

Bill,

Per email, attached is a draft of the EC we have prepared concerning recording custodial interviews. Please let me know if you have any comments. We are shooting to get this out on Thursday.

Valerie

Row - but this came
 sorry but this came
 in which was not.
 Will you give it a
 read? In particular,
 I want to make
 sure it does nothing
 to preclude the
 DAs authority to
 initiate a PICT
 in AZ or elsewhere
 if he decides
 to do so.

Post-It® Fax Note		7671	Date	3/14/06	# of pages	7
To	Bill Mercer		From	Valerie Caproni		
Co./Dept.			Co.	OCIC		
Phone #			Phone #			
Fax #	202-514-9368		Fax #	324-5366		

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 3/17/2006

To: All Field Offices
All HQ Divisions

All Legats

Attn: ADIC, SAC, and CDC
AD
FBIHQ, Manuals Desk
Legal Attache

From: Office of the General Counsel
Investigative Law Unit
Contact: Jung-Won Choi (202)324-9625

Approved By: Caproni Valerie E
Lammert Elaine *NLM*
Larson David C *DCL/ELN*

Drafted By: Choi Jung-Won

Case ID #: 66F-HQ-1283488-3
66F-HQ-C1384970

Title: ELECTRONIC RECORDING OF CONFESSIONS AND WITNESS INTERVIEWS

Synopsis: To reaffirm existing FBI policy on electronic recording of confessions and witness interviews and to provide guidance on some of the factors that the SAC should consider before granting exceptions.

Administrative: This document is a privileged FBI attorney communication and may not be disseminated outside the FBI without OGC approval. Also, to read the footnotes in this document, it may be required to download and print the document in WordPerfect.

Details: FBI policy on electronic recording of confessions and witness interviews is contained in a SAC Memorandum 22-99, dated 10 August 1999, which revised SAC Memorandum 22-98, dated 24 July 1998. Under the current policy, agents may not electronically record confessions or interviews, openly or surreptitiously, unless authorized by the SAC or his or her designee. See MIOG, Part II, Section 10-10.10(2). Consultation with an attorney (AUSA, CDC, or OGC) may be appropriate in certain circumstances, but it is not required.¹

¹ If the recording is going to be surreptitious, SACs are urged to obtain the concurrence of the CDC or the appropriate OGC attorney. In addition, in accordance with the Attorney General's "Procedura for Lawful, Warrantless Monitoring of Verbal Communication," dated May 30, 2002, advice that the proposed surreptitious recording is both legal and appropriate must

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Re: 66F-HQ-1283488-3, 3/17/2006

In certain special circumstances (set forth in the above guidance),² FBIHQ concurrence is required.

In recent years, there has been an on-going debate in the criminal justice community on whether to make electronic recording of custodial interrogations mandatory. According to a study published in 2004 by a former U.S. Attorney,³ 238 law enforcement agencies in 37 states and the District of Columbia electronically record some or all custodial interviews of suspects. In four of those jurisdictions, electronic recording is mandated by law - by legislation in Illinois and the District of Columbia and by case law opinions issued by the state supreme courts of Alaska and Minnesota. In addition, it is the practice in some foreign countries--such as Great Britain and Australia--to record all interviews of suspects.

There is no federal law that requires federal agents to electronically record custodial interviews and, to our knowledge, no federal law enforcement agency currently mandates this practice. There have been isolated incidents in which federal district court judges, as well as some United States Attorneys Offices, have urged the FBI to revise its current policy to require recording all custodial interviews, or at least those involving selected serious offenses. In addition, agents testifying to statements made by criminal defendants have increasingly faced intense cross-examination concerning this policy in apparent efforts to cast doubt upon the voluntariness of statements in the absence of recordings or the accuracy of the testimony regarding the content of the statement. Furthermore, in some task force cases that result in state prosecution, FBI state or local partners have been precluded from using FBI agent testimony of the defendant's confession because of restrictive state law or policy.

Against this backdrop, FBI executive management has reviewed the current policy. After a careful deliberation of

be obtained from the USA, AUSA or DOJ attorney responsible for the investigation.

² These circumstances include, among other things, extensive media scrutiny, difficult legal issues, complex operational concerns, or significant involvement by FBIHQ.

³ Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, Northwestern University School of Law, Center on Wrongful Convictions, Number 1, Summer 2004.

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all the available options, the Director has opted to retain the current policy in its entirety but has tasked the General Counsel to issue guidance on the factors that the SAC or his or her designee should consider before granting exceptions.

Before listing those factors, a brief review of the sound reasons behind the FBI policy on electronic recording of confessions and interviews is in order. First, the presence of recording equipment may interfere with and undermine the successful rapport-building interviewing technique which the FBI practices.⁴ Second, FBI agents have successfully testified to custodial defendants' statements for generations with only occasional, and rarely successful, challenges. Third, as all experienced investigators and prosecutors know, perfectly lawful and acceptable interviewing techniques do not always come across in recorded fashion to lay persons as a proper means of obtaining information from defendants. Initial resistance may be interpreted as involuntariness and misleading a defendant as to the quality of the evidence against him may appear to be unfair deceit. Finally, there are 56 field offices and over 400 resident agencies in the FBI. A requirement to record all custodial interviews throughout the agency would not only involve massive logistic and transcription support but would also create unnecessary obstacles to the admissibility of lawfully obtained statements, which through inadvertence or circumstances beyond control of the interviewing agents, could not be recorded.

So we want to hide the truth? Don't want jury to react its own judgment?

Notwithstanding these reasons for not mandating recording, it is recognized that there are many situations in which recording a subject's interview would be prudent. For this reason, it has been FBI policy for nearly eight years to grant an SAC the authority and flexibility to permit recording if he or she deems it advisable. Often, during the time this policy has been in effect, SAC discretion has been viewed negatively; i.e., as an "exception" to the "no recording" policy, instead of positively; i.e., as a case-by-case opportunity to use this technique where and when it will further the investigation and the subsequent prosecution. Supervisors are encouraged to seek permission to record, and SACs are encouraged to grant it, whenever it is determined that these objectives will be met.

⁴ In theory, surreptitious recording would not affect this approach. However, if recording became routine practice, it would not take long before that practice became well known--especially among members of organized crime.

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When deciding whether to exercise this discretion, SACs are encouraged to consider the following factors:

1) Whether the purpose of the interview is to gather evidence for prosecution, or intelligence for analysis, or both;

2) If prosecution is anticipated, the type and seriousness of the crime; including, in particular, whether the crime has a mental element (such as knowledge or intent to defraud), proof of which would be considerably aided by the defendant's admissions in his own words;

3) Whether the defendant's own words and appearance (in video recordings) would help rebut any doubt about the voluntariness of his confession raised by his age, mental state, educational level, or understanding of the English language; or is otherwise expected to be an issue at trial, such as to rebut an insanity defense; or may be of value to behavioral analysts;

4) The sufficiency of other available evidence to prove the charge beyond a reasonable doubt;

5) The preference of the United States Attorney's Office and the Federal District Court regarding recorded confessions;

6) Local laws and practice--particularly in task force investigations where state prosecution is possible;

7) Whether interviews with other subjects in the same or related cases have been electronically recorded;

8) The potential to use the subject as a cooperating witness and the value of using his own words to elicit his cooperation;

9) Practical considerations--such as the expected length of the interview, the availability of recording equipment, and transcription, and, if necessary, translation services, and the time and resources ~~required~~ to obtain them.

available

These factors should not be viewed as a checklist and are not intended to limit the SAC's discretion. It is recognized, however, that an SAC may want to impose reasonable standards on the type of cases, crimes, circumstances, and subjects for which recording will be authorized so as to maintain internal field office consistency. This office is

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prepared to assist in the preparation of such standards if desired.

Field office standards are to be encouraged for another very important reason in addition to internal guidelines for field office supervisors. The absence of any standard by which field office discretion in this matter is exercised will render testifying agents vulnerable to attack on cross-examination. If, on the other hand, an agent can point to identifiable standards that provide a reasonable explanation for why some interviews are recorded and others are not, the implication that the agent chose not to record an interview to mask the involuntary nature of the defendant's admissions will be much harder to argue.⁵

In order to assist agents who testify to unrecorded admissions, an explanation of this policy and the reasons behind it should be added to field office quarterly legal training. Questions may be directed to Assistant General Counsel Jung-Won Choi, at the Office of the General Counsel, Investigative Law Unit, at 202-324-9625.

⁵ It may be even easier to withstand cross-examination if a fixed policy as to when to record and when not to record were established at FBI Headquarters that permits no field office or agent discretion. Yet, such an advantage would be far off set by the loss of flexibility that field office SACs and supervisors need to make sound investigative decisions such as the choice of interviewing techniques.

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LEAD(s):

Set Lead 1: (Action)

ALL RECEIVING OFFICES

Disseminate to all personnel. The CDC of each field office should be the principal point of contact for this EC and should provide a briefing to the agents in his or her office consistent with this EC.

◆◆

- 1 - Ms. Caproni
- 1 - Mr. Kelley
- 1 - Ms. Gulyassy
- 1 - Ms. Thomas
- 1 - Ms. Lammert
- 1 - Mr. Larson
- 1 - Mr. Choi
- 2 - ILU

Notes on proposed metrics

Good start in terms of tracking what can easily be tracked, and getting collaborative input from affected agencies

- 1) proposes to track convictions, pleas, etc
 - need to figure out length of sentence and decision to plea down, too, since that's one of his primary complaints
- 2) Need to figure out way to measure "law enforcement" costs other than actual convictions
 - for example, drug defendant may fully confess to his involvement, but may not provide information about supplier
 - that is a "cost" to law enforcement, even if this drug dealer is convicted
- 3) Some costs include:
 - how many people chose not to confess bc of recording equipment
 - how many negotiate what they will talk about if they are recorded (ie., I will tell you about myself, but not about my supplier)
 - creation of Jencks if that person ends up being a cooperator (i.e., how much did the cross examination with transcript end up hurting the witness on the stand)
 - when did violations of policy end up leading to suppression
 - when did violations of policy end up playing into jury's decision to acquit where otherwise may not have
 - \$ costs of transcription/recording (this is easy to track)
- 4) Agency comparisons
 - would suggest agency to agency comparison, bc each agency different policies on recording
 - ie., the "control" group of FBI agents is going to do something very different than the "control" group of ATF agents
- 5) FBI squads need to be doing essentially the same type of work so that we know that it is not the type of case – but recording itself – that is making the difference

→ why not try it w/ just FBI Indian
Country cases?
→ would definitely excuse MSMS
- pers pref to excuse DEA

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

*Tempas
Rybicki*

DATE OF DOCUMENT: 03/08/2006 **WORKFLOW ID:** 970765
DATE RECEIVED: 03/15/2006 **DUE DATE:** 03/30/2006

FROM: The Honorable Paul K. Charlton
U.S. Attorney, District of Arizona
40 North Central Avenue, Suite 1200
Phoenix, AZ 85004

TO: Acting DAG (cc indicated for ODAG Mercer & Elston)

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Requesting that the Acting DAG allow the District of Arizona to go forward with a pilot program that would, where reasonable, require agents to record confessions. Attaches a letter to all Special Agents in Charge in the District of Arizona that sets out the general rule for the recording of confessions, either overtly or covertly at the discretion of the interviewing agency. Encloses several FBI cases where because of the FBI's failure to tape confessions, jurors acquit or prosecutors must plead down cases, that would otherwise be won, or result in more severe sentences had the FBI recorded the confessions.

DATE ASSIGNED
03/16/2006

ACTION COMPONENT & ACTION REQUESTED
Executive Office of United States Attorneys
Prepare response for DAG signature.

INFO COMPONENT: ODAG, FBI

COMMENTS:

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

710165

U. S. Department of Justice



RECEIVED
OFFICE OF THE ATTORNEY GENERAL

United States
District of

276 MAR 15 PM 4 29
EXHIBIT 1

2 Renaissance S
40 North Centre
Phoenix, Arizona

PLEASE
~~PDF~~
PDF these
materials
(all except
1st page).
Make 2
separate
document for
each document

M

Honorable Paul J. McNulty
Acting Deputy Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. McNulty:

RON

I write to ask that you allow the District of Arizona to that would, where reasonable, require agents to record confessions. I attach to this request my letter to all Special Agents in Charge in the District of Arizona which provides my reasoning for this policy. (Exhibit 1). That letter sets out the general rule for the recording of confessions, either overtly or covertly at the discretion of the interviewing agency, and clarifies that the rule does not apply where recording would be unreasonable.

For reasons outlined in my letter to the SACs, I feel strongly that we must have such a policy in place. In this letter, I wish to emphasize one additional reason in support of this policy. Furthermore, while my proposed policy is directed at all federal agencies, it is the FBI which has the only nationwide policy that I am aware of which discourages agents from taping confessions. I will, therefore, focus most of this letter on issues dealing with the FBI.

As you know, in this District, the U.S. Attorney has sole jurisdiction for prosecuting major crimes in Indian country. In Arizona we have 21 Indian reservations to whom we owe a trust obligation to provide a fair system of justice. The FBI is the lead agency on most of those reservations. FBI agents are bright, well trained individuals and we are, to a man and woman, grateful for their dedication and hard work. But, because of the FBI's failure to tape confessions, jurors acquit or we must plead down cases, that would otherwise be won, or result in more severe sentences had the FBI recorded the confessions.

I provide the following cases for you as examples with the AUSAs' supporting memoranda attached as exhibits. In February 2005 a jury acquitted John Yellowman, who ordered the execution of a Jesus Lopez-Rocha, a Native American, at FCI Phoenix. Yellowman confessed to an FBI agent. Consistent with FBI policy, the agent did not record the interview. In a post trial conversation with the jury, jurors informed the prosecutor that they were unwilling to convict Yellowman based on a confession that was not recorded. (Exhibit 2).

On September 15, 2005, a grand jury indicted Jimmie Neztosie, a Navajo, with Kidnaping, Assault with Intent to Commit Murder, Assault with a Dangerous Weapon, and Assault Resulting in Serious Bodily Injury. The charges arose out of Neztosie's assault on his live-in girlfriend, Ida Webster, that sent Ms. Webster to the intensive care unit. In an interview that lasted approximately two hours, Neztosie confessed to severely beating and choking Ms. Webster. The guidelines, if convicted at trial, were 135 to 168 months. Ms. Webster, as often happens, subsequently refused to cooperate with law enforcement. That left the confession as our primary piece of evidence in support of the prosecution. Consistent with FBI policy, the confession was not taped, and the two hour confession was reduced to a one and a half page report written by the FBI agent. The AUSA was forced to plead the case to a reduced charge which lowered the guideline range to 63 to 78 months. (Exhibit 3).

On March 2, 2006, a jury acquitted Roger Harrison of Aggravated Sexual Abuse of a Minor (digital penetration). Harrison had been accused of molesting the five year old child of his girlfriend on the Navajo Reservation. The FBI agent who interviewed Harrison obtained a statement in which Harrison admitted that his thumb may have "accidentally" penetrated the child's vagina. Consistent with FBI policy, the admission was not taped. The AUSA prosecuting the case states that she has been prosecuting sex abuse cases since 1987 and that in her experience, "one of the most important developments in winning these cases was law enforcement's taping of the defendant's statements." Here the AUSA concluded that, "While I cannot say a taped statement would have guaranteed a conviction, I firmly believe it would have been a factor in our favor when the jury began deliberations. When you have a sex abuse case where the credibility of the victim and the defendant is such a key element, especially when there is no physical evidence (most cases), the jury should hear the admissions and confessions in the defendant's own words, rather than the agents." (Exhibit 4).

I note, as well, that we do not seem to be the only District challenged by the FBI's policy, and attach a news article reflecting an acquittal of an investment banker in a Philadelphia trial. The jurors there are reported to have said the acquittal was based, in part, on the FBI's failure to tape the defendant's statement. (Exhibit 5).

Finally, I ask that you consider one other aspect of the FBI policy that has created the appearance of a disparate system of justice in our state. Police agencies in the State of Arizona, from the smallest town to the largest city tape confessions. Thus, a murder or rape committed in Phoenix, and investigated by the Phoenix Police Department will include a video taped confession where the defendant has made a statement. On the other hand, a case involving a confessed murderer or rapist on Navajo, the nation's largest reservation, will only have a summarized report written by an FBI agent. This juxtaposition of policies can lead to the conclusion that both Native American defendants and victims are denied a quality of justice that those off of the reservation routinely receive.

I am grateful to you for your commitment to move on this issue expeditiously. For, as long as the current policy remains on place, we risk additional acquittals, or greatly reduced sentences.

Thank you again for your consideration of this request. Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Paul K. Charlton", with a large, sweeping flourish above the name.

PAUL K. CHARLTON
United States Attorney
District of Arizona

cc:

Bill Mercer
Principle Associate Deputy Attorney General
Office of the Deputy Attorney General

Michael Elston
Chief of Staff to the Deputy Attorney General
Office of the Attorney General

DAG000001538

Exhibit 1



U. S. Department of Justice

*United States Attorney
District of Arizona*

*2 Renaissance Square
40 North Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408*

*(602) 514-7500
FAX (602) 514-7670*

February 9, 2006

Michael Nicley, Chief
Bureau of Customs & Border Protection
1970 West Ajo Way
Tucson, AZ 85713

Dear Mr. Nicley:

Beginning March 1, 2006, the Arizona U.S. Attorney's Office will follow a new policy—the "Recording Policy." With limited exceptions this Recording Policy shall require the recording of an investigative target's statements, and will be in effect for all cases submitted to the Arizona U.S. Attorney's Office. In brief, the Recording Policy: (i) sets out a general rule for the recording of an investigative target's statement either overtly or covertly at the discretion of the interviewing agency, (ii) clarifies that the rule does not apply where taping would be unreasonable; and (iii) defines "investigative target". This policy will make all of us more effective in holding those who commit crimes accountable, and it is that belief that spawned this policy. The complete Recording Policy is appended to this letter.

Before turning to the details of the Recording Policy, I want to stress that every effort was made to craft the policy with utmost regard for legitimate concerns against recording custodial interrogations. First, it often is said that it is not practical to record a custodial statement in a fast-breaking case where arrests are happening in the field, or that there might be a variety of reasons for not recording where a probable cause arrest leads to a decision to immediately cooperate. Mindful of those concerns, the Recording Policy does not adopt a rule that all custodial statements at all times in all circumstances must be recorded, and does adopt an express exception precisely to cover situations where obtaining a taped statement would not be practical. Second, some believe that taping a statement can inhibit some individuals from talking. However, there is no hard and fast rule under the Recording Policy

DAG000001540

that all statements in every circumstance must be overtly recorded. Additionally, covert recordings are legal and acceptable.*

While there might be reasonable concerns about any recording policy, no one can reasonably dispute that there are sound reasons in favor of a taping policy. Here then is a summary of the reasons that I considered in the implementation of the Recording Policy:

1. Evidentiary Value. A recorded statement is the best evidence as to what was said. As such, the Recording Policy eliminates the many baseless, but facially plausible, arguments we face from defense counsel that can be made only because there was no recording.

2. Facilitation of Admissibility. We spend countless hours in extensive hearings arguing with defense counsel over admissibility of a defendant's statement. The Recording Policy will reduce this time-consuming litigation. Without a tape recording to rebut accusations of improper conduct, defense counsel frequently argues that the defendant's mental health or intoxication at the time of the interview make his statement inadmissible. Defense counsel also allege that a defendant was unable to understand the *Miranda* warnings or the exact nature of the questions due to language barriers. The courts have consistently noted that these issues would rarely exist if the government taped the confession. I agree.

3. Jury Impact. A defendant's admission regarding his own criminal conduct is often the single most powerful piece of evidence in a case. We have received negative feedback from jurors regarding the failure of agents to tape confessions. Jurors today are inundated with technology. They get much of their information from television and the internet. They know that electronic devices can be tiny, effective and cheap. Much of the evidence they now see in court has been digitized and is presented to them on flat screen monitors in the jury box. As a result, they question why they are asked to take the word of an agent that a defendant admitted criminal responsibility, when a defendant's statement could have been recorded using a low tech tape recorder.

4. Enhancing Law Enforcement. While I have confidence in the credibility of agents who testify about what occurred during an unrecorded confession, we are not the judge who decides whether to admit the confession, nor are we the trial jury assessing whether to convict. We must take steps to enhance our ability to obtain convictions. The recording policy will help law enforcement in a number of critical areas. Agents would no longer be subjected to cross examinations about abusive interview tactics. Agents would

* The possible dampening effect of overt recordings has been addressed by the 300-plus law enforcement agencies that do record statements. The results of a formal 1998 study by the International Association of the Chiefs of Police have not found that recording custodial interrogations impacts a suspect's willingness to talk.

conduct more effective interviews because they would not have to worry about taking copious notes. Instead, agents could focus all of their attention on the defendant, the defendant's demeanor and the substance of the answers. Agents would have an opportunity to review the statement interviews later in detail to explore new leads and to identify inconsistencies that might have been overlooked initially. The public's confidence in law enforcement would increase as courts and the public could hear and see for themselves that officers have nothing to hide.

The Recording Policy strives to take account of all these reasons and concerns. Indeed, having given due regard to the common concerns and reasons for tape recording, implementing the Recording Policy becomes all the more compelling.

We are grateful for the hard work and effort that you and your agents do to combat crime in the District of Arizona. By implementing this policy we will be better able to ensure that the U.S. Attorney's Office holds the individuals who commit those crimes accountable. Thank you for your cooperation in this effort.

Yours,



PAUL K. CHARLTON
United States Attorney
District of Arizona

The Recording Policy

Rule: Cases submitted to the United States Attorney's Office for the District of Arizona for prosecution in which an investigative target's statement has been taken, shall include a recording, by either audio or audio and video, of that statement. The recording may take place either surreptitiously or overtly at the discretion of the interviewing agency. The recording shall cover the entirety of the interview to include the advice of Miranda warnings, and any subsequent questioning.

Exception: Where a taped statement cannot reasonably be obtained the Recording Policy shall not apply. The reasonableness of any unrecorded statement shall be determined by the AUSA reviewing the case with the written concurrence of his or her supervisor.

Definition: Investigative target shall mean any individual interviewed by a law enforcement officer who has reasonable suspicion to believe that the subject of the interview has committed a crime. A witness who is being prepared for testimony is not an investigative target.

Exhibit 2



Memorandum

To: Paul K. Charlton, United States Attorney
From: Kurt M. Altman, AUSA
Subject: United States v. Jesse Moore, et. al. CR03-00764-PHX-JAT
Date: November 21, 2005

This memo is intended to provide background information on the above referenced case and trial results influenced by the lack of a tape recorded confession from John Yellowman.

Indictment:

On July 22, 2003, Jesse Moore, Joseph Fuentes, Henri H. Markov, John Yellowman, Keith Thomas, Mark Case, Nicholas Pablo, and Stephanie Thomas, were indicted in a two count indictment for (1) First degree murder, and (2) Conspiracy to commit first degree murder.

Facts:

On May 9, 2001, victim Jesus Lopez-Rocha was murdered near the handball courts and track on the FCI Phoenix yard. He was murdered by being stabbed one time in the chest with a prison made shank. The murder was orchestrated by Joseph Fuentes and is sidekick Henri Markov, both 9th Street gangsters from the Phoenix area. Both Fuentes and Markov were at FCI Phoenix as part of the disruption of the Fuentes Drug Organization. The victim, Lopez-Rocha, was also a minor player in the Fuentes organization and arrived at FCI Phoenix last. Sources (able to testify) indicate that Joseph Fuentes believed Lopez-Rocha was a snitch and was the reason he and his organization were in prison. According to sources, from the time he arrived at FCI Phoenix, Fuentes was obsessed with retaliating against Lopez-Rocha.

In order to complete the plan to hurt or kill the victim, Fuentes and Markov had to coordinate with the Native American prison population because Lopez-Rocha was Native American, otherwise a race war would ensue in the prison. Fuentes and Markov met numerous times with the Native Americans in order to ensure Lopez-Rocha would be killed. According to a source, initially the Native American were simply going to have Lopez-Rocha "rolled up" or check himself into the SHU for his protection. Fuentes then is reported to have offered heroin to the Native Americans for his murder.

The involvement of each defendant in the conspiracy that lead to Lopez-Rocha's murder is as follows:

1. **Joseph Fuentes:** Initiated the plan to kill the victim in retaliation for his perceived disloyalty. Arranged and attended meetings with the Native American "Shot Caller" to solicit Native American involvement in the murder.
2. **Henri Markov:** Attended meetings with Native Americans to arrange for the murder. Obtained, copied and distributed paperwork (believed to be PSI of victim) around the FCI Phoenix yard to

show the Native Americans that Lopez-Rocha was a "snitch" and deserved to be hit.

3. **John Yellowman:** Native American "Shot Caller" who made the final decision to have victim killed. Yellowman tells the FBI that it was his final decision to make, he picked who from the Natives would do the murder, he trained the actual killer on how to do it, and he made the shank that was used.
4. **Keith Thomas:** Leader of the Natives at FCI Phoenix from the Salt River Reservation. (A step down from Yellowman) He was integral in picking the participants and planning the murder. He was transferred out of FCI Phoenix prior to the murder but would write letters to his wife with instructions to inmates still at Phoenix, which she in turn would re-write or "piggyback" into FCI Phoenix as letters from her to defendant Nicholas Pablo.
5. **Stephanie Thomas:** Sent instructions from Keith Thomas from outside the prison to Nicholas Pablo inside the prison. She admit knowing the letters meant someone would get hurt but claims no knowledge of who or how badly.
6. **Nicholas Pablo:** Received instructions from Keith Thomas, through Stephanie, inside FCI Phoenix. Pablo is also purported to have knowledge of the place and time of attack. He is also purported to have been on the yard at the time of attack, with his own shank, to act as a back up in case the attack went bad. He was caught ripping up letters from Stephanie Thomas and trying to flush them immediately after the murder.
7. **Mark Case:** Source indicates he had knowledge of attack and was on the yard as another backup like Pablo. Other evidence linking him to murder is weak.
8. **Jesse Moore:** Moore is identified by a source as the actual murderer. This is confirmed by Yellowman's statement.

Trial:

Defendant's Fuentes, Moore, Yellowman and Pablo were eventually tried beginning November 30, 2005. Trial ended approximately the second week of February, 2005, with the convictions of Fuentes, Pablo, and Moore. Each was sentenced to life imprisonment and each is currently pending appeal. Yellowman was acquitted at trial. The primary evidence against Yellowman was a confession given to the FBI. This confession was not recorded electronically although it was conducted within the prison where recording devices were available. There was little to no other evidence against Yellowman. The FBI was attacked by the defense on their policy not to tape interviews. It was somewhat effectively attacked by using other FBI policies that are public and showing how they are not always followed. Although many of those policies used to attack the agent were policies not designed for criminal investigations, the defense effectively showed that FBI policy is not always followed in other areas and the answer "it's FBI policy not to tape record," is not sufficient when it comes to a first degree murder investigation where the death penalty is a possibility.

Memo to Paul K. Charlton

March 3, 2006

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In a post trial conversation with the jury the attorneys were told by jurors that without any other evidence to connect Yellowman with the crime they were unwilling to convict based on a confession that was not recorded. Had it been recorded , the jury felt they would have been better able to assess the credibility of the confession by body language and demeanor of Yellowman had it be video taped, or at the very least listened to the actual words and reactions of the defendant had it only been audio recorded. In my professional opinion, I believe the verdict would have been different had the confession been audio and video recorded.

cc: Joseph Welty

DAG000001547

Exhibit 3



Memorandum

To: Paul Charlton
From: Kimberly M. Hare
Subject: USA v. Jimmie Neztosie, CR-05-934-PCT-FJM
Date: March 3, 2006

CHARGES:

On September 15, 2005, a federal grand jury returned a four count indictment charging the defendant with Kidnapping, Assault with Intent to Commit Murder, Assault with a Dangerous Weapon, and Assault Resulting in Serious Bodily Injury.

If convicted of all counts at trial, the probable guideline range would be 135-168 months.

FACTS:

In the early morning hours of August 22, 2005, Ida Webster was found on the porch in front of a small travel trailer by Jimmie Neztosie's sister in law, Carol Neztosie. Webster was only wearing a bra and her pants and panties were down to her ankles. Carol observed Webster's face and neck were purple in color, an impression around her neck that appeared to come from a rope, a bump and scrape under her left eye, blood around her mouth, scrapes on her elbow and a lot of dried blood. Carol covered Webster with a blanket and took her inside the trailer. Navajo Police responded to the residence around 7:39 a.m. EMTs on the scene said Webster was breathing and had several bruises to her face.

Jimmie Neztosie, Webster's live-in boyfriend, was also at the home. He told police that he found Webster hanging from a metal pole in a shed near the residence at about 5:15am. He said that he brought her down and dragged her to the travel trailer. Neztosie did not answer when asked why he took so long to report the incident. Neztosie appeared intoxicated and was arrested on the tribal charge of Criminal Nuisance. He was booked into the Tuba City Detention Center.

Webster was taken to Flagstaff Medical Center where she was placed in the Intensive Care Unit and placed on a ventilator. She had injuries to her neck, a left temporal abrasion, numerous bruises to her arms and legs and a cut to the back of her right knee.

Webster was interviewed. She stated that the last thing she remembered was drinking with Jimmie Neztosie and her friends, Stanley Neztosie and Theresa Walker. She remembered Stanley and Theresa leaving and did not remember anything after that. Webster said she attempted suicide eight years ago by taking aspirin, but has not contemplated suicide since that time. Webster is living back with Neztosie's family and is uncooperative with the investigation. After she was released from the hospital, she refused to let SA Karceski take photos of her injuries and she did not want to speak with him.

Theresa Walker, one of the individuals Webster and Neztosie were drinking with that evening, told investigators Webster said "I want to hang myself."

Later that afternoon, Jimmie Neztosie was interviewed by the FBI Agent and Navajo Nation Criminal Investigators. He initially told them that he found Webster around 4:00am in the shack hanging from a rope. He said she was being supported by a rope around her neck which was secured to a ceiling beam in the shack. Neztosie claimed he took her down from the rope, wrapped her in a blanket and took her inside. When confronted with discrepancies in his story, Neztosie changed it. He told the Agent and Investigators that he and Webster got into an argument because he believed Webster had been cheating on him. The argument became heated and he punched Webster in the face with his fists about ten times. He then got on top of Webster and began to choke her with his right hand. He stated that she tried to free herself but eventually went limp and passed out. He said he then got off of her and kicked her in the rib area approximately 3 times. He told the officers that he wanted to make it look like a suicide so he dragged her to the shack, put a rope around her neck and hung her for approximately ten minutes. He then removed the rope and carried her into the trailer wrapped in a blanket. He did not call for help.

PLEA OFFER:

We are offering a plea to Assault with Intent to Commit Murder which will likely result in a guideline range of 63-78 months. The reason for the plea offer is because the case rests almost entirely on the unrecorded statement of the defendant.

The victim has attempted suicide in the past and a witness she was with the evening of the incident says the victim said "I want to hang myself." The evidence contradicting suicide is the prior incident of abuse, the victim's state of undress, the defendant's delay in calling the police and the defendant's statement.

At trial the defendant will likely say the victim's clothing came off when he was dragging her back to the trailer and that he did not call the police because he was intoxicated and did not want to get into trouble. Our best evidence is his statement.

The statement was not recorded. The interview lasted about two hours and was documented in a 1 1/2 page 302. The agent did not take notes during the interview, but rather, had the CI take notes. The interview was conducted in English, but the investigators did not ask the defendant if he spoke English. He appeared to answer appropriately, but was halting in his responses. The defendant now claims to need a Navajo interpreter. I also recently learned that a Navajo speaking CI came in part way through the interview and spoke with the defendant in Navajo. The defendant apparently told that CI the same information he told the Agent, but the fact there was an exchange in Navajo is not documented in any report. The defendant was also not asked if he was under the influence of any substances.

These facts leave the Agent and Investigators vulnerable to cross-examination. An audio and/or video recording of the statement would allow the jury to hear from the defendant's own mouth what he did to Ida Webster. The jury would be able to hear and see that the agents did not put words in the defendant's mouth, that the defendant understood English and that he was not intoxicated. They would also know exactly what happened during that entire two hours of the interview, rather than being forced to rely on a 1 1/2 page summary of that interview.

In addition, the interview was conducted at the Tuba City Detention Center. This facility could be

Memo to Paul Charlton
March 3, 2006
Page - 3

wired with audio and video equipment to allow surreptitious recording of the interviews.

Lastly, I discussed all of these issues with the Agent and CIs. They are all in favor of recording interviews, but are limited by FBI policy.

DAG000001551

Exhibit 4



Memorandum

To: Paul Charlton, Pat Schneider, Joe Welty
From: Dyanne C. Greer
Subject: Acquittal in U.S. v. Roger Harrison
Date: March 6, 2006

As you know, I tried this case last week in Prescott and the defendant was acquitted after a 2 day trial and 4 1/2 hours of deliberation. The defendant was charged with Aggravated Sexual Abuse of a Minor (digital penetration of a five year old, although it was charged as touching of the vaginal area, not through the clothing, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of the defendant). There were several issues in the case, but I believe that had the defendant's statement (an admission, not a confession) been taped, we would have had a better shot at a conviction.

The defendant had gone to junior high with the victim's mother and in February of 2005 they met again at Basha's. They dated for a few weeks, and at the end of February, she had him come home with her for two days. The second day the mother and the defendant left in the evening to go to the laundromat. While they were gone, the 5 year old victim went upstairs, jumped on her 18 year old sister's bed and said "ouch". The sister asked her what was wrong, and the victim was reluctant to say, but eventually told her that Roger had put his finger inside of her. Angry, the sister sent her to bed and waited for Mom and the defendant to come home. When they did, around 11:30 p.m., she told her mother, got mad at the defendant and hit him; he denied the accusation, saying the victim was lying and left the house. Police were called, and the officer spoke to Mom and the 18 year old, but not the victim (which was good) The next day the child was taken to the doctor and the child disclosed fondling. The doctor found her to have a normal exam. During the exam, the doctor learned that the child had made a previous accusation that an uncle had poked her in the privates with a screwdriver (when she was 3). The doctor notified social services, who FAXed the report to the F.B.I. The case was apparently not assigned for a few weeks, and SA Sherry Rice made arrangements for a forensic examination at Safechild in Flagstaff once she was assigned the case. That interview took place on March 29, 2005. During that interview the child reluctantly disclosed digital penetration, saying the defendant put his finger up under her pants and underpants. He also said Don't tell. All of this had to be obtained with leading questions, as the child did not respond to open ended questions, and even then her responses were one and two words.

SA Rice attempted to locate the defendant, and finally went to his home to interview him on May 5, 2005. She was accompanied by a Navajo police officer. The interview took place at a picnic table outside and lasted about an hour. The defendant denied initially, and blamed this 18 year old, who he said bribed the victim to say what she said. SA Rice confronted him, asking if it could have been an accident. He then stated that the victim had been crawling over his shoulders and began to fall. He tried to catch her and his thumb accidentally went under her pants and underpants and penetrated her vagina. SA Rice considered that statement a confession (I don't) and didn't confront him further, ending the interview. Her notes became an issue in the case because the 302 contained quotes, while she failed to put quotes around the defendant's words in her notes when he made the admissions, although she had earlier used quotes around some of his statements.

Neither SA Rice nor the initial officer went to the scene (the initial officer remained outside), and the clothing worn by the victim were never collected. Additionally, the mother continued to have intimate relations with the defendant after the incident.

At trial during opening statement, we found out that the victim's grandfather and uncles had been at the home the evening Mom and defendant went to the laundromat, and that one of the uncles was a convicted sex offender. The doctor testified that the normal exam was consistent with the history of fondling and could be consistent with digital penetration. The victim was very reluctant to testify, and initially disclosed over the clothes fondling (despite intensive pretrial prep and review of her previous statement), which didn't help me. I was able to get her to disclose penetration but only by very leading questions and the use of a teddy bear, as she was unable to say what he did to her. She did identify Roger as the perpetrator. The victim's mother testified about her ongoing relationship and also testified that her older daughter had promised the victim Burger King if she told her what was wrong when the victim made the initial disclosure, although the 18 year old said this did not happen. This, of course, hurt because it matched what the defendant said. SA Rice testified about the investigation and was asked about not taping. She indicated it was FBI policy, but did agree that there is an exception if SAC approval is obtained, which she did not do. She told me that because the interview was outside the tape would not have worked, but I pointed out she could have done the interview in her vehicle (which many agents do if there is no other private place to conduct the interview). She disagreed with that, saying her vehicle is caged. I also pointed out that she didn't even attempt to get approval during the two months she was trying to reach the defendant. She also did not have the defendant write out a statement, but testified she thought about it but didn't do it. (In my opinion, a written statement is not as helpful as the tape: it is too easy to argue that the agent fed the words to the defendant).

The jury asked for transcripts of the victim and SA Rice, which tells me they were determining the credibility of the victim and the reliability of the defendant's untaped statement. Of course, they did not get these, being told to rely on their memory. The jury did not speak to me after the verdict (again, as is always the case in Prescott, at least in my cases).

I have been prosecuting sex abuse cases since 1987, and over the years I have taught law enforcement techniques to enhance the probability of conviction. As you know, I have also done forensic interviews of sexually abused children in my past career as a pediatric social worker and have testified at trials about such interviews. In my experience, one of the most important developments in winning these cases was law enforcement's taping of the defendant's statement. Defense attorneys will not attack a small child directly, especially if the case is the victim's statement vs. the defendant's. Instead, they will attack the law enforcement officer claiming that they put words in the defendant's mouth or skewed their report. The defense's ability to do so was severely hampered once statements were taped. They could no longer argue that the defendant was led into making the statement (and if he was, we knew it from the outset of the case and could judge if we could proceed). The defendant's words and phrasing often helped convict him, and juries could see the defendant's justifications and denials and judge his credibility. In this case, the admission (actually an excuse) negated the specific intent necessary for conviction, but if the jury had heard the defendant's words, they could conceivably have determined how ludicrous the excuse really was, which is more difficult when the agent is testifying to what she heard (especially when quotes were omitted). Of course, we do not know if that was the reason for the acquittal, or if the victim's initial testimony of over the clothes fondling, the presence of a convicted sex offender or Mom's continuing to have contact with the

Memo to Paul Charlton, Pat Schneider, Joe Welty

March 7, 2006

Page - 3

defendant played a role.

While I cannot say a taped statement would have guaranteed a conviction, I firmly believe it would have been a factor in our favor when the jury began deliberations. When you have a sex abuse case where credibility of the victim and the defendant is such a key element, especially when there is no physical evidence (most cases), the jury should hear admissions and confessions in the defendant's own words, rather than the agent's.

Please let me know if you need more information.

DAG000001555

Exhibit 5

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FBI policy against taping interviews key in acquittal

Federal jury in Philadelphia said lack of recordings was key to their decision

Sunday, February 06, 2005

By David B. Caruso, The Associated Press

PHILADELPHIA — The FBI loves using bugs and wiretaps to listen in on crime suspects, but its skittishness about recording its own interrogations may have cost it a case.

A federal jury acquitted an investment banker this week of charges that he lied to FBI agents during an interview, in part, jurors said, because the only record of the bond trader's allegedly false statements were the scribbles of an agent with bad handwriting.

During the trial, the agent explained that the FBI, as a matter of policy, bars agents from taping their interviews with witnesses and suspects.

After the verdict, several jurors said they couldn't understand why.

"We wouldn't have been here if they had a tape recorder at that meeting," said jury foreman Harvey Grossman, an electrician.

"We didn't know with certainty exactly what was asked," said juror Patty Acri, a pharmacist. "My advice to the FBI would be to tape their interviews."

The lack of a recording seemed especially glaring because of the nature of the case.

The defendant, Denis Carlson, was one of a number of Philadelphia businessmen questioned by the FBI after he was overheard speaking on a wiretapped phone with Ronald A. White, a lawyer and Democratic fund-raiser who allegedly was trying to buy influence with city officials.

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As part of the probe, agents tapped City Hall telephones, bugged White's office and phones for nine months, and eventually installed a listening device in the office of Philadelphia Mayor John F. Street.

Carlson was charged on the grounds that he made statements to two FBI agents that seemed to contradict things he said on the phone to White and others.

The case against him was largely based on recordings of those secretly intercepted calls.

FBI spokeswoman Jerri Williams defended the bureau's decision not to tape interviews.

The bureau's theory, she said, is that subjects in criminal cases tend to clam up when they know their words are being recorded, either because of nervousness or because they are afraid of being caught in a lie. They also get reluctant to change their stories, which can be a problem if they started with a lie.

"We feel that it could be very chilling, very intimidating," Williams said. "Sometimes, it's a journey for people to get to the truth. We have to work our way in a very gentle, friendly way to get there."

The question -- to tape or not to tape -- has been an issue for a variety of law enforcement agencies.

In 1998, the forewoman of a federal jury called FBI agents "arrogant" for failing to use a tape recorder during a 9 1/2-hour interview with Oklahoma City bombing defendant Terry Nichols. The lack of a recording was one of the factors that left the jury undecided over whether Nichols should get a death sentence.

Civil rights groups have pressured police to videotape interviews routinely so that judges and juries can see interrogation tactics firsthand and don't have to rely on an officer's recollections.

Illinois recently enacted a law requiring officers to tape all interrogations of murder suspects in response to concerns that some had been coerced into confessing to crimes they did not commit.

Places that mandate taping generally require it only when someone is under arrest, not when officers are still in the field, as FBI agents were when they interviewed Carlson.

Williams said requiring thousands of agents to carry pocket recorders with them on assignments would be impractical.

For his part, Carlson said he was glad to be exonerated, and, after a week of listening to himself talk on wiretapped phone lines, wasn't anxious for



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another chance to hear his voice on tape.

"I don't think I ever want to hear a phone ring again," he said.

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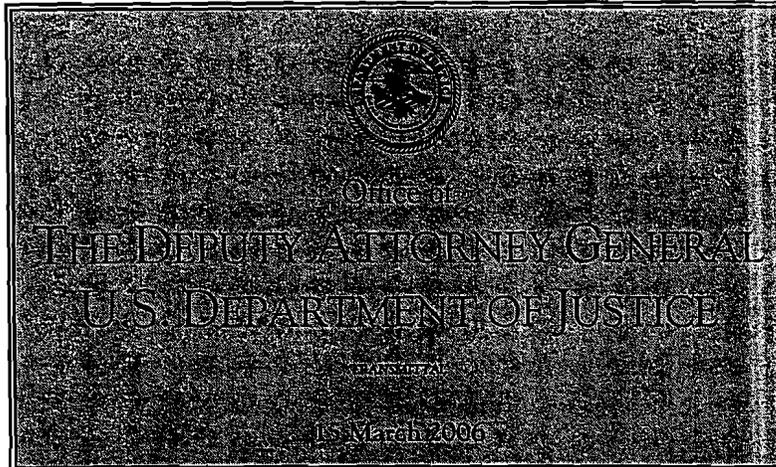
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Start file
"Videotaped
Confessions"



TO:

WILLIAM W. MERCER
Principal Associate
Deputy Attorney General

Bill: Comments per your request. I think this has a very thoughtful articulation of some reasons to go for a blanket policy of taping and some reasons not to. It reaffirms policy of the FBI to seek SAC approval before taping - - and has a useful set of factors to consider in making the case-by-case decision.

It is a mixed bag for the DAG because: (1) it acknowledges the pressures to tape (providing logic for a pilot) but then says (2) other considerations are more weighty and so we'll leave it to case-by-case (this conclusion somewhat undermines a pilot - - why do a pilot if FBI is correct in announcing the overall balance weighs against taping all statements).

On balance, I'd let it go out because it will perhaps improve things in the short-run while we do a pilot. It only really screws things up if we anticipate, in the short term, demanding an "all tape, all the time" DOJ-wide policy, which strikes me as unlikely.

FROM:

Ronald J. Tenpas
Associate Deputy Attorney General

Room 4216 RFK
202-514-3286

DAG000001560

Department Of Justice
Deputy Attorney General
Control Sheet

Date Of Document: 03/08/06
Date Received: 03/23/06
Due Date: 05/08/06

Control No.: 060323-5858
ID No.: 431815

From: CHARLTON, THE HONORABLE PAUL K., U.S. ATTORNEY,
DISTRICT OF ARIZONA, PHOENIX, AZ 85004

To: DAG

Subject:

REQUESTING THAT THE ACTING DAG ALLOW THE DISTRICT OF ARIZONA TO GO FORWARD WITH A PILOT PROGRAM THAT WOULD, WHERE REASONABLE, REQUIRE AGENTS TO RECORD CONFESSIONS. ATTACHES A LETTER TO ALL SPECIAL AGENTS IN CHARGE IN THE DISTRICT OF ARIZONA THAT SETS OUT THE GENERAL RULE FOR THE RECORDING OF CONFESSIONS, EITHER OVERTLY OR COVERTLY AT THE DISCRETION OF THE INTERVIEWING AGENCY. ENCLOSURES SEVERAL FBI CASES WHERE BECAUSE OF THE FBI'S FAILURE TO TAPE CONFESSIONS, JURORS ACQUIT OR PROSECUTORS MUST PLEAD DOWN CASES, THAT WOULD OTHERWISE BE WON, OR RESULT IN MORE SEVERE SENTENCES HAD THE FBI RECORDED THE CONFESSIONS.

Executive Reviewer; Elston, Michael

Due: 03/23/06

Instructions:

Action/Information:

Signature Level: DAG PAUL J. MCNULTY

From: Elston, Michael Assign: 03/23/06 Due: NON To: Tenpas, Ronald

Mercer would like you to be responsible for evaluating/vetting this proposal.

Exec. Sec. ID: 970765

File Comments:

DAG000001561

Department Of Justice
Deputy Attorney General
Control Sheet

Date Of Document: 03/08/06
Date Received: 03/23/06
Due Date: 04/06/06

Control No.: 060323-5858
ID No.: 431815

From: CHARLTON, THE HONORABLE PAUL K., U.S. ATTORNEY,
DISTRICT OF ARIZONA, PHOENIX, AZ 85004

To: DAG

Subject:

REQUESTING THAT THE ACTING DAG ALLOW THE DISTRICT OF ARIZONA TO GO FORWARD WITH A PILOT PROGRAM THAT WOULD, WHERE REASONABLE, REQUIRE AGENTS TO RECORD CONFESSIONS. ATTACHES A LETTER TO ALL SPECIAL AGENTS IN CHARGE IN THE DISTRICT OF ARIZONA THAT SETS OUT THE GENERAL RULE FOR THE RECORDING OF CONFESSIONS, EITHER OVERTLY OR COVERTLY AT THE DISCRETION OF THE INTERVIEWING AGENCY. ENCLOSURES SEVERAL FBI CASES WHERE BECAUSE OF THE FBI'S FAILURE TO TAPE CONFESSIONS, JURORS ACQUIT OR PROSECUTORS MUST PLEAD DOWN CASES, THAT WOULD OTHERWISE BE WON, OR RESULT IN MORE SEVERE SENTENCES HAD THE FBI RECORDED THE CONFESSIONS.

Executive Reviewer; Elston, Michael

Due: 03/23/06

Instructions:

Action/Information:

Signature Level: DAG PAUL J. MCNULTY

Monica: Pls ask Exec Sec to change due date to 5/6/06 - this requires a lot of inter-departmental discussion.

Exec. Sec. ID: 970765

File Comments:

To Ron Tempas: Monica would like you to be responsible for evaluating/vetting this proposal.

Elston 23 March 06



Washington, DC 20530

June 20, 2006

MEMORANDUM

TO: William Mercer
Principal Associate Deputy Attorney General
Office of the Deputy Attorney General

FROM: Mythili Raman *not MR*
Senior Counsel to the Deputy Attorney General
Office of the Deputy Attorney General

SUBJECT: District of Arizona request to implement recording of confessions.

On March 8, 2006, Paul Charlton, United States Attorney for the District of Arizona, requested the Department's permission to institute a pilot program that would require federal investigative agencies in the District of Arizona to record confessions except in instances where a recording cannot be "reasonably obtained." As noted below, the investigative agencies that have been asked for their input on this proposal – FBI, DEA, ATF and USMS – are unanimously opposed to the implementation of a recording policy, while the Criminal Chiefs Working Group strongly favors the pilot program. For the reasons stated below, I recommend that the Department disapprove the request for the pilot program.

I. The USAO's Proposal to Implement a Pilot Program**A. The "Recording Policy"**

The recording policy proposed by the U.S. Attorney's Office for the District of Arizona provides as follows:

Cases submitted to the United States Attorney's Office for the District of Arizona for prosecution in which an investigative target's statement has been taken, *shall* include a recording, by either audio or audio and video, of that statement. The recording may take place either surreptitiously or overtly at the discretion of the interviewing agency. The recording *shall* cover the entirety of the interview to include the advice of Miranda warnings, and any subsequent questioning.... *Where a taped statement cannot reasonably be obtained the Recording Policy shall not apply.* The reasonableness of any unrecorded statement shall be determined by

the AUSA reviewing the case with the written concurrence of his or her supervisor.

(emphasis added). An "investigative target" is defined by the USAO as "any individual interviewed by a law enforcement officer who has reasonable suspicion to believe that the subject of the interview has committed a crime."

Despite the mandatory language of the policy, Paul Charlton, in a letter to the investigative agencies in Arizona, emphasized that the policy "does not adopt a rule that all custodial statements at all times in all circumstances must be recorded, and does adopt an express exception precisely to cover situations where obtaining a taped statement would not be practical." Furthermore, he emphasized that "there is no hard and fast rule under the Recording Policy that all statements in every circumstance must be overtly recorded." He did not, however, identify any specific examples of what he viewed to be acceptable exceptions to the policy.

B. The USAO's Stated Reasons for Implementing the Pilot Program

In requesting that the Department permit the pilot program to go forward in the District of Arizona, USA Charlton has thoughtfully articulated a number of factors favoring such a policy. Among other things, he argues that (1) a recorded statement is the best evidence of what was said; (2) recordings would facilitate the admission of any statements and would save the government time-consuming pretrial litigation; (3) recorded statements have a powerful impact on juries and are particularly important given that jurors are well aware that electronic devices can be small, effective and cheap; (4) recording confessions would enhance the government's ability to obtain convictions and would ensure that agents not be subject to unfair attack; (5) recording confessions would relieve agents of the need to take notes, thereby allowing them to conduct more effective interviews; (6) recording statements would allow agents to review the taped statements to look for additional clues and leads, and (7) recording would raise the public's confidence in law enforcement. He additionally notes that the U.S. Attorney has sole jurisdiction for prosecuting major crimes in Indian country, and because local police agencies in Arizona routinely tape confessions, the failure of the FBI to record confessions – which, in his view, resulted in acquittals or less than desirable pleas in at least three different cases prosecuted by his office – has created an unfair disparity between the way that crime is treated in the Native American community and all other communities in Arizona.

II. Opposition to Proposed Recording Policy by Investigative Agencies

With the exception of the Criminal Chiefs Working Group, which expressed a strong sentiment that there should be wider, if not regular, use of recording equipment to document confessions and certain witness interviews, all other agencies whose input was sought uniformly oppose the proposed recording policy. (The Criminal Chiefs Working Group did not articulate any reasons for its position beyond those stated by Paul Charlton and did not suggest any substantive changes to the Arizona policy.) Although some of the investigative agencies'

criticisms are focused on Arizona's particular proposal, most of the criticisms concern the implementation of *any* one-size-fits-all recording policy.

A. FBI

Under the FBI's current policy, agents may not electronically record confessions or interviews, openly or surreptitiously, unless authorized by the Special Agent in Charge ("SAC"). In reaffirming that policy in a memorandum issued to all field offices on March 23, 2006, the FBI argued that (1) the presence of recording equipment might interfere with and undermine a successful "rapport-building interviewing technique"; (2) FBI agents have faced only occasional, and rarely successful, challenges to their testimony; (3) "perfectly lawful and acceptable interviewing techniques do not always come across in recorded fashion to lay persons as a proper means of obtaining information from defendants"; (4) the need for logistical and transcription support would be overwhelming if all FBI offices were required to record most confessions and statements; and (5) a mandatory recording policy would create obstacles to the admissibility of lawfully obtained statements which, through inadvertence or circumstances beyond the control of the interviewing agents, could not be recorded. Despite the presumption in the FBI policy that most confessions are not to be recorded, the policy also expressly anticipates that recording can be useful in some situations, and accordingly gives each SAC the authority to permit recording if she or he deems it advisable.

The FBI opposes Arizona's proposed recording policy, primarily because the existing FBI policy, in its view, already gives SACs flexibility to authorize the recording of statements, as evidenced by the FBI Phoenix Division's internal policy of recording interviews of child sex victims and by its decision in many cases (including in Indian country cases), to record statements of targets or defendants. The FBI, in opposing the recording policy, also takes issue with Paul Charlton's description of three failed prosecutions that the USAO attributes to the FBI's failure to record a confession; in each of those three instances, the FBI points out several other factors that, in its view, contributed to the unfavorable results. More significantly, the FBI contends that the vast majority of Indian country cases, even those in which confessions were not recorded, have resulted in convictions.

B. DEA

The DEA's current policy permits, but does not require, the recording of defendant interviews. In voicing its strong opposition to the proposed pilot program, the DEA describes that the proposal is neither necessary nor practical. Among other things, the DEA notes that there is no history or pattern of the DEA's recording policy resulting in acquittals or the suppression of defendants' statements. Additionally, the DEA notes that given the number of multi-district investigations that it and other agencies conduct, the adoption of a mandatory recording policy by one district would make it extremely difficult for agents operating in other divisions to conduct multi-district investigations that involve that district. Moreover, the DEA, like the FBI, avers that a violation of the USAO recording policy could very well lead to suppression or acquittals in

cases in which a confession was not recorded, even where the confession was otherwise obtained lawfully. The DEA additionally notes that, at the very least, the failure of an agent to follow the recording policy would be admissible in civil litigation and could adversely affect agencies' ability to invoke the discretionary function exception in cases brought under the Federal Tort Claims Act.

Additionally, the DEA has expressed specific concerns about the particular policy proposed by the USAO in Arizona. First, the DEA notes that the recording policy, which anticipates the recording of statements of all "investigative targets," is overbroad, as the recording requirement would be triggered during even routine interdiction or other *Terry* stops. Additionally, the DEA notes that because the USAO's policy provides no guidance as to what constitutes a "reasonable" reason for not recording a statement, AUSAs and their supervisors might engage in after-the-fact second-guessing of decisions made by the agents, which may result in disputes between the agencies and USAO and "AUSA shopping." Additionally, the DEA avers that the proposed Arizona policy would allow the USAO to decline to prosecute an otherwise meritorious case simply because a recording was not made, rather than considering all the facts and circumstances in the case (including *all* admissible evidence), in deciding whether to accept a case for prosecution.

C. ATF

The ATF's current policy does not require electronic recording, but instead leaves the decision about whether to record to the discretion of the individual case agent. In making that decision, the case agent may confer with supervisors and the relevant USAO.

In voicing its opposition to Arizona's proposed pilot program, the ATF states that the Department should not promulgate a one-size-fits all approach to interrogation. Among other things, the ATF has expressed concern that (1) a suspect may "play" to the camera or be less candid; (2) utilizing "covert" recordings would not eliminate the problem of a suspect "playing" to the camera or withholding information, because the fact that an agency is covertly recording confessions would become public after the first trial at which such a recording is played; (3) juries may find otherwise proper interrogation techniques unsettling; (4) suspects may confess while being transported to a place where an interrogation is to take place; (5) mandatory recording raises a host of logistical questions, including questions about retention/storage of recordings and what to do in the event of an equipment malfunction; (6) the costs of supporting such a pilot program, including purchasing recording equipment and securing transcription services, would be enormous; (7) the mandatory language of the Arizona proposal leaves no discretion to agents on the field; and (8) the recording policy would hamper task force investigations where federal charges are brought in jurisdictions in which local law enforcement officers do not electronically record confessions. In sum, ATF argues that any benefits that may result from recording confessions would come at the expense of limiting the flexibility of agents to make the decision about whether to record a confession in any particular situation.

D. USMS

The USMS does not currently require taping of confessions and, indeed, the USMS notes that it does not normally solicit confessions to accomplish its mission of tracking and capturing fugitives. The USMS's opposition to a recording policy is based primarily on the impracticality of taping in carrying out its mission. Among other things, the USMS notes that because it conducts most of its interviews in the field, rather than in a controlled environment, recording is generally impractical. Additionally, the USMS notes that even when a defendant does confess to a crime while in USMS custody, that confession is usually spontaneous and not in response to any question posed by a USMS officer, and is usually made in vehicles or other remote locations where recording is not available.

III. Recommendation

I have set forth below factors that weigh in favor of and against instituting the specific pilot program proposed by the USAO in Arizona. On balance, I recommend against implementing the pilot program, as I believe that the potential costs, as outlined below, outweigh the potential benefits. For purposes of this analysis, I have not assumed that recording confessions necessarily is a presumptively wise or presumptively unwise law enforcement technique, given that experienced investigators and prosecutors have widely divergent views on that issue.

The following factors weigh in favor of permitting the USAO to institute a pilot program that would require the recording of confessions:

- 1) As noted in more detail by Paul Charlton, it is possible that at least some classes of prosecutions will be benefitted as a result of a mandatory recording policy, for example, child molestation cases in which the victim is often not cooperative or too afraid to testify. Accordingly, a pilot program, like the one proposed by the USAO, would allow the district to make immediate changes that could instantly strengthen at least some of its prosecutions. Additionally, and related, for the numerous reasons set forth in the USAO's submission to the Department, law enforcement as a whole could very well benefit from a policy that mandates recording of confessions.
- 2) The FBI's current policy creates a presumption that recording confessions is an unwise law enforcement technique. The FBI's decision to vest the discretion in the SAC to create "exceptions" to its policy, moreover, makes it difficult for any agent (or even the agent's immediate supervisor) to exercise his or her discretion to record a confession in any particular case or circumstance in which a recording may be warranted. Accordingly, although the FBI argues that it allows its agents the flexibility to record confessions, the practical effect of allowing only the SAC to grant an exception to its policy is the creation of a heavy presumption against taping.

- 3) Unless a pilot program is initiated, the District of Arizona will not be able to develop any real experience with the possible benefits of recording confessions, particularly given the presumption in the FBI's current policy that confessions should not be recorded.

The following factors weigh against permitting the USAO in the District of Arizona to institute its proposed pilot program. In my view, these factors far outweigh those favoring the pilot policy:

- 1) The problems identified by Paul Charlton in formulating his recording policy – such as the inadequacy of agents' reports documenting confessions – do not appear to be widespread, and isolated acquittals in the District of Arizona should not lead the Department to institute a pilot program that could hamper multi-district investigations and task force investigations. Absent evidence that many or most cases involving unrecorded confessions result in acquittals, there is simply an insufficient basis to impose any particular practice on investigative agents in any particular district.¹
- 2) As noted by many of the investigative agencies, mandating the recording of confessions could have a harmful effect on law enforcement, such as causing some defendants who may have been inclined to confess if they were not recorded, to decide not to confess once confronted with a recording device.
- 3) No federal agency currently prohibits agents from recording a statement, despite variances in their approaches to how and by whom the decision to record a confession can be made. Accordingly, the need for the USAO's proposed policy is unclear.
- 4) As noted by some of the agencies, the implementation of a pilot program would likely disrupt multi-district investigations that involve the district that is selected to implement the program. Additionally, if the local law enforcement authorities in that district do not mandate recording of confessions, task force investigations, too, could be disrupted.
- 5) A new USAO policy that mandates recording of confessions could *de facto* become a new basis on which judges suppress statements – a high cost given the uncertainty of the potential benefits.
- 6) The USAO has not indicated what measures of success it will use in evaluating the pilot program. In my view, measuring the success of such a program by, for

¹ The USAO's proposed policy does not appear to be limited to the Department and would presumably apply to investigative agencies such as ICE and USPIS.

example, evaluating the number of acquittals, convictions, guilty pleas or lengths of sentences, would not be helpful because, as seen by the competing views of the FBI and USAO in the District of Arizona, reasonable people can disagree as to the factors that lead to any particular result in a case. Similarly, it would be difficult, if not impossible, to definitively track some of the potential costs of imposing the recording policy, such as whether a particular defendant declined to give a confession *because* the agents used recording equipment. Additionally, the problem of usefully extrapolating the experience of one district to another district is amplified by the fact that, as noted by the FBI, there are numerous variables involved in how and where to institute such a pilot program, including whether the district selected for the program should be one in which the local and state agencies record interrogations; whether the district selected for the program should be large or small; whether two offices should be selected so that one can operate as a "control"; whether the selected district should be one in which there are many prosecutions under the Assimilated Crimes Act; whether all target interviews should be recorded or only those involving certain serious felonies; and whether the recordings should be surreptitious or overt.

IV. Summary

For the reasons discussed in my description of the factors weighing against the pilot program, I recommend that the Department not approve the USAO's request to initiate a pilot program, as I believe that the potential costs far outweigh the potential benefits. If the Department, after further evaluating the USAO's proposal, is inclined to authorize the pilot program, I would recommend that the Department, at the very least, require the USAO in Arizona to provide the Department with a proposal of the measures by which the success of the pilot program will be assessed.

cc: Michael Elston
Ronald Tenpas

Raman, Mythili (ODAG)

From: Mercer, Bill (ODAG)
Sent: Tuesday, June 27, 2006 4:05 PM
To: Raman, Mythili (ODAG)
Subject: Fw: Arizona Pilot Program

Attachments: tmp.htm

- suggest FBI cases

Let's discuss.

Sent from my BlackBerry Wireless Handheld

How ops. used: gav

-----Original Message-----
From: Charlton, Paul (USAAZ)
To: Mercer, Bill (ODAG)
Sent: Sun Jun 25 20:54:40 2006
Subject: RE: Arizona Pilot Program

Bill:



tmp.htm (5 KB)

one of their complaints is pleading down cases to less than desirable sentences

I propose the following for evaluating the success of the pilot project. We would track plea and conviction rates of cases in which the in-custody statements or admissions have or have not been taped for a period of one year. Instead of tracking all cases, I would focus on one more manageable set of cases. I would ask the FBI, which has several violent crime squads covering Indian reservations, to divide those squads. There are a number of ways to divide those squads; by reservation, by numbers, by geographical area. How exactly that division is done would be worked out by me and the SAC. One portion of the squads would tape all confessions pursuant to my policy, and the other would follow current FBI policy. After one year we should have enough cases to determine whether taped confessions and statements result in better guilty pleas, more convictions, and a savings in resources than cases in which the statements and confessions are not taped. I would seek a similar arrangement with other Justice agencies, focusing on a finite set of cases by agreement with their SAC's.

*① FBI only?
② other age?
squads
① - same type of work?
→ squads?*

During the period of the study, a coordinating group consisting of a representative from my office and representatives from the agencies participating in the pilot would meet periodically to iron out any problems and establish uniform procedures. We would also ask the district judges to let our AUSAs poll trial juries after a verdict in cases in which a confession has been introduced whether it would have made a difference if the confession had (or had not) been taped.

*Measure
Costs - how many people
- about confessions
- minimize what about...
in shop
cases*

At the end of the pilot study, we will distribute a simple questionnaire for AUSAs and agents soliciting their comments and anecdotal impressions regarding taping. We will then present a compilation of the questionnaires, along with the statistical data, to agency SACs for their comments. Perhaps by then a consensus will have developed about the utility of taping confessions. If not, then a majority/minority report could be submitted to the DAG.

*Other agencies
but have same policies
same FBI
no more
resistor*

Hope this helps. Thanks for your guidance on this. Any thoughts you have would be appreciated.

Paul

if want to test policy then need compare

DAG000001590

From: Mercer, Bill (ODAG)
Sent: Thursday, June 22, 2006 8:34 AM
To: Charlton, Paul (USAAZ)
Subject: Re: Arizona Pilot Program

One argument made in opposition is that there isn't any evaluation plan. Argument goes along the lines of "pilots are designed as a way to learn whether something works, should be exported, what the plusses and minuses were, etc.". Can you get a supplemental piece on how you'd go about evaluating the lessons learned, including getting the input of all key stakeholders at the end of the project period?

Sent from my BlackBerry Wireless Handheld

-----Original Message-----

From: Charlton, Paul (USAAZ)
To: Mercer, Bill (ODAG); Mercer, Bill (USAMT)
Sent: Mon Jun 19 12:30:50 2006
Subject: Arizona Pilot Program

Bill,

I understand that you are going back home in two weeks. I'm guessing that you're looking forward to that. Ron tells me that all the responses are in on the Pilot Program request and they have argued against the project. Bill, I hope that I can count on your support for this project. As I've said before, this is a good thing and one we can be proud of having tried to accomplish. Let me know if you'd like to talk about this anytime.

Paul

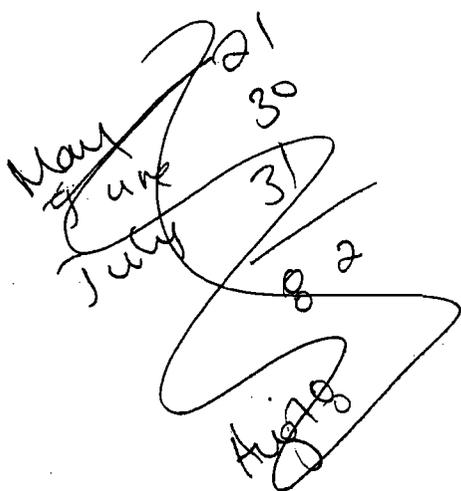
① Measurements

- would also track length of sentence since one of his complaints was plea-ing down cases so that we don't get good sentences.

①

Measuring Costs

- how many people don't confess
- how many people negotiate what they will talk about
 - ie, in div context, will someone be willing to say I bought a kilo, but not tell about Supplier



- ~~its~~ creation of Tenders - how much did X examination hurt
- \$ Costs of transcription - recording equipment
- suppression - ie, where does policy factor into suppression
 - acquittals bc of violations of records

②

Other agencies - probably need to compare agency to each agency already has different policies

=

③ FBI

- division of squads - need to make sure squads do the same work

Set this up as a
Memo from you to
Bill Mercer

On March 8, 2006, Paul Charlton, United States Attorney for the District of Arizona, requested the Department's permission to institute a pilot program that would require federal investigative agencies in the District of Arizona to record confessions except where a recording cannot be "reasonably obtained." As noted below, the investigative agencies that have been asked for their input on this proposal – FBI, DEA, ATF and USMS – are unanimously opposed to the implementation of a recording policy, while the Criminal Chiefs Working Group strongly favors the pilot program. Because the practicality and wisdom of recording confessions varies widely in every investigation, I recommend against instituting a pilot program that would create a presumption that confessions should be recorded.

Need
to distinguish

Whether recording
is good from
whether to do
pilot

I. The USAO's Proposal to Implement a Pilot Program

A. The "Recording Policy"

The recording policy proposed by the U.S. Attorney's Office for the District of Arizona provides as follows:

Cases submitted to the United States Attorney's Office for the District of Arizona for prosecution in which an investigative target's statement has been taken, *shall* include a recording, by either audio or audio and video, of that statement. The recording may take place either surreptitiously or overtly at the discretion of the interviewing agency. The recording *shall* cover the entirety of the interview to include the advice of Miranda warnings, and any subsequent questioning.... *Where a taped statement cannot reasonably be obtained the Recording Policy shall not apply.* The reasonableness of any unrecorded statement shall be determined by the AUSA reviewing the case with the written concurrence of his or her supervisor.

(emphasis added). An "investigative target" is defined by the USAO as "any individual interviewed by a law enforcement officer who has reasonable suspicion to believe that the subject of the interview has committed a crime."

acceptable

Despite the mandatory language of the policy, Paul Charlton, in a letter to the investigative agencies in Arizona, emphasized that the policy "does not adopt a rule that all custodial statements at all times in all circumstances must be recorded, and does adopt an express exception precisely to cover situations where obtaining a taped statement would not be practical." Furthermore, he emphasized that "there is no hard and fast rule under the Recording Policy that all statements in every circumstance must be overtly recorded." He did not, however, identify any specific examples of what he viewed to be exceptions to the policy.

B. The USAO's Stated Reasons for Implementing the Pilot Program

In requesting that the pilot program be permitted to go forward in the District of Arizona, USA Charlton has thoughtfully articulated a number of factors favoring such a policy, including that (1) a recorded statement is the best evidence of what was said; (2) recordings would facilitate the

admission of any statements and would save the government time-consuming pretrial litigation; (3) recorded statements have a powerful impact on juries and are particularly important given that jurors are well aware that electronic devices can be tiny, effective and cheap; and (4) recording confessions would enhance the government's ability to obtain convictions, would ensure that agents not be subject to unfair attack, would relieve agents of the need to take notes, thereby allowing them to conduct more effective interviews, would allow agents to review the taped statements to look for additional clues and leads, and would raise the public's confidence in law enforcement. He additionally noted that the U.S. Attorney has sole jurisdiction for prosecuting major crimes in Indian country, and because local police agencies in Arizona routinely tape confessions, the failure of the FBI to record confessions – which, in his view, resulted in acquittals or less than desirable pleas in at least three different cases prosecuted by his office – have created an unfair disparity between the way that crime is treated in the Native American community and all other communities in Arizona.

these seem like more than a single "point 4"

II. Opposition to Proposed Recording Policy by Investigative Agencies

With the exception of the Criminal Chiefs Working Group, which expressed a strong sentiment that there should be wider, if not regular, use of recording equipment to document confessions and certain witness interviews, all other agencies whose input was sought uniformly oppose the proposed recording policy. (The Criminal Chiefs Working Group did not articulate any reasons for its position beyond the reasons stated by Paul Charlton and did not suggest any substantive changes to the Arizona policy.) Although some of the investigative agencies' criticisms and concerns are focused on Arizona's particular proposal, most of the criticisms concern the implementation of *any* one-size-fits-all recording policy.

A. FBI

Under the FBI's current policy, agents may not electronically record confessions or interviews, openly or surreptitiously, unless authorized by the Special Agent in Charge ("SAC"). In reaffirming that policy in a memorandum issued to all field offices on March 23, 2006, the FBI argued that (1) the presence of recording equipment might interfere with and undermine a successful "rapport-building interviewing technique"; (2) FBI agents have faced only occasional, and rarely successful, challenges to their testimony; (3) "perfectly lawful and acceptable interviewing techniques do not always come across in recorded fashion to lay persons as a proper means of obtaining information from defendants"; (4) the need for logistical and transcription support would be overwhelming if all FBI offices were required to record most confessions and statements; and (5) a mandatory recording policy would create obstacles to the admissibility of lawfully obtained statements which, through inadvertence or circumstances beyond the control of the interviewing agents, could not be recorded. Despite the presumption in the FBI policy that most confessions are not to be recorded, the policy also expressly anticipates that recording would be prudent in some situations, and accordingly gives each SAC the authority and flexibility to permit recording if she or he deems it advisable.

The FBI opposes Arizona's proposed recording policy, primarily because the existing FBI policy, in its view, already gives SACs flexibility to authorize the recording of statements, as evidenced by the FBI Phoenix Division's internal policy of recording interviews of child sex victims and by its decision in many cases (including in Indian country cases), to record statements of targets