IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Respondent/Plaintiff-Appellee,

vs.

CHARLES ZUFFANTE,
Petitioner/Defendant-Appellant.

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SCWC-23-0000376

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

SEPTEMBER 17, 2025

DISSENTING OPINION BY GINOZA, J.

The majority holds that the due process clause of the Hawai'i Constitution[1] now requires that all in-station custodial interrogations must be video and audio recorded, and that all custodial interrogations outside the station must similarly be recorded, when feasible. In proclaiming this new constitutional

[1] The Hawai'i Constitution, article I, section 5 provides in relevant part: "No person shall be deprived of life, liberty or property without due process of law[.]"

rule, the majority overrules State v. Kekona, 77 Hawai'i 403, 886 P.2d 740 (1994), where this court held that the due process clause of the Hawai'i Constitution does not mandate recording a custodial interrogation, and implicitly overrules State v. Eli, 126 Hawai'i 510, 273 P.3d 1196 (2012), to the extent Eli reaffirmed Kekona thirteen years ago.

Further, the majority also relies on the right of confrontation under article I, section 14 of the Hawai'i Constitution and the right against self-incrimination under article I, section 10 of the Hawai'i Constitution. However, neither of these grounds were the basis for Petitioner/Defendant Charles Zuffante's (**Zuffante**) appeal, and no party had the opportunity to brief the court on whether these separate constitutional grounds support a mandate of recording custodial interrogations. See Hawai'i Rules of Appellate Procedure Rule 28(b)(4) (eff. 2022) ("If an appellate court, when acting on a case on appeal, contemplates basing the disposition of the case wholly or in part upon an issue of plain error not raised by the parties through briefing, it shall not affirm, reverse, or vacate the case without allowing the parties the opportunity to brief the potential plain-error issue prior to disposition."). The issue Zuffante asserted pretrial in the Circuit Court of the

Third Circuit[2] (**Circuit Court**) was whether Kekona – addressing due process – should be overruled. This was the focus of his briefing on appeal, not other constitutional grounds.

At least twenty states have rejected the argument that their state constitution mandates law enforcement to record custodial interrogations. Only Alaska has previously adopted such a ruling, in Stephan v. State, 711 P.2d 1156 (Alaska 1985), which required the electronic recording of custodial interrogations in places of detention when recording is feasible. Even Alaska courts have rejected the argument that such recordings are constitutionally required outside of places of detention.

In Hawai'i, Kekona was decided over thirty years ago and expressly rejected the Stephan rule. In 2012, in Eli, this court reaffirmed Kekona and rejected a defendant's argument that this court should exclude statements obtained after an unrecorded waiver. 126 Hawai'i at 518-19, 273 P.3d at 1204-05. Although the majority points out concerns with the U.S. Supreme Court for unsettling long-standing precedent, in turn that is what this decision does without any time for law enforcement to comply. Serious consequences are foreseeable because the court

[2] The Honorable Robert Kim presided.

mandates a significant new rule based on pure supposition about the ability of law enforcement to meet the court's new mandate.

I respectfully dissent and would reject Zuffante's claim that his constitutional rights required that his statement to a police officer, made after he waived his Miranda[3] rights, had to be recorded or would be inadmissible. My view aligns with this court's precedent and the majority of courts that have considered the issue. Even if recording custodial interrogations is a policy worthy of pursuing, it is not a matter of constitutional dimension to require recording of all in-station custodial interrogations, let alone all such interrogations in the field when feasible (which is beyond the Stephan rule and beyond the issue in this case and thus dicta).

This court's sweeping mandate requires law enforcement compliance by imposing a harsh exclusionary rule precluding the admission of unrecorded statements in court. This is done without actual information about the ability of law enforcement to meet the majority's new mandates. Instead, I believe there should be input from key stakeholders – including law enforcement, the attorney general, prosecutors, the public defender, and others – because there is too much this court does not know about on-the-ground ability and resources to effectuate

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

this new rule. Even if video recordings are generally easier than ever to obtain and store, there is no doubt significant resources and policy implementation that are needed for proper compliance. There is nothing in the record about the current state of law enforcement's ability in Hawaiʻi to meet this new requirement, whether on Oʻahu, Maui, Hawaiʻi Island, Kauaʻi, Molokaʻi or Lānaʻi. The majority's decision does not give law enforcement any time for compliance at a statewide scale.

All the above while overruling a thirty-year precedent, which was reaffirmed thirteen years ago. This case now makes Hawaiʻi the second state after Alaska to require recordation under a state constitution. The new requirements imposed here are also far broader than Alaska's rule.

At least twenty-nine states have addressed recording of custodial interrogations without constitutional mandate. Twenty-three states and the District of Columbia have addressed recording interrogations by adopting statutes, four states via court rules, and two by court rulings that relied on a state supreme court's supervisory powers. None of these statutes, court rules, rulings, or Alaska's Stephan rule are as broad or onerous as the majority's new rule for Hawaiʻi. Because this issue involves policy decisions, I believe state legislatures are best equipped to handle the issue. The next best path would

be to invoke our supervisory powers over inferior courts and promulgate a court rule after input from law enforcement, the attorney general, prosecutor's offices, the public defender, and other key stakeholders. See, e.g., Rivera v. Cataldo, 153 Hawaiʻi 320, 324, 537 P.3d 1167, 1171 (2023) ("When issues of considerable public importance are at stake, we may exercise our supervisory power." (citation and internal quotation marks omitted)).

As demonstrated by the numerous statutes and court rules adopted in other states, there are important parameters and exceptions that should be considered. One parameter is the scope, such as the location where recording is required and for which types and levels of offenses. Possible exceptions include when recording is not feasible because of exigent circumstances; when the suspect states they will respond to questions only if not recorded, and such agreement is recorded; when the statement is made during an out-of-state custodial interrogation; or when there is an inadvertent failure of equipment. See Unif. Elec. Recordation of Custodial Interrogations Act § 5-10 cmt. at 21-27 (Unif. L. Comm'n 2010). Another consideration is the consequence of an unexcused failure to record, and whether to adopt a per se rule of inadmissibility or to treat such occurrence as a factor to be considered for admissibility. See

id. § 13 cmt. at 29-33. The latter situation could require a cautionary jury instruction. See id. at 32-33.

I also disagree with the majority because the facts of this case do not support its holding. At trial, Zuffante did not object to Hawai'i Police Department (**HPD**) Officer Justin Gaspar's (**Officer Gaspar**) testimony about Zuffante's statements based on lack of a recording, and did not cross-examine Officer Gaspar regarding the lack of a recording. Zuffante thus did not preserve the issue.

Further, even though this court should not reach issues not raised by Zuffante or briefed to this court, Zuffante's right against self-incrimination was not violated. Zuffante does not contest that he was given his Miranda rights by Officer Gaspar, and that he signed an Advice of Rights form in which he expressly waived those rights, including his right to remain silent. Further, at trial, the Circuit Court found Zuffante knowingly, voluntarily, and intelligently waived his right to remain silent and exercised his right to testify. See Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995). Zuffante does not challenge the Circuit Court's Tachibana colloquies.

I also disagree with the majority's holding that the Circuit Court's admission of Officer Gaspar's testimony constituted plain error. Again, there is no briefing to the

court on the plain error issues, and there was no error that seriously affected the fairness of the Circuit Court proceedings. The majority imposes a new and significant constitutional mandate for law enforcement in this state when judicial restraint is warranted given the facts, precedent, and what is just in this case.

Moreover, the majority applies its new rule to this case and all cases that are on direct review or not yet final as of the date of this decision, giving the rule pipeline retroactive effect. In this paradigm shifting case, the new rule should apply only prospectively. By applying the new rule to this case, Zuffante's statement made at the police station in 2021 and properly obtained based on the law at that time, will be precluded from evidence. Similarly, by applying this new rule to cases in the pipeline – where investigations have been done and law enforcement conformed their actions to the law at the time – unrecorded statements that violate this new rule will be precluded from evidence. The results of this case undermine the truth-seeking function of the courts and the proper administration of justice. Hence, not only do I disagree with the new constitutional mandate but also the unfair manner it is being applied.

I therefore respectfully dissent. I would affirm the Intermediate Court of Appeals' (**ICA**) judgment on appeal, which

affirmed the Circuit Court's judgment convicting Zuffante of Attempted Promotion of a Dangerous Drug in the First Degree, in violation of Hawaiʻi Revised Statutes (**HRS**) § 712-1241(1)(b)(ii) (Supp. 2016)[4] and HRS § 705-500 (2014).[5]

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[4] At the time of the offense, HRS § 712-1241, promoting a dangerous drug in the first degree, provided, in pertinent part:

> (1) A person commits the offense of promoting a dangerous drug in the first degree if the person knowingly:
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> . . . .
>
> (b) Distributes:
>
> . . . .
>
> (ii) One or more preparations, compounds, mixtures, or substances of an aggregate weight of:
>
> (A) One-eighth ounce or more, containing methamphetamine[.]

[5] HRS § 705-500, governing criminal attempt, provides:

> (1) A person is guilty of an attempt to commit a crime if the person:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
>
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
>
> (2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

## I. BACKGROUND

This case arises from a traffic stop in Kona on October 21, 2021. Police pulled over Zuffante's girlfriend. Zuffante was in the passenger seat. Police observed a glass smoking pipe in the console cup holder. During a pat down of Zuffante, an officer found a zip packet of crystal methamphetamine (**meth**) in his pocket. In a vehicle search at the police station, police found more meth, including a fanny pack containing sixteen zip packets and a sunglasses case with one zip packet. In total, approximately 130 grams of meth was recovered from the vehicle, and 3.9 grams from Zuffante's pocket.

Prior to trial, Respondent/Plaintiff the State of Hawaiʻi (**State**) filed a motion to determine voluntariness of the statements Zuffante made to Officer Gaspar. Officer Gaspar testified that there was a recording device in the interview room, but it was not operational.

The Circuit Court found that Officer Gaspar advised Zuffante of his Miranda rights and Zuffante intelligently, knowingly, and voluntarily waived them before voluntarily speaking with Office Gaspar. The Circuit Court granted the

> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

motion, allowing the State to use Zuffante's statements at trial, subject to proper foundation.

Zuffante filed a motion in limine seeking to preclude Officer Gaspar's testimony regarding Zuffante's statements. Zuffante argued the lack of a recording made Officer Gaspar's statements uncorroborated, arguing that in order for Zuffante to be accorded his due process rights, the court should require recordings of custodial interrogations. The Circuit Court denied Zuffante's motion in limine without prejudice and determined that during trial, Zuffante could contradict Officer Gaspar's statements and discuss the lack of a recording.

At trial, HPD officers testified about the meth found in Zuffante's pocket and in the vehicle. HPD's criminalist testified that the fanny pack contained sixteen bags of meth, ten of which were small pink zip packets containing 3.5 grams, typically used for distribution and known as "eight balls" because they contain one eighth an ounce of meth.

Officer Gaspar testified that following Zuffante's arrest, he made contact with Zuffante at the station and read Zuffante his Miranda rights prior to interviewing him. Zuffante signed the HPD's Advice of Rights form waiving his Miranda rights, including his right to remain silent. Officer Gaspar testified that during the interview, Zuffante told him he spends $7,000 for a pound of meth at a time and sells the meth in

eight-ball increments for $150 apiece. During cross-examination, Officer Gaspar testified that Zuffante told him all the meth was his, and that Zuffante did not want his girlfriend to be charged for anything. Zuffante's trial counsel did not ask Officer Gaspar about recording the interview or the recording equipment. On redirect, Officer Gaspar again testified that Zuffante told him "[a]ll the meth was [Zuffante's]." In the background, Zuffante repeatedly stated, "[t]hat's a lie."

Zuffante testified after Officer Gaspar. Following the Circuit Court's Tachibana colloquy, Zuffante stated, "[m]y decision is to testify and tell the Court what happened." The Court found that Zuffante knowingly, voluntarily, and intelligently exercised his constitutional right to testify and waived his right not to testify, which Zuffante does not challenge. Zuffante testified that he did tell Officer Gaspar everything in the car was his, but he did not tell Officer Gaspar that "all the meth" in the car was his. Zuffante testified that when Officer Gaspar asked whether or not he had ever bought and sold meth, Zuffante answered "yes" because he did not want his girlfriend to be arrested. Similarly, he testified that everything in the car was his because he "didn't want him to arrest [his girlfriend] with me so I just said everything was mine." He also testified that Officer Gaspar did

not tell him anything about the interview being audio-recorded, but he assumed it was.

On cross-examination, Zuffante testified he told Officer Gaspar everything in the vehicle was his even though he did not know what was in the vehicle.

The jury found Zuffante guilty of Attempted Promotion of a Dangerous Drug in the First Degree and the Circuit Court entered its judgment of conviction, sentencing Zuffante to twenty years imprisonment.

Zuffante appealed to the ICA, which entered a Summary Disposition Order affirming the Circuit Court. State v. Zuffante, No. CAAP-23-0000376, 2024 WL 4224777 (Haw. App. Sept. 18, 2024) (SDO). Pertinent to the issues before this court, the ICA concluded the Circuit Court did not err by concluding Zuffante waived his Miranda rights and intelligently, knowingly and voluntarily spoke with Officer Gaspar. Id. at *4. Further, the ICA noted that Zuffante argued for adoption of the Stephan rule in a motion in limine, which the Circuit Court denied without prejudice to Zuffante raising the lack of a recording at trial. Zuffante failed to raise the issue at trial. Id. at *3.

## II. DISCUSSION

### A. Kekona Should Not Be Overruled

Zuffante argues that we should require electronic recording of custodial interrogations by adopting Alaska's

Stephan rule, even though this court rejected the Stephan rule in Kekona. 77 Hawaiʻi at 408-09, 886 P.2d at 745-46 (declining "to interpret the due process clause of the Hawaiʻi Constitution as requiring that all custodial interrogations be recorded"). Thirty years ago, this court pointed out that the majority of jurisdictions "specifically declined to adopt the *Stephan* rule that mandates electronic recording of a suspect's statements as a requirement of due process." Id. at 408, 886 P.2d at 746 (citations omitted). At least twenty jurisdictions that have considered whether to require recording of custodial interrogation by constitutional mandate still reject such a requirement. More recently, this court reaffirmed Kekona in Eli, rejecting a defendant's efforts to exclude his statement made to a detective after an unrecorded waiver of rights. 126 Hawaiʻi at 518-19, 273 P.3d at 1204-05.

I respectfully disagree with the majority that Kekona should be overruled to require video and audio recording under the due process clause of the Hawaiʻi Constitution both in and outside of police stations. I disagree with the majority's view that changes in technology since Kekona lays the groundwork for the seismic constitutional change they adopt here. There is nothing in the record to support the majority's bare assumption that law enforcement can comply with the new requirements. Having a cellular phone in hand is not equivalent to a law

enforcement officer having to record custodial interrogations for all potential criminal offenses, with interrogations being of unknown length, under unknown circumstances, during active criminal investigations, with potential safety and other myriad issues outside of police stations, and having to collect, store, and maintain such recordings for potential use in criminal proceedings that could occur years later. See State v. Garcia, 96 Hawai'i 200, 205, 29 P.3d 919, 924 (2001) (stating the doctrine of stare decisis "operates as a principle of self-restraint . . . with respect to the overruling of prior decisions. The benefit of stare decisis is that it furnishes a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; . . . eliminates the need to relitigate every relevant proposition in every case; and . . . maintains public faith in the judiciary as a source of impersonal and reasoned judgments (citations, internal quotation marks, and brackets omitted)); Dairy Rd. Partners v. Island Ins. Co., 92 Hawai'i 398, 421, 992 P.2d 93, 116 (2000) (stating "a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it" (citation and internal quotation marks omitted)).

Kekona was properly decided, and even other states have cited Kekona as support for finding no recordation requirement under their respective state constitutions. See,

e.g., State v. Lockhart, 4 A.3d 1176, 1190 (Conn. 2010); Commonwealth v. DiGiambattista, 813 N.E.2d 516, 530 (Mass. 2004); State v. Blair, 298 S.W.3d 38, 52 (Mo. Ct. App. 2009); State v. Turner, 187 P.3d 835, 840 n.9 (Wash. Ct. App. 2008); Stoker v. State, 692 N.E.2d 1386, 1388 n.5 (Ind. Ct. App. 1998); People v. Fike, 577 N.W.2d 903, 907 (Mich. Ct. App. 1998).

Moreover, the majority's new requirements go far beyond what Zuffante requested, which was to adopt the Stephan rule under Hawai'i's due process clause. First, as noted, the majority relies on the right of confrontation and the right against self-incrimination, which were not part of the Stephan rule, and which were not briefed by the parties for plain error review. Second, the new rule in this case is far broader than Alaska's Stephan rule. The Supreme Court of Alaska held that law enforcement's failure to electronically record a custodial interrogation conducted in a place of detention violates an individual's due process rights under the Alaska Constitution. Stephan, 711 P.2d at 1158. Alaska courts have rejected attempts to expand the Stephan rule to custodial interrogations in the field, as the majority does here. See Resecker v. State, 721 P.2d 650, 653 n.1 (Alaska Ct. App. 1986) (declining to extend Stephan "to cover crime scene interrogations even if recording equipment is fortuitously available"); see also Shindle v. State, 731 P.2d 582, 585 (Alaska Ct. App. 1987) (declining to

require police to record in-the-field Fourth Amendment waivers and stating "[a]lthough the *Stephan* court acknowledged that it might be necessary to expand the rule in future cases, it made clear its view that any such expansion is to be undertaken cautiously, and only if the need for expansion is demonstrated by experience with the current rule" (citing Stephan, 711 P.2d at 1165 n.33)). Third, because Zuffante challenges only statements he made in the police station, the majority's decision requiring recording of custodial interrogation outside a police station is untethered to the facts, unnecessary for deciding this case, and is therefore dicta. See, e.g., State v. Hussein, 122 Hawai'i 495, 534, 538, 229 P.3d 313, 352, 356 (2010) (Moon, C.J., concurring in part and dissenting in part) (stating that the majority opinion includes a lengthy discussion "wholly unnecessary to the disposition of the instant case," and "because the entirety of the majority's extensive discussion, attempting to justify its new 'rule,' constitutes *orbiter dicta*, the 'rule' clearly has no precedential value").

At bottom, for a variety of reasons, this case presents no cogent reason to depart from Kekona. Before Officer Gaspar interviewed Zuffante, Zuffante signed a written waiver of his Miranda rights. At the time Zuffante was interviewed, Kekona was the prevailing law in Hawai'i and expressly held that a recording was not required. During trial, Zuffante failed to

raise the lack of recording, did not object to Officer Gaspar's testimony about Zuffante's statements, and did not cross-examine Officer Gaspar regarding other means of recording. The undisputed evidence establishes that the recording equipment was broken, by no fault of Officer Gaspar. This fact is apparently of no concern under the majority decision.

Furthermore, the record does not show Zuffante's due process rights were violated. Zuffante signed an Advice of Rights form demonstrating he voluntarily made statements to Officer Gaspar. There was no legitimate basis to preclude Officer Gaspar's testimony because Zuffante had a full opportunity to question Officer Gaspar on two occasions, at a hearing on a motion to determine voluntariness of Zuffante's statement, and at trial. Zuffante did not cross-examine Officer Gaspar about why there was no recording. Zuffante does not challenge the Circuit Court's Tachibana colloquies regarding whether he knowingly, voluntarily, and intelligently exercised his right to testify and waived his right not to testify. Further, Zuffante's testimony at trial did not contest much about Officer Gaspar's testimony, except he asserted he did not say "all the meth" was his. Zuffante admitted, however, that he told Officer Gaspar that everything in the car was his and that he bought and sold meth. Zuffante explained he said these things so that his girlfriend would not be arrested. Thus, even

if there was a recording, Zuffante would have had to testify if he wanted to provide this explanation. The facts and circumstances of this case simply do not warrant overruling Kekona.

**B. A large majority of other states have not required electronic recording of custodial interrogations by constitutional mandate.**

Approximately twenty-three states and the District of Columbia address electronic recordation by statute,[6] four by court rule,[7] and two by state supreme courts exercising their

[6] Cal. Penal Code § 859.5 (West 2017); Cal. Welf. & Inst. Code § 626.8 (West 2014); Colo. Rev. Stat. Ann. § 16-3-601 (West 2016); Conn. Gen. Stat. Ann. § 54-1o (West 2014); D.C. Code Ann. §§ 5-116.01 to -116.03 (West 2005); 705 Ill. Comp. Stat. Ann. 405/5-401.5 (West 2023); 725 Ill. Comp. Stat. Ann. 5/103-2.1 (West 2017); Kan. Stat. Ann. § 22-4620 (West 2022); Me. Rev. Stat. Ann. tit. 25, § 2803-B (2023); Md. Code Ann., Crim. Proc. § 2-402 (West 2008); Mich. Comp. Laws Ann. §§ 763.7 to 11 (West 2013); Mo. Ann. Stat. § 590.700 (West 2017); Mont. Code Ann. §§ 46-4-406 to -411 (West 2009); Neb. Rev. Stat. Ann. §§ 29-4501 to -4508 (West 2008); N.M. Stat. Ann. § 29-1-16 (West 2006); N.Y. Crim. Proc. Law § 60.45 (McKinney 2018); N.C. Gen. Stat. Ann. § 15A-211 (West 2023); Ohio Rev. Code Ann. § 2933.81 (West 2021); Okla. Stat. Ann. tit. 22, § 22 (West 2019); Or. Rev. Stat. Ann. § 133.400 (West 2020); Tenn. Code Ann. 37-1-127 (West 2023); Tex. Code Crim. Proc. Ann. art. 38.22, § 3 (West 2025); Vt. Stat. Ann. tit. 13, § 5585 (West 2022); Va. Code Ann. § 19.2-390.04 (West 2020); Wash. Rev. Code Ann. § 10.122.030 (West 2022); Wis. Stat. Ann. §§ 968.073, 972.115 (West 2025).

A review of these statutes demonstrates the important policy decisions made by the respective state legislatures regarding, among other things, the parameters and exceptions for imposing a requirement to record custodial investigations. Parameters include the location of the custodial interrogation and the type of offenses. Exceptions include when recording is not feasible because of exigent circumstances; when the suspect states they will respond to questions only if not recorded, and such agreement is recorded; when the statement is made during an out-of-state custodial interrogation; or when there is equipment malfunction. The consequences of an unexcused failure to record are another part of the policy discussion, such as whether to adopt a per se rule of inadmissibility or treat such occurrence as a factor to be considered for admissibility (the latter of which may require a cautionary jury instruction).

[7] Ark. R. Crim. P. 4.7 (eff. 2012) (requiring electronic recording "whenever practical" "at a jail, police station, or other similar place"); Ind. R. Evid. 617 (eff. 2014) (excluding evidence of unrecorded statements

supervisory powers.[8] Alaska is the only other state that requires recordation under its state constitution. Stephan, 711 P.2d at 1158.

Since the Supreme Court of Alaska issued Stephan in 1985, multiple state courts have expressly declined to require recording of custodial interrogations on state constitutional grounds. See e.g., Lockhart, 4 A.3d at 1199[9] ("We cannot construe article first, §§ 8 and 9, of our state constitution to impose such a requirement."); State v. Goebel, 725 N.W.2d 578, 584 (N.D. 2007) ("[W]e decline to hold that criminal defendants have a right to electronic recording of all custodial interrogations under Article 1, Section 12 of the North Dakota Constitution."); DiGiambattista, 813 N.E.2d at 529, 534, 534 n.26 (stating "we have to date stopped short of requiring electronic recording of interrogations as a constitutional or

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made during a custodial interrogation in a place of detention in felony criminal prosecutions); N.J. Ct. R. 3:17 (eff. 2007) (requiring electronic recording for certain offenses conducted in a place of detention); Utah R. Evid. 616 (eff. 2016) (excluding evidence of unrecorded statements made by the defendant during a custodial interrogation in felony criminal prosecutions).

[8] State v. Scales, 518 N.W.2d 587 (Minn. 1994) (declining to rule based on the due process clause of the Minnesota Constitution, but exercising its supervisory power to require recordation as specified therein); In re Jerrell C.J., 699 N.W.2d 110 (Wis. 2005) (exercising its supervisory power to require that all custodial interrogations of juveniles in future cases be electronically recorded where feasible and without exception when questioning occurs at a place of detention).

[9] Subsequently, the Connecticut General Assembly enacted a law requiring recording. Conn. Gen. Stat. Ann. § 54-1o.

common-law prerequisite to the admissibility of any resulting statements by the defendant," but holding a defendant is entitled to a jury instruction in the absence of a recording in cases involving interrogation of a defendant in custody or at a place of detention (citations omitted)); State v. Cook, 847 A.2d 530, 545 (N.J. 2004) (declining to impose by "judicial fiat" a constitutional requirement and stating, "[b]ecause there is otherwise 'fair-minded' disagreement concerning the appropriateness of imposing a sweeping requirement of electronic recordation of custodial statements, we hold that defendant's point of error 'is not of constitutional dimension'" (citation omitted)); State v. Barnett, 789 A.2d 629, 632 (N.H. 2001) ("Consistent with the overwhelming majority of States that have addressed this issue, we hold that due process does not require the recording of custodial interrogations."); Brashars v. Commonwealth, 25 S.W.3d 58, 61 (Ky. 2000) ("After reviewing the text, history, and previous precedent interpreting Section Eleven's due process protections, we hold that the Constitution of Kentucky does not mandate the electronic recording requirement[.]"); People v. Holt, 937 P.2d 213, 242 (Cal. 1997)[10] (stating "the fact that a particular procedure might enhance

[10] Subsequently, the California State Legislature enacted a law requiring recording. Cal. Penal Code § 859.5.

reliability does not make it one that is constitutionally mandated"); State v. Morgan, 559 N.W.2d 603, 609 (Iowa 1997) (stating "[w]e are confident . . . that such procedures [requiring recording] are in no way mandated by any provision in the Iowa Constitution"); State v. Williams, 438 S.E.2d 881, 886 (W. Va 1993) (declining "to expand the Due Process Clause of the West Virginia Constitution . . . to encompass a duty that police electronically record the custodial interrogation of an accused" (citation omitted)); State v. Buzzell, 617 A.2d 1016, 1018 (Me. 1992)[11] (stating "[defendant] has not persuaded us that . . . the due process clause of our state constitution requires electronic recording of custodial interrogation" (footnote omitted)); State v. Rhoades, 809 P.2d 455, 462 (Idaho 1991) ("We decline to adopt Alaska's standard in Idaho."); State v. Gorton, 548 A.2d 419, 422 (Vt. 1988) ("The most appropriate means of prescribing rules to augment citizens' due process rights is through legislation. In the absence of legislation, we do not believe it appropriate to require, by judicial fiat, that all statements taken of a person in custody be tape-recorded." (citations omitted)); Blair, 298 S.W.3d at 52[12] ("There is nothing in the text of the

[11] Subsequently, the Maine State Legislature enacted a law requiring recording. Me. Rev. Stat. Ann. tit. 25, § 2803-B.

[12] Subsequently, the Missouri General Assembly enacted a law requiring recording. Mo. Ann. Stat. § 590.700.

Missouri Constitution that requires recording custodial interrogations."); Turner, 187 P.3d at 840[13] (analyzing Washington case law and finding "no basis to interpret the due process clause to impose a duty to record interrogations"); Gasper v. State, 833 N.E.2d 1036, 1040-41 (Ind. Ct. App. 2005) (reviewing Stoker, 692 N.E.2d 1386, and again declining to impose a constitutional requirement (citations omitted)); Fike, 577 N.W.2d at 907[14] (finding "an extension of the rule set forth in [Stephan, 711 P.2d 1156] represents . . . an 'unprincipled creation of state constitutional rights'" (citation omitted)); Commonwealth v. Craft, 669 A.2d 394, 397 (Pa. Super. Ct. 1995) ("We are unconvinced that a custodial interrogation must be recorded to adequately protect the accused's rights. We hold that custodial interrogations do not need to be recorded to satisfy the due process requirements of the Pennsylvania Constitution[.]"); State v. James, 858 P.2d 1012, 1018 (Utah Ct. App. 1993) (stating "in accord with other courts, we refrain from requiring recording of interrogations under the Utah Constitution" but noting policy reasons for recording); People

[13] Subsequently, the Washington State Legislature enacted a law requiring recording. Wash. Rev. Code Ann. § 10.122.030.

[14] Subsequently, the Michigan Legislature enacted a law requiring recording. Mich. Comp. Laws Ann. §§ 768.8, 763.9.

v. Raibon, 843 P.2d 46, 49 (Colo. App. 1992)[15] (declining "to mold our particular view of better practice into a constitutional mandate which would restrict the actions of law enforcement agents in all cases" (citations omitted)); Coleman v. State, 375 S.E.2d 663, 664 (Ga. Ct. App. 1988) (stating "we find that neither the Georgia Constitution nor the Constitution of the United States mandates such a procedure [to electronically record] in the instant case").

My view that electronic recording is not constitutionally mandated by the Hawai'i Constitution is thus consistent with the numerous state courts that have considered the issue under their state constitutions. Despite the benefits that electronic recording may have, "the overwhelming majority of courts have declined to require recording as a constitutional dictate." Cook, 847 A.2d at 542 (citation omitted).

**C. This court can seek stakeholder input and promulgate a court rule exercising its supervisory powers.**

Because electronic recording involves policy decisions that impose significant requirements on law enforcement, it is an issue best suited for the legislature. Here, the Hawai'i Legislature has not yet acted. Given this situation, the court can exercise its supervisory authority for the administration of

[15] Subsequently, the Colorado General Assembly enacted a law requiring recording. Colo. Rev. Stat. Ann. § 16-3-601.

criminal justice. See HRS § 602-4 (2016) ("The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."); State v. Harrison, 95 Hawai'i 28, 32, 18 P.3d 890, 894 (2001); State v. Pattioay, 78 Hawai'i 455, 468, 896 P.2d 911, 924 (1995).

Currently, the supreme courts of six states address recording of custodial interrogation by court rule or a ruling based on supervisory powers. See N.J. Ct. R. 3:17; Ark. R. Crim. P. 4.7; Ind. R. Evid. 617; Utah R. Evid. 616; State v. Scales, 518 N.W.2d 587 (Minn. 1994); In re Jerrell C.J., 699 N.W.2d 110, 123 (Wis. 2005). But see Brashars, 25 S.W.3d at 63 (declining to exercise its supervisory authority); Baynor v. State, 736 A.2d 325, 332 (Md. 1999). I agree with the approach of New Jersey, Arkansas, Indiana, and Utah, as these courts invited stakeholder input before promulgating court rules. Rather than force immediate compliance, this court should refer the matter to a standing judiciary committee or constitute a special committee consisting of relevant stakeholders to propose rules addressing the need for recording of custodial interrogations, the types and levels of offenses for which recordings should be required, the status and need for proper equipment, training, digital file retention and resources, and other on-the-ground issues unforeseeable from the bench.

I disagree with the majority's approach and would require recordation following the course taken by the Supreme Court of New Jersey in Cook, 847 A.2d 530. After summarizing electronic recordation's benefits, protections, and drawbacks, the court determined that "[t]he foregoing concerns militate in favor of pursuing the study of whether and how to implement the benefits of recording electronically part, or all, of custodial interrogations." Id. at 546. Noting potential legislative action as well as the attorney general and county prosecutors taking steps to implement an administrative policy, the court stated, "[t]hose steps are welcome, but this issue deserves the broad involvement of all stakeholders and, importantly, must involve the judiciary." Id. at 546. The court stated certain considerations, such as whether to encourage recordation through the use of a presumption against admissibility of a non-recorded statements, were "important and nuanced, and should be addressed in a context broader than that permitted in any one criminal appeal." Id. at 547. Further:

> The balancing of interests will require careful and deliberate study if we are to be successful in securing to the judicial system, law enforcement, and defendants the benefits of recordation without unduly hampering the legitimate needs of law enforcement. We believe that the criminal justice system will be well served if our supervisory authority is brought to bear on this issue and we will exercise that authority mindful of the various interests involved. Accordingly, we will establish a committee to study and make recommendations on the use of electronic recordation of custodial interrogations.

Id. (emphasis added).

I agree with this approach because we must be mindful of the various interests involved, and invite stakeholders so that we avoid "unduly hampering the legitimate needs of law enforcement." See id. at 546-47. The majority's decision changes the law indiscriminately, appearing to apply "stem to stern" for interrogations of even minor offenses in the field. Such a sweeping command "should be addressed in a context broader than that permitted in any one criminal appeal." See id. at 547.

To conduct the study, the chief justice of the Supreme Court of New Jersey commissioned the Special Committee on Recordation of Custodial Interrogations (**Committee**). Report of the Supreme Court Special Committee on Recordation of Custodial Interrogations, at 6 (Apr. 15, 2005), https://www.njcourts.gov/sites/default/files/courts/criminal/cookreport.pdf [https://perma.cc/3GR8-Q33W]. The Committee was made up of, inter alia, retired judges, prosecutors, a public defender, and law enforcement representatives. Id. at 7. In its report, the Committee evaluated the approach of other states and existing county-level initiatives within New Jersey, discussed the challenge of estimating costs, and issued recommendations. Id. at 9-56.

In 2005, the court adopted New Jersey Court Rule 3:17 based on recommendations issued by the Committee in its report,

including that recording only be required for certain degrees of crimes to avoid the practical burdens on law enforcement. Id. at 42. The Committee also recommended circumstances in which the requirement should not apply, such as in the case of a spontaneous statement made outside the course of an interrogation. Id. at 43.

In Arkansas, prior to promulgating a court rule, the Supreme Court of Arkansas analyzed how other jurisdictions approached this issue, noting inconsistencies in designating the portion of the interview which must be recorded, and what sanctions to impose when law enforcement fails to record. Clark v. State, 287 S.W.3d 567, 574-76 (2008) (citations omitted). Due to these differences and concerns with implementation, the court determined:

> In view of these questions and many others that merit consideration, and bearing in mind the difficult task of drafting a rule that would clearly delineate the parameters of a recording requirement, we believe that the criminal justice system will be better served if our supervisory authority is brought to bear on this issue. We therefore refer the practicability of adopting such a rule to the Committee on Criminal Practice for study and consideration.

Id. at 576.

In 2012, the court adopted Arkansas Rules of Criminal Procedure Rule 4.7 in response to its decision in Clark. Ark. R. Crim. P. 4.7. This rule, which was adopted following public comment, does not mandate the recording of all custodial statements, but allows the trial court to consider the failure

to record in determining admissibility. Id.; see also In re Adoption of Ark. Rule of Crim. Proc. 4.7, 2012 Ark. 294, at 1 (per curiam), https://opinions.arcourts.gov/ark/supremecourt/en/item/294617/index.do?q=2012+Ark.+294 [https://perma.cc/YX86-XXEX].

The Indiana Supreme Court adopted Indiana Rules of Evidence 617, requiring recording for felony criminal prosecutions in places of detention. Ord. Amending Rules of Evidence, No. 94S00-0909-MS-4 (Ind. Sep. 15, 2009), https://www.in.gov/ilea/files/Evidence_Rule_617.pdf [https://perma.cc/L644-FL92]. Under its inherent authority to supervise administration of its courts, the court directed the Supreme Court Committee on Rules of Practice and Procedure to draft and publish a rule for public comment. Id. at 1. More than 300 comments were received and reviewed by the court: "eighty-nine of which were from law enforcement officers, eighty from the general public, thirty-six from prosecutors, twenty-seven from public defenders, five from judges, sixty-one from other attorneys, and five from other judicial officers." Id.

Although the Indiana Supreme Court adopted the rule in 2009, court delayed implementation until 2011 at the request of the prosecutor's office and police department, in order to permit the purchase and installation of equipment and training of officers. Id. at 4. Two justices dissented, with one

stating: "Given that law enforcement agencies are already moving in this direction on their own, I do not believe that it is necessary or advisable for this Court to prescribe practice in this area by rule." Id. at 6 (Sullivan, J., dissenting).

In Utah, the path to Utah Rules of Evidence Rule 616 began with the Attorney General's Office drafting – together with law enforcement – a Best Practices Statement for Law Enforcement that recommended electronic recording. See Utah R. Evid. 616 advisory committee's note to 2016 amendment. Most agencies subsequently did adopt recordation policies, but the Supreme Court of Utah promulgated Rule 616 "to bring statewide uniformity to the admissibility of statements made during custodial interrogations." Id.; see State v. Perea, 322 P.3d 624, 653 (Utah 2013) (refusing to "judicially pronounce" a recording requirement, but stating the benefits and concerns "are most appropriately addressed in the first instance by our Advisory Committee on the Rules of Evidence, within which the relative merits of mandating a recording requirement can be fully debated").

The experience of the above supreme courts demonstrates public and stakeholder interest in providing input to this important issue, and the recognition by these courts that it is imperative to consider the knowledge of many other groups affected by this issue. Where the majority sees a

constitutional imperative, I see the necessity for judicial restraint and for exercising our supervisory authority only after inviting the participation of stakeholders most affected by a requirement to record custodial interrogations. The rules other courts have adopted demonstrate well-considered parameters and exceptions.

Regarding location, Indiana, New Jersey, Utah, and Arkansas have limited their electronic recording requirement to places of detention or specified locations of detention. See Ark. R. Crim. P. 4.7(a); Ind. R. Evid. 617(a); N.J. Ct. R. 3:17(a); Utah R. Evid. 616(b).

As to the types and levels of offenses covered, Indiana and Utah have limited their requirements to felony criminal prosecutions, and New Jersey to specific enumerated crimes. See Ind. R. Evid. 617(a); Utah R. Evid. 616(b); N.J. Ct. R. 3:17(a) (stating recording is required "when the person being interrogated is charged with murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault, aggravated arson, burglary, violations of Chapter 35 of Title 2C that constitute first or second degree crimes, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes").

Additionally, Arkansas, Indiana, New Jersey, and Utah all set forth exceptions to the recording requirement. See, e.g., Ark. R. Crim. P. 4.7(2)(E), (G) (including exceptions such as when a statement was made out of state or a statement was made after questioning that is routinely asked during processing of the arrest of the suspect); Ind. R. Evid. 617(a)(3) (including exceptions such as when "law enforcement officers conducting the Custodial Interrogation in good faith failed to make an Electronic Recording because the officers inadvertently failed to operate the recording equipment properly, or without the knowledge of any of said officers the recording equipment malfunctioned or stopped operating"); N.J. Ct. R. 3:17(b)(iv) (including exceptions such as when "a statement is made during a custodial interrogation by a suspect who indicated, prior to making the statement, that he/she would participate in the interrogation only if it were not recorded; provided however, that the agreement to participate under that condition is itself recorded"); Utah R. Evid. 616(c)(8) (including exceptions such as when "[s]ubstantial exigent circumstances existed that prevented or rendered unfeasible the making of an electronic recording of the custodial interrogation, or prevented its preservation and availability at trial").

In New Jersey, rather than a per se exclusionary rule, the consequence for failing to record is a factor in deciding admissibility, as follows:

> (d) The failure to electronically record a defendant's custodial interrogation in a place of detention shall be a factor for consideration by the trial court in determining the admissibility of a statement, and by the jury in determining whether the statement was made, and if so, what weight, if any, to give to the statement.
>
> (e) In the absence of an electronic recordation . . ., the court shall, upon request of the defendant, provide the jury with a cautionary instruction.

N.J. Ct. R. 3:17(d), (e).

Here, the majority's holding imposes much while offering little guidance or consideration to those charged with implementation.

**D. The Circuit Court did not err by admitting Officer Gaspar's testimony.**

The majority holds that the Circuit Court's admission of Officer Gaspar's testimony was plain error. State v. Ishimine, 151 Hawaiʻi 375, 378-79, 515 P.3d 192, 195-96 (2022) (stating "this court will apply the plain error standard of review to correct errors [that] seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights"). I respectfully disagree. The trial was fair. Zuffante's constitutional rights were not infringed. It is uncontested that he waived his Miranda rights at the police station and voluntarily gave a statement to Officer Gaspar. He

had a full and fair opportunity to cross-examine Officer Gaspar at a pre-trial hearing on a motion to determine voluntariness of his statement, and at trial. The Circuit Court also properly denied Zuffante's pretrial motion in limine to preclude Officer Gaspar's testimony about Zuffante's statements at the police station, where Zuffante argued based on the Stephan rule that had been rejected by Kekona. The Circuit Court denied the motion without prejudice to Zuffante raising the lack of recording at trial and a possible jury instruction about the lack of a recording, neither of which Zuffante pursued at trial. Further, the Circuit Court noted there was no contrary evidence to Officer Gaspar's testimony to warrant Zuffante's in limine motion. At trial, Zuffante did not cross-examine Officer Gaspar about the lack of a recording or raise the issue.

Further, as to the majority's plain error holding that Zuffante's right not to testify was impacted by a lack of a recording, the only material part of Officer Gaspar's testimony he challenges is whether he told Officer Gaspar that "all the meth" in the car was his. Yet, Zuffante agrees that he admitted to Officer Gaspar that he bought and sold meth and that everything in the car was his. To the extent that Zuffante testified that he made these statements so that his girlfriend would not be arrested, he would have had to testify even if there was a recording.

**E. The new rule should be given purely prospective application.**

The majority applies its new constitutional rule to Zuffante and all cases that are on direct review or not yet final as of the date of the decision, giving it "pipeline" retroactive effect. To accord with precedent and the proper administration of justice, this court should give this new rule purely prospective application.[16]

In State v. Auld, 136 Hawai'i 244, 361 P.3d 471 (2015), this court stated:

> We are cognizant of the fact that we announce new rules in this case. As such, we consider whether these new rules will be given (1) purely prospective effect, which means that the rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision; (2) limited or "pipeline retroactive effect, under which the rule applies to the parties in the decision and all cases that are on direct review or not yet final as of the date of the decision; or (3) full retroactive effect, under which the rule applies both to the parties before the court and to all others by and against whom claims may be pressed.
>
> The "paradigm case" warranting a prospective-only application of a new rule arises when a court **expressly overrules a precedent** upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct.

[16] Even Justice Levinson's concurring and dissenting opinion in Kekona, in which he advocated for adopting the Stephan rule, states that he would have given such a new rule requiring recording of custodial interrogations purely prospective application, which would apply "only to future and as yet uncharged criminal defendants." 77 Hawai'i at 410-11, 411 n.3, 886 P.2d at 747-48, 748 n.3 ("I would hold all custodial police interrogations of criminal suspects, conducted *after* the date of this opinion, to the [standard requiring recording in places of detention, if feasible]").

Id. at 255-56, 361 P.3d at 482-83 (emphases added) (citations and quotation marks omitted, formatting altered).

In Auld, like this case, the court adopted a new constitutional rule and overruled prior case law, stating:

> [W]e now hold that the State provides 'reasonable notice' to a defendant it seeks to sentence as a repeat offender when it alleges the defendant's predicate prior convictions in a charging instrument. To the extent [our prior case law held] that due process requires only that notice be given prior to sentencing, they are hereby overruled.

Id. at 255, 361 P.3d at 482. This court recognized that prior to Auld, "the parties may previously have regulated their conduct consistent[] with the rules set forth" in the prior case law, and "[t]his further counsels in favor of a prospective-only application." Id. at 256, 361 P.3d at 483 (internal quotation marks omitted).

Like Auld, this case is clearly a paradigm case that "overrules a precedent upon which [this] contest would otherwise be decided differently and by which the parties may previously have regulated their conduct." Id. (citation omitted). In October 2021, when Zuffante waived his Miranda rights and voluntarily gave his statement to Officer Gaspar at the police station, Kekona had been the law in Hawaiʻi for decades. Officer Gaspar acted properly and well within Zuffante's constitutional rights at that time.

Similarly, there are an unknown number of criminal cases where investigations have been completed, charges have

been brought, and/or cases are pending in court where law enforcement similarly conducted their activities, *i.e.*, regulated their conduct, based on Kekona.

In addition to Auld, this court has been careful in the past to give new constitutional rules purely prospective application when warranted, like this case. See State v. Glenn, 148 Hawaiʻi 112, 128-29, 468 P.3d 126, 142-43 (2020) (adopting a new rule under the Hawaiʻi Constitution requiring that when a trial court receives notice that a defendant's penal responsibility is at issue, it must conduct a colloquy with a defendant to ensure that a waiver of the defense is intelligent, knowing, and voluntary, and applying it prospectively); State v. Alkire, 148 Hawaiʻi 73, 79, 87, 468 P.3d 87, 93, 101 (2020) (establishing a new rule to protect a defendant's constitutional right to a speedy trial by requiring a "meaningful" commencement of trial, but holding that "it will only apply prospectively to events occurring after publication of this decision, i.e., to trials that commence after the date of this opinion" and stating "this holding does not apply to [defendant's] case" (footnotes omitted)); Tachibana, 79 Hawaiʻi at 236-38, 900 P.2d at 1303-05 (establishing new principle of constitutional law requiring that trial courts advise criminal defendants about their right to testify and obtain an on-the-record waiver in every case in

which the defendant does not testify, and applying it only prospectively (citations and footnotes omitted)).

The new rule announced in this paradigm shifting case should be given purely prospective application.

**III. Conclusion**

For all these reasons, I respectfully dissent. I would affirm the ICA's Judgment on Appeal entered on October 25, 2024, which affirmed the Circuit Court's First Amended Judgment of Conviction and Sentence entered on April 6, 2023.

/s/ Lisa M. Ginoza