

TESTIMONY OF
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NEW YORK STATE BAR ASSOCIATION
TASK FORCE ON WRONGFUL CONVICTIONS

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I come before you today to discuss a particular topic in the preliminary report of the New York State Bar Association Task Force on Wrongful Convictions, video recording of interrogations. The Task Force recommends that the New York State Legislature continue funding pilot programs to provide localities with resources to record police interrogations. Schenectady County, along with Broome County, is one of the first two counties to benefit from such a pilot program, having received the sum of \$50,000 from the Division of Criminal Justice Services, together with an additional \$50,000 provided by the New York State Bar Association. I endorse this recommendation of the Task Force and wish to express my thanks to the State Bar Association for the resources provided to me for this project.

I became convinced that recording police interrogations was necessary following two high-profile jury trials conducted by my office in late 2005. One was a murder and one was a rape. Both cases featured written confessions obtained from the defendants by police interviewers. In both cases, defense attorneys argued strenuously to the jury that simple technology exists to record interrogations and that in the absence of a recording, the confessions should not be deemed reliable. Both cases resulted

in convictions, but jurors afterwards told me that their deliberations were prolonged by the determination as to whether to credit the confessions. They felt that had these interviews been recorded, they would have reached the same conclusion more quickly and with greater certitude. We live in a video age where anyone with a cell phone camera can record video and post it on YouTube, and these jurors wondered why the police were slow in embracing video technology.

At the 2006 Winter Conference of the New York State District Attorneys' Association, I had the opportunity to talk to my colleague, Broome County D.A. Gerry Mollen, about this issue and he told me that he has been requiring his police agencies to do some form of video recording since the mid-1990s and welcomed me to visit his office in order to plan for our own project. I accepted that invitation and in March of that year I accompanied three members of the Schenectady Police Department - an assistant chief, a sergeant, and an experienced interrogator - to Binghamton to meet with D.A. Mollen and sworn personnel of the Binghamton Police Department. I thought it was important for a senior investigator to discuss his reservations about this project with his counterpart in the Binghamton Police Department.

What we learned in that meeting convinced us that Schenectady should pursue this project. Binghamton Police officers told us that when the District Attorney asked them to begin recording interrogations, they were concerned, believing that this would tend to compromise their methods, make them overly self-conscious, or embarrass them by revealing to juries the kinds of statements that interviewers sometimes make in order to build bonds of identification with the subject of an interview. Instead, they found that the preservation of the actual interrogations provided their best defense against false claims in subsequent legal proceedings. None of the Binghamton police officers we talked to wanted to return to the days when they did not have the ability to record interrogations.

Following this site visit, the Schenectady Police were ready to enthusiastically pursue the project. This support was critical, as a District Attorney does not manage the police and can only ensure compliance by the implementation of extreme measures that are detrimental to public safety, such as refusal to prosecute in the absence of recordings.

Schenectady is geographically the second smallest county outside of New York City. Our population of approximately 150,000 people is served by a county Sheriff's Department that maintains a small road patrol but has no investigative division,

a barracks of the New York State Police in the town of Princetown, and five police departments in the city of Schenectady, the towns of Rotterdam, Glenville and Niskayuna, and the village of Scotia. Scotia is such a small police department that it lacks an interview room; that left us with four police departments to equip with recording devices.

All four police agencies agreed to protocols - which I drafted, with input from local police, based on successful policies from other states - that would require the video recording of all suspect interviews in felony cases from beginning to end. Exempted from the requirement to record are statements made by suspects at a crime scene, while in transit to the police department, at booking or while being asked pedigree information; statements made in an interrogation at a time when the interviewer is unaware that a felony has occurred, statements made at another location not equipped with recording devices and the reasons for that location are not designed to avoid the intent of the policy; statements where the person interviewed has indicated that he or she does not wish to be recorded; and statements made where electronic recording fails due to malfunction and not the result of intentional conduct of law enforcement personnel.

Even though the pieces were in place to begin this project, it still took two years from the time we agreed to embark upon it until interview rooms were equipped to record interviews. We signed our DCJS contract in April 2007 and our contract with the New York State Bar Association in November 2007. Among other factors, this delay is attributable to time spent reaching agreement on protocols; choosing a vendor and a product to use from the several competing systems now offered in the marketplace; following the legal requirements of the procurement process including writing the RFP and selecting from competing bidders; preparing the rooms for the installation of the equipment, including whatever soundproofing may be necessary; and the actual installation of the equipment itself. The equipment we purchased and installed is a surreptitious system that does not interfere with the interview process. Because it is unobtrusive, subjects may not know that they are being recorded and they are not specifically informed of that fact. Our protocol does state that if an individual requests that he or she not be recorded, the interviewer can, at his discretion, decide whether to comply with the request.

With the total of \$100,000 in grants, we purchased five Irecord systems for nine interview rooms from Office Data Systems, a vendor for this product in Latham, New York. The

cost for this system was approximately \$78,000. The remainder of the money is being spent to equip a courtroom in the Schenectady County Courthouse so that this evidence can be easily played for juries. We also have secured forfeiture funds to equip the State Police barracks in Princetown with this same system so that within a short time every police agency in Schenectady County that conducts interviews and maintains a facility for that purpose will be recording police interviews in their entirety for all felony cases.

Our system went online on April 1, 2008, and we have recorded 372 interrogations to date. The reaction of all parties in the criminal justice system has been uniformly positive.

Our police believe that video recording protects them from false claims of coercion or intimidation. The most commonly used attack on written statements is that the words on the paper are those of the officer, not the individual being interviewed. A recording makes clear who said what and how it was stated. Police also no longer need to recreate in testimony the process during which a defendant begins an interview with a denial and ends it hours later with the making of a written confession. That process is recorded for all to see.

Prosecutors believe that this evidence promotes earlier disposition of cases. Defense attorneys like it because they receive a DVD copy of the interview upon arraignment and have a much better idea of what their client is facing. If there is any ambiguity about whether a suspect invoked his or her right to counsel, the video recording either establishes or negates that claim and eliminates any temptation on the part of either the police or the defendant to conceal or distort the truth. Judges benefit from the clarity that a video recording provides to issues at Huntley hearings which would otherwise be the subject of contention and ultimately require an exercise of judicial discretion to resolve. Whether someone has been advised of his or her Miranda rights appropriately or at some point invoked his or her right to silence or to an attorney, is likely to be the subject of a stipulation between the parties rather than an evidentiary hearing.

Finally, juries benefit by seeing the entire interview as it took place, not just the final product. Mere words on a piece of paper cannot convey the body language, tone, and emotion expressed by a subject during an interview. However, all of those factors can be important in evaluating both the

voluntariness and the credibility of a statement, and video captures them.

There are some drawbacks to video recording. Grants funded the purchase and installation of the equipment, but provided no money for the maintenance of the system. We did have one equipment malfunction that our vendor is addressing, so it is important for ongoing maintenance to be factored into the cost of the project. Some judges are unsure of the best way to conduct hearings involving video recordings. Our preferred methodology is to authenticate the DVD of the interview at a Huntley hearing and ask the defense to call the judge's attention to any particular portion of it which supports any legal arguments for suppression. One judge suggested that if he had to listen to the entire DVD then everyone would have to sit in the courtroom while it was played. When video recordings are used for trial, it is usually necessary to transcribe the interviews. This is both expensive and time consuming. If time is saved at Huntley hearings, more time is required for pre-trial hearings to determine whether portions of a recorded interview should be excluded from the jury's consideration. For instance, discussions of a defendant's past criminal record that may occur in police custody would not ordinarily be admissible. Assistant district attorneys are therefore required to spend

time editing an exhibit before trial to remove the inadmissible portions of the interview. It is more time consuming for both the defense and the prosecution to fully familiarize themselves with evidence, which may consist of hours of police interrogation over several days, instead of the former process that required only mastery of written statements. All that being said, it is clear that Schenectady has been ideally suited to pilot this project because we have neither the logistical problems nor expense associated with large rural counties with small police departments or heavily-populated urban counties with antiquated facilities and storage issues.

I believe that a consensus is emerging in the law enforcement community to support these projects, which will only be furthered by the provision of additional state resources to enable communities to equip police departments with recording equipment. Recording police interviews may be an example of that rare issue where prosecutors and defense attorneys agree that it works for both sides and enhances the criminal justice system.

As much as I support expansion of our pilot program to other communities, I do not think that it is realistic or appropriate to mandate video recording by statute or court order that would preclude the admission of unrecorded confessions. It

took my small county of Schenectady two years to implement a project that had universal support among its partner agencies; it is unrealistic to think that larger counties, with multiple agencies and varying opinions, could implement systems in shorter periods of time. In addition, the expense of such a project on a statewide basis would be prohibitive given current fiscal realities and should not be mandated by the state but unfunded.

In addition, it would be wrong to exclude from the consideration of juries an entire class of evidence solely because local governments cannot afford the technology to preserve those statements in a particular fashion. We have always relied upon judges to rule on the admissibility of evidence and juries to sort out issues of credibility and veracity; we ought not now say to jurors that they can't consider a legally obtained statement as evidence unless they can see and hear a video recording of the interaction between a defendant and police officer.

Video recordings are important tools in advancing the truth-seeking process that the criminal justice system aspires to, but their absence should not be used to exclude evidence upon which we have relied for more than 200 years of jurisprudence.