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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 166

EVERETT M. DURANT,

Appellant.

20 Eagle Street
Albany, New York 12207
October 20, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN

Appearances:

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Karen Schiffmiller
Official Court Transcriber

CHIEF JUDGE LIPPMAN: And we're going to

1 start the day with number 166, People v. Durant.

2 Counsel?

3 MS. SOMES: Good afternoon, I'd like one
4 minute for rebuttal, please?

5 CHIEF JUDGE LIPPMAN: One minute, you have
6 it. Go ahead.

7 MS. SOMES: Janet Somes on behalf of Mr.
8 Durant.

9 We are asking this court to hold that where
10 police conduct a custodial interrogation but fail to
11 - - -

12 CHIEF JUDGE LIPPMAN: Let me ask you a
13 question, counsel. What - - - I understand the issue
14 very much so, and you know, it's very much a policy
15 issue in this state about electronic recording.
16 What's the precedent in New York for some kind of an
17 adverse inference charge or what you're - - - what
18 you're seeking?

19 MS. SOMES: This court has repeatedly held
20 an adverse inference charge to be appropriate in a
21 variety of situations in different contexts.

22 CHIEF JUDGE LIPPMAN: Yes, but in this
23 particular situation of - - - of failure to - - - to
24 conduct an interrogation and to - - - to not, you
25 know, video it or electronically store in some way.

1 MS. SOMES: Your Honor, can I - - - I can't
2 point to a particular precedent, however, the
3 rationale underlying the adverse inference
4 instructions that this court has re - - - required
5 does support it in this case.

6 CHIEF JUDGE LIPPMAN: Tell us how so. How
7 - - - what - - - why - - - why, in the normal course
8 - - - certainly not close to all of our
9 interrogations or most of our interrogations are
10 being videotaped in New York - - - in the normal
11 course, how does the failure to do so support a - - -
12 a - - - an adverse inference charge, in terms of the
13 thought behind what an adverse inference charge is?

14 MS. SOMES: Because when the police conduct
15 an interrogation, they are creating evidence.
16 They're creating what is often the most powerful
17 evidence that a prosecutor can put before a jury.
18 When they fail to record the interrogation, they have
19 created nonreviewable evidence. That puts the
20 defense in an incredible disadvantage.

21 CHIEF JUDGE LIPPMAN: So if they don't
22 record it, they can't use it? Or they can use it but
23 they get a natural inference against it?

24 MS. SOMES: We're asking for the natural
25 inference against it. This court has found an

1 adverse inference instruction to be appropriate in
2 cases where evidence has been withheld from - - -
3 from one party by another, something that the other
4 party has done. It's been to mitigate the harm or
5 the damage done.

6 JUDGE ABDUS-SALAAM: Counsel, I - - - I'd
7 like - - -

8 MS. SOMES: This court has also said that -
9 - -

10 JUDGE ABDUS-SALAAM: Counsel, I'd just like
11 to know, you said - - - you started to say that
12 recordings should be done only in custodial
13 situations. Why only custodial?

14 MS. SOMES: That's all we're asking for at
15 this point. This was a custodial interrogation. The
16 police are ab - - - they control the situation in a
17 custodial interrogation, much more than they might
18 control a situation out on the street. I'm not
19 saying that we would never ask for an adverse
20 inference down the road, with body cameras and all,
21 but right now we're asking for the adverse inference
22 for the custodial interrogation only in the station
23 house.

24 JUDGE RIVERA: But your - - - your argument
25 is that they create evidence because the police

1 officer then subsequently testifies or there's a
2 written statement that comes out of this custodial -
3 - -

4 MS. SOMES: Yes.

5 JUDGE RIVERA: - - - right - - -

6 MS. SOMES: They've created the evidence.
7 The evidence didn't exist until they actually do the
8 interrogation. And then they don't preserve that
9 evidence in a reliable and accurate way.

10 CHIEF JUDGE LIPPMAN: Counsel - - -

11 JUDGE RIVERA: Well, they preserve it
12 through - - - well, I - - - they don't preserve it
13 they way you're requesting that it be preserved,
14 which is through a video, right?

15 MS. SOMES: Accurate and reliable.

16 JUDGE RIVERA: And they provide it and so
17 forth. But when - - - when they commence this
18 custodial investigation, they don't know where the -
19 - - where the statements are going to lead, and of
20 course, your client could choose not to speak with
21 them.

22 MS. SOMES: Absolutely, but there's no harm
23 in recording it. And when they create the - - - when
24 they - - -

25 JUDGE RIVERA: Well, you're not arguing

1 this was a breach of their protocol?

2 MS. SOMES: We're not arguing it's a breach
3 of protocol - - -

4 JUDGE RIVERA: This is not intentional on
5 their part. Is that - - - are you suggesting it was
6 intentional to avoid - - -

7 MS. SOMES: It could be.

8 JUDGE RIVERA: - - - the existence of a
9 recording?

10 MS. SOMES: I think it could be where - - -
11 where, you know, that is, you know, what the intent
12 is.

13 JUDGE RIVERA: Is that necessary in a case?

14 MS. SOMES: I don't believe so. I - - -

15 CHIEF JUDGE LIPPMAN: Counsel, but let me
16 ask you a question - - - two questions. First of
17 all, if you do - - - generally do video recording,
18 and there are some places in the state where this has
19 become - - - as a matter of policy, is being done,
20 what happens then if you don't do it? Do you have a
21 better case in that situation where they said this is
22 what we're going to do and then for whatever the
23 logistical or other reason, or intentional, then you
24 don't do it? Does that give you a better case in
25 that situation if the norm is to do it, and then you

1 don't?

2 MS. SOMES: I think it's a good case in
3 either situation, but if the norm is to do it, it
4 certainly shows that they can do it and that there is
5 - - - there is the ability to do it. And when they
6 opt not to do it - - -

7 JUDGE RIVERA: Well, they can do it here.
8 It's just in a different location.

9 MS. SOMES: They absolutely could have done
10 it here. It's in a - - - it's in a different
11 location.

12 JUDGE RIVERA: Aren't you - - - aren't you
13 demanding that they create evidence to benefit your
14 client?

15 MS. SOMES: Absolutely not.

16 JUDGE RIVERA: Because you're assuming it's
17 going to benefit your client.

18 MS. SOMES: We're not - - - we don't know
19 what it's - - - what it's going to do. The - - - the
20 problem is that we cannot look and see what happened.
21 When our - - - when it seemed that - - -

22 JUDGE RIVERA: But neither could they when
23 they made this choice.

24 MS. SOMES: But when - - - when the
25 confession is then made, the su - - - the alleged

1 confession is then made and it's - - - it's used as
2 evidence against our clients, we cannot then look and
3 see what was said. Whose words are these? Are these
4 the defendant's words or are these words - - -

5 CHIEF JUDGE LIPPMAN: Counsel, but - - -

6 MS. SOMES: - - - that came from the police
7 officer?

8 CHIEF JUDGE LIPPMAN: - - - the second
9 question I wanted to ask you is, is there anywhere in
10 the United States where this is the - - - the case
11 that - - - that if you don't videotape it, you get an
12 - - - the equivalent of an adverse inference charge?

13 MS. SOMES: Yes, several states are - - -
14 are going that way.

15 CHIEF JUDGE LIPPMAN: Which - - - which
16 states, counsel?

17 MS. SOMES: New Jer - - - New Jer - - - or
18 Massachusetts is the one that has created the - - -
19 the adverse inference for failure to record. Other
20 states are in various - - -

21 CHIEF JUDGE LIPPMAN: In all kinds of
22 cases, counselor?

23 MS. SOMES: In - - - I - - - I'm not - - -
24 I think it's on all felonies, but states are doing
25 very, very different things across the board. Some

1 are requiring it in - - - in homicides only or in
2 serious - - -

3 JUDGE STEIN: But doesn't - - - doesn't
4 that sort of point to - - - that maybe this is better
5 for a legislative enactment?

6 MS. SOMES: Absolutely not, Your Honor.

7 JUDGE STEIN: Well, how would we set the
8 parameters?

9 MS. SOMES: A custodial interrogation at
10 the station house needs to be recorded.

11 JUDGE STEIN: Any level crime?

12 MS. SOMES: Any level crime. If it - - -
13 if the crime is important enough for the police to
14 interrogate, it should be important enough for the
15 police to record.

16 JUDGE ABDUS-SALAAM: Counsel, at the - - -

17 MS. SOMES: Our - - -

18 JUDGE ABDUS-SALAAM: At the time that - - -
19 that this interrogation took place, apparently
20 cameras were - - - or recording equipment was not
21 that available, at least not in this city, right?
22 They only had it in the Public Safety Building for
23 homicides, and not on the east side where this crime
24 oc - - - occurred. But that's changing, isn't it?
25 Aren't there - - - haven't cities and states and

1 municipalities gotten money from, say, federal
2 government and so on, to get the type of recording
3 equipment that you're now saying should be used
4 generally?

5 MS. SOMES: Absolutely. I think the
6 district attorney's amicus brief lays out very
7 clearly what has been done to supply all police
8 departments with recording equipment.

9 JUDGE ABDUS-SALAAM: So doesn't that
10 suggest that what you're asking for will happen - - -

11 MS. SOMES: Absolutely not.

12 JUDGE ABDUS-SALAAM: - - - or is happening?

13 MS. SOMES: Absolutely not. It - - - it
14 may be happening in some cases, but it would still be
15 up to the police to say when they're going to record,
16 when they're not. We're asking for a rule which will
17 incentivize recording in all cases. And my client is
18 doing - - -

19 CHIEF JUDGE LIPPMAN: So it will require it
20 despite the cost issues that might - - -

21 MS. SOMES: I'm sorry; I - - - I misspoke.
22 That would re - - - we were asking for the adverse
23 inference. So there were - - - are going to be times
24 when perhaps the - - - the district attorney or the
25 police - - -

1 CHIEF JUDGE LIPPMAN: But in general, it
2 would become incumbent upon the police department to
3 record all interrogations or certain level of
4 interrogations, if we were to find some kind of - - -
5 make some kind of ruling along the lines that you
6 suggest?

7 MS. SOMES: They - - - if they didn't, then
8 they would, you know - - -

9 CHIEF JUDGE LIPPMAN: Right - - -

10 MS. SOMES: They'd get the ad - - -

11 CHIEF JUDGE LIPPMAN: - - - suffer the
12 consequences, right.

13 MS. SOMES: - - - the adverse inference.

14 JUDGE PIGOTT: Well, it would be
15 permissive, I assume. I mean - - -

16 MS. SOMES: It would be permissive, and
17 there is no - - - right, right. If the jury - - -
18 the jury could hear what the - - -

19 JUDGE RIVERA: Then they would have to put
20 forward evidence as to why they didn't act badly or
21 the - - - or the jury shouldn't decide - - -

22 MS. SOMES: They would have that option.

23 JUDGE RIVERA: - - - or could they assess
24 this as a - - -

25 JUDGE PIGOTT: Well - - -

1 MS. SOMES: They would absolutely have that
2 option, then they could argue - - -

3 JUDGE RIVERA: They would have a mini-trial
4 in this criminal trial about their policy choices
5 regarding whether or not to have recording equipment
6 in all their stations, what their policy should be?

7 MS. SOMES: I don't think it would be a
8 mini-trial, but I think that it would be important
9 because then there - - - the defense is on a more
10 even footing here. Because right now, we don't know
11 - - - we don't know what was said and it - - - we're
12 suffering a disadvantage because of it.

13 JUDGE PIGOTT: If the - - - if the
14 legislature were entertaining legislation doing
15 exactly this, would - - - should we be waiting for
16 them?

17 MS. SOMES: No, you shouldn't, because what
18 we know now is that wrongful convictions happen and
19 that false confessions and fabricated testimony about
20 confessions are a primary - - - a primary cause of
21 false - - - false con - - - of wrongful convictions.

22 CHIEF JUDGE LIPPMAN: Yeah, but the - - -
23 but the issue is that - - - assuming we agree with
24 you, that - - - that it is a very - - - a positive
25 thing to be able to, you know, see what happened;

1 this is a little bit different because you're - - -
2 you're - - - you're almost making it, not quite - - -
3 you're almost making it mandatory by saying if you
4 don't, you're going to have in every case an adverse
5 inference charge.

6 So I guess that's the - - - the question
7 that I - - - how does this translate to some kind of
8 right to have it videoed? To have your interrogation
9 - - - can it be put in that framework of a right that
10 you have, that if you're going to be accused of
11 something or if - - - there's always an issue as to
12 whether, you know, what you did was voluntary?

13 What's the - - - again, what's the - - - we
14 started out with this. What's the rationale why - -
15 - why should we find for you - - - and the - - - and
16 we know what you want, in all custodial
17 interrogations - - - how does it - - - how does it
18 figure in terms of the individual defendant and what
19 he or she may or may not have a right to?

20 MS. SOMES: The individual defendant should
21 not be convicted upon evidence he or she cannot see.
22 And that is exactly what an unrecorded interrogation
23 is. It is convicting on evidence that his attorney
24 can't look at, can't figure out, you know - - -

25 JUDGE ABDUS-SALAAM: Counsel, what if - - -

1 what if - - -

2 MS. SOMES: - - - what are the nuances - -

3 -

4 JUDGE ABDUS-SALAAM: What if the record - -

5 - what if this interrogation was recorded, for

6 example, and there's one camera, and the camera is on

7 your client, as opposed to the interrogator? Then

8 would we be hearing that, well, they should've had

9 two cameras or there should've been an angle where we

10 could see the person asking the questions as well as

11 the person who is answering them?

12 You know, I - - - I can just see a scenario

13 where, you know, we - - - it would never end in terms

14 of what would be - - - the best evidence, I guess is

15 what you're saying - - - what's the best evidence of

16 this interrogation and what was actually said, and

17 how, you know, the demeanor of each person involved

18 would be captured or not captured on camera?

19 MS. SOMES: It could be very important for

20 - - - to capture the demeanor of the defendant. You

21 know, is he men - - - does - - - is he incapacitated?

22 Is he distraught? What - - - what kind of signals

23 did he get?

24 JUDGE ABDUS-SALAAM: What about the

25 interrogator? What if the - - - what if the

1 interrogator is making faces or, you know, signaling
2 something, and - - - and you can't see that person on
3 the camera?

4 MS. SOMES: I think that the ad - - - I
5 think that we've got a recording - - - at least an
6 audio recording of what happened, and so we're - - -
7 we're in a much better position than we would
8 otherwise. So where those lines end up being drawn,
9 that's another case, probably.

10 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's
11 hear from your adversary, and then you'll have your
12 rebuttal.

13 MR. KAEUPER: Good afternoon, Your Honors.
14 May it please the court, Geoffrey Kaeuper for the
15 People.

16 CHIEF JUDGE LIPPMAN: Counsel, why
17 shouldn't this happen in every case?

18 MR. KAEUPER: Well, I mean, I think in the
19 - - - in the abstract it would be a good thing. I
20 mean, certainly - - -

21 CHIEF JUDGE LIPPMAN: It would be a very
22 good thing. You know, we have loads of cases here
23 every day where when we can see it, we can make a
24 much better judgment as to what happened than we're
25 just going on, you know, one side says so-and-so - -

1 -

2 MR. KAEUPER: Right.

3 CHIEF JUDGE LIPPMAN: - - - and the other
4 side says another.

5 MR. KAEUPER: Right. And there's no
6 dispute that - - - that recording interrogations is a
7 good thing, and there's been massive efforts
8 undertaken by law enforcement, by - - - by the
9 judicial task force, to - - - to bring this about.
10 But it's a complicated problem, and I think that's
11 reflected in the proposals that are - - -

12 JUDGE PIGOTT: Well, I can show you how
13 complicated it was. We had a case about six months
14 ago where the DA, down in one of the bro - - -
15 boroughs, was bringing in each defendant and saying,
16 you know, you're about to be arraigned, but this is -
17 - - before you're arraigned, we're going to give you
18 your Miranda warnings and we're going to tell you
19 this is the last chance you have to talk to us before
20 and tell us what happened.

21 And then they would give the Miranda
22 warnings, and the guy would say, I didn't really mean
23 to steal it or - - - and we said, you can't do that.
24 But it was a pretty sophisticated operation that
25 showed the interrogator, showed the defendant, showed

1 a clock, showed him getting his Miranda warnings.
2 Why can't we do things like that? It's not that
3 complicated, it seems to me.

4 MR. KAEUPER: Well, I mean, there are - - -
5 there are - - - there are serious problems with
6 resources. I mean, we have - - - we have - - - we've
7 made major efforts to equip - - -

8 JUDGE PIGOTT: Well, I know enough about
9 Rochester to know that the east side down to the
10 Public Safety Building is not that far.

11 MR. KAEUPER: Right, but - - - but there
12 are a limited number of interrogation rooms that have
13 recording equipment.

14 JUDGE PIGOTT: You got a cell phone? I
15 mean, at this point - - - I mean, you can - - - you
16 can give a dozen reasons why you can't do it in high
17 fidelity. But it seems to me that when you got a
18 situation like in this one, when the - - - when the
19 interrogator was asked about the - - - the
20 interrogation that he undertook, that the guy was
21 cuffed, that he - - - that he condensed what the guy
22 said, wrote it down and then had the guy sign it.

23 Well, who got - - - who gets to decide what
24 gets condensed? Who gets to decide this is an
25 important fact and this one isn't in a situation like

1 that?

2 MR. KAEUPER: Right, I mean, and - - - and
3 - - - you know, so certainly it's - - - it's the
4 investigator who is - - - who's naturally going to
5 testify. Defendants do sometimes testify about their
6 interrogations. That certainly happens and can
7 happen. But - - -

8 JUDGE PIGOTT: But if in this case, if the
9 defendant said, you know, I tried to call my sister
10 and I couldn't reach her, and that never made the
11 statement, and nobody ever found out about it, and
12 then he testifies at the trial that he tried to call
13 his - - - they'd say, well, why didn't you tell the
14 officer that, and he'd say, I did, but it didn't make
15 the statement. Who are you going to believe?

16 MR. KAEUPER: You know, well, I mean, I
17 think you would testify that at - - - to that at a
18 suppression hearing, but - - - but - - -

19 JUDGE PIGOTT: A hypothetical.

20 MR. KAEUPER: Well, yeah. But - - - but I
21 guess - - - I guess part of the problem with that is
22 - - - is - - - is that is a limitless principal, and
23 that goes to, I think, Judge Abdus-Salaam's question
24 about the best evidence. I mean, you could al - - -
25 I mean, that would be - - - that would be giving you

1 - - -

2 JUDGE PIGOTT: How about - - - how about
3 putting GPSs on cars? Do you think that's a good
4 idea? That was a court-made law. We said you can't
5 do that; it violates the Constitution. So - - -

6 MR. KAEUPER: Right.

7 JUDGE PIGOTT: - - - we can make rules and
8 - - - and there was all kinds of excuses about why
9 GPSs on cars was not a good idea. It was, you know,
10 limiting that. It would seem to me - - - you know,
11 most of the ones that we've gotten, videotape con - -
12 - have helped the People.

13 MR. KAEUPER: Yes.

14 JUDGE PIGOTT: Remarkably.

15 MR. KAEUPER: Yeah, absolutely.

16 JUDGE PIGOTT: So I - - - so I don't
17 understand why this is a problem? You say it's
18 complicated. I - - - I'm missing that.

19 MR. KAEUPER: Well, I mean, look - - - look
20 at the proposals by the judicial task force, by the -
21 - - by DCJS, the legislative proposals which - - - I
22 mean, something will pass very shortly; they - - -
23 they limit the interrogation requirement to homicides
24 and certain B violent felonies.

25 As a - - - as a practical - - - there are -

1 - - there are lots of problems with - - -

2 JUDGE RIVERA: So - - - so this happened,
3 whatever, more than seven years or so.

4 MR. KAEUPER: Yeah.

5 JUDGE RIVERA: Have things changed?

6 MR. KAEUPER: Yes, oh, certainly. I mean,
7 there's been - - - there's been tremendous
8 development on this issue since then.

9 JUDGE RIVERA: No, no, I'm sorry. I'm
10 saying specifically in this -- - in - - - where this
11 occurred.

12 MR. KAEUPER: In the Rochester Police - - -

13 JUDGE RIVERA: Is the same policy in place?

14 MR. KAEUPER: The Rochester's Police - - -
15 Police Department's policy is - - - is basically what
16 - - - what the task force recommended. It's for
17 homicides, certain B violent felonies, I think - - -

18 JUDGE RIVERA: That has not changed.

19 MR. KAEUPER: I - - -

20 JUDGE RIVERA: What they'd done - - - what
21 they did in 2007 and 2008 has not changed, that's
22 what I want to say.

23 MR. KAEUPER: I - - - don't believe that
24 that policy was formalized in 2008, but I - - - I beg
25 your pardon, Your Honor, that I can't - - -

1 CHIEF JUDGE LIPPMAN: Yeah, but let me ask
2 you another question. The - - - you know, the idea
3 of this whole endeavor and everything we do in the
4 criminal justice system is about justice. And I
5 think we - - - we - - - I think the thrust of most of
6 the questioning thus far - - - you know, putting
7 aside the ultimate legal determination - - - is that
8 I think there's almost a consensus, prosecution and
9 defense and everybody else, that justice is better
10 served if you videotape, record interrogations.

11 If the whole game here is about justice,
12 why wouldn't we say that - - - that - - - that if you
13 don't do it - - - it's not that you must, but if you
14 don't do it, then there is - - - there is some kind
15 of inference that says, gee, then maybe you - - -
16 you're not really looking at - - - at justice.
17 You're not trying to get justice and if that's,
18 again, what it's about, why wouldn't we do some kind
19 of a finding that you have to do it, and if you don't
20 - - - okay, you know, there are cost issues, all
21 kinds of things. But if you don't do it, then it
22 hurts your case.

23 MR. KAEUPER: A couple of reasons. First
24 of all I think - - -

25 CHIEF JUDGE LIPPMAN: Is your answer,

1 that's not good for justice?

2 MR. KAEUPER: No, no, I - - - well, I mean
3 - - -

4 CHIEF JUDGE LIPPMAN: Go ahead; I'm
5 kidding.

6 MR. KAEUPER: I think under these
7 circumstances, an adverse inference would not be good
8 for justice, because, for one thing, you're - - - you
9 would be asking the jury to just sort of speculate.
10 You can't - - -

11 JUDGE PIGOTT: No, no, no, no. You're
12 going to have a judge, and - - - and someone's going
13 to say they didn't record this, and your officer's
14 going to say, I didn't, because we didn't have any
15 equipment and I had, you know - - - it was expedient
16 circumstances and everything, and the judge says, I'm
17 not going give it. Done.

18 Now, you got another situation where maybe
19 it's the opposite. It's not - - - it's not that the
20 jury is all - - - all of a sudden going to be - - -
21 is going to be told, these bad cops are trying to do
22 this.

23 MR. KAEUPER: No, but - - - but in this
24 case, for instance, you would say, why didn't record
25 this? Because we don't record interrogations for

1 Class C felonies.

2 JUDGE PIGOTT: Right.

3 MR. KAEUPER: That's - - - that's the
4 policy. So then you have to go into a - - - into a
5 mini-trial about - - -

6 JUDGE ABDUS-SALAAM: Is this - - -

7 MR. KAEUPER: - - - about that policy.

8 JUDGE ABDUS-SALAAM: Counsel, is this
9 different from not dusting for fingerprints in every
10 burglary?

11 MR. KAEUPER: I don't think there's any way
12 to distinguish them. I don't think there - - - I
13 think - - - I mean, the - - - the defendant's
14 position really is a - - - is a limitless one.

15 JUDGE PIGOTT: Suppose he didn't write this
16 down. Suppose the interrogator, when he did this,
17 didn't write it down, but came in and testified to
18 exactly what was in the statement. Would that be
19 okay?

20 MR. KAEUPER: If - - - I beg your pardon?

21 JUDGE PIGOTT: He - - - you know, he just
22 comes in and testifies. He says, yeah, we had Durant
23 in and he told - - - he told us what happened and - -
24 -

25 MR. KAEUPER: Sure. Yeah - - -

1 JUDGE PIGOTT: - - - and end of story.

2 MR. KAEUPER: - - - and that - - - I mean,
3 that happens. Certainly.

4 JUDGE PIGOTT: Could defense counsel say,
5 did you have a pencil?

6 MR. KAEUPER: Yeah, I mean, you know, the
7 defense counsel could certainly make that argument
8 and the defense made the argument here - - -

9 JUDGE PIGOTT: And if they did, would they
10 be entitled to an adverse inference charge if you get
11 - - -

12 MR. KAEUPER: No.

13 JUDGE PIGOTT: - - - wait a minute - - -

14 MR. KAEUPER: Oh.

15 JUDGE PIGOTT: - - - if you get the
16 investigator to say I had a pencil, I had paper, I
17 was sitting there and I thought, you know, I'm just
18 too damn tired to write it down, and - - - and by the
19 way, as far as I was concerned, there was only two
20 things he was saying that was important. One that he
21 was guilty and two that he was sorry.

22 Now, could you get an adverse inference
23 from - - - from a judge that maybe that's not all he
24 said, and maybe some other things he said would have
25 been important?

1 MR. KAEUPER: I mean - - - I - - - no, I
2 don't - - - I mean, I think - - - I think the - - -
3 the - - - I think the judge could give that
4 instruction in - - - in the judge's discretion if - -
5 - if under the circumstances, that seems appropriate.

6 JUDGE PIGOTT: Right.

7 MR. KAEUPER: But I don't think it's a
8 matter of law that the judge has to give that kind of
9 instruction, because if you're going to go down that
10 road, again, this is limitless. You're going to have
11 instru - - - you're going to have adverse
12 instructions on all kinds of evidentiary - - -

13 JUDGE PIGOTT: But not - - - not - - -

14 JUDGE RIVERA: Your adversary says you're
15 creating evidence that benefits you. She says that's
16 what's the problem with - - - with the approach that
17 you've taken.

18 MR. KAEUPER: But that's the same as
19 dusting for fingerprints or something else. I mean,
20 you - - - when you dust for fingerprints, you're
21 creating evidence - - - I mean, if - - - if we can
22 use that term at all - - - you're creating evidence
23 in just the same way as an - - - as an interrogation.
24 Or when you talk - - - go and knock on - - - on
25 neighborhood doors and talk to witnesses, do we need

1 to record those, too? I mean, what if - - - what if
2 that - - - what - - - you know, what if the officer's
3 going to possibly lie about what that - - -

4 JUDGE PIGOTT: Well, you - - - wait a
5 minute. You're making a joke out of this, and - - -
6 and it seems to me when - - -

7 MR. KAEUPER: I - - - I'm not trying to. I
8 beg your pardon, Your Honor.

9 JUDGE PIGOTT: I'm almost done. When - - -

10 MR. KAEUPER: Sorry.

11 JUDGE PIGOTT: It seems to me if you've got
12 somebody in handcuffs who is going to - - - who's
13 facing liberty interests that that's a little
14 different than knocking on somebody's door and say,
15 didn't you see anything? And, you know, we're not
16 trying to make it - - - you know, make it silly that
17 - - - that the police officers that we know have a -
18 - - have a difficult job. The - - - the situation
19 we're addressing is in - - - in the modern times with
20 what all we have, and with the police able in murders
21 to do this. Well, I don't know; I don't want to go
22 away for ten years. Well, it's unfortunate, but
23 you've got a D felony, pal, and so we're not
24 recording yours, but the guy across the street, we
25 are, because he's got a - - - he's got an A felony,

1 and how do you rationalize that?

2 JUDGE PIGOTT: And I - - - Judge, I
3 apologize. I'm certainly not trying to - - - to make
4 light of this at all. I take this extremely
5 seriously, and that's - - - and that's why I think
6 it's important that if we're going to - - - if we're
7 going to entertain these - - - the - - - the legal
8 argument that the - - - that the defense is making,
9 that we look at what the consequences of that would
10 be, and - - -

11 JUDGE PIGOTT: All right. But if we do
12 that, can you tell me why you can do it for a murder
13 and you won't do it for a serious assault?

14 MR. KAEUPER: Well, I think there are - - -
15 there are probably a number of considerations. First
16 of all, you - - - you simply can't, at this point,
17 record every police interaction with everyone on a
18 petty larceny and so forth.

19 JUDGE PIGOTT: No, no, you keep doing that.
20 Let me pull you back a little bit. You've got a - -
21 - you've got a murder and you say, we have to record
22 this, right? Police protocol.

23 MR. KAEUPER: Okay.

24 JUDGE PIGOTT: Right, now you've got a guy
25 over here who's got some felony that you say we don't

1 have to do it. What's your policy reason for saying
2 this guy is going to get - - - is going to get
3 videotaped, and this guy, we're going to write it
4 down, summarize it, and have him sign it?

5 MR. KAEUPER: I think it has to do with - -
6 - with practicalities of resources - - -

7 JUDGE PIGOTT: Money?

8 MR. KAEUPER: Money is one - - - one
9 element of that. But there are also other - - -
10 other issues with this. I mean, you have to - - -
11 you have to then store all that material.

12 JUDGE PIGOTT: Oh - - -

13 MR. KAEUPER: You have to have procedures
14 for - - - you have, who has access to it?

15 JUDGE PIGOTT: If I have - - - if I - - -
16 if somebody puts up the money for the garage, can you
17 put this tape someplace? It's - - -

18 MR. KAEUPER: I mean, I think it's - - -

19 JUDGE PIGOTT: You can't say store it. I
20 mean, you - - - you store your records on appeal. So
21 do we.

22 MR. KAEUPER: I - - - I think - - - I think
23 if - - - if money and - - - and, you know, training
24 and staffing and so forth, were - - - if none of
25 those things were issues, I think we would have - - -

1 we would have legislation today already. The
2 legislature was - - -

3 JUDGE PIGOTT: I know, but I - - - I - - -
4 the reason I asked you that, you - - - money, I get.
5 All right, so then I would ask you how much is it
6 going to cost. But you're saying - - - and then
7 storage. All right. If - - - if you got - - - if
8 you got storage taken care and somehow we found the
9 money, or this legislature found the money, is there
10 any other reason why?

11 MR. KAEUPER: I'm just say - - - I think
12 there are - - - there are complicated issues about
13 how this - - - you're generating lots of - - - of
14 data in lots of circumstances.

15 JUDGE PIGOTT: Well, how's Massachusetts
16 handling it?

17 MR. KAEUPER: I - - - I beg your pardon,
18 but I can't answer about Mass - - --

19 CHIEF JUDGE LIPPMAN: I think isn't it a
20 general consensus today and that's why so many of the
21 - - - and this is the last question and then we'll go
22 to the rebuttal - - - isn't the general consensus
23 today that it doesn't cost very much because of the
24 modern advances in equipment, and that's one of the
25 reasons why it has become relatively not uncommon for

1 - - - for these kinds of interrogations to be
2 videotaped, because it's not a big deal today. I
3 mean, the question is - - - and we get it, what
4 you're saying - - - how fast you move to, you know,
5 that place when maybe all interrogations would be
6 videotaped, but it is - - - it is not that big a deal
7 today, right?

8 MR. KAEUPER: It - - - it's becoming much
9 less of a big deal, and that's one of the reasons
10 that this is moving forward, and I think that's a
11 good reason to allow the legislature to set the
12 appropriate parameters for it, and that would not
13 raise these problems of - - -

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 MR. KAEUPER: Thank you.

16 CHIEF JUDGE LIPPMAN: Thanks so much.

17 MS. SOMES: Just three quick things.

18 CHIEF JUDGE LIPPMAN: Counsel, we're moving
19 in that direction, clearly.

20 MS. SOMES: Yes.

21 CHIEF JUDGE LIPPMAN: The police get it.
22 The prosecutors get it. The defense gets it. This
23 is something that makes sense in - - - and again, in
24 terms of this concept of justice. So the question
25 is, I guess I come to back to the first thing I asked

1 you, is should we be saying - - - yeah, such a - - -
2 in a way, a severe way of - - - of inducing this kind
3 of videotaping all over the place, should we be
4 saying in a case, as a matter of law, that if you
5 don't do it, there's an adverse inference. Is - - -
6 is that the way we should be going or is it more a
7 policy issue, and the trend of it is all very clear.
8 I think all partners in the justice system gets it.
9 What - - - why go the route and - - - and I
10 understand your arguments for it - - - why go that
11 route instead of letting - - - letting it evolve?

12 MS. SOMES: Because the co - - - the human
13 costs of wrongful convictions is too high. And while
14 we wait for the legislature to - - - to act, if maybe
15 they will someday, who knows, and who knows what
16 it'll look like, in the meantime we know that there
17 will be more convictions - - -

18 JUDGE PIGOTT: Well, there are bills in the
19 legislature and the assembly and in the senate, one
20 by Senator Nozzolio of Rochester right now.

21 MS. SOMES: Yes.

22 THE COURT: Have you - - - have you looked
23 at these?

24 MS. SOMES: I have - - - a long time ago I
25 did. I thought these - - -

1 JUDGE PIGOTT: Assuming they were passed,
2 would you satisfy your views - - -

3 MS. SOMES: No.

4 JUDGE PIGOTT: - - - with respect to this?

5 MS. SOMES: No, because there's no sanction
6 for not recording and we would then ask for the
7 adverse inference.

8 CHIEF JUDGE LIPPMAN: So - - - so you're -
9 - -

10 JUDGE STEIN: Why can't - - - why can't you
11 rely on the discretion, then, of the judge, to ask -
12 - - if - - - if - - - if we didn't say that it was
13 required as a matter of law, but simply that the
14 court can give that instruction in a particular case
15 if it seems warranted by the facts and circumstances
16 of that case, why can't we rely on the judge's good
17 discretion and - - - and - - -

18 MS. SOMES: Because it doesn't solve the
19 problem. It doesn't mitigate against the harm of a
20 defendant - - -

21 JUDGE STEIN: No, no, the discretion to
22 grant the adverse inference, that's what I'm saying.

23 MS. SOMES: Because this court has always
24 held when an adverse inference is required, that it's
25 not the discretion of the court. In People v. Handy

1 - - -

2 CHIEF JUDGE LIPPMAN: So - - - and you
3 know, this is the issue that is being dealt with in
4 terms of the legislation in that, what's the
5 consequence? Certainly one of the things that the
6 justice task force and you know, everybody who's
7 looking at the legislation is dealing with, but, let
8 me just in a nutshell - - - I think I get where
9 you're coming from - - - in a nutshell, your argument
10 is that if there's one person who gets wrongfully
11 convicted because of the lack of - - - of videotaping
12 or recording of it, it's one too many.

13 MS. SOMES: That's a very, very high cost,
14 yes.

15 JUDGE PIGOTT: But before you leave, though
16 - - -

17 CHIEF JUDGE LIPPMAN: Yes, Judge Pigott?

18 JUDGE PIGOTT: Rochester's a pretty
19 sophisticated town. I mean, it's good sized and - -
20 - but what do you do in Orleans County or Lewis
21 County or some of the smaller rural counties?

22 MS. SOMES: It seems to me that the - - -
23 it is so easy and so ubiquitous to do it now that
24 there's no reason that they should not have recording
25 equipment there. As you said, you know, there's all

1 sorts of different varieties of recording equipment.

2 CHIEF JUDGE LIPPMAN: Let me just - - - I'm
3 going to close it, but a point of information, that's
4 exactly the argument that - - - that is being made in
5 the smaller places around the state, as you know,
6 along the lines that Judge Pigott is raising, that
7 gee, it's easy to do it in the big metropolitan
8 centers, and in some ways, it depends how you look
9 it, maybe it's easier to do - - -

10 JUDGE PIGOTT: Yeah.

11 CHIEF JUDGE LIPPMAN: - - - in the - - - in
12 the more rural areas, but that is the argument that's
13 being made by police chiefs, you know, in places
14 around the state, that, gee, hard to do in the very
15 rural environment. I'm not asking you to give an
16 answer. I'm just saying informationally, that's some
17 of the debate that's going on about it.

18 MS. SOMES: And we know that funding has
19 been supplied.

20 CHIEF JUDGE LIPPMAN: Yeah.

21 MS. SOMES: Thank you.

22 CHIEF JUDGE LIPPMAN: Okay, counsel.

23 Thank you both, appreciate it.

24 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Everett M. Durant, No. 166, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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