

**Criminal Procedure**—Not There Yet: Police Interrogations Should Be Electronically Recorded or Excluded from Evidence at Trial—*Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004)

In the United States, a criminal suspect held in police custody may refuse to answer questions during an interrogation, but if a suspect waives this right, anything he says during questioning can be used as evidence against him at trial.<sup>1</sup> The government bears the burden of proving that the suspect waived these rights voluntarily and free of coercion.<sup>2</sup> The government traditionally satisfied its burden by presenting testimonial evidence that the police informed the suspect of his rights, that the suspect understood those rights, and that the suspect voluntarily spoke to the police.<sup>3</sup> In *Commonwealth v. DiGiambattista*,<sup>4</sup> the Massachusetts Supreme Judicial Court (SJC) held that if the police fail to electronically record a suspect's custodial interrogation and later proffer the statements as evidence at trial, a defendant may request, and will be granted, a jury instruction allowing the jury to weigh the voluntariness of the alleged statements with caution.<sup>5</sup>

In March 1998, Valerio DiGiambattista, his girlfriend, and her children moved out of their rental house at 109 Adams Street in Newton, Massachusetts.<sup>6</sup> Citing poor living conditions during their final year of tenancy, DiGiambattista withheld rent from the landlord for failing to make

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1. U.S. CONST. amend. V (creating right against self-incrimination); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (creating warnings for custodial interrogations). The *Miranda* court highlighted the importance of warning criminal suspects of their constitutional rights and the consequences of waiving those rights. *Id.* at 469.

2. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (articulating government's burden to prove knowledgeable, voluntary, and intelligent waiver); *Commonwealth v. Day*, 444 N.E.2d 384, 387 (Mass. 1983) (defining Commonwealth's burden of proof regarding waiver and voluntariness). In Massachusetts, courts require the government to "prove a knowing and intelligent waiver beyond a reasonable doubt." *Commonwealth v. Day*, 444 N.E.2d 384, 387 (Mass. 1983).

3. See Wayne T. Westling & Vicki Waye, *Videotaping Police Interrogations: Lessons from Australia*, 25 AM. J. CRIM. L. 493, 501 (1998) (describing general pre-trial process for admitting confessions); cf. Yale Kamisar, *Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 234-35 (1977) (criticizing traditional testimonial evidence as "crude").

4. 813 N.E.2d 516 (Mass. 2004).

5. 813 N.E.2d at 533-34 (introducing court's preference for jury instructions). The court further held that, if the voluntariness of the proffered statement is at issue, the jury may conclude that the government, by not electronically recording the statement, failed to meet its burden of proof in attempting to show that the suspect made the statements voluntarily. *Id.* If the government fails to meet its burden on voluntariness, the jury must disregard the confession. *Id.* at 534 (citing *Commonwealth v. Cryer*, 689 N.E.2d 808, 814 (Mass. 1998)).

6. 813 N.E.2d at 518-19 (reviewing facts presented at trial). DiGiambattista and his girlfriend rented a house from Angelo Paolini, who also owned the construction company next door. *Id.*

necessary repairs.<sup>7</sup> Three days after DiGiambattista and his family moved out, the house caught on fire.<sup>8</sup> Firefighters at the scene found the house locked and boarded closed.<sup>9</sup> Investigators determined that someone deliberately started the fire in a closet beneath the stairs by using gasoline as an accelerant.<sup>10</sup>

A month after the fire, interrogators questioned DiGiambattista at a fire station near his home.<sup>11</sup> The interrogating officers informed DiGiambattista that he was their prime suspect and that an eyewitness placed him at the scene around the time the fire started.<sup>12</sup> During questioning, a state trooper not previously part of the interrogation entered the room carrying a file folder and two video tapes labeled “109 Adams Street” and “Paolini Construction Worker’s Comp Case.”<sup>13</sup> The trooper asked DiGiambattista if there was any reason he would be seen on a surveillance video of Paolini’s office building on the night of the fire.<sup>14</sup> DiGiambattista repeatedly denied setting the fire, and further denied that he was at the house that night.<sup>15</sup> The trooper then switched interrogation tactics and minimized the seriousness of the crime by acknowledging that “no one was hurt” and claiming that he understood DiGiambattista’s anger at the landlord for poor maintenance of the house.<sup>16</sup>

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7. 813 N.E.2d at 519. Immediately before moving out, DiGiambattista placed a pad lock on the front door, kept one key, and gave the other to his mother. *Id.* The door could only be locked from the outside with a key. *Id.*

8. 813 N.E.2d at 519. The neighbor reported the fire to the authorities just before midnight. *Id.* An eyewitness reported seeing someone matching DiGiambattista’s description at the house around 6:00 or 6:30 that evening. *Id.* The witness, however, could not positively identify DiGiambattista as the man he saw entering the house. *Id.* at 519 n.4.

9. 813 N.E.2d at 519 (reviewing facts surrounding fire). The trial record reflects that “the front door [was] locked, the other two doors boarded up and the windows closed.” *Id.* There was conflicting evidence regarding the rear window because evidence at the scene suggested that the window may have been open, but a police officer testified at trial that the window was covered in plastic. *Id.* at 519 n.2.

10. 813 N.E.2d at 519. Testing revealed that someone also set a smaller fire in the kitchen sink. *Id.*

11. 813 N.E.2d at 519. The interrogators told DiGiambattista that he was free to leave at any time, advised him of his *Miranda* rights, and had him sign a waiver of his rights. *Id.*

12. 813 N.E.2d at 519 (citing statements raising police suspicion about DiGiambattista’s involvement in Newton fire). During DiGiambattista’s first interview with police the day after the fire, he suggested that Paolini may have set the fire using gasoline. *Id.* At that point in the investigation, the police were unaware that an accelerant had been used to set the fire. *Id.* There was also conflicting information regarding DiGiambattista’s whereabouts on the day of the fire. *Id.* Contrary to his girlfriend’s statement that he was at home all night, DiGiambattista told police that he left his house at approximately 10:30 p.m. on the night of the fire to run a short errand, and a house guest informed police that DiGiambattista left the house much earlier than 10:30 p.m. *Id.* at 519 n.3.

13. 813 N.E.2d at 520. The “109 Adams Street” tape contained the investigation footage shot at the scene of the fire, and the “Paolini Construction Worker’s Comp Case” tape was blank. *Id.* The file folder contained a stack of blank paper and random newspaper clippings. *Id.*

14. 813 N.E.2d at 520. The trooper explained to DiGiambattista that Paolini was under investigation in a worker’s compensation fraud case. *Id.* In reality, the interrogators created a fake fraud case as part of a pre-arranged plan to trick DiGiambattista into believing that they had solid evidence implicating him. *Id.* at 524.

15. 813 N.E.2d at 519-20 (describing multiple denials of guilt). DiGiambattista agreed to take a polygraph test; however, the interrogators ultimately did not administer the test, admitting they only made the suggestion to test DiGiambattista’s reaction. *Id.* at 520 n.5.

16. 813 N.E.2d at 520, 524 (recounting trooper’s minimization of DiGiambattista’s actions and describing

DiGiambattista continuously denied his guilt until the trooper suggested that DiGiambattista must have been under stress and drinking on the night of the fire.<sup>17</sup> DiGiambattista agreed with the interrogators that he had been under a great deal of stress and confessed to setting the fire after they suggested that his punishment might be limited to counseling for alcohol abuse.<sup>18</sup> DiGiambattista drew a map of the apartment indicating where he poured gasoline, but his confession differed both from the forensic evidence of the fire and from information gathered during interviews with store employees where DiGiambattista allegedly bought the gasoline and can.<sup>19</sup> At his trial, DiGiambattista filed a motion to suppress his confession, claiming that his statements were the product of coercive interrogations and were therefore involuntary.<sup>20</sup> The judge denied the motion and, after hearing evidence of his confession at trial, the jury convicted DiGiambattista of burning a dwelling house.<sup>21</sup> Crediting DiGiambattista's arguments on appeal and reversing his conviction, the SJC found that the interrogators' combined use of trickery, minimalization, and implied promises of counseling created a coercive environment, rendering DiGiambattista's confession involuntary.<sup>22</sup>

Interrogation techniques that involve physical or mental torture to elicit coerced or false confessions are not a new problem.<sup>23</sup> Through the 1930's,

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it as "standard interrogation tactic"). Police often use minimization techniques to lull a suspect into thinking the crime he committed was justified under the circumstances and that it would be safe to confess. *Miranda v. Arizona* 384 U.S. 436, 450 (1966) (reciting suggested interrogation techniques for obtaining confession).

17. 813 N.E.2d at 520. The trooper reminded DiGiambattista of the eyewitness and that DiGiambattista and his girlfriend had made inconsistent statements to the police regarding his movements on the night of the fire. *Id.* at 519 n.3.

18. 813 N.E.2d at 520 (describing circumstances surrounding DiGiambattista's confession). The motion judge did not believe DiGiambattista's testimony that the interrogator's offer of counseling occurred before his confession rather than after, and therefore refused to suppress the statements. *Id.* at 520 n.7. After writing a detailed confession, DiGiambattista wrote a letter of apology promising "to get help with [his] alcohol problem and any stress related [sic] problems." *Id.* at 522.

19. 813 N.E.2d at 521-22 (reviewing DiGiambattista's detailed statement to police). DiGiambattista told police that he bought a gas can at a hardware store on his way to the apartment on the night of the fire. *Id.* He then purchased one dollar of gasoline from a nearby gas station. *Id.* at 521. DiGiambattista also stated that, after drinking some beers, he went to the apartment, poured gasoline throughout both floors, lit the fire, and fled the building. *Id.* Investigators only found gasoline poured at the stair landing and in the kitchen sink, whereas DiGiambattista's confession stated that he poured gasoline throughout the apartment. *Id.* The hardware store and the gas station that DiGiambattista identified in his confession did not sell a gasoline can or one dollar of gas on the day DiGiambattista allegedly bought the items. *Id.* at 522.

20. 813 N.E.2d at 525 (reviewing motion judge's finding investigators gave "no express promises of leniency"). DiGiambattista argued that the combination of police trickery, minimization of the crime, and suggestions that he may need counseling caused him to falsely confess to the crime. *Id.* at 523-28.

21. 813 N.E.2d at 518 (reviewing procedural history).

22. 813 N.E.2d at 527-28 (noting each interrogation technique in isolation might not render confession involuntary). After deciding the case, the court created a new rule allowing a criminal defendant to request a jury instruction cautioning the jury about the voluntariness of the confession when the Commonwealth presents confession evidence that is not electronically recorded. *Id.* at 533-34.

23. See Zechariah Chafee, Jr. et al., *The Third Degree*, in 11 WICKERSHAM COMM'N REPORTS, NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT REPORT ON LAWLESSNESS IN LAW ENFORCEMENT, 13,

police in the United States used the “third degree” to obtain confessions from suspected criminals.<sup>24</sup> In 1931, George Wickersham compiled reports from the investigations of the National Commission on Law Observance and Enforcement that identified the problems of the use of the third degree and suggested ways to improve police investigations.<sup>25</sup> Recognizing the damage done to the criminal justice system by physical and mental abuse, namely coerced or false confessions, the Wickersham Report recommended recording interrogations and making the records public.<sup>26</sup> A few years after Wickersham published his findings, the United States Supreme Court decided *Brown v. Mississippi*,<sup>27</sup> holding that confessions obtained through police brutality and torture violate due process and are inadmissible in court.<sup>28</sup> Nearly two decades later, Charles O’Hara, author of a well-known manual on police investigations, advocated for the electronic recording of police interrogations, reasoning that such recordings would help investigators create the most accurate record of suspects’ confessions and would protect police from witnesses later changing their statements.<sup>29</sup>

While *Brown* banned confessions obtained through physical abuse, police continue to use, and courts allow, any psychological techniques available to get suspects to confess.<sup>30</sup> Much of the commentary since the Wickersham Report

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19 (Patterson Smith ed. 1968) (1931) [hereinafter WICKERSHAM REPORT] (associating third degree during police questioning with mental and physical suffering). The report recalls court cases addressing third-degree tactics as far back as 1920. *Id.* at 20; *see also* *Brown v. Mississippi*, 297 U.S. 278, 285-87 (1936) (holding confessions obtained by torture violate due process).

24. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 908 (2004) (reviewing history of police using physical violence to obtain confessions). Commentators describe the “third degree” as “the infliction of bodily pain and psychological torment.” *Id.*; *see also* *Brown v. Mississippi*, 297 U.S. 278, 281-82 (1936) (describing how police coerced defendant’s confessions through rigorous and repeated whippings).

25. *See* WICKERSHAM REPORT, *supra* note 23, at 180-92 (suggesting evils of third degree harmed law enforcement and communities where used). The Wickersham Report described how police use of the third degree led to problems such as increased incidents of false confessions, making police and prosecutors lax in their investigations, created additional issues at trial for the fact finder to decide, and created a lawless atmosphere in the criminal justice system as a whole. *Id.*

26. *See* WICKERSHAM REPORT, *supra* note 23, at 192 (advocating better record keeping regarding detainment and interrogation). The Wickersham Report suggested that contemporaneous written records would provide better information about the length and location of interrogations, visible injuries to witnesses, and the identities of the interrogators. *Id.* The Wickersham Report asserted that such records would allow communities to maintain higher standards for their criminal justice systems. *Id.* at 191.

27. 297 U.S. 278 (1936).

28. *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936) (analogizing trial admitting tortured confessions to “rack and torture chamber”). In *Brown*, the police freely admitted they hung, whipped, and beat the defendants until they confessed to the statements that the police created. *Id.* at 281-82. The prosecutor, trial judge, and state supreme court judges were aware of the details surrounding the defendants’ confessions. *Id.* at 285. Other than these confessions, there was no evidence connecting the defendants to the crime. *Id.* at 284.

29. CHARLES E. O’HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 152-53 (4th ed. 1976) (discussing electronic recordings as most accurate record of interrogations). O’Hara published the first edition of his book in 1956, ten years before the Supreme Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966).

30. *See* *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936) (excluding confessions obtained by physical

has stressed that electronic recordings help fact-finders to discover the truth in trials where confessing witnesses later claim innocence and begin a war of words with police.<sup>31</sup> In the 1985 case *Stephan v. State*,<sup>32</sup> the Supreme Court of Alaska became the first jurisdiction to follow Wickersham and O'Hara's suggestions by mandating the electronic recording of suspects' interrogations.<sup>33</sup> The *Stephan* court, deciding the case on state constitutional grounds, held that police failure to record custodial interrogations violates the due process clause of the Alaska Constitution and excludes any unrecorded statements from evidence at trial.<sup>34</sup> The exclusionary rule results from Alaska law enforcement's failure to follow previous case law requiring the electronic

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torture); see also Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 623-24 (2004) (describing increased use of psychological techniques in interrogations); see also *Fresh Air: Bill Clark & David Milch Discusses Clark's Work on the TV Series "NYPD Blue"* (NPR radio broadcast, Feb. 25, 2005) (illustrating detective's beliefs of psychological interrogations as not coercive).

31. See Kamisar, *supra* note 3, at 238 (discussing conflicts in testimony). Kamisar reviewed the two versions of the "Christian burial" speech in *Brewer v. Williams*, 430 U.S. 387 (1977), and criticized the court time wasted in courts because the interrogation was not recorded. *Id.* at 235-38; see also Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 721-26 (1997) (reviewing four cases of false confessions). A recording of an interrogation would assist the fact-finder in determining how many facts are provided by the suspect and how many facts are fed to the suspect by police through the course of the interrogation. Johnson, *supra*, at 735-36; cf. Wayne T. Westling, *Something is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537, 547 (2001) (arguing video-taping full interrogation would remove most elements of unreliability). Westling identified four key areas where confessions are most unreliable, including: "physical and psychological coercion," "confusion and doubt" about the suspects' own memories, fabricated confessions by interrogators or jailhouse informants, and "errors in nuance" of suspects' answers. Westling, *supra*, at 543; Drizin & Leo, *supra* note 24, at 925 (identifying 125 proven cases of "interrogation-induced false confessions"). The cases identified in Drizin & Leo's article are "proven" false confessions. Drizin & Leo *supra* note 24, at 925. The authors define "proven" as "confessions that are indisputably false because at least one piece of dispositive evidence objectively establishes, beyond any doubt, that the confessor could not possibly have been the perpetrator of the crime." *Id.*

32. 711 P.2d 1156 (Alaska 1985).

33. See *Stephan v. State*, 711 P.2d 1156, 1164 (Alaska 1985) (holding confessions not electronically recorded excluded from evidence at trial). In the years since the *Stephan* decision, four legislatures and one state supreme court have enacted requirements for the electronic recording of interrogations. D.C. CODE ANN. § 5-133.20 (2004) (requiring electronic recording of interrogations for dangerous, violent crimes); 725 ILL. COMP. STAT. § 5/103-2.1 (2004) (excluding statements made during custodial interrogations if not electronically recorded); ME. REV. STAT. ANN. tit. 25 § 2803-B (West 2004) (requiring all law enforcement agencies adopt written policies regarding electronic recording of interrogations); TEX. CRIM. PROC. CODE ANN. § 38.22 (Vernon 2004) (requiring electronic recording of oral confessions); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (exercising court's supervisory power in excluding unrecorded confessions); cf. John Caher, *N.J. Attorney General to Expand Policy of Taping Suspects' Confessions*, LEGAL INTELLIGENCER, Dec. 22, 2004, at 4 (describing proposed recording requirement). The New Jersey Attorney General is currently considering a policy that would require police to record a defendant's final statement in all first- and second-degree crimes. Caher, *supra*.

34. *Stephan v. State*, 711 P.2d 1156, 1159 (Alaska 1985) (describing law enforcement duty to preserve evidence). The court reasoned that electronically recording a defendant's interrogation helps to ensure "his right to a fair trial." *Id.* at 1159-60.

recording of custodial interrogations.<sup>35</sup>

Minnesota adopted its own exclusionary rule regarding unrecorded interrogations with *State v. Scales*.<sup>36</sup> Rather than relying on state or federal constitutional law, the Minnesota Supreme Court decided *Scales* through its supervisory powers.<sup>37</sup> Like Alaska, Minnesota created this rule after law enforcement failed to follow the court's suggestion to record the interrogations of criminal suspects.<sup>38</sup> The Massachusetts SJC considered mandating electronically recorded interrogations in 1993 and 1996 but declined to follow the trend set by *Stephan* and *Scales*.<sup>39</sup> With little discussion on the issue, the court refused to require law enforcement to electronically record interrogations, but recommended that police consider adopting the technique on a voluntary basis to aid the fact-finding process.<sup>40</sup> In *Commonwealth v. Diaz*,<sup>41</sup> the SJC held that a defendant may argue that the absence of a recorded interrogation should be considered as one of the elements that determine the voluntariness of

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35. *Stephan v. State*, 711 P.2d 1156, 1163 (Alaska 1985) (holding exclusion best remedy for failure to record interrogation). The Supreme Court of Alaska previously held that it was law enforcement's responsibility to preserve interrogation evidence. See *Mallott v. State*, 608 P.2d 737, 743 n.5 (Alaska 1980) (advising police to "tape record, where feasible" questioning at "place of detention"). Commentary illustrates the general reluctance of law enforcement to record interrogations; however, the jurisdictions that do record interrogations are pleased with the results. Lawrence Hurley, *Videotaped Interviews Now Common Procedure in Prince George County Police Dept.*, DAILY REC. (Baltimore), July 9, 2004, at News (citing initial police resistance to using electronic recordings in interrogations); see also Westling, *supra* note 31, at 552 (noting small number of police departments regularly record interrogations).

36. 518 N.W.2d 587, 592 (Minn. 1994) (mandating electronic recordings for police interrogations). The court required police to record all interrogations that take place while the suspect is in a place of detention. *Id.* The court also explicitly required police to record the full interrogation, including *Miranda* warnings and waiver. *Id.*; cf. *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985) (requiring electronic recording of full interrogation).

37. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (recognizing exclusionary rule aids court in "fair administration of justice"). The court left open the possibility that the trial court could consider admitting unrecorded statements if it determines that the violation of the rule is not "substantial." *Id.*; cf. *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985) (allowing police to introduce unrecorded statements where failure to exclude excused). Alaska allows for the possibility of power outage or equipment failure. *Id.*

38. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (discussing previous warnings to law enforcement). The court previously recognized the utility to police and courts of police recording their interrogations. *Id.* at 591.

39. See *Commonwealth v. Diaz*, 661 N.E.2d 1326, 1329 (Mass. 1996) (declining to adopt exclusionary rule); *Commonwealth v. Fryar*, 610 N.E.2d 903, 910 n.8 (Mass. 1993) (declining to interpret state constitutional requirement for exclusion as decided in *Stephan*).

40. See *Commonwealth v. Diaz*, 661 N.E.2d 1326, 1328-29 (Mass. 1996) (recognizing benefits of electronic recording). The court recognized that an electronic recording of an interrogation "speaks for itself literally" with respect to exactly what was said during an interrogation. *Id.* at 1328. The SJC further put the police on notice that the court may require electronic recordings in the future. *Id.* at 1329; see also Westling & Wayne, *supra* note 3, at 509 (suggesting electronic recordings best way to preserve historical facts). Westling and Wayne compare police failure to electronically record interrogations with failure to use "state-of-the-art fingerprint analysis equipment." Westling & Wayne, *supra* note 3, at 509; cf. David Rohde, *Jurors Faulted Police Work in Murder Case of a Teacher*, N.Y. TIMES, Feb. 13, 1999, at B1 (reporting jurors discredited unrecorded confession). Despite an eleven-page confession, the defendant raised enough questions regarding the circumstances surrounding his interrogation that the jury acquitted him. Rohde, *supra*.

41. 661 N.E.2d 1326 (Mass. 1996).

the defendant's statements.<sup>42</sup>

In *Commonwealth v. DiGiambattista*, the SJC relied on the totality of the circumstances test in determining that DiGiambattista made his statements involuntarily.<sup>43</sup> The court held that, while each individual tactic that the police used during DiGiambattista's interrogation might not have created a coercive environment, when the court viewed all of the tactics together, the Commonwealth had failed to meet its burden of proof in attempting to show that DiGiambattista made his statements voluntarily.<sup>44</sup> The court used the circumstances surrounding DiGiambattista's interrogation as an opportunity to revisit the issue of the electronic recording of police interrogations.<sup>45</sup> The court held that the lack of an electronic recording is a primary factor in determining the voluntariness of a suspect's statements.<sup>46</sup> The court adopted a new rule, allowing the defendant to request a jury instruction that unrecorded statements made during an interrogation should be considered "with great caution and care."<sup>47</sup> The court also adopted an instruction permitting the jury to conclude that the Commonwealth failed to meet its burden of proof of voluntariness if it introduces unrecorded statements that the defendant challenges.<sup>48</sup>

The court's adoption of the jury instructions is a positive step toward ensuring judicial fairness, but the rule falls short of the ideal standards set by the Minnesota and Alaska supreme courts.<sup>49</sup> The rule is problematic because it allows the jury to hear potentially coerced or false confessions without the

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42. *Commonwealth v. Diaz*, 661 N.E.2d 1326, 1329 (Mass. 1996) (discussing tactics for defense counsel to use in lieu of exclusion). The court's suggestion does not instruct the judge to weigh this element, despite the defense arguments to do so. *Id.*

43. 813 N.E.2d at 524 (stating trickery one of many factors used to determine voluntariness).

44. 813 N.E.2d at 528 (recognizing combination of tactics could cause innocent person to confess to crimes). The court considered the police's use of trickery in implying that they had video footage of DiGiambattista at the crime scene on the night of the fire, minimization by suggesting that DiGiambattista's actions were justified, and implications of lenient treatment such as counseling if he confessed. *Id.* Under these circumstances, the SJC held that the Commonwealth failed to prove beyond a reasonable doubt that DiGiambattista's confession was given voluntarily. *Id.*

45. 813 N.E.2d at 528-29 (recognizing inability to know true facts of police interrogation without electronic recording). The court commented on the significant amount of judicial resources that were expended in the attempt to recreate the circumstances surrounding DiGiambattista's interrogation. *Id.* at 529; *cf.* Kamisar, *supra* note 3, at 238 (commenting on court's time spent deciding admissibility of contested statement).

46. 813 N.E.2d at 533-34 (explaining new rule regarding electronic recording). The court did not require the police to record all interrogations, but merely placed an additional burden on them to do so if they wish to have the jury rely without question on the credibility of the statements. *Id.* at 532-33.

47. 813 N.E.2d at 533-34 (articulating jury instruction). To avoid the instruction, the police must record the entire interrogation when it is either custodial or occurs in a place of detention. *Id.* at 533.

48. 813 N.E.2d at 534 (articulating additional instructions allowed when voluntariness at issue).

49. *See* 813 N.E.2d at 532 (deciding juries should have same cautionary instruction judges follow when deciding circumstances surrounding unrecorded statements). The court considered creating a rule of exclusion following the Minnesota rule, but called the *Scales* decision "superficial simplicity." *Id.* The SJC criticized the rule of exclusion because it would require the court to precisely identify the situations in which police would be required to electronically record interrogations. *Id.*

benefit of an electronic recording to determine the circumstances surrounding the statements.<sup>50</sup> Juries routinely give more credit to police testimony when presented with conflicting testimony about the circumstances of an interrogation.<sup>51</sup> Confessions, even if false or coerced, are such powerful evidence that a jury would likely convict on the basis of a confession regardless of credible evidence contradicting it.<sup>52</sup>

The problem of credibility regarding confessions is exacerbated by the fact that juries tend to believe that, absent physical abuse or torture, a person would not confess to a crime that he did not commit.<sup>53</sup> The new instruction, as stated in *DiGiambattista*, provides the jury with an additional tool with which to treat the interrogating police officer's testimony with skepticism.<sup>54</sup> Even the most strongly-worded instruction, however, may not remove the specter of prejudice created by a jury hearing the most incriminating statements.<sup>55</sup> In the case at bar, the police were unable to substantiate any part of DiGiambattista's confession.<sup>56</sup> Despite this, the motion judge, trial judge, and appellate panel all credited the police testimony despite instructions from the SJC to such treat unrecorded statements with caution.<sup>57</sup>

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50. See 813 N.E.2d at 533-34 (discussing new rule). The court recognized that confessions are significant evidence used by the prosecution and juries, and that failure by the police to record them is a failure to preserve evidence. *Id.* at 533; see also Drizin & Reich, *supra* note 30, at 637 (discussing power of confession evidence); *infra* notes 51-52 and accompanying text (specifying how false confession evidence damaging to fact-finding process).

51. See Drizin & Reich, *supra* note 30, at 638 (reviewing how police control totality of circumstances surrounding interrogation). Drizin and Reich noted that when the jury is left to rely on conflicting testimony between police investigators and a criminal defendant, the jury usually credits the police version. *Id.* But see Rohde, *supra* note 40, (highlighting unusual result of jury rejecting police version of circumstances surrounding interrogation).

52. See Drizin & Reich, *supra* note 30, at 636-37 (illustrating false confession cases where DNA later exonerated defendants); see also Drizin & Leo, *supra* note 24, at 922-23 (discussing false confession cases). In their study, Drizin and Leo found that juries convicted approximately four in five defendants who later recanted a confession. Drizin & Leo, *supra* note 24, at 960. These were individuals whose confessions were later proven to be false. *Id.*

53. See Drizin & Reich, *supra* note 30 at 637-38 (explaining juries unfamiliar with police interrogation techniques); see also Drizin & Leo, *supra* note 24, at 910 (emphasizing power of modern psychological interrogation techniques). Drizin and Reich blamed wrongful convictions based on false confession on a "knowledge gap" between jurors' own knowledge and the realities of harsh, but legal, police interrogation techniques. Drizin & Reich, *supra* note 30, at 637; cf. Johnson, *supra* note 31, at 726 (explaining use of psychology in factors leading to false confessions). While there are many reasons why a person would falsely confess to a crime, Johnson noted the common misunderstanding that "perfectly normal people may still confess to crimes they did not commit under the pressures of interrogation." Johnson, *supra* note 31, at 727.

54. 813 N.E.2d at 532 (noting lack of recording presents jury with incomplete evidence).

55. See Drizin & Leo, *supra* note 24, at 922-23 (observing bias created by confession evidence). Police know that the state's ability to proffer a confession to a jury at trial is the most powerful evidence that the state can obtain because so few criminals are caught in the act of committing a crime. *Id.* at 921.

56. *Commonwealth v. DiGiambattista*, 794 N.E.2d 1229, 1232-34 (Mass. App. Ct. 2003), (reviewing trial judge's failure to credit any of defendant's claims of coercion) *rev'd* 813 N.E.2d 516 (Mass. 2004); see also *supra* note 21 and accompanying text.

57. See 813 N.E.2d at 532 (recalling instruction to judges to use lack of recording in deciding motions to suppress).

The court should have followed Alaska and Minnesota's lead by adopting a rule of exclusion regarding unrecorded statements that a defendant makes during custodial interrogations.<sup>58</sup> An exclusionary rule would only allow juries to hear confession evidence that the police have properly preserved.<sup>59</sup> As the SJC noted, the police, rather than relying solely on police testimony, regularly use photographs or videotapes to preserve other types of evidence, such as the condition of the crime scene.<sup>60</sup> The need to photograph crime scenes is no different than the need to electronically record suspects' interrogations because witnesses are often unable to recall the details of an event with complete accuracy, especially months or years after it occurred.<sup>61</sup>

The jury instruction rule will likely not lead to the changes in police procedure sought by the SJC in adopting the rule. The Commonwealth can continue to introduce unrecorded confessions, and risk only the court giving one additional instruction to the jury. Unlike an exclusionary rule, the jury instruction does not aid the fact-finder in determining the true circumstances surrounding confessions. Until either the SJC or the legislature requires the electronic recording of interrogations, courts will continue to force juries into deciding unnecessary swearing contests between police interrogators and criminal defendants. It is not difficult to predict who the losers of those contests will be.

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58. See *supra* note 49 (setting forth court's reasoning for rejecting exclusionary rule).

59. See 813 N.E.2d at 532 n.22 (recognizing police reliance on other forms of recorded evidence); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (holding electronic recordings of interrogations necessary for fair trial); see also *Westling & Waye*, *supra* note 3, at 508 (illustrating electronic recordings provide reliable record).

60. 813 N.E.2d at 532 n.22 (describing preservation techniques police use for other types of critical evidence).

61. See *Kamisar*, *supra* note 3, at 242-43 (noting police witness memory fallible). *Kamisar* equates the police witness's recollection of a suspect's unrecorded interrogation with arguing a case on appeal without the benefit of trial transcripts and based only on the lawyer's memory and interpretation of the critical events. *Id.* at 242.