UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEBRA JEAN MILKE, Petitioner/Appellant, vs. DORA B. SCHRIRO, et al., Respondent/Appellee.	No. 07-99001 District Court No. CV-98-00060-PHX-RCB **DEATH PENALTY CASE**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF AMICUS CURIAE BY ARIZONA CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANT DEBRA JEAN MILKE (REVERSAL REQUESTED)

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STATEMENT OF INTEREST

The ACLU of Arizona (hereinafter "ACLU") is a 501(c)(3) non-profit organization and is the statewide affiliate of the American Civil Liberties Union. Since 1959, the ACLU has advocated for the rights of Arizonans under the United States and Arizona Constitutions, and ACLU legal staff and cooperating counsel represented the defendant in the landmark case of *Miranda v. Arizona*. The ACLU attorneys in the instant case are both experienced and nationally recognized constitutional law advocates. Daniel Pochoda, the Legal Director of the ACLU of AZ, has litigated numerous constitutional cases at the trial and appellate levels, including argument before the United States Supreme Court, and has served on the faculty of several law schools. Cooperating attorney Larry Hammond is a leading criminal defense practitioner in Arizona, and has led organizations dedicated to protecting the rights of criminal defendants and to a fair court process, including the American Judicature Society and the Arizona Justice Project. The ACLU has also developed special expertise and knowledge of the constitutional issues in the present case. We have read the Opening Brief of Ms. Milke and the habeas briefs in district court in this matter. We are filing a motion for leave to appear as amicus simultaneously with this Brief pursuant to FRAP 29(a),(c).

The interest the ACLU has in this matter involves the constitutional arguments regarding the admissibility of uncorroborated and unrecorded confessions. While the defendant in this matter is ably represented in the brief already submitted, the constitutional arguments and marshalling of the research and precedence in the area of recording of confessions by the ACLU will assist the Court in understanding this rapidly changing area of law. At this time, for example, there are several states that have adopted a rule mandating the electronic recording of an interrogation and confession in order for it to be admissible. Additionally, in other states such recording has been mandated by the highest court. Cautionary jury instructions are required in both New Jersey and Massachusetts regarding all non-recorded custodial statements the prosecution seeks to enter into evidence.[1] The practical result of these developments has been that many law enforcement agencies in these jurisdictions have voluntarily begun recording interrogations.[2] Moreover, this is a case in which a woman's life is at stake. The U.S. Supreme Court has recognized the "truly awesome responsibility" associated with death penalty cases. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). Given this

[1] *See* Sullivan, Thomas P., The Time Has Come For Law Enforcement Recordings Of Custodial Interviews, Start To Finish, 37 Golden Gate U. L. Rev. 175, 176 (Fall 2006).

[2] Sullivan, The Time has Come, at 176-77.

responsibility, organizations with relevant information and informed argument should be heard.

STATEMENT OF THE ISSUES

I. **DOES THE SECRETIVE AND COERCIVE NATURE OF JAILHOUSE CONFESSIONS RESULT IN VIOLATIONS OF A SUSPECT'S FUNDAMENTAL RIGHTS?**

II. **HAVE COURTS AND LEGISLATURES CORRECTLY RECOGNIZED THAT THE FAILURE TO REQUIRE A CONTEMPORANEOUS RECORDING OF A CONFESSION EFFECTIVELY ELIMINATES THE ABILITY TO SAFEGUARD A SUSPECT'S FUNDAMENTAL RIGHTS?**

III. **SHOULD THE INTENTIONAL FAILURE TO RECORD THE CONFESSION OF DEBRA MILKE DESPITE THE PROBLEMATIC NATURE OF THE INTERROGATION TECHNIQUES AND HER STATE OF MIND, AND OF THE POLICE OFFICER, RESULT IN A FINDING OF INADMISSABILITY?**

SUMMARY OF THE ARGUMENT

A confession is one of the most powerful pieces of evidence that can be introduced at trial. Widespread evidence of false confessions continues to mount, calling into serious question the practices by which these confessions are elicited. The legion of psychological studies and analysis of interrogation room practices performed since the Supreme Court's decision in *Miranda v. Arizona* show that the *Miranda* warnings have not succeeded in alleviating the secrecy surrounding a custodial interrogation. Coupled with evidence from police manuals and reported cases, these studies show that unrecorded police interrogations result in the violation of the Fifth Amendment right to counsel and against self-incrimination. Confessions obtained through unrecorded interrogations are inherently untrustworthy, and their use by the state violates a defendant's due process right to a fair trial.

As the data grows on the unreliability of unrecorded confessions, there is an increasing consensus across the country that interrogations must be recorded. To date five (5) states have some sort of mandatory recording requirement and over 450 local police and sheriffs departments customarily record custodial interrogations. Overwhelmingly, law enforcement officials in jurisdictions that have such practices approve of them.

The evidence of such violations is in accord with the interrogation at the heart of the present case. The techniques employed by Debra Milke's interrogator make her alleged confession highly suspect, and no objective record of the interrogation exists. This is precisely because the same interrogator failed to electronically record the event of the interrogation even after being instructed to do so by his superior. Accordingly, the state's use of Debra Milke's alleged confession, obtained by way of her secret, unrecorded interrogation, violated her right to counsel, her right against self incrimination, and her due process right to a fair trial.

LEGAL ARGUMENT

I. THE COERCIVE AND SECRETIVE NATURE OF JAILHOUSE CONFESSIONS PREDICTABLY RESULT IN THE VIOLATION OF SUSPECTS' FUNDAMENTAL RIGHTS.

As Justice Harlan remarked in *Mayberry v. Pennsylvania*, "[T]he appearance of even-handed justice ... is at the core of due process. 400 U.S. 455, 469 (1971) (Harland, J., concurring). Also at this core is the right to a fair trial. *Chambers v. Mississippi*, 410 U.S. 284 (1973). Fundamental to a fair trial is the notion that untrustworthy evidence should not be presented to a trier of fact. *Id*. Courts have noted that, absent procedural safeguards, custodial interrogation leads to violations of the defendant's right against self-incrimination and the right to counsel. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966); *Michigan v. Jackson*, 475 U.S. 625, 629 (1986) ("the Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations"). Unchecked interrogations result in untrustworthy confessions. *Jackson v. Denno*, 378 U.S. 368 (1964) (due process forbids the use of involuntary confessions because such confessions are unreliable and because they are derived from a suspect against that suspect's will); *U.S. v. Tingle*, 658 F.2d 1332, 1334 (9th Cir. 1981) ("Confessions obtained in a coercive manner are likely to be unreliable"). The introduction at trial of such untrustworthy evidence, obtained by means which may violate the

defendant's rights against self-incrimination and the right to counsel, violates the defendant's due process rights. Without recording as a safeguard, such violations are likely to occur.

A. Confessions Obtained Through Unrecorded Interrogations Enable Violations of a Defendant's Right Against Self-Incrimination And The Right To Counsel.

The right against self-incrimination is an "essential mainstay" of our criminal justice system that is guaranteed under the Fifth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964). In *Miranda*, The Supreme Court recognized that custodial interrogation is inherently coercive and threatens the right against self-incrimination. *Miranda*, 384 U.S. at 467; *U.S. v. Haddon*, 927 F.2d 942, 946 (7th Cir. 1991) (a confession secured from a defendant during custodial interrogation is attended with the presumption of coercion"). "[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures." *Miranda*, 348 U.S. at 467. Because of the secrecy under which many police interrogations take place, the Court in *Miranda* noted, "[w]hatever the testimony of the authorities as to waiver of rights by an accused, the fact of ... incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." *Id.* at 476.

Notwithstanding the unambiguous and understandable mistrust the *Miranda* Court had for secret custodial interrogation, the safeguards the Court imposed have not succeeded in lifting the veil of secrecy that surrounds the interrogation room or in assuaging the inherently coercive nature of that environment. Interrogations still remain largely hidden from both the eyes of the public and of the court. It is often routine police practice to isolate a suspect from the outside world during questioning and to rely upon the officer's testimony as to what occurred.[3]

While interrogations themselves may be hidden, the methods police use in order to elicit confessions from suspects are no secret. Prior to *Miranda*, such confessions were often obtained through physical force. *See, e.g., Brown v. Mississippi*, 297 U.S. 278 (1936) (police whipped and tortured three African American suspects until they confessed). By the time *Miranda* was decided, the police techniques had experienced a shift from the physical to the psychological. *Miranda*, 348 U.S. at 448.[4] *See also,* Welsh S. White,

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[3] *See* Wayne T. Westling, Something is Rotten in the Interrogation Room: Let's Try Video Oversight, 34 J. Marshall L. Rev. 537, 537 (2001).

[4] The Court in *Miranda* noted that examples of physical torture present in *Brown* "are undoubtedly the exception now," and that, without appropriate measures "there can be no assurance that practices of this nature will be eradicated in the foreseeable future." 348 U.S. at 447. The Court undoubtedly thought that the *Miranda* warnings would become such measures, but physical torture of suspects continues: the physical torture of suspects in Chicago's Area

Miranda's Waning Protections: Police Interrogation Practices After Dickerson p. 25 (U. Mich. Press 2001). Both physical and psychological pressure, however, may lead to the production of an involuntary confession. *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960). Ibnau & Reid's Criminal Interrogation and Confessions, widely used by police before *Miranda* and just as widely used today, teaches interrogators to exert dominance and control over the suspect by using a range of tactics, from sympathy to intimidation, promises of leniency, and outright lies about evidence, in order to get the suspect to confess.[5] The Supreme Court has noted that these techniques lead to involuntary confessions. *See Hutto v. Ross*, 429 U.S. 28, 30 (1976) (a confession obtained by any "direct or implied promises, however slight," is involuntary). Other manuals have encouraged officers to question the suspect "outside of *Miranda*" by, among other things, reading the *Miranda* warnings and then minimizing their importance to the suspect.[6] A more recent case, *Hairston v. United States,*

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2 Police station is now well-known. *U.S. ex rel Maxwell v. Gilmore*, 37 F.Supp.2d 1078, 1094 (N.D. Ill. 1999) (explaining that accounts by both suspects and police "substantiate that those beatings and other means of torture occurred as an established practice, not just on an isolated basis").

[5] White, Miranda's Waning Protections, supra, at 28, citing Fred Ibnau and John Reid, Criminal Interrogation and Confessions, 1st ed (1962).

[6] *See California Attorney's for Criminal Justice v. Butts*, 195 F.3d 1039, 1042 (9th Cir. 1999)(holding that such activity is "identical with the historical

illustrates this point perfectly. 905 A2d. 765 (D.C. Cir. 2006). In *Hairston*, the interrogating officer was specifically told not to administer *Miranda* warnings and engaged in a number of techniques designed to elicit a confession from a young murder suspect. *Id.* at 770-772 (cited in Paul Shechtman, An Essay on Miranda's Fortieth Birthday, 10 Chap. L. Rev. 655, 656 (2007)). The questionable tactics routinely used by police in their persuasion, coupled with attempts to circumvent the protections *Miranda* sought to safeguard and performed in the secrecy of the interrogation room, severely threaten a suspect's Fifth Amendment right against self incrimination.

As noted above, the Fifth Amendment right against self-incrimination also provides a right to have counsel present at custodial interrogations. This guarantee means little when the secrecy surrounding an interrogation leaves the police to be the sole and uncorroborated record for whether such a right was invoked. In *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981), the Supreme Court held that once a suspect invokes his right to an attorney, all questioning

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practices of incommunicado interrogation at which the right against self-incrimination was aimed.") (quoting *Cooper v. Dupnick*, 963 F.2d 1220, 1244 (9th Cir. 1992)). *See also* Charles D. Weisselbert, Saving Miranda, 84 Cornell L. Rev. 109, 135-136 (1998); Paul Marcus, It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions, 40 Val. U. L. Rev. 601, 611-635 (2006) (discussion on various interrogation methods and factors that affect voluntariness).

must cease unless initiated again by the defendant. Despite this holding, cases and studies show police continue questioning suspects after those suspects have invoked their rights.[7] The secrecy of an interrogation can only encourage such blatant disregard of constitutional rights, as evidenced by the conduct of police in *Cooper v. Dupnick*, 963 F.2d 1220 (9th Cir. 1992), where interrogators repeatedly ignored the suspect's request for counsel and questioned him in secret for hours. While Cooper was later cleared of all charges, this Court strongly condemned the conduct of the police: "With his requests to see a lawyer disregarded, Cooper was a prisoner in a totalitarian nightmare, where the police no longer obeyed the Constitution, but instead followed their own judgment, treating suspects according to their whims." 963 F.2d at 1234, n. 5.

B. Confessions Obtained Through Unrecorded Interrogation Result In The Production Of Untrustworthy Evidence In The Form Of False Confessions And Uncorroborated Police Officer Testimony.

The same secretive interrogation practices that violate a suspect's rights often end in producing false and generally untrustworthy evidence. This principle has long been accepted in American and British jurisprudence going back to the common-law voluntariness test, which excluded confessions

[7] For a list of cases from 38 states in which police continued to question suspects after these suspects had invoked their right to remain silent or to an attorney, see Weisselbert, 84 Cornell L. Rev. at 138 n. 152.

extracted with certain practices as unreliable evidence.[8] While the Warren Court's line of cases leading up to *Miranda* initially focused on the suspect's free will in giving a confession under interrogation, the notion that such evidence is also untrustworthy continues to be a factor in voluntariness determinations. *See, e.g., Tingle,* 658 F.2d at 1334. The process by which unrecorded confessions are obtained leads on the one hand to false confessions, and on the other to the creation of a "swearing match" between a suspect and her interrogator: the defendant maintains her innocence, while the interrogator claims the defendant has confessed. Both results are inherently untrustworthy -- the first by definition, the second by its uncorroborated nature.

Indeed, the advent of DNA testing and other evidence in a variety of cases has helped to illustrate the magnitude of the false confession problem and the link between unrecorded custodial interrogation practices and untrustworthy "confession" evidence. The "Central Park Jogger" case is a recent example of DNA evidence exonerating defendants who confessed falsely to crimes they never committed. *See* Julie R. Linkins, Satisfy the Demands of Justice: Embrace Electronic Recording of Custodial Investigative Interviews Through

[8] *See, e.g., Hopt v. Utah*, 110 U.S. 574 (1884) (adopting the common-law voluntariness test into federal law); *Brown*, 297 U.S. 278 (applying the same voluntariness test to the states as a matter of due process).

Legislation, Agency Policy, or Court Mandate, 44 Am. Crim. L. Rev. 141 (2007). Several hours of the defendant's interrogations were unrecorded. *Id.*

Psychological studies also detail how the common interrogation techniques listed above, such as threats of punishment, promises of leniency, and fabrication or misrepresentation of evidence against the suspect, are responsible for a significant number of false confessions, even in situations where police claim they have given *Miranda* warnings.[9] Out of 45 Wrongful convictions for murder discovered in Illinois since 1946, fifteen (15), or 33 percent, involved either a false confession by the defendant or the fabrication of such confession by authorities. Rob Warden, Center on Wrongful Convictions, The Role of False Confessions in Illinois Wrongful Murder Convictions Since 1970, (2003), http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions2.htm.

[9] *See, e.g.,* Richard Leo & Richard Ofshe, The consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim. L. & Criminology 429 (1998); Richard Ofshe and Richard Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. U. L. Rev. 979 (1997); Welsh S. White, False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions, 32 Harv. C.R.-C.L. L. Rev. 105 (1997); Gail Johnson, False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations, 6 B.U. Pub. Intl. L.J. 719 (1997); Saul M. Kassin & Karyln McNall, Police Interrogations and Confessions: Compliance, Internalization, and Confabulation, 7 Psychol. Sci. 125, 126-127 (1996).

The "swearing match" that often takes place between defendants and police over whether a confession was made is also highly untrustworthy. Presented with the conflicting testimony of a police officer and the defendant in a criminal case, judges overwhelming believe the police officer.[10] As a result, the officer's testimony is often erroneously held to satisfy the due process voluntariness test and may be presented to a jury. Standing alone, this practice continues to be questionable.[11] Where no corroboration exists except perhaps for the self-serving and coerced statements of one co-defendant, the use of such unrecorded confessions at trial flies in the face of due process.

Recent evidence of false confessions obtained through police abuse also calls frequent rubber-stamping of police testimony into question. "Interrogation" techniques used in Chicago's Area 2 police station, such as suffocation and prolonged hanging by the wrists, were calculated to leave little or no marks (and hence little or no support for a defendant's false confession

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[10] *See* White, Miranda's Waning Protections, *supra*, at 192(citing Anthony Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U. L. Rev. 785, 806-808 (1970)).

[11] Professor Kamisar notes that such swearing contests continue today, as evidenced by high profile cases such as in the Washington sniper case, where the fact that Lee Malvo's interrogation was not recorded created a great deal of confusion over whether or not he had requested an attorney be present. Yale Kamisar, Limit Police Secrecy, Nat'l L.J., June 9, 2003, at 43.

claim).[12] Even assuming such physical abuse did not exist, the generally unreliable and presumptively involuntary evidence produced by unrecorded interrogations means that the hearsay testimony given by officers as to what transpired in this environment must be doubly unreliable. This, coupled with the fact that police choose not to record an event when such recording is easily available and will undoubtedly bolster a valid confession, makes the uncorroborated testimony of police officers with regard to confessions entirely untrustworthy.

Questionable motives aside, a police officer must testify as to what transpired in one interrogation months, and sometimes years, afterward and after hundreds of similar interrogations have since been performed. This fact was persuasive in the Alaska Supreme Court's decision to exclude statements made by defendants when there had been a failure to electronically record them:

> Human memory is often faulty...it is not because a police officer is more dishonest than the rest of us that we...demand an objective recordation of the critical events. Rather it is because we are entitled to assume that he is no less human—no less inclined to reconstruct and interpret past events in a light most favorable to himself—that we should not permit him to be a "judge of his own cause."

[12] White, Miranda's Waning Protections, *supra*, at 133.

Stephan v. State, 711 P.2d 1156, 1161 (Alaska 1985) (quoting Kamisar, Forward: Brewer v. Williams—A Hard Look at a Discomfiting Record, 66 Geo. L. J. 209, 242-243 (1977)). Ultimately, the secrecy surrounding the defendant's interrogation and the utter lack of any reliable record of events other than the officer's testimony at trial results in the kind of "gap in knowledge" that the *Miranda* rule was intended, but has ultimately failed, to fill. *Miranda*, 384 U.S. at 448.

II. COURTS AND LEGISLATIVE BODIES HAVE RECOGNIZED THAT THE FAILURE TO REQUIRE A CONTEMPORANEOUS RECORDING OF A CONFESSION EFFECTIVELY ELLIMINATES THE ABILITY OF A DEFENDANT TO DEMONSTRATE IMPROPER POLICE PRACTICES, IN EFFECT NULLIFYING THE BAN AGAINST INVOLUNTARY, COERCED CONFESSIONS.

Unrecorded custodial interrogation frequently violates the defendant's right against self-incrimination and the right to counsel, and the police practices that induce these violations are likely to lead to wrongful convictions and the production and presentation of untrustworthy evidence to a trier of fact. A fair trial cannot be guaranteed to a defendant under such circumstances, and this Court can and should send a message that electronic recording, or some other form of reliable corroboration, is necessary to adequately preserve the defendant's due process rights to a fair trial. Of all possible methods of corroboration, recording best ensures that a defendant's confession is lawful

and voluntarily given and that the presentation of confession evidence to a trier of fact will be reliable and trustworthy.

A. This Court Has The Power To Encourage Electronic Recording In Order To Safeguard The Defendant's Due Process Rights To A Fair Trial.

The imposition of judicial requirements to safeguard the defendant's rights to a fair trial is nothing new. The due process clause has long been held to require the government to actively protect the innocent from wrongful convictions.[13] Recently, in *U.S. v. Dickerson*, 530 U.S. 428 (2000), the Supreme Court held that judicially imposed prophylactic rules such as *Miranda* are constitutional decisions and that Congress cannot overrule them. Even before *Miranda*, the Court adopted similar prophylactic measures to safeguard due process.

In *Jackson v. Denno*, the Supreme Court held that a New York state court procedure that submitted the question of voluntariness of a defendant's confession to the same jury that would then decide the defendant's guilt was

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[13] *See, e.g., Manso v. Brathwaite*, 432 U.S. 98 (1997) (government required to use fair identification procedures); *U.S. v. Bagley*, 473 U.S. 667 (1985) and *Brady v. Maryland*, 373 U.S. 83 (1963) (disclosure of exculpatory evidence to the defendant an absolute requirement); *Giglio v. U.S.*, 405 U.S. 150 (1972) (*Brady* rule expanded to cover impeachable information regarding testifying government witness); *Wardius v. Oregon*, 412 U.S. 470 (1973) (government must provide reciprocal discovery to defendant); *U.S. v. Henthron*, 931 F.2d 29 (9th Cir. 1991), *cert denied*, 503 U.S. 972 (1992) (Government required to examine federal agent's file to search for exculpatory evidence).

unconstitutional on due process grounds. 378 U.S. 368. Instead, because the Court felt that juries were ill equipped to decide the issue of voluntariness under those circumstances, it held that either the judge or a different jury should make that determination. *Id.* at 395. In doing so, the Court noted, "expanded concepts of fairness in obtaining confessions have been accompanied by a correspondingly greater complexity in determining whether an accused's will has been overborne." *Id.* at 390. The state court procedure then in place was not an adequate tool to assure such fairness or the reliability of the evidence in question; indeed, it "pose[d] substantial threats to a defendant's constitutional right to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined." *Id.* at 389. A more reliable procedure for determining the voluntariness of a confession, via a judge or a different jury, was thus constitutionally required. *Id*. at 392.

Fundamentally, *Jackson* stands for the notion that in order to protect due process, courts should impose the use of better fact-finding procedures where the old procedure does not adequately assure that reliable evidence will be presented at trial. As argued above, the multitude of problems surrounding unrecorded custodial interrogation leads to the presentation of untrustworthy and hence, unreliable evidence at trial. Consistent with the principles of *Jackson*

and *Miranda*, a rule promoting the recording of interrogations is a constitutional necessity in order to protect the due process rights of the defendant.

The fact that the judiciary is specifically empowered and charged with the duty to protect the due process rights of a defendant to a fair trial suggests that this Court's decision in *U.S. v. Coades*, 549 F.2d 1303 (1977), be reconsidered. In *Coades*, this Court chose not to adopt an across the board rule mandating the electronic recording of police interrogations and held that an officer's testimony as to the defendant's unrecorded confession was not subject to suppression, and instead deferred to the legislature on the issue. 549 F.2d at 1305. This Court obviously felt bound to follow *Coades* in the recent case of *U.S. v. Smith-Baltiher*, 424 F.3d 913, 926 (9th Cir. 2005). But recent legal decisions and studies, coupled with the actual experiences of law enforcement agencies, demonstrate a clear need for a prophylactic rule mandating or encouraging electronic recordings as the only way to safeguard the fundamental rights of a defendant.

Both the Alaska and Minnesota Supreme courts understood this principle in their decisions to mandate recording. *Stephan v. State*, 711 P.2d 1156 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587 (1994). While both courts understandably based their holdings upon state law, they premised both of their decisions upon the right to a fair trial. The court in *Stephan* found that

mandatory recording "is now a reasonable safeguard, essential to the adequate protection of the accused right to counsel, his right against self incrimination, and, ultimately, his right to a fair trial." 711 P.2d at 1159-60. Drawing upon this reasoning, the *Scales* court mandated recording in accordance with the court's "supervisory power to insure the fair administration of justice." *Scales*, 518 N.W.2d at 592. While the court did not equate this power with the due process clause of the Minnesota Constitution, the analysis above clearly shows that, similar to the judicially imposed safeguards in *Jackson* and *Miranda*, a court may exercise such "supervisory power" in order to safeguard the right to a fair trial under the federal due process clause. Courts in New Jersey, Massachusetts, and New Hampshire have already taken action ranging from mandatory jury instructions to recording under specific circumstances in order to protect defendants in their jurisdictions where the legislature has failed to act.[14]

B. Recording Is A Necessary Measure To Ensure The Trustworthiness Of Evidence At Trial.

"It is precisely the function of a judicial proceeding to determine where the truth lies." *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983). As described above, confessions obtained through coercion and intimidation are inherently untrustworthy and obfuscate rather than illuminate the truth. It is therefore

[14] Thomas Sullivan, Electronic Recording of Custodial Interrogations: Everybody Wins, 95 J. Crim. L. & Criminology 1127 (2005).

incumbent on this Court to encourage practices that promote illumination, particularly in capital cases, where the defendant's life is in jeopardy. Requiring the recording of interrogations as a prerequisite to the admissibility of a confession would significantly aid this Court in presenting accurate facts to a jury for deliberation. The Eighth Circuit has acknowledged as much when it addressed the issue of electronic recording as an aid to determining the circumstances surrounding an interrogation: "For jurors to see as well as hear the events surrounding an alleged confession or incriminating statement is a forward step in the search for truth." *Hendricks v. Swenson*, 456 F.2d 503, 506 (8th Cir. 1972). Strongly encouraging the recording of interrogations would be such a step.

Recording allows the court access to a custodial interrogation, thereby lifting the veil of secrecy surrounding the interrogation room. Contemporaneous electronic recording of the events that take place within the interrogation room eliminate the need for attempts to fill the "gap in knowledge" which so disturbed the *Miranda* Court; with mandatory recording such a gap would simply not exist. Recording would also positively affect the conduct of police officers in the interrogation room. While a defendant may be coerced into signing a sworn statement when the interrogation took place in secret, such coercion would be much less likely to occur if the interrogation, including all

constitutionally mandated warnings, was administered on tape.[15] A police officer is more likely to act appropriately during an interrogation if the officer knows that higher authorities may review a recording of his or her work. [16] Similarly, convictions due to false confessions would be prevented in many, if not all, cases where a judge has the ability to review aspects of contested custodial interrogation.[17]

Like Alaska and Minnesota, other jurisdictions and legal organizations have begun to recognize the importance of a mandatory recording requirement. Texas requires such recording by statute. Vernon's Ann. Texas Code of Crim. Pro. Art. 38.22(3) (requiring that no oral statement of the accused be used in court unless first videotaped). Illinois enacted similar legislation that provides

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[15] Mandy DeFilippo, You Have the Right to Better Safeguards: Looking Beyond Miranda in the New Millennium, 34 J. Marshall L. Rev. 637, 702 (2001); *See also* Thomas Sullivan, Electronic Recording of Custodial Interrogations: Everybody Wins, 95 J. Crim. L. & Criminology 1127 (2005); Paul G. Cassell, Miranda's Social Costs: An Empirical Reassessment, 90 Nw. U. L. Rev. 387, 486 (1996) (listing videotaping as one remedy for police coercion).

[16] DeFilippo, 34 J. Marshall L. Rev. at 702.

[17] The same scholars who performed the studies listed above identifying the factors of a police interrogation that lead to false confessions identify mandatory recording of interrogations as a solution. *See* Ofshe & Leo, 74 Denv. U. L. Rev. at 1120; White, 32 Harv. C.R.-C.L. L. Rev. at 153; Johnson, 6 B.U. Pub. Int. L.J. at 736; Kassin & McNall, 7 Psychol. Sci. 125, 126-127; Cloud, 69 U. chi. L. Rev. at 575.

that any unrecorded statement made by the accused in a homicide investigation will be presumed inadmissible. 725 Ill. Comp. Stat. Ann. 5/103-2.1. Maine, New Mexico, and the District of Columbia passed legislation similar to Illinois. Me. Rev. Stat. Ann. tit. 25 §2803-B(1)(K) (West 2004); D.C. Code §§5-116.01, 5-116.03 (2005); N.M. Stat. Ann. §29-1-16.A (LexisNexis 2005). [18] Numerous legal commissions and organizations support such a requirement.[19] Municipalities across the country have adopted a form of mandatory recording.[20] There are at least 450 police and sheriffs departments in nearly every state that customarily record a majority of their custodial interrogations.[21] All of the other major common law countries (Britain, Canada, and Australia)

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[18] *See also* Wis. Stat. §§ 968.073, 972.115 (2005)

[19] These organizations include the American Law Institute, ALI Model Code of Pre-Arraignment Procedure, 130.4 (1975); the Arizona Capital Case Commission (2002 Report); The Illinois governor's Commission on Capital Punishment (2002 Report); and the Connecticut Commission on the Death Penalty (2003 Report).

[20] To date, 238 cities and counties have instituted some form of mandatory recording of custodial interrogations including Los Angeles, San Francisco, and Houston. Jessica Silbey, Videotaped Confessions and the Genre of Documentary, 16 Fordham Intell. Prop. Media & Ent. L. J. 789, 790 (Sprint 2006).

[21] For a comprehensive list, see Sullivan, 37 Golden Gate U. L. Rev. at Appendix 1.

have done the same. Daniel Donovan and John Rhodes, Comes a Time: The Case for Recording Interrogations, 61 Mont. L. Rev. 223, 231 (2000).

Mandating recording also meets the standards of constitutional materiality and may be distinguished from the preservation of breath samples at issue in *California v. Trombetta*, 467 U.S. 479 (1984). In *Trombetta*, the Supreme Court held that, while due process requires the state to provide the defendant with access to evidence, it does not require the preservation of breath samples for independent review by the defendant. Breath samples, the Court said, do not meet the standard for constitutional materiality, whereby such evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable available means." *Id*. at 489. Because the highly accurate Intoxilyzer machines that analyzed breath samples were designed to be as neutral and accurate as possible, the Court found that independent review would be unlikely to exculpate the defendant.

These procedures are far removed from the world of the interrogation room, where the results are determined not by machines, but by humans capable of serious error. Such unrecorded interrogations are inherently coercive, *see Miranda*, 384 U.S. at 458, and thus far less trustworthy than a machine analysis. Any recording made would therefore tend to expose the existence of

untrustworthiness and exculpate the defendant. As noted above, unrecorded interrogations and confessions have resulted in numerous constitutional violations and wrongful convictions. The sample of an Intoxilyzer analysis, even when related in court by a lab technician, is therefore far more reliable than the testimony of a police officer as to the events that take place during an unrecorded interrogation.[22] Additionally, there is a key difference in the nature of the evidence itself: the breath samples in *Trombetta* were concrete evidence that was analyzed at one time and then later destroyed, while unrecorded interrogations and confessions are just that—unrecorded.

Confessions produced through custodial interrogation are crucial evidence in any prosecution of a defendant. Investigators obtain such confessions, however, in a manner that is presumptively coercive. *Miranda*, 384 U.S. at 467; *U.S. v. Haddon*, 927 F.2d at 946. Preservation of a confession is thus different from the preservation of evidence in *Arizona v. Youngblood*, 488 U.S. 51 (1988). *Youngblood* held that the government's failure to preserve

[22] Federal courts have suppressed destroyed evidence in accordance with *Trombetta*, even where the exculpatory nature of such evidence is slight. In *U.S. v. Belcher*, 762 F. Supp. 666 (W.D. Va. 1991), the district court dismissed the indictments of defendants on federal drug charges where the drugs had been destroyed prior to the indictments. In doing so, the court noted that "law enforcement officials are almost always correct in determining, by a simple visual inspection, whether a plant is marijuana or not. But it is the "almost" that convinces this court not to allow this prosecution to go forward. Law enforcement officials are not infallible..." 752 F.Supp. at 673.

"potentially useful" evidence of the defendant's sperm for independent analysis was not a denial of due process unless the government acted in bad faith. 488 U.S. at 57. The Court noted that the prosecution had not attempted to use the lost evidence in its case in chief, and the defendant's conviction was independent of the lost evidence. *Id*. at 56. In any case where a confession is presented at trial, however, the circumstances surrounding the making of the confession are not merely useful, but essential to a determination as to whether such a confession was made voluntarily. This is especially true where an alleged confession provides the linchpin of the prosecution's argument.

However, even if a record were only to fall within the ambit of "potentially useful" evidence,[23] the failure to make such a record would certainly constitute bad faith under *Youngblood.* If an unrecorded interrogation takes place at a police station where recording equipment is readily available, a likely reason for the failure to record is that the interrogating officer did not want an objective record of events. In contrast, if a recording would support an

[23] *Holloway v. Horn*, 161 F.Supp.2d 452, 530 (E.D. Pa. 2001), held that the failure to electronically record when typewritten records existed was only "potentially useful" in that case because there was no way to divine if there would have been potentially exculpatory information within a recording that never existed. Further, a complete question and answer transcript existed, which was reviewed with the suspect and multiple officers. *Id*. at 531. None of Ms. Milke's interrogation or alleged confession was recorded in any way. The present case is further distinguishable from *Hollaway* because in that case the defendant did not claim the officer's conduct was in bad faith. *Id*. at 530.

officer's otherwise uncorroborated testimony, the state would want to present it. If an interrogator fails to record a custodial interrogation, this fact gives further support to the notion that this failure is in bad faith.

C. Electronic Recording Of Police Interrogations Is A Necessary Improvement In Fact-Finding And The Most Reliable Method Devised For Determining The Trustworthiness Of A Suspect's Confession, And As Such, Has Gained Wide Support Among Law Enforcement Agencies And Scholars.

As the Alaska Supreme Court in *Stephan* recognized, "The concept of due process is not static; among other things, it must change to keep pace with new technological developments." 711 P.2d at 1161. This is especially true of a case where the death penalty may be imposed; in such a case the stakes are so high that the procedures used to ensure the trustworthiness of evidence become all the more important. *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring in judgment) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases").

And yet, while cutting-edge technological advances are currently employed to fight crime in all manner of police investigation, such advances have been conspicuously absent in the realm of custodial interrogation—a form of investigation that arguably produces the most important evidence for the state in a criminal trial. The use of blood alcohol testing is routine in arrests for driving under the influence, just as radar guns are commonplace tools for patrol

officers in catching speeding motorists.[24] Indeed, without the evidence that results from the use of these accurate evidentiary tools, most judges and juries would be loathe to convict a defendant on police testimony alone. Judges and juries seem predisposed, however, to believe the testimony of a police officer when it comes to an unrecorded confession, despite the unreliability of such evidence.[25] If the state places cameras in police cruisers and at traffic intersections to pursue misdemeanors, it is inconceivable that we would not require such technology for cases involving the most heinous of crimes in order to protect the innocent and convict the guilty.

Support in the law enforcement community for mandatory recording requirement mirrors the widespread support that police and prosecutors showed for *Miranda* warnings shortly before the Supreme Court's decision in *Dickerson*.[26] This support is especially strong from officers and prosecutors in

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[24] *See* Westling, 34 J. Marshall L. Rev. at 547.

[25] As the Supreme Court stated in *Reck v. Pate* of incommunicado interrogation, "what actually transpired no one will know...There is the word of the accused against the police. But his voice has little persuasion." 367 U.S. 433, 446 (1961).

[26] For such support of *Miranda*, see ABA Special Commission on Criminal Justice in a Free Society, Criminal Justice in Crisis 28 (1988) (finding that, in a survey of over 800 prosecutors, judges, and police officers, a "very strong majority ... agree that compliance with *Miranda* does not present serious problems for law enforcement."

states where recording of custodial interrogations is already mandated. *See* Veronica Rose, Videotaping Police Interrogations in Select States, Connecticut General Assembly, Office of Legislative Research Report 72 (1999). Interviews with these individuals in Alaska and Minnesota reveal a universal desire to keep some form of mandatory recording and a consensus that such a requirement aids law enforcement. *Id*. at 57-58. Similar interviews with police chiefs in Texas show that, while some officers were initially skeptical about the electronic recording requirement in that state, most now view the requirement positively.[27] *Id*. at 75. *See also* Thomas Sullivan, The Police Experience Recording Custodial Interrogations, 28-DEC Champion 24 (Dec. 2004).

It is easy to see why law enforcement personnel in jurisdictions that require recording value the requirement so highly. As several scholars have noted, the benefits police receive from mandatory recording are numerous.[28] An objective record of police work inside the interrogation room lends credibility and support to the statements police have obtained. Leo, 86 J. Crim. L. &

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[27] A study from the U.S. Department of Justice's National Institute of Justice reported similar findings and concluded that a "consensus" of police departments surveyed favored videotaping interrogations. *See* William A. Geller, Videotaping Interrogations and Confessions p. 10 (National Institute of Justice Research in Brief Series, March 1993).

[28] *See* DeFilippo, 34 J. Marshall L. Rev. at 702; Richard Leo, The Impact of Miranda Revisited, 86 J. Crim. L. & Criminology 621, 683-684 (1996).

Criminology at 683. Police may review such evidence multiple times, giving investigators detail that notes or the memory of an interrogator seriously lack. *Id*. Supervisors may use tapes of interrogations as effective training tools. *Id.* Prosecutors, too, benefit from seeing the demeanor and general disposition of the defendant during interrogation; they may use such information in charging a defendant or in framing their case for trial. *Id.* at 684. Perhaps most importantly, a recording requirement serves as a bright line rule that is easy to monitor.

Of the remaining concerns those in law enforcement cite regarding a recording requirement, the most prominent are the cost of implementation and the perceived inhibition suspects will have to recorded interrogation. *Id.* at 684-685; Illinois Association of Chiefs of Police, Response to Illinois Governors Commission on Capital Punishment p. 4 (2002). These concerns, too, are misplaced. When constitutional rights are at stake any potential "cost" to law enforcement is, of course, beside the point. This is especially true considering the fact that the Fifth Amendment is an unambiguous restraint on law enforcement. But there is no reason to think that a mandatory recording requirement will be unmanageable. As mentioned, many departments already possess the necessary materials for such a requirement. Rather than dragging on the already tight budgets of many police forces, mandatory recording is in fact cost-effective: police save money on transcription and the prosecution saves

time and effort defending against allegations of improper police conduct. Leo, 86 J. Crim. L. & Criminology at 685.

There is similarly no reason to believe many suspects will refuse to talk on camera. After *Miranda,* the majority of commentators believed the warnings would encourage suspects to invoke their rights to remain silent. In fact, the opposite is true: the vast majority of suspects waive their rights after police read them the *Miranda* Warnings.[29] We would expect similar results from suspects interrogated on camera. As a St. Paul, Minnesota police sergeant with 25 years of field experience noted, "My experience is that the tape doesn't have a negative effect. I turn it on in the beginning, set it to one side, and the interview takes place. Individuals forget about it. I noticed no change in the suspect's demeanor whether they are being taped or not." Rose, *supra*, at 77.

[29] See Paul G. Cassell & Bret S. Hayman, Police Interrogation in the 1990s: an Empirical Study of the Effects of Miranda, 43 UCLA L. Rev. 839, 881 (1996) (finding as many as 84% of suspects choose to waive their rights at the outset of an interrogation); Leo, 86 J. Crim. L. & Criminology at 275-276 (finding 78% of suspects choose to waive their rights at the outset of an interrogation).

III. THE INTENTIONAL FAILURE TO RECORD THE INSTANT CONFESSION DENIES AN OPPORTUNITY FOR MEANINGFUL REVIEW AND MAKES A NULLITY OF THE BAN ON COERCED AND UNRELIABLE STATEMENTS, PARTICULARLY GIVEN THE UNSAVORY RECORD OF THE POLICE OFFICER INVOLVED AND THE FACTS OF THIS INTERROGATION.

In the instant case, Detective Saldate's failure to record his interrogation resulted in nullifying the ability of a reviewing court to adequately assess the multiple violations of Ms. Milke's constitutionally protected rights. This knowing failure is a shining example of bad faith and requires reversal of the admission of her statement. Even though specifically instructed to record his interrogation of Ms. Mike by his superior officer, Saldate chose not to do so. The demonstrably problematic circumstances of Ms. Milke's interrogation are forever lost and her conviction, which is based on her confession, cannot be allowed to stand. (R.T. 9/10/90 at 29, 41-43). Saldate's actions were willful, and he never intended to follow orders and record his interrogation of Ms. Milke. This is evidenced by the fact that he did not even bring recording equipment with him, nor did he ask to borrow such equipment from the sheriff's office when he arrived. (R.T. 9/10/90 at 43).

There is ample evidence demonstrating that Saldate purposefully avoided recording so he alone would be the "record" of events at trial. He never asked Ms. Milke to sign a written confession. He ordered the other officers out of the

interrogation room so that there would be not witnesses. (R.T. 9/10/90 at 47). Further, Saldate destroyed all of his notes of the interrogation and at trial relied solely up on his police report for his testimony.[30] The conscious and deliberate failure of Detective Saldate to preserve any recording of the event calls into question his claim, after the fact, that he did not record the interrogation because Ms. Milke did not want it recorded.[31] In these circumstances, Saldate's failure to record allowed violations of Ms. Milke's constitutionally protected rights to due process to proceed without the possibility of meaningfully review.

Detective Saldate denied Debra Milke's request for an attorney and continued to question her even though she made it clear that she did not understand her constitutional rights. (R.T. 10/3/90 at 17). This is exactly the kind of interrogation this Court so abhorred in *Cooper*. Without an objective

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[30] Not surprisingly, none of Detective Saldate's actions surrounding the failure to record Ms. Milke's confession would fall under any "good cause" exceptions to very flexible legislation requiring recording that is being introduced in several states. *See* Matthew D. Thurlow, Lights, Camera, Action: Video Cameras As Tools of Justice, 23 J Marshall J. Computer & Info. L. 771, 789 (Summer 2005). Under such legislation, examples of good cause include interrogations that take place "in the field" without recording equipment readily available, interrogations where the accused refuses to be recorded, and the technical failure of the recording equipment to memorialize the interrogation. *Id*.

[31] Debra has consistently maintained that she did not refuse to have her interrogation recorded. Rather she refused to be interrogated and asserted her right to counsel, which Saldate ignored. (R.T. 10/29/90 at 13).

record of events, the court can only piece together the events of the interrogation. And, what may be pieced together makes it highly likely that Ms. Milke's right against self-incrimination and her right to counsel were completely ignored.

Moreover, the techniques employed by Detective Saldate during Ms. Milke's interrogation, while perhaps not physically abusive, were psychologically coercive rendering any alleged statements inherently unreliable. Saldate controlled the interrogation by exerting his dominance over Ms. Milke and invading her personal space. (R.T. 10/3/90 at 17-18). During the interrogation, Saldate arranged his and Ms. Milke's chairs so that their knees were almost touching. (Id.). Due to Saldate's failure to electronically record, it is impossible to know exactly what transpired in the interrogation room. After reviewing Saldate's interrogation, however, Professor Richard Leo found that in the absence of a recorded interrogation to verify Saldate's often outrageous claims, "Detective Saldate's account of the interrogation and the alleged confession is too untrustworthy to support a conviction (especially a capital conviction) and ... he may very well have fabricated or coerced a false or non-existent confession from Debra Milke." (Appellant's ER 399-40).

Ms. Milke's state of mind coupled with Detective Saldate's interrogation techniques raise the issues of voluntariness and reliability. Research shows that

the compliant and mentally retarded are groups that are especially susceptible to false confessions.[32] In the instance case, the facts clearly show that Ms. Milke was functionally impaired. The evening before the interrogation, Ms. Milke had repeatedly been given alcohol and prescription medication by family and friends to calm her anxiety over her missing son, and she had virtually no sleep throughout the night. (R.T. 9/24/90 at 93-95, 102, 109-110, 117, 142). She managed to get only a few hours of sleep the afternoon of the next day, after imbibing more alcohol. (R.T. 9/13/90 at 110-111, 113). Later that afternoon she was taken to the Florence Sheriff's station. (R.T. 10/2/90 at 11).

In addition to being sleep deprived and somewhat chemically impaired, Ms. Milke was suffering from extreme anxiety and depression due to her son's disappearance. (R.T. 9/13/90 at 110). When Saldate finally arrived after Ms. Milke had been waiting two or three hours at the station, he immediately announced that authorities had found her son dead and that she was under arrest for his murder. (R.T. 10/29/90 at 11; R.T. 9/12/90 at 64). Any mother confronted with this news in these circumstances would clearly be completely overwhelmed and incoherent. Ms. Milke went into shock and became hysterical until Saldate succeeded in commanding her to be silent. (R.T. 10/3/90 at 13, 18-

[32] *See* Morgan Cloud et al., Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. Chi. L. Rev. 495 (2002); White, 32 Harv. C.R.-C.L.L. Rev. at 121.

20). Due to Ms. Milke's state at the time of her interrogation, any statements made to Saldate could not have been the product of a rational mind.

For reasons such as those discussed above, it is generally accepted that an accused may not be convicted solely through his or her own uncorroborated confession.[33] In this case, the only evidence offered to arguably substantiate Detective Saldate's version of events was hearsay testimony from Detective Mills regarding the co-defendants' initial story that Ms. Milke's child was "missing" from Metrocenter. (R.T. 9/18/90 at 25-27). It is important to note here that co-defendant Roger Scott refused to testify against Ms. Milke, even to spare his own life (Steinle Affidavit, Appellant's ER 1123), and co-defendant Styers maintains to this day that Ms. Milke is innocent.

Overall, the interests of justice in this case warrant this Court's use of its well-defined powers in order to protect Debra Milke's constitutionally protected rights. This is particularly important in light of the fact that this is a capital

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[33] *See*, *e.g.*, *Smith v. U.S.*, 348 U.S. 147, 152-153 (1954); *Opper v. U.S.*, 348 U.S. 84, 89 (1954); *U.S. v. Lopez-Alvarez*, 970 F.2d 583, 589 (9th Cir. 1992). This is largely due to the notion that prosecutions must not rest upon such potentially unreliable evidence. "Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, further caution is warranted because the accused may be unable to establish the involuntary nature of his statements. *Smith*, 348 U.S. at 153. It is equally accepted that the confessions of codefendants that implicate the defendant are "inherently unreliable." *Lilly v. Virginia*, 527 U.S. 116, 131 (1999); *see also*, *Hernandez v. Small*, 282 F.3d 1132, 1139 (9th Cir. 2002).

conviction. If this Court abdicates its power in order to defer to the legislature, Ms. Milke will be denied her constitutional rights. And in this case, such a denial will be final; any legislative remedy would be entirely lost to her.

CONCLUSION

For the foregoing reasons, Amicus Curiae ACLU respectfully requests this Court to reverse the decision of the district court denying habeas relief, and to vacate Debra Milke's capital conviction. Because Ms. Milke's interrogation and purported confession were not electronically recorded or corroborated by any other independent, objective means, and because of the improper interrogation tactics employed by Detective Saldate, the confession evidence in her case is inherently unreliable. As a result, Ms. Milke's due process right to a fair trial was violated.

RESPECTFULLY SUBMITTED this 18th day of December, 2007.

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STATEMENT OF RELATED CASES

To the best of undersigned counsel's knowledge, two related cases are pending before this Court. Those involve appeals from the denials of habeas corpus relief to Debra's co-defendants, James Styers and Roger Scott. *See Styers v. Schriro*, 07-99003, and *Scott v. Schriro*, 05-99012.

_____
Larry Hammond

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2007.

_____
Notary Public

CERTIFICATION OF COMPLIANCE TO
FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBER 07-99001

I certify that: **(check appropriate option(s))**

___1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

□ Proportionately spaced, has a typeface of 14 points or more and contains_____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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Date Signature of Attorney or Unrepresented Litigant

CERTIFICATE OF SERVICE

Larry Hammond, being first duly sworn, upon oath states that on the 18th day of December, 2007, he caused the original and 15 copies of the foregoing Brief of Amicus Curiae ACLU to be delivered for filing to:

Clerk, United States Court of Appeals
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and that he caused two copies of the foregoing brief to be deposited in the United States Mail, postage prepaid, to:

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