Attached.

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