IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

CHARLES ZUFFANTE,
Petitioner/Defendant-Appellant.

SCWC-23-0000376

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-23-0000376; CASE NO. 3CPC-22-0000315)

SEPTEMBER 17, 2025

OPINION BY RECKTENWALD, C.J.,
CONCURRING IN PART AND DISSENTING IN PART

The instant case highlights the issues inherent in unrecorded custodial interrogations. On that, we appear to agree unanimously. Further, we also agree that the "proverbial time has arrived" for this court to revisit the need for a rule mandating recordation of police station interviews. See State v. Cook, 847 A.2d 530, 546-47 (N.J. 2004) (internal quotation marks omitted). I write separately because there is

disagreement as to how, and by whom, such a new rule should be crafted.

I agree with the majority that requiring recordation of police station interviews implicates a criminal defendant's rights under the Hawai'i Constitution. However, as Justice Ginoza's dissent persuasively shows, a practicable recordation rule requires the balancing of complex considerations, including law enforcement's legitimate investigative needs and the rights of criminal defendants.

Today, the majority adopts an expansive rule requiring recordation of every police station interview, regardless of feasibility, and extends that rule to all other feasible custodial interrogations. Other jurisdictions have taken a more nuanced approach, requiring recordation for specific categories of cases and providing for exceptions when warranted. New York law, for example, which requires recordation only in certain classes of violent felony cases, provides for exceptions for good cause showing, including ten statutorily defined exceptions. N.Y. Crim. Proc. Law § 60.45 (McKinney 2018). Similarly, the Uniform Electronic Recordation of Custodial Interrogations Act (UEROCIA) (Unif. Law Comm'n, Draft September 30, 2010), which has been adopted in four states, recognizes six.

The majority's new rule makes no room for any exceptions in police station interviews and only one exception in every other context: a showing of infeasibility. The rule the majority sets forth today does not account for exigent circumstances, equipment malfunctions, or spontaneous statements. See UEROCIA §§ 3(e), 5, 10. Nor does it address how trial courts should handle interrogations conducted in other jurisdictions in compliance with that jurisdiction's laws, or situations where an officer reasonably believes recordation is not required. See id. §§ 7, 9. Further, the recordation requirement for custodial interrogations conducted outside the police station implicates numerous additional considerations, the foremost being when, how, and by whom the threshold question of feasibility will be determined. Failure to account for these, and other, nuances now will likely only lead to further litigation, which could result in piecemeal resolution of these important issues over a long period of time, perhaps on less-than-ideal records.

As such, I respectfully believe Part II.C of Justice Ginoza's dissent offers the better approach. A special committee of stakeholders should be convened to develop a rule tailored to Hawaiʻi's specific circumstances. By bringing stakeholders together, we can be sure to provide maximal protections to criminal defendants, consistent with the Hawaiʻi

Constitution, "without unduly hampering the legitimate needs of law enforcement." See Cook, 847 A.2d at 547. This measured approach would limit the unintended and unforeseen consequences of an untested rule that may prevent criminal prosecutions tomorrow for crimes committed and investigated yesterday.

To that end, I would give that rule prospective application only because the majority expressly overrules our controlling precedent in State v. Kekona, 77 Hawaiʻi 403, 886 P.2d 740 (1994). See State v. Auld, 136 Hawaiʻi 244, 256, 361 P.3d 471, 483 (2015) (quoting State v. Jess, 117 Hawaiʻi 381, 400, 184 P.3d 133, 152 (2008)) ("The 'paradigm case' warranting a prospective-only application of a new rule arises 'when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct.'").

In the interim, I would adopt a jury instruction, to be given at criminal defendants' election, cautioning the jury to carefully evaluate the reliability of an unrecorded custodial statement given in a police station. See, e.g., Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533-34 (Mass. 2004) (holding that, where a police station custodial interrogation was not recorded, criminal defendants are entitled to a cautionary instruction that the Commonwealth's highest court expressed a preference for recordation and that the jury "should weigh

evidence of the defendant's alleged statement with great caution and care"); Mont. Crim. Jury Instr. No. 1-119 (2022) ("Evidence of an unrecorded oral admission or oral confession of the Defendant should be viewed with caution."). Giving a cautionary jury instruction in the context of an unrecorded custodial interrogation, where potentially unreliable testimony may be given undue consideration by a jury, is consistent with this court's treatment of similar potentially unreliable testimony in the past. See, e.g., State v. Cabagbag, 127 Hawaiʻi 302, 313-14, 277 P.3d 1027, 1038-39 (2012) (holding defendants may request a cautionary jury instruction where an eyewitness is central to the case because such testimony is unreliable and likely to be given undue weight by a jury).

To the extent that the majority gives its new rule retroactive application, including to Defendant Charles Zuffante, I respectfully dissent.

/s/ Mark E. Recktenwald