SCWC-23-0000376

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Respondent / Plaintiff-Appellee, vs. CHARLES ZUFFANTE, Petitioner / Defendant-Appellant.	Circuit Court Case No. 3CPC-22-0000315 ICA Case No. CAAP-23-0000376 CIRCUIT COURT OF THE THIRD CIRCUIT HON. ROBERT D.S. KIM

BRIEF OF *AMICI CURIAE* ACLU OF HAWAI‘I FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF PETITIONER / DEFENDANT-APPELLANT

APPENDIX A

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I. INTRODUCTION

Over 30 years ago, this Court recognized that "recording . . . all custodial interrogations would undoubtedly assist the trier of fact in ascertaining the truth." *State v. Kekona*, 77 Hawai'i 403, 408–09, 886 P.2d 740, 745–46 (1994). Even so, it held that the due process clause of the Hawai'i Constitution does not require such recording. *Id.* Now, with most adults carrying cell-phone cameras, and most Hawai'i police officers deploying body-worn cameras, it is time to revisit the Court's holding that no camera needs to be activated when the police interrogate suspects in their custody.

This case involves an inexplicable failure to record a custodial interrogation. Defendant Charles Zuffante was a passenger in a car that was stopped by the Hawai'i Police Department ("Hawai'i PD"). Officers found methamphetamine in the car and took Mr. Zuffante to the station for questioning. The two officers who conducted the traffic stop were equipped with body-worn cameras and recorded the stop. *See* Zuffante Op. Br. at 5, Dkt. 40:11[1]; Supp. ROA, SC Dkt. 3:37–43. But when another officer interrogated Mr. Zuffante at the station, he did not record it. He did not even take notes. Yet, at trial, this officer testified that Mr. Zuffante confessed to drug trafficking.

The State appears to concede there were no exigent circumstances requiring Mr. Zuffante to be interrogated urgently, without a recording. In its view, this was a "run-of-the-mill drug distribution case." State Ans. Br. at 1, Dkt. 45:5. But the State now says Hawai'i PD—which had the means to record Mr. Zuffante in the field—could not record him at the station. *Id.* at 2.

That argument is untenable. And this case perfectly illustrates why, in the year 2025, it does not make sense to excuse the police from recording custodial interrogations—especially given their high stakes, where a defendant's words can mean the difference between conviction and acquittal. This Court should require those recordings, either as an application of the Hawai'i Constitution's due process guarantee or as an exercise of this Court's supervisory authority.

II. ARGUMENT

The Hawai'i Constitution guarantees every accused person the right to "a fundamentally fair trial." *State v. Matsumoto*, 145 Hawai'i 313, 328, 452 P.3d 310, 325 (2019) (citations and

1 Citations to the record shall be cited as: ([Title of Document] at [document page number if applicable], Dkt. [ICA docket number]:[PDF page number].). Citations to the Hawai'i Supreme Court docket will be referenced as "SC Dkt."

quotation marks omitted). Nowhere is this protection more critical than during custodial interrogations—environments susceptible to coercion and false confessions. Recognizing these risks, this Court has implemented safeguards against coerced or unreliable confessions. *See, e.g.*, *State v. Baker*, 147 Hawai‘i 413, 424, 465 P.3d 860, 871 (2020) (describing the Court's "broader" purpose of "curtail[ing] the improper use of manipulative and deceptive tactics during custodial interrogations"). The time has come to add another safeguard: requiring police to record custodial interrogations. *Amici Curiae* ACLU of Hawai‘i Foundation and American Civil Liberties Union ("ACLU Amici") submit that the due process clause of article I, section 5 of the Hawai‘i Constitution bars the State from introducing a police officer's oral testimony about the content of an unrecorded, non-exigent, custodial interrogation.

A. This Court should reconsider *Kekona* and hold that due process requires police to record custodial interrogations.

Due process principles, as applied to today's world, require the police to record custodial interrogations. While *Kekona* held that failing to record custodial interrogations does not render a criminal trial fundamentally unfair, its reasoning rested on three factors: (1) the defendant's ability to challenge police testimony, (2) the practical impact of announcing a right that would be limited to interrogations at police stations and (3) the decisions of courts in other states. More than 30 years later, these justifications no longer hold, and *Kekona* should be overruled.

1. Failing to record custodial interrogations is profoundly unfair.

Kekona posited that defendants whose interrogations were not recorded can overcome that problem by cross-examining police witnesses and testifying in their own defense. 77 Hawai‘i at 409, 886 P.2d at 746. In this case, Mr. Zuffante and the Innocence Project have identified problems with this reasoning. For example, forcing a defendant to testify in response to a police account of an unrecorded interrogation tends to undermine the defendant's right not to testify. Op. Br. at 23, Dkt. 40:29. Moreover, in the context of unrecorded custodial interrogations, ascertaining what was said by turning trials and suppression hearings into credibility contests between police officers and criminal defendants tends to undermine truth-seeking and yield wrongful convictions. Innocence Project Amicus Br. at 9–10, SC Dkt. 13:14–15.

The ACLU Amici agree with those arguments and write separately only to observe that, for two reasons, these arguments should matter under the Hawai‘i Constitution.

First, requiring police to record custodial interrogations would be consistent with post-

Kekona case law emphasizing that due process requires the state to act affirmatively to show that a defendant knowingly waived their right to remain silent and confessed. This Court has held that, "as a matter of state constitutional law, statements stemming from custodial interrogation may not be used by the State unless it 'first demonstrate[s] the use of procedural safeguards effective to secure the privilege against self-incrimination.'" *State v. Uchima*, 147 Hawai'i 64, 84, 464 P.3d 852, 872 (2020) (quoting *State v. Kazanas*, 138 Hawai'i 23, 34, 375 P.3d 1261, 1272 (2016)). The *Miranda* warning is an example of one such safeguard. *Id.* This Court requires "the prosecution [to] establish that *Miranda* warnings, *as well as a valid waiver of the defendant's related constitutional rights*, preceded any 'interrogation' as a precondition to the admissibility at trial of any resulting statement made by the defendant." *State v. Ketchum*, 97 Hawai'i 107, 124, 34 P.3d 1006, 1023 (2001) (overruled on other grounds) (emphasis added). These post-*Kekona* statements are consistent with recognizing that the state has an affirmative duty to establish, through recording, that a defendant voluntarily made a supposed confession.

Second, because recording custodial interrogations protects suspects and officers alike, requiring those recordings would promote the values that guide this Court's constitutional jurisprudence. This Court's interpretation of state constitutional rights seeks to promote mutual respect among the people of Hawai'i. *State v. Wilson*, 154 Hawai'i 8, 27, 543 P.3d 440, 459 (2024); *City & Cnty. of Honolulu v. Sunoco LP*, 153 Hawai'i 326, 363, 537 P.3d 1173, 1210 (2023) (Eddins, J., concurring); HRS § 5-7.5(b) (2009). It is significant, then, that criminal suspects are not the only ones who favor recording interrogations. In recent years, "law-enforcement agencies themselves have shifted to requiring recordings." American Law Institute, Principles of Law, Policing § 11.02; Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs,* 31 Law & Hum. Behav. 381, 382 (2007).[2] That is presumably because recordings protect not only "the accused," but also "the public's interest in honest and effective law enforcement" and law enforcement's interest in

[2] *See, e.g.*, International Association of Chiefs of Police, National Summit on Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions 14 (2013) ("[S]tanding IACP model policies, support audio and/or video recording of all major crime interviews with suspects."); National Association of Criminal Defense Lawyers, National Organizations – Recording Custodial Interrogations (Feb. 25, 2019) (listing 17 organizations, including the Major Cities Chiefs Association, that favor recording requirements), https://www.nacdl.org/Content/NationalOrgsonRecordingCustodialInterrogations#MCCA.

"confirming the content and the voluntariness of a confession." *Kekona*, 77 Hawai'i at 412, 886 P.2d at 749 (Levinson, J., dissenting) (quoting *Stephan v. State*, 711 P.2d 1156, 1161 (Alaska 1985)).

2. Technological developments warrant reconsidering *Kekona.*

Changing technologies, in combination with changing law enforcement use of technologies, have also undermined *Kekona*'s reasoning. *Kekona* leaned on the idea that, in 1994, recording was much easier in the station house than in the field; both the majority and the dissent seemed to accept that any due process right to recorded custodial interrogations would have to be limited to the station house. 77 Hawai'i at 409, 886 P.2d at 746. Consequently, the majority hypothesized that announcing a due process right to recorded custodial interrogations in the station house would have a limited impact because the police would respond by "conducting all interrogations out in the field," *id.*, presumably without recording them. No matter how persuasive that logic may have been in 1994, it does not withstand scrutiny now. Today, police recording cannot logically be limited to, and is not in fact limited to, police stations.

Video recording has become nearly ubiquitous, and far less cumbersome, in the decades since *Kekona*. People now carry recording devices—cell phones—that can easily be carried into a station house or out in the field. It is implausible, in the year 2025, for an officer to claim that, in non-exigent circumstances, they had to go forward with a custodial interrogation—whether in the station house or in the field—without finding a device capable of recording it.

A police-specific development has also made recording easier since *Kekona*: body-worn cameras. Every police department in Hawai'i—including Hawai'i PD, which investigated Mr. Zuffante—uses body-worn cameras.[3] That means *all* Hawai'i residents are subject to a police jurisdiction that has body cameras. Not only that, body-worn-camera policies typically instruct

[3] *See* Hawai'i Police Dept., *General Order 818, Body-Worn Cameras* (Mar. 29, 2022), https://www.hawaiipolice.gov/wp-content/uploads/GO-818-PV-Body-Worn-Cameras.pdf; Honolulu Police Dept., *Policy Number 2.57, Body-Worn Cameras* (Sept. 24, 2021), https://www.honolulupd.org/wp-content/uploads/2020/08/HPD-Policy-257-3-7-2023.pdf; Maui County Police Commission, *Maui Police Department Highlights* (Oct. 23, 2024) at 12, https://www.mauicounty.gov/DocumentCenter/View/149962/Agenda-Item-5---Highlights; Kaua'i Police Department, *Fiscal Year 2024 Annual Report* (July 1, 2023 – June 30, 2024) at 8, https://www.kauai.gov/files/assets/public/v/1/office-of-the-mayor/documents/annual-reports/fy24/13_kpd_ar-fy24.pdf; Jack Truesdale, *Bodycams Are Becoming 'Second Nature' For Cops But Piling On Work For Prosecutors*, Honolulu Civil Beat (Apr. 7, 2023), https://www.civilbeat.org/2023/04/bodycams-are-becoming-second-nature-for-cops-but-piling-on-work-for-prosecutors.

officers to record dynamic activities in the field, including calls for service and transports to detention facilities.[4] Here is Hawai‘i PD's explanation of why these recordings are so vital:

> *The Hawai‘i Police Department uses* [*body-worn cameras*] *as a means by which real time evidence and activity can be captured in an environment that cannot be duplicated again. It is vital to the law enforcement objective that real time video evidence be captured and utilized in police activities and* [*body-worn cameras*] *are an acceptable means to attain this goal.*[5]

This post-*Kekona* landscape, together with *Kekona*'s holding, yielded an absurd set of facts in this very case. When Hawai‘i PD encountered Mr. Zuffante in the field, it recorded video. *See* Supp. ROA, SC Dkt:3:37, 43. Yet, when interrogating him at the police station, the police stopped recording. True, the State claims this was because "the equipment at the police station was not working." Ans. Br. at 2, Dkt. 45:6. But there was no exigency requiring Hawai‘i PD to conduct the interrogation without first locating a working camera, such as the body-worn cameras its officers had used to record the traffic stop. The State concedes that this was a "run-of-the-mill drug distribution case," *id.* at 1, Dkt. 45:5, so it cannot seriously contend that, having just recorded video in the field, the Hawai‘i PD lacked the ability to record video—using a camera of one kind or another—at its own station house.

This case, in which police made recordings in the field but *not* at the station house, is essentially the reverse of the technological scenario *Kekona* imagined in 1994. And for that reason, it is an appropriate case in which to reconsider *Kekona*. Given the video-recording capacity of all people in 2025—and especially the recording capacity of police departments in Hawai‘i—the Court should hold that Mr. Zuffante's due process rights were violated when a police officer was permitted to testify about what Mr. Zuffante supposedly said during an unrecorded, non-exigent, custodial interrogation. And if the Court remains concerned about creating a rule that would hinge on whether a custodial interrogation occurs at the station house or in the field, it should resolve those concerns not by holding that due process *never* requires recording custodial interrogations (as it did in *Kekona*), but instead by holding that due process requires recording non-exigent custodial interrogations *wherever they occur*.

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[4] *See, e.g.*, Hawai‘i PD General Order 818 at §6.3; Honolulu PD Policy Number 2.57 at §II.B.

[5] Hawai‘i PD General Order 818 at §1 (emphasis altered from underlining to italics).

3. Other states increasingly require that custodial interrogations be recorded.

Finally, a changing national landscape warrants reconsidering *Kekona*. Citing decisions in 11 states, *Kekona* concluded that most jurisdictions had declined to adopt the Alaska Supreme Court's rule requiring the recording of custodial interrogations "when the interrogation occurs in a place of detention and recording is feasible." *Stephan,* 711 P.2d at 1159; *see Kekona*, 77 Hawai'i at 408, 57 P.3d at 745. But most states now require that certain custodial interrogations be recorded—including 8 of the 11 states referenced in *Kekona*.

Today, at least 31 states, as well as the District of Columbia, have required or facilitated (via rules or statutes) the recording of certain custodial interrogations. *See* Brandon Garrett, *Jurisdictions that Record Police Interrogations*, Wilson Ctr. for Science & Justice at Duke Law, 3–4 (2024) (listing 29 states and the District of Columbia), https://wcsj.law.duke.edu/wp-content/uploads/2024/08/Jurisdictions-that-Record-Police-Interrogations.pdf; *Commonwealth v. DiGiambattist*a, 813 N.E.2d 516, 535 (Mass. 2004); *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006). In 8 states, courts have pursued this result through decisions or evidentiary rules. *See Stephan*, 711 P.2d at 1162 (requiring the recording of certain custodial interrogations under the Alaska Constitution's due process clause); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994); *State v. Cook*, 847 A.2d 530, 547 (N.J. 2004); *DiGiambattista*, 813 N.E.2d at 535; *In re Jerrell C.J.*, 699 N.W.2d 110, 123 (Wis. 2005); Ark. R. Crim. P. 4.7; Ind. R. Evid. 617; N.J. Supreme Court Rule 3:17; Utah R. Evid. 616. In the other 23 states and the District of Columbia, change has come via state legislatures, agencies, or commissions. *See*, Garrett, *Jurisdictions that Record Police Interrogations*, *supra*.

Most of these recording requirements and endorsements did not exist when this Court decided *Kekona*. Indeed, of the 11 states cited in *Kekona*, 8 have since changed their law. *See* Cal. Penal Code § 859.5 (2014); Colo. Rev. Stat. Ann. § 16-3-601 (2016); 725 Ill. Comp. Stat. Ann. 5/103-2.1 (West 2009); 705 Ill. Comp. Stat. Ann. 405/401.5(b); 725 Ill. Comp. Stat. Ann. 5/103-2.1(b-5); Me. Rev. Stat. Ann. tit. 25, § 2803-B (2009); Nev. Rev Stat. § 171.1239 (2024); Wash. Rev. Code Ann. § 10.122.030 (2021); 13 V.S.A. § 5581 (2014); *DiGiambattist*a, 813 N.E.2d at 531–34 (exercising court's superintendence power).

To be sure, instead of announcing due process rights, many of these post-*Kekona* developments have involved legislative enactments or (as discussed below) the exercise of a court's supervisory power. But they reflect an emerging consensus about what is *fair*. They also

help explain why there has not been more litigation on the due process question; in many states, courts have had no need to articulate a right to recorded custodial interrogations because legislatures beat them to it. This modern-day conception of fairness should inform this Court's decision about whether to revisit *Kekona*.

B. In the alternative, the Court should exercise its supervisory power to require the recording of custodial interrogations.

In *Kekona*, even as it rejected the defendant's due process argument, the Court "stress[ed] the importance of utilizing tape recordings during custodial interrogations when feasible." 77 Hawai'i at 409, 886 P.2d at 746. This case demonstrates that stronger medicine is needed. Accordingly, even if the Court does not overrule *Kekona*, it should exercise its supervisory authority to ensure that what happened in this case will not recur.

1. This Court has broad supervisory powers.

This Court's supervisory authority is substantial. The Hawai'i Constitution vests "[t]he judicial power of the State" in this Court. Haw. Const. art. VI, § 1. It establishes an "inherent power of the court" that includes "the power to administer justice" and "to promulgate rules for its practice." *State v. Moriwake*, 65 Haw. 47, 55, 647 P.2d 705, 712 (1982). This means that the Court has not only the power to decide appeals, but also "inherent equity, supervisory, and administrative powers" that "derive[] from the state Constitution." *State v. Pattioay*, 78 Hawai'i 455, 468 n.28, 896 P.2d 911, 924 n.28 (1995) (quoting *Richardson v. Sport Shinko*, 76 Hawai'i 494, 507, 880 P.2d 169, 182 (1994)). In addition, Title 32 of the Hawai'i Revised Statutes tasks this Court with "the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein . . . ." HRS § 602-4.[6]

The Court can exercise its supervisory power in many contexts. It can choose to decide a case because it presents issues of considerable public importance. *Rivera v. Cataldo*, 153 Hawai'i 320, 324–25, 537 P.3d 1167, 1171–72 (2023). It can correct lower court errors. *State v. Moniz*, 69 Haw. 370, 373, 742 P.2d 373, 376 (1987).

And, crucially, the Court can exercise its supervisory power to exclude evidence in criminal cases. The Court has held that evidence obtained in violation of the Posse Comitatus Act, though not subject to a formal exclusionary rule, "must be suppressed under the authority of

[6] This statute "is merely a legislative restatement" of the Court's powers, which are "inherent." *Pattioay*, 78 Hawai'i at 468 n.27, 896 P.2d at 924 (citation and quotation marks omitted).

this court's supervisory powers in the administration of criminal justice in the courts of our state." *Pattioay*, 78 Hawai'i at 469, 896 P.2d at 925. The Court has also held that an officer's violation of a statutory consent requirement "precludes admissibility of . . . blood test results in [a] related criminal DUI proceeding . . . under this court's supervisory powers." *State v. Garcia*, 96 Hawai'i 200, 204, 29 P.3d 919, 923 (2001) (discussing *State v. Wilson*, 92 Hawai'i 45, 53–54, 987 P.2d 268, 276 (1999)). Similarly, short of excluding evidence, this Court has used its supervisory authority to require trial courts to give special jury instructions in cases dependent upon eyewitness identifications, *State v. Cabagbag*, 127 Hawai'i 302, 304, 277 P.3d 1027, 1029 (2012), and to create procedural safeguards to protect essential due process rights. *Tachibana v. State*, 79 Hawai'i 226, 236, 900 P.2d 1293, 1303 (1995); *State v. Glenn*, 184 Hawai'i 112, 126, 468 P.3d 126, 140 (2020).

2. Other courts have exercised their supervisory powers to ensure that custodial interrogations are recorded.

High courts in several states have exercised their supervisory power, either through judicial decisions or rulemaking, to promote or require the recording of custodial interrogations.

In five states—Massachusetts, Minnesota, New Hampshire, New Jersey, and Wisconsin—courts have exercised their supervisory authority either to exclude or impose consequences on the introduction of testimony concerning the content of unrecorded custodial interrogations. *See DiGiambattista*, 813 N.E.2d at 535; *Scales*, 518 N.W.2d at 592; *State v. Barnett*, 789 A.2d 629, 632 (N.H. 2001); *Cook*, 847 A.2d at 547; *Jerrell*, 699 N.W.2d at 121. These courts properly recognize that supervisory authority encompasses "tak[ing] all appropriate measures to ensure the fair and proper administration of a criminal trial." *Scales*, 518 N.W.2d at 592. The Supreme Court of Wisconsin, for example, has "exercise[d] [its] supervisory power to require that all custodial interrogations of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention." *Jerrell*, 699 N.W.2d at 123. In New Jersey, the court established a committee to investigate the issue, and it ultimately adopted a court rule requiring the recording of custodial interrogations for a broad range of crimes. N.J. Supreme Court Rule 3:17; *Cook*, 847 A.2d at 547.[7]

[7] *Cf. State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006) ("[E]lectronic recording, particularly videotaping, of custodial interrogations should be encouraged, and we take this opportunity to do so."). *But see Brashars v. Commonwealth*, 25 S.W.3d 58, 63 (Ky. 2000) (declining to exercise its supervisory authority); *Baynor v. State*, 736 A.2d 325, 332 (Md. 1999) (same).

Like New Jersey, and as noted above, several courts have adopted evidentiary rules that mandate recording of custodial interrogations under certain circumstances. The exercise of that rulemaking authority is akin to the exercise of a court's supervisory authority.[8]

Finally, Massachusetts' highest court has crafted jury instructions designed to ensure that police departments will record custodial interrogations. In *DiGiambattista*, the court held: "[T]he admission in evidence of any confession or statement of the defendant that is the product of an unrecorded custodial interrogation, or an unrecorded interrogation conducted at a place of detention, will entitle the defendant, on request, to a jury instruction concerning the need to evaluate that alleged statement or confession with particular caution." 813 N.E.2d at 518. Where the voluntariness of the defendant's alleged statement is contested, the jury is also told "that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt." *Id.* at 534. The standard *DiGiambattista* instruction tells juries: "The Supreme Judicial Court—this state's highest court—has expressed a preference that such interrogations be recorded whenever practicable. Since there is no complete recording of an interrogation in this case, you should weigh evidence of the defendant's alleged statement with great caution and care."[9]

3. This Court should exercise its superintendence authority to ensure that the police record custodial interrogations.

This Court's supervisory-authority cases, as well as the cases from other states, chart a potential path forward in this case. Even if this Court is not persuaded that due process mandates recording custodial interrogations, it does not follow that the Court must allow defendants to be prosecuted, convicted, and sentenced based on oral accounts of alleged confessions. Instead, either by excluding oral testimony or prescribing clear jury instructions, this Court can safeguard

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[8] *See* Ark. R. Crim. P. 4.7, Reporter's Note ("This rule was added in 2012 in response to the decision in *Clark v. State*, 374 Ark. 292, 287 (2008)."); Indiana Supreme Court, Order Amending Rules of Evidence, No. 94S00-0909-MS-4 (Sept. 15, 2009), https://www.in.gov/ilea/files/Evidence_Rule_617.pdf (adopting Ind. R. Evid. 617); Utah R. Evid. 616, Advisory Committee Note ("This rule is promulgated to bring statewide uniformity to the admissibility of statements made during custodial interrogations.").

[9] Commonwealth of Mass. Admin., Off. of Dist. Ct., *Instruction 3.820: Unrecorded Custodial Interrogations,* in Criminal Model Jury Instructions For Use in the District Court 319–320 (2009 ed., revised Oct. 2024), https://www.mass.gov/doc/3820-unrecorded-custodial-interrogation/download (attached as **Appendix A**).

the truth-seeking function of criminal trials.

In *Cabagbag*, the Court cited the emergence of "substantial scholarship and empirical research" questioning the reliability of eyewitness identification, as well as past practice invoking such powers "to adopt new procedural requirements to prevent error in the trial courts." 127 Hawai‘i at 315, 277 P.3d at 1040 (citing *Shak v. Doi*, 49 Haw. 404, 406–07, 420 P.2d 100, 102 (1966)). As shown above, post-*Kekona* developments amply demonstrate the need to assure that courts and juries are presented with actual recordings of custodial interrogations, rather than an officer's oral retelling of them. This Court can provide that assurance by excluding unrecorded, non-exigent, custodial interrogations from evidence, similar to the approach in *Pattioay*, *Wilson* (1999), *Scales*, *Barnett*, and *In re Jerrell*. Or it could provide that assurance by crafting appropriate jury instructions, as in *Cabagbag* and *DiGiambattista*.

In contrast, the facts of this case demonstrate that mere exhortation is inadequate. Despite *Kekona* encouraging police to record custodial interrogations—and despite the Hawai‘i PD's access to body-worn cameras—the officer in this case conducted a solo interrogation of a suspect in custody, without recording or even contemporaneously memorializing it. If the court chose not to record a critical hearing, and instead had a court clerk later testify to their recollection of what was said during the hearing, that decision would be indefensible. The same should be true in a custodial interrogation, where an individual's liberty is at stake. Going forward, this Court can discourage police departments from repeating that mistake.

III. CONCLUSION

The Court should reconsider its decision in *Kekona* and hold, on the record in this case, that the due process clause of article I, section 5 of the Hawai‘i Constitution bars the State from introducing a police officer's oral testimony about the content of an unrecorded, non-exigent, custodial interrogation. Alternatively, the Court should exercise its supervisory authority to require such recording or, at a minimum, to require trial courts to issue a cautionary jury instruction when the State seeks to introduce a police officer's oral testimony about the content of an unrecorded, non-exigent, custodial interrogation.

DATED: Honolulu, Hawai‘i, April 4, 2025.

Respectfully submitted,

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Appendix A

UNRECORDED CUSTODIAL INTERROGATION

You have heard some evidence that there was no recording of the complete interrogation of the defendant conducted while (he) (she) was (in custody) (at a place of detention). The Supreme Judicial Court — this state's highest court — has expressed a preference that such interrogations be recorded whenever practicable. Since there is no complete recording of an interrogation in this case, you should weigh evidence of the defendant's alleged statement with great caution and care. The reason is that the Commonwealth may have had the ability to reliably record the totality of the circumstances upon which it asks you to determine beyond a reasonable doubt that the defendant's statement was voluntary, but instead is asking you to rely on a summary of those circumstances drawn from the possibly fallible or selective memory of its witness(es). [In evaluating the significance of the lack of a recording in this case, you may also consider any evidence concerning whether the defendant was given an opportunity to have (his) (her) interrogation recorded, and whether the defendant voluntarily elected not to have the interrogation recorded.]

Here the jury must be instructed on "Confessions and Admissions (Humane Practice)" (Instruction 3.560) when voluntariness is a live issue.

NOTES:

1. **When instruction required.** A defendant is entitled to this instruction on request when a defendant's statement arises from a custodial interrogation or from one conducted at a place of detention and there is no electronic recording of the complete interrogation. *Commonwealth v. DiGiambattista*, 442 Mass. 423, 448-449 (2004). It must be given whether or not the prosecution offers reasons or justification for the lack of recording.

While the Commonwealth always bears the burden of proving beyond a reasonable doubt that a statement is voluntary, the preference for recording is limited to statements made during custodial interrogation or interrogation conducted at a place of detention (e.g., a police station or jail cell). Custodial interrogation consists of questioning by law enforcement officers after a person has been taken into custody or deprived of his or her freedom in any significant way. Whether a defendant is in custody at any moment depends on whether a reasonable person in the defendant's shoes would have believed that he or she was not free to leave. *Commonwealth v. Morse*, 427 Mass. 117, 122-123 (1998); *Commonwealth* v. *Gendraw*, 55 Mass. App. Ct. 677, 682-683 (2002); *Commonwealth* v. *Ayre*, 31 Mass. App. Ct. 17, 20 (1991).

DiGiambattista applies only prospectively; that is, to cases tried after August 16, 2004. *Commonwealth v. Dagley*, 442 Mass. 713, 721 (2004).

2. **Voluntariness.** The absence of an electronic recording is only one factor to be considered in determining the voluntariness of a defendant's statement in the totality of the circumstances. *Commonwealth v. Trombley*, 72 Mass. App. Ct. 183, 187 (2008).

3. **Instruction must be given even where defendant refuses to have recording made.** The prosecution may "'address any reasons or justifications that would explain why no recording was made, leaving it to the jury to assess what weight they should give to the lack of a recording.'" *Commonwealth v. Tavares*, 81 Mass. App. Ct. 71, 73 (2011), quoting *Commonwealth v. DiGiambattista*, 442 Mass. 423, 448-449 (2004).

4. **Defendant's objection to recording.** When a defendant is given the opportunity to have his or her interrogation recorded, the jury should be advised that they may consider whether the defendant voluntarily chose not to have a recording made. *Commonwealth v. Rousseau*, 465 Mass. 372, 393 (2013).

5. **Not required for witness interviews where defendant is not a suspect.** The *DiGiambattista* instruction is not required for unrecorded witness interviews of non-suspects, specifically, where the police did not electronically record the volunteered statement by an uncharged defendant who appeared unexpectedly at the police station to discuss the victim's demise shortly after her death. The defendant was not a suspect at the time of the interview. *Commonwealth v. Issa*, 466 Mass. 1, 20-21 (2013).