

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. Charlton has 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 guilty pleas in 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 the USAO.) Although some of the investigative agencies' criticisms are focused on Arizona's particular proposal, many 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 stated 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 this presumption in the FBI policy that most confessions are not to be recorded, the policy also 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 has stated that the proposal is neither necessary nor practical because, among other things (1) that there is no history or pattern of the DEA's recording policy resulting in acquittals or the suppression of defendants' statements; (2) 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; (3) 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; and (4) 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 Federal Tort Claims Act cases. Additionally, the DEA has expressed specific concerns about the particular policy proposed by the USAO in Arizona, including that (1) 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; (2) 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"; and (3) 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 agents, who may confer with supervisors and the relevant USAO.

In voicing its opposition to Arizona's proposed pilot program, 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 significant; (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, notes that it does not normally solicit confessions to accomplish its mission of tracking and capturing fugitives. Among other things, the USMS notes that because it conducts most of its interviews in the field (including in remote locations and vehicles), 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, unanticipated, and not in response to any question posed by a USMS officer.

III. Proposed Modifications to the Exception to the Recording Policy

I recommend that before the pilot program is implemented, the "exception" to the Arizona recording policy be modified to address the concerns expressed by the law enforcement agencies. Specifically, I recommend that the exception be amended to read as follows:

Exception: Where taping a statement would not be reasonable in light of the specific circumstances presented, the Recording Policy shall not apply. Each agent or agency, before making a decision not to record a statement in a particular circumstance, must make every effort to consult with an Assistant United States Attorney. The failure to record a statement pursuant to this Recording Policy will be a factor considered by the United States Attorney's Office in evaluating whether there is sufficient evidence to accept a case for prosecution.

A. Expansion of Circumstances Under Which the Policy Would Not Apply

In the current version of the recording policy, the exception is triggered only in instances "where a taped statement cannot be reasonably obtained." That language suggests that the

exception applies only in cases where the physical act of recording cannot be practicably accomplished – for example, when an agent stops a suspect on the roadside and begins immediately to question him for safety reasons, even though recording equipment is not readily available to tape the roadside interrogation.

That current version of the exception is not expansive enough to accommodate legitimate law enforcement concerns that go beyond just the availability of recording equipment or the practicability of recording a statement that may be taken at a roadside. For example, the current version of the exception does not appear to take into account the familiar situation in which a target agrees to cooperate with law enforcement and provide information about others involved in criminal activity, but – because of concerns about retaliation, concerns about personal safety or other factors – will do so only if the statement is not recorded and if agents can guarantee that his identity will remain confidential. In those circumstances, it would be reasonable – indeed crucial – for law enforcement agents to decline to record a statement in order to get as much information from the target as possible. This flexibility is particularly important in terrorism cases, where gathering as much information as possible from a cooperative target is vital for national security. Similarly, the current version of the recording policy's exception does not appear to take into account situations in which, for example, a target in a drug case is interdicted with drug proceeds and immediately agrees to cooperate and conduct a controlled delivery of the money to his supplier. In such a situation, the agents should have the flexibility to determine that the entire pre-delivery debriefing and each statement made by the target while conducting the delivery itself (which could span several days) need not be recorded. The suggested amendment to the exception – which provides that the policy would not apply where *"taping a statement would not be reasonable in light of the specific circumstances presented"* – provides flexibility to the agents, in consultation with an AUSA, to decide not to record a statement in such circumstances.

B. How the USAO Will Treat A Failure to Record

The USAO's stated exception to the recording policy currently reads: "The reasonableness of any unrecorded statement shall be determined by the AUSA reviewing the case with the written concurrence of his or her supervisor." That language, when read in conjunction with the rest of the recording policy, has left the impression with some of the law enforcement agencies that the USAO can and will presumptively decline to prosecute a case in which a statement was not recorded. In cases where the evidence of a target's guilt is overwhelming, but an agent neglected to record the target's statement, declining prosecution clearly would not be in the best interests of the government. Accordingly, I propose deleting that sentence and replacing it with the following sentence: *"The failure to record a statement pursuant to this Recording Policy will be a factor considered by the United States Attorney's Office in evaluating whether there is sufficient evidence to accept a case for prosecution."* That amendment would reaffirm that the USAO has flexibility to decline a case in which the USAO believes that the failure to record will adversely affect the outcome of the prosecution, while still allowing agencies to present to the USAO cases that should be accepted for prosecution even absent a recorded statement.

IV. Evaluation of the Pilot Program

In response to the Department's request for recommendations on how the USAO would evaluate the pilot program, Paul Charlton has proposed the following: (1) the USAO would track plea and conviction rates in cases in which statements were or were not taped, and would compare those rates to the plea and conviction rates obtained in cases investigated by "control" squads that would continue to use current agency recording policies; (2) the USAO would convene a coordinating group consisting of representatives from the USAO and the agencies, which would meet periodically to establish uniform procedures and iron out any problems; (3) AUSAs would obtain permission to poll juries after verdicts in cases in which confessions were introduced to determine what effect the decision to tape a confession had on the juries' decisions; and (4) at the end of the one-year trial period, the USAO would distribute a questionnaire to AUSAs and agents soliciting their comments and anecdotal impressions regarding the recording policy and compile all of those findings into a report that could be presented to the Department.

I recommend that the following additional procedures and factors be used in evaluating the program:

- 1) The questionnaires that are completed by the agents and AUSAs should be anonymous, so that agents and AUSAs feel free to express opinions that may differ from the opinions of their supervisors or agencies. Additionally, given the wide divergence of views about this pilot program – with the USAO strongly in favor and the agencies strongly against – the Department, rather than the USAO, should compile the questionnaires and the statistics, and then prepare a report on the implementation of the program.
- 2) In addition to tracking plea and conviction rates, the USAO should track whether the defendants are convicted of or plead to the most serious count charged in the indictment. This factor is an important one to follow, precisely because one of the complaints underlying the USAO's request to implement the pilot program was that, in at least one case, the USAO was forced to "plead down" a case to a less serious charge because the defendant's statement was not recorded.
- 3) The USAO should track whether the trial/guilty plea ratio is affected by the implementation of the recording policy to determine whether defendants, when confronted with their recorded confessions, elect to plead guilty rather than go to trial.
- 4) In formulating the questionnaires that are circulated to AUSAs and agents, the Department must focus on obtaining information not just about factors that can be easily quantified – such as number of convictions – but also about other factors that cannot be easily quantified. For example, any anecdotal evidence from jurors that the taping of statements gives the community greater confidence in federal law enforcement would be important to compile and consider. Similarly, in formulating the questionnaires, the

Department must focus on determining whether there are law enforcement "costs" that result from the implementation of the program that cannot be easily quantified, including (a) whether targets decline to give a statement when faced with a recording device that they may have otherwise given; (b) whether targets "negotiate" with agents about what they will or will not say when the agents insist on recording the statements; (c) whether defendants decline to cooperate and provide information about others immediately after an arrest because of the recording requirement; (d) whether the failure to comply with the recording policy results in, or is a factor in, any decisions by judges to suppress statements that were otherwise properly obtained; and (e) whether jurors acquit defendants of any or all counts because of a failure to comply with the recording policy where the jurors may not otherwise have considered that factor in the absence of a mandatory recording policy. This set of variables – i.e., the costs to law enforcement that are not reflected in rates of convictions – will necessarily be the most difficult to track, but must be tracked in order to fully evaluate the benefits and costs of the program.

- 5) Because the "control" squads from each participating agency will be using a different standard for recording during the one-year pilot program, an assessment should be made at the conclusion of the program of whether the recording policy had different effects on cases investigated by different agencies. (For example, the FBI "control" squads will utilize a policy of not recording statements absent approval from the SAC, while the ATF "control" groups will operate under a policy that allows each agent to use his or her own discretion in making the decision about whether to record.) Because one of the goals of the pilot program should be to determine whether the USAO's recording policy is more effective than any existing policy of a particular agency, the Department should endeavor to determine whether the recording policy affected cases investigated by each agency in a different way.¹

VI. Conclusion

In order to accommodate the request of the USAO, while taking into account the concerns of the law enforcement agencies involved, I recommend that the amendments to the policy, which are described above, be made before the pilot program is approved. Additionally, I recommend that an independent assessment of the program be made by the Department at the end of the one-year trial period which takes into account not only the easily assessed factors that may be affected by the program, but also the costs and benefits of the program that are more difficult to quantify.

¹ The USMS should be excepted from complying with the recording policy because, as mentioned in the USMS's submission, the USMS's mission is primarily to find fugitives rather than affirmatively investigate criminal matters, and most of the USMS's encounters with fugitives are under circumstances that do not easily lend themselves to recording.

Raman, Mythili (ODAG)

From: Mercer, Bill (ODAG)
Sent: Thursday, June 15, 2006 9:33 AM
To: Tenpas, Ronald J (ODAG)
Cc: Raman, Mythili (ODAG)
Subject: Re: Taping Confessions

Many thanks.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Tenpas, Ronald J (ODAG)
To: Mercer, Bill (ODAG)
CC: Raman, Mythili (ODAG)
Sent: Thu Jun 15 09:23:48 2006
Subject: RE: Taping Confessions

Deadline has passed -- all components -- FBI, DEA, ATF, Marshals -- plus Crim Chiefs have weighed in. Mythili is summarizing responses for your and DAG review. She knows this is an expedite to try and close out before your departure.

Ron

-----Original Message-----
From: Mercer, Bill (ODAG)
Sent: Wednesday, June 14, 2006 6:36 PM
To: Tenpas, Ronald J (ODAG)
Subject: Re: Taping Confessions

Still haven't seen it.

Has the deadline for comments passed? If so, who have we heard from?

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Tenpas, Ronald J (ODAG)
To: Mercer, Bill (ODAG)
Sent: Tue Jun 06 09:05:02 2006
Subject: Fw: Taping Confessions

?

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Valerie.Caproni@ic.fbi.gov
To: Tenpas, Ronald J (ODAG)
CC: Elaine.Lammert@ic.fbi.gov
Sent: Fri Jun 02 17:55:58 2006
Subject: RE: Taping Confessions

We had sent a memo to Bill Mercer a few weeks ago responding to the letter from the District of Arizona. We will dust it off and make sure it fully responds to his proposal and then send it to you.

-----Original Message-----
From: Ronald.Tenpas@usdoj.gov [mailto:Ronald.Tenpas@usdoj.gov]

Sent: Friday, June 02, 2006 4:00 PM
To: Caproni, Valerie E.
Subject: FW: Taping Confessions

Val:

Looks like we had the wrong e-mail address the first time. This bounced back to me. Trying again.

Ron

From: Tenpas, Ronald J (ODAG)
Sent: Friday, June 02, 2006 2:55 PM
To: Group Listing; Caproni, Valerie; Charlton, Paul (USAAZ); Earp, Mike (USMS); Favreau, Kevin; Finan, Robert (USMS); Hahn, Paul (USAE0); Harrigan, Thomas M.; Hertling, Richard; Howard, Joshua (USANCW); Jaworski, Thomas J.; Kenrick, Brian C.; O'Keefe, Kevin C.; Rowan, Patrick (ODAG); Rowley, Raymond G.; Rybicki, James E; Sutton, Johnny K. (USATXW); Wainstein, Kenneth (USADC); Wulf, David M.
Subject: Taping Confessions

Colleagues:

I have taken over shepherding this issue in ODAG, along with Senior Counsel Mythili Raman, in the wake of the combined departures of Bob Trono and Jim Rybicki. Attached you will find a proposal from the District of Arizona submitted to the Deputy Attorney General, seeking permission to operate a pilot program in the District of Arizona in which taping of interviews of investigatory targets would become the presumptive norm, although with exceptions for certain circumstances. Please provide any comments you have regarding this proposal to me by close of business, Tuesday, June 13. If there are comments, I would appreciate it if component agencies could provide a single consolidated response per agency/component -- i.e. one for FBI, one for ATF, etc.

Ron

Ronald J. Tenpas
Associate Deputy Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4216
Washington, D.C. 20530
(202) 514-3286 / (202) 305-4343 (fax)

Raman, Mythili (ODAG)

From: Tenpas, Ronald J (ODAG)
Sent: Thursday, June 15, 2006 12:09 PM
To: Raman, Mythili (ODAG)
Subject: RE: Taping Confessions

July 6

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

From: Raman, Mythili (ODAG)
Sent: Thursday, June 15, 2006 10:15 AM
To: Tenpas, Ronald J (ODAG)
Subject: RE: Taping Confessions

When is Bill's departure?

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

From: Tenpas, Ronald J (ODAG)
Sent: Thursday, June 15, 2006 9:24 AM
To: Mercer, Bill (ODAG)
Cc: Raman, Mythili (ODAG)
Subject: RE: Taping Confessions

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To: Tenpas, Ronald J (ODAG)
Subject: Re: Taping Confessions

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Sent from my BlackBerry Wireless Handheld

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

From: Tenpas, Ronald J (ODAG)
To: Mercer, Bill (ODAG)
Sent: Tue Jun 06 09:05:02 2006
Subject: Fw: Taping Confessions

?

Sent from my BlackBerry Wireless Handheld

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

From: Valerie.Caproni@ic.fbi.gov
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From: Ronald.Tenpas@usdoj.gov [mailto:Ronald.Tenpas@usdoj.gov]
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To: Caproni, Valerie E.
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From: Tenpas, Ronald J (ODAG)
Sent: Friday, June 02, 2006 2:55 PM
To: Group Listing; Caproni, Valerie; Charlton, Paul (USAAZ); Earp, Mike (USMS); Favreau, Kevin; Finan, Robert (USMS); Hahn, Paul (USAEO); Harrigan, Thomas M.; Hertling, Richard; Howard, Joshua (USANCW); Jaworski, Thomas J.; Kenrick, Brian C.; O'Keefe, Kevin C.; Rowan, Patrick (ODAG); Rowley, Raymond G.; Rybicki, James E; Sutton, Johnny K. (USATXW); Wainstein, Kenneth (USADC); Wulf, David M.
Subject: Taping Confessions

Colleagues:

I have taken over shepherding this issue in ODAG, along with Senior Counsel Mythili Raman, in the wake of the combined departures of Bob Trono and Jim Rybicki. Attached you will find a proposal from the District of Arizona submitted to the Deputy Attorney General, seeking permission to operate a pilot program in the District of Arizona in which taping of interviews of investigatory targets would become the presumptive norm, although with exceptions for certain circumstances. Please provide any comments you have regarding this proposal to me by close of business, Tuesday, June 13. If there are comments, I would appreciate it if component agencies could provide a single consolidated response per agency/component -- i.e. one for FBI, one for ATF, etc.

Ron

Ronald J. Tenpas
Associate Deputy Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4216
Washington, D.C. 20530
(202) 514-3286 / (202) 305-4343 (fax)

Raman, Mythili (ODAG)

From: Mercer, Bill (ODAG)
Sent: Thursday, June 22, 2006 12:34 PM
To: Raman, Mythili (ODAG); Tenpas, Ronald J (ODAG)
Subject: FW: Arizona Pilot Program

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

From: Charlton, Paul (USAAZ)
Sent: Thursday, June 22, 2006 11:59 AM
To: Mercer, Bill (ODAG)
Subject: Re: Arizona Pilot Program

Will do! Thanks. Paul

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

From: Mercer, Bill (ODAG)
Sent: Thursday, June 22, 2006 11:32 AM Eastern Standard Time
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

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

Let's discuss.

Sent from my BlackBerry Wireless Handheld

-----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)

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.

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.

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.

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

Paul

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,

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Paul

Raman, Mythili (ODAG)

From: Mercer, Bill (ODAG)
Sent: Wednesday, July 05, 2006 5:02 PM
To: Raman, Mythili (ODAG)
Cc: Henderson, Charles V
Subject: Re: Meeting re Arizona pilot program

Sorry about that. Let's try tomorrow.

Sent from my BlackBerry Wireless Handheld

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

From: Raman, Mythili (ODAG)
To: Mercer, Bill (ODAG)
CC: Henderson, Charles V
Sent: Wed Jul 05 16:19:36 2006
Subject: Meeting re Arizona pilot program

Bill,

You were in another meeting at 3:30 when I swung by for our mtg on the Arizona pilot program. Let me know when you want to talk about this.

Raman, Mythili (ODAG)

From: Elston, Michael (ODAG)
Sent: Tuesday, July 11, 2006 11:35 PM
To: Raman, Mythili (ODAG)
Subject: RE: Closing the loop on two things

Thanks. On no. 2, I am not sure that I have the materials to which you refer. WWM left me a pile of things I have not had time to go through. Perhaps you could give me copies of the two memos to which you refer?

From: Raman, Mythili (ODAG)
Sent: Tuesday, July 11, 2006 4:57 PM
To: Elston, Michael (ODAG)
Subject: Closing the loop on two things

Mike, I am just closing the loop with you on two things:

1) Tasia and FBI Public Affairs decided to let the VA announce the FBI's forensic results in whatever way they think appropriate for reaching the veterans and for making the decision on credit monitoring.

2) The Thursday before Bill left, he met with me about a memo I had written on the Arizona USAO's proposed pilot program requiring the recording of confessions. Bill asked me to do a follow up memo for him to read on his last day, which I did, but Bill and I never met on Friday to close the loop on that project. I'm happy to do whatever you'd like me to do on that issue. I know that the USAO was eager for us to make a decision on that proposal.

Mythili Raman
Senior Counsel
Office of the Deputy Attorney General
950 Pennsylvania Avenue, N.W.
Room 4315
Washington, D.C. 20530
(202) 305-9886

Raman, Mythili (ODAG)

From: Elston, Michael (ODAG)
Sent: Monday, July 17, 2006 10:11 AM
To: Raman, Mythili (ODAG); Tenpas, Ronald J (ODAG)
Subject: RE: FBI to tape more interrogations

How about 10:45?

From: Raman, Mythili (ODAG)
Sent: Monday, July 17, 2006 9:35 AM
To: Tenpas, Ronald J (ODAG); Elston, Michael (ODAG)
Subject: RE: FBI to tape more interrogations

Mike,

Would you have a couple minutes today so that we can discuss next steps?

From: Tenpas, Ronald J (ODAG)
Sent: Monday, July 17, 2006 9:26 AM
To: Raman, Mythili (ODAG); Elston, Michael (ODAG)
Subject: FW: FBI to tape more interrogations

Re interview taping proposal. FYI, Charlton called me Friday looking for a status report. I advised that Bill had asked for some supplemental briefing before he left but that I generally thought the matter was either before the DAG or shortly would be for a resolution.

Ron

From: Hertling, Richard
Sent: Monday, July 17, 2006 9:19 AM
To: Tenpas, Ronald J (ODAG)
Subject: FBI to tape more Interrogations

<http://www.suntimes.com/output/news/cst-nws-corrupt17.html>

Raman, Mythili (ODAG)

From: Elston, Michael (ODAG)
Sent: Friday, July 21, 2006 10:26 AM
To: Raman, Mythili (ODAG)
Subject: Re: Two quick things

No on 1, but on 2 please follow up. I do not recall having seen a plan. It would be great if you could stay on them.

On 1, I am not convinced of its merits, and we are having some management problems with AZ.

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

From: Raman, Mythili (ODAG)
To: Elston, Michael (ODAG)
Sent: Fri Jul 21 09:03:43 2006
Subject: Two quick things

Mike, two quick things I wanted to check in with you on:

- 1) Should I just go ahead and schedule time with Linda for some time next week to meet with you and Paul on the Arizona pilot project program so that we can talk about it before I leave on vacation? (I'll be gone for a week and a half, 7/31- 8/8)
- 2) Just before Bill left, I was in on the meeting with you, Bill, John Cohn and Neil Gorsuch on OIL's hiring plans, and they were supposed to send us a memo describing their options. I haven't seen it yet, but I assume you have. Do you want me to do anything to follow up, or has the issue been settled?

Mythili Raman
Senior Counsel
Office of the Deputy Attorney General
950 Pennsylvania Avenue, N.W.
Room 4315
Washington, D.C. 20530
(202) 305-9886

Start a file:
Videotape
Interviews



OFFICE OF
THE DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

TRANSMITTAL

23 FEBRUARY 2006

TO:

RONALD TENPAS
ASSOCIATE DEPUTY ATTORNEY GENERAL

This is an information copy for you. Thanks.

FROM:

WILLIAM W. MERCER
PRINCIPAL ASSOCIATE
DEPUTY ATTORNEY GENERAL

ROOM 4208 RFK
202.514.2105

DAG000001616

02-10-06 P04:48 IN

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

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.

Dear Mr. Landrum:

Timothy Landrum, Special Agent in Charge
 Drug Enforcement Administration
 3010 North Second Street, Ste. 301
 Phoenix, AZ 85012-3055

February 9, 2006

2 Renaissance Square
 40 North Central Avenue, Suite 1200
 Phoenix, Arizona 85004-4708
 (602) 514-7500
 FAX (602) 514-7570

United States Attorney
 District of Arizona

U. S. Department of Justice



CC: TWR/AS

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 alleges 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.



U.S. Department of Justice

Federal Bureau of Investigation

Office of the General Counsel

Washington, D.C. 20535

June 13, 2006

Ronald J. Tenpas
Associate Deputy Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Electronic Recording of Interviews

Dear Mr. Tenpas:

Recently, Paul K. Charlton, United States Attorney for the District of Arizona, requested the Deputy Attorney General to proceed with a pilot program that would require all federal law enforcement agents to record all target interviews electronically. The FBI opposes this program as it pertains to FBI.

It appears that Mr. Charlton's request for the pilot program is based on the large number of Indian country cases his office prosecutes and the assumption that the FBI policy prohibits the electronic recording of interviews. The current FBI policy has been in effect since 1998, and it allows the electronic recording of confessions and witness interviews in all types of cases ranging from traditional criminal investigations to national security investigations. Furthermore, the current policy gives Special Agents in Charge ("SACs") the flexibility to establish their own internal field office standards that are unique to their operating environment and investigative needs.

In January of 2006, the Phoenix Division established an internal policy that automatically approves specially trained agents interviewing child victims of sex crimes that occur on Indian reservations to record the interviews. Overall, the Phoenix Division records many statements and confessions, particularly for violent crimes in Indian country. During the current year there have been over one hundred twenty-five interviews recorded in Indian country cases, not including the

DAG000001621

many child forensic interviews which are all recorded. These interviews were conducted in support of FBI Indian country cases and recorded by either FBI agents or their partner investigators on the reservation.

In his request for the pilot program, Mr. Charlton gave examples of three cases (one prison murder case involving a Native American victim and two Indian country cases) in which he attributed the lack of recording as the key factor in the outcome of those cases.¹ While I share Mr. Charlton's frustrations, there were a number of factors that affected the outcome of those cases, and we believe the lack of recording was not the key factor.

In the first case, *United States v. Jesse Moore, et al.* (Exhibit 2), John Yellowman, a prisoner, was acquitted in his role as the "shot caller" (a person ordering a murder). Mr. Charlton's office states that, "[t]he primary evidence against Yellowman was a confession given to the FBI Had [the confession] been recorded, the jury felt they would have been better able to assess the credibility of the confession" What Mr. Charlton's letter did not explain was that John Yellowman retracted his confession shortly after giving it. As a matter of fact, he retracted it twice. His explanation for the retraction was quite credible in that he was believed to be a former informant by others in the prison and "confessed" because he wanted protection. There was evidence to support this. John Yellowman stated that by confessing, he thought he would be moved to another facility. Also, the original confession (later retracted) included a description of a murder weapon that did not match the color of the actual murder weapon. Cooperating witnesses and others testifying in the case all had similar recollections of the crime -- none of which involved John Yellowman. Lastly, medical testimony was presented as to John Yellowman's mental health at the time of his confession to include a Bureau of Prison psychological profile that he had

¹ It should be noted that over the past several years, FBI Phoenix has presented for prosecution literally hundreds of Indian country cases -- most of which did not have recorded confessions -- which have been successfully adjudicated. In 2004, 229 convictions were obtained. In 2005, 186 convictions were obtained. In 2006, as of this date, 80 convictions have been obtained. These convictions were all felonies in cases ranging from homicides to theft, with the majority of resources dedicated to the top three Indian country investigative priorities: homicides, child physical/sexual abuse, and violent assaults.

possible Schizoid Personality Disorder. From the jury's comments, it was clear that they believed the agent's testimony of the confession. But given the retraction along with evidence supporting the rationale for a false confession, there was reasonable doubt. It is doubtful that a recording of the confession would have eliminated that doubt and led to a different outcome. It should be noted that all other defendants charged in this matter were convicted without the benefit of recorded statements.²

As to the two Indian country cases Mr. Charlton discussed, the lack of recording, in our view, was not the most critical issue, and the outcome likely would not have changed had statements been recorded. Indian country cases have a number of inherent problems, and taped confessions are not a panacea. Regarding *United States v. Jimmie Neztosie* (Exhibit 3), an adult rape case, a memorandum from AUSA Hare to Mr. Charlton states, "[w]e 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." In our view, the biggest difficulty in prosecuting this case was the victim. Not only was she too intoxicated to provide information on what happened to her, but she also refused to cooperate. Based on this alone, the AUSA was unlikely to seek the maximum possible sentence irrespective of the presence of a taped confession. The AUSA, however, rightfully points out that the FBI agent did not include some information in the agent's FD-302 which was relevant regarding the claim by the defendant that he needed an interpreter during the interview.³ Regardless, we do not believe that recording the interview would have resolved the language issue.

In *United States v. Roger Harrison* (Exhibit 4), a child molestation case, there were several factors that we believe led

² Prison cases are often very difficult to prosecute; however, the Phoenix Division has been extremely successful in its efforts. With the exception of John Yellowman, every prison case submitted for prosecution in the past two years has led to convictions; none included recorded statements. In 2004, six convictions were obtained, and in 2005, ten convictions were obtained.

³ The case agent was a probationary agent, *i.e.*, he has been an FBI agent less than 2 years. The FBI has taken measures to assist him to ensure future FD-302s are more comprehensive.

to the acquittal, not just the lack of a recording. First, the five year-old victim gave conflicting statement and testimony.⁴ Second, the subject's confession/admission was weak, at best, with or without a recording of it. Third, there was lack of physical evidence. It is duly noted, however, that the probationary agent's FD-302 was lacking in detail.

Last year, the FBI executive management reviewed the current recording policy and presented the Director Mueller with all available options, including a proposal that would require the electronic recording of all post-arrest interviews. After careful deliberation, the Director chose to retain the current policy in its entirety and asked my office to issue guidance on the factors that the SAC, or his or her designee, should consider before approving the electronic recording of an interview or confession. A copy of that guidance, an Electronic Communication (EC) dated March 23, 2006, is attached for your information.

Although the FBI would like to retain its current policy because of the flexibility it allows, we are ready to support a pilot program if the DAG so elects. In that case, we would like to participate fully in the planning process, including the selection of the field office, the parameters of the program, and the method of measuring the outcome.

Numerous issues come to mind in the selection of the field office and the judicial district in which to run the pilot program. Should it be a large, busy field office or a smaller office? Does it matter what section of the country it is in? Should it be in a state that has mandated its police to record certain interrogations? Should there be two offices selected: with one operating as a "control"? Should it be an office where there are many assimilated crimes cases?

The actual parameters of any pilot program also present a wealth of possibilities -- all of which have both practical and fiscal consequences. USA Charlton proposed recording all target interviews regardless of whether the target is in custody. Should that be what is looked at within a pilot program? Or, should the pilot mandate recording only custodial target interviews? Should all target interviews be recorded or only those of certain serious felonies? If the latter, what felonies?

⁴ This is typical in child sexual abuse cases and, regardless of recording issues, has led to many acquittals across the nation.

Should the recording be surreptitious or overt? Should there be video as well as audio recording? Should the entire interview from beginning to end be recorded? Will all law enforcement agencies be affected or only DoJ agencies? Who will pay for the added costs associated with obtaining recording equipment and in transcribing the interviews?

We believe the biggest challenge by far will be designing a pilot program that has real metrics by which we can measure costs and success (or failure). Without such metrics, we are concerned that we may be in the same position after the pilot as we are now: some people will think recording is a great idea and others will think it is a terrible idea and both camps will have something they can point to.

Among the factors we think might be measured are: how many defendants decline to provide statements in the face of recording; the types of cases in which defendants decline to be recorded; the cost of transcription of the statements; the frequency of guilty pleas in cases when there is a recorded statement compared to the frequency of guilty pleas when there is not a recorded statement; the number and length of suppression hearings when there is a recorded statement compared to the number and length of such hearings when there is not; the relative outcomes of the suppression hearings; and the outcomes of trials when there are recorded statements and when there are not.

These are just but a few of the factors that we believe should be considered when devising the pilot program. Perhaps forming a working group to study the feasibility of a pilot program in detail may assist the DAG in his ultimate decision.

Thank you for your attention to this very important matter. If you have any question, I may be reached at 202-324-6829.

Very truly yours,



Valerie Caproni
General Counsel

Encl.

cc: William W. Mercer
Principal Associate Deputy Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Stephen Rubenstein
Chief Counsel
Bureau of Alcohol, Tobacco, Firearms and Explosives
Room 6100
650 Massachusetts Avenue, NW
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Wendy H. Goggin
Chief Counsel
Headquarters
Drug Enforcement Administration
Washington, DC 20537

Gerald M. Auerbach
General Counsel
United States Marshals Service
CS-3 12th Floor
Washington, DC 20530-1000

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 3/23/2006

To: All Field Offices
All HQ Divisions

All Legats

Attn: ADIC, SAC, and CDC
EAD; 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 N
Larson David C

Drafted By: Choi Jung-Won

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

Title: ELECTRONIC RECORDING OF CONFESSIONS AND WITNESS
INTERVIEWS

Synopsis: To clarify existing FBI policy on electronic recording of confessions and to provide guidance on some of the factors that the SAC should consider when deciding whether to authorize recording.

Administrative: This document is a privileged FBI attorney communication and may not be disseminated outside the FBI without OGC approval. 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 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 AUSA, CDC, or OGC may be appropriate in certain circumstances, but it is not required.¹ In certain circumstances (set forth in the above)

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 "Procedure for Lawful, Warrantless Monitoring of Verbal Communication," dated May 30, 2002, advice that the proposed surreptitious recording is both legal and appropriate must be obtained from the USA, AUSA or DOJ attorney responsible for the investigation.

To: All Field Offices From: Office of the General Counsel
Re: 66F-HQ-1283488-3, 3/23/2006

guidance),² FBIHQ concurrence is required.

In recent years, there has been on-going debate in the criminal justice community 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, and some U.S. Attorneys feel strongly that at least some interviews should be required to be recorded.⁴

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, 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.

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.

⁴ There is a group within the Department of Justice, which includes the FBI, DEA, ATF and the Marshals Service, that has met periodically to discuss this issue. It is conceivable that an outgrowth of those discussions will be a pilot program in one or more judicial districts in which recording at least certain interviews will be required.

To: All Field Offices From: Office of the General Counsel
Re: 66F-HQ-1283488-3, 3/23/2006

Against this backdrop, FBI executive management has reviewed the current policy. After a careful deliberation of all the available options, the Director has opted for now to retain the current policy 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.⁵ 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 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.

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.

⁵ 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.

To: All Field Offices From: Office of the General Counsel
Re: 66F-HQ-1283488-3, 3/23/2006

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 available resources required to obtain them. If cost factors prove prohibitive, consider whether the requesting U.S. Attorney's Office will agree to pay for the services.

These factors should not be viewed as a checklist and are not intended to limit the SAC's discretion. It is recognized, however, that establishing reasonable standards on the type of cases, crimes, circumstances, and subjects for which recording is a desirable objective so as to maintain internal field office consistency and to inform field agents and supervisors when and why to request recording.

To: All Field Offices From: Office of the General Counsel
Re: 66F-HQ-1283488-3, 3/23/2006

Field office standards are to be encouraged for another very important reason. 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.⁶ This office is prepared to assist in the preparation of such standards if desired.

Finally, 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.

⁶ Carrying this point further, it would 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.

To: All Field Offices From: Office of the General Counsel
Re: 66F-HQ-1283488-3, 3/23/2006

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

Raman, Mythili (ODAG)

From: Tenpas, Ronald J (ODAG)
Sent: Thursday, June 15, 2006 9:19 AM
To: Raman, Mythili (ODAG)
Subject: FW: Taping Confessions

Attachments: tmp.htm



tmp.htm (6 KB)

Crim Chiefs

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

From: Murphy, Rich (USAIAN)
Sent: Tuesday, June 13, 2006 6:22 PM
To: Tenpas, Ronald J (ODAG)
Cc: Hahn, Paul (USAEO)
Subject: RE: Taping Confessions

Ron --

Paul forwarded your e-mail to me and I circulated it to the Criminal Chiefs Working Group for response.

The Criminal Chiefs that replied (about 6) were unanimously in favor of Arizona's proposal.

Our group has met with the FBI within the past year on this issue. I think it is safe to say that there is strong sentiment within the group, and among criminal chiefs nationally, that there should be much wider, if not regular, use of recording equipment to document confessions and certain witness interviews.

I received no specific substantive comments to the Arizona proposal.

Best regards ---

Rich Murphy

From: Hahn, Paul (USAEO)
Sent: Friday, June 02, 2006 1:59 PM
To: Murphy, Rich (USAIAN)
Subject: FW: Taping Confessions

FYI. Comments are due by COB, Tuesday June 13. Please send any comments by Monday, June 12, as Ron wants coordinated responses. Have a great weekend.

Paul

From: Tenpas, Ronald J (ODAG)
Sent: Friday, June 02, 2006 2:55 PM
To: Caproni, Valerie; Favreau, Kevin; Hertling, Richard; Rowan, Patrick (ODAG); Rybicki, James E; Wulf, David M.; Wainstein, Kenneth (USADC); Sutton, Johnny K. (USATKW); Rowley, Raymond G.; O'Keefe, Kevin C.; Kenrick, Brian C.; Jaworski, Thomas J.; Howard, Joshua (USANCW); Harrigan, Thomas M.; Hahn, Paul (USAEO); Finan, Robert (USMS); Earp, Mike (USMS); Charlton, Paul (USAAZ); _Group Listing
Subject: Taping Confessions

Colleagues:

I have taken over shepherding this issue in ODAG, along with Senior Counsel Mythili Raman, in the wake of the combined departures of Bob Trono and Jim Rybicki. Attached you will find a proposal from the District of Arizona submitted to the Deputy Attorney General, seeking permission to operate a pilot program in the District of Arizona in which taping of interviews of investigatory targets would become the presumptive norm, although with exceptions for certain circumstances. Please provide any comments you have regarding this proposal to me by close of business, Tuesday, June 13. If there are comments, I would appreciate it if component agencies could provide a single consolidated response per agency/component -- i.e. one for FBI, one for ATF, etc.

Ron

<<Arizona proposal6.pdf>> <<Arizona proposal1.pdf>> <<arizona
proposal2.pdf>> <<Arizona proposal3.pdf>> <<Arizona proposal4.pdf>>
<<Arizona proposal5.pdf>>

Ronald J. Tenpas
Associate Deputy Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4216
Washington, D.C. 20530
(202) 514-3286 / (202) 305-4343 (fax)

Raman, Mythilli (ODAG)

USMS

From: Tenpas, Ronald J (ODAG)
Sent: Thursday, June 15, 2006 9:21 AM
To: Raman, Mythilli (ODAG)
Subject: FW: Taping Confessions - correction

Attachments: tmp.htm



tmp.htm (2 KB)

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

From: Roque, Steve (USMS)
Sent: Tuesday, June 13, 2006 2:05 PM
To: Tenpas, Ronald J (ODAG)
Subject: Taping Confessions - correction

Mr. Tenpas,

My earlier e-mail contained a typo in the response. Here is the correct response:

The United States Marshals Service (USMS) does not require mandatory taping of all statements or "confessions" taken by its federal law enforcement agents. The USMS does not normally solicit confessions to accomplish its investigative mission of tracking and capturing fugitives. Interviews and questioning of sources and witnesses are the principal investigative techniques of the USMS, rather than interrogation seeking confessions. Because the USMS conducts most investigations in the field, rather than in a controlled static, environment, recording devices are generally impractical investigative tools in accomplishing the USMS mission. Occasionally, an individual in USMS custody may confess to some other crime, but that confession is usually spontaneous, and not in response to any question by a USMS officer. Since the confessions made to USMS personnel are usually made spontaneously in vehicles and other remote locations, recording devices are not available.

Sorry for the confusion.

Steve Roque
United States Marshals Service
Office of General Counsel
(202) 307-9046

DEA

Raman, Mythili (ODAG)

From: Tenpas, Ronald J (ODAG)
Sent: Thursday, June 15, 2006 9:22 AM
To: Raman, Mythili (ODAG)
Subject: FW: Taping Confessions/DEA's response

Attachments: tmp.htm; OE Memo1.doc



tmp.htm (720 B) OE Memo1.doc (62 KB)

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

From: Harrigan, Thomas M.
Sent: Tuesday, June 13, 2006 9:22 AM
To: Tenpas, Ronald J (ODAG)
Cc: Ciminelli, Michael L.; Landrum, Timothy J; Wing, Timothy D.
Subject: Taping Confessions/DEA's response

Ron:

Please find attached DEA's response. If you have any additional questions, please do not hesitate to call. Thank you.

<<OE Memo1.doc>>



U. S. Department of Justice
Drug Enforcement Administration

www.dea.gov

MEMORANDUM

TO: Ronald J. Tenpas
Associate Deputy Attorney General
Department of Justice

FROM: Thomas Harrigan
Chief of Enforcement Operations

SUBJECT: Proposal by United States Attorney's Office, District of Arizona, for Mandatory
Recording of Interviews

Thank you for the opportunity to comment on behalf of the Drug Enforcement Administration (DEA) on the proposal by the United States Attorney's Office (USAO), District of Arizona, to issue a District policy requiring Federal law enforcement agencies to record defendant interviews, entitled "The Recording Policy." While we understand and appreciate the USAO's concerns in this area we do not believe the proposed policy is necessary or practical.

First, there is no history or pattern of DEA defendant statements being suppressed, or DEA defendants be acquitted in the District of Arizona as a result of DEA's current policy which permits but does not require recording of defendant interviews. Thus, speaking for DEA, we do not believe the proposed policy is necessary.

Second, the proposed policy is overbroad by requiring recording of statements by "investigative targets." "Investigative targets" are defined in the policy as individuals for whom a law enforcement officer has "reasonable suspicion" has committed a crime. By its own terms, the policy is not limited to custodial interrogations, but to any interview of a subject when there is reasonable suspicion of a crime. Reasonable suspicion is the standard for investigative or "Terry" stops, so the policy as currently drafted would require recording of interviews in non-custodial investigative detention situations on the street. This requirement would be impractical if not impossible in the myriad of situations encountered by DEA Special Agents and Task Force Officers, especially in performing interdiction activities.

Third, although the policy contains an exception for cases "[w]here a taped statement cannot be reasonably obtained", there are no criteria or guidance provided on what is "reasonable." Rather, the decision is made on a case-by-case basis after the fact by individual AUSAs and their supervisors. It is inevitable that different AUSAs will interpret and apply the reasonableness requirement

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differently. This lack of a uniform standard will make it difficult if not impossible for Agents to comply with the policy. Also, this is likely to lead to disputes between the USAO and law enforcement agencies, and may also result in attempts to "AUSA-shop" in an effort to direct a given case to AUSAs or supervisors deemed more lenient in applying the exception to the recording requirement.

Fourth, the policy requires recordings of the statements given by investigative targets for all "[c]ases submitted to the United States Attorney's Office for the District of Arizona for prosecution" Thus, the policy suggests that the USAO would not accept for prosecution any case in which the required recording(s) were not made. We do not believe it is proper for the USAO to reject a meritorious prosecution—especially one involving a serious or violent Federal crime—because recordings of investigative targets have not been made. Rather, the USAO should consider all the facts and circumstances in the case, and the available admissible evidence, in deciding whether to accept a case for Federal prosecution.

Fifth, DEA does many multi-district investigations. Adoption of this policy by the District of Arizona would make it very difficult to prosecute cases in the District of Arizona in which investigative activity has been by DEA divisions in other districts. Conversely, there would also be an adverse impact on multi-district cases prosecuted in other districts if defendant interviews are recorded in Arizona but not elsewhere.

Sixth, although this policy should not confer any rights, privileges, or benefits on any criminal defendant seeking to suppress his or her statement to law enforcement, *see United States v. Caceres*, 440 U.S. 741 (1979), it is likely that defendants will raise alleged violations of the USAO policy in seeking to suppress statements in pre-trial hearings, or in seeking acquittal at trial. At a minimum, this risks introducing the policy requirements into criminal trials.

Seventh, the existence of this policy presents civil liability concerns. As an initial matter, the failure to follow the policy, even if reasonable, will be admissible in civil litigation and will inject an issue that would not otherwise be present. This is exacerbated by the lack of any guidelines in the policy as to when exceptions to the recording requirement are reasonable, which is likely to lead to issues in civil cases over whether the failure to record an interview in a given case was "reasonable" under the USAO policy. More importantly, however, the existence of this policy may preclude the United States from benefiting from the discretionary function exception in cases brought pursuant to the Federal Tort Claims Act. At a minimum, however, in all civil cases, alleged violations of the USAO policy would be admissible against the United States and federal employees in civil cases.

In sum, rather than issuing the proposed policy, we believe that the USAO should continue to work cooperatively with management of the various Federal law enforcement agencies to address the issue of recording interviews. Please feel free to contact me if you wish additional input on this issue.

ATF

Raman, Mythili (ODAG)

From: Tenpas, Ronald J (ODAG)
Sent: Thursday, June 15, 2006 9:21 AM
To: Raman, Mythili (ODAG)
Subject: FW: ATF's response to the pilot program for recording statements
Attachments: Electronic recording.doc

From: Jaworski, Thomas J.
Sent: Tuesday, June 13, 2006 2:59 PM
To: Tenpas, Ronald J (ODAG)
Cc: Wulf, David M.; O'Keefe, Kevin C.; Kenrick, Brian C.; Durham, Melissa A.
Subject: ATF's response to the pilot program for recording statements

Mr. Tenpas,

ATF's comments re: the proposed pilot program are outlined below.

I have also attached a copy of a memorandum that we provided to the working group last summer. Please let us know if you have any questions.

Thank you.

Tom

Thomas J. Jaworski
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Last summer when the Department components met, it was agreed that the taping of post arrest statements would be at the agency's discretion. As a result, ATF's Investigative Priorities, Procedures, and Techniques order was updated and is currently in draft form. This order leaves taping to the discretion of the case agent, with input from the supervisory chain and the AUSA. The proposed pilot program now requires mandatory taping of 'investigatory targets,' which (1) is broader than originally discussed by the working group and (2) is not based on any new policy arguments or new developments/change in circumstances since the group met last summer.

We reiterate ATF's concerns expressed last summer regarding the promulgating of a 'one-size fits all' approach to interrogation, suspects 'playing to the camera,' possible unsettling interrogation techniques, and logistical questions (type of recording, type of equipment required, must officers carry equipment, taping procedures, retention and storage issues, technical malfunctions). We have attached a copy of the memorandum provided to the Department last summer outlining ATF's position. Our position has not changed. We are strongly opposed to this program.

Further, we have concerns regarding the budgetary costs for the pilot program. We have no appropriation for recording equipment and transcription and storage costs for thousands of potential interviews each year. We did not request nor receive funding for the pilot program in FY 2006 or FY 2007.

Finally, we are also concerned with the mandatory language of the recording policy. This policy provides for an exception, but leaves the applicability of the exception solely within the discretion of the AUSA reviewing the case. Accordingly, it appears that law enforcement agents in the field have no discretion concerning taping, other than to decide whether the taping will be surreptitious or overt.

We suggest that your office hold a meeting with the components in order to discuss these issues further before implementation of any pilot program requiring the recording of statements.

From: Tenpas, Ronald J (ODAG)

Sent: Friday, June 02, 2006 2:55 PM

To: Wulf, David M.; Rowley, Raymond G.; O'Keefe, Kevin C.; Kenrick, Brian C.; Jaworski, Thomas J.; valerie.caproni@fbi.gov; kevin.favreau@ic.fbi.gov; Hertling, Richard; Rowan, Patrick (ODAG); Rybicki, James E; Walnstein, Kenneth (USADC); Sutton, Johnny K. (USATXW); Howard, Joshua (USANCW); Harrigan, Thomas M.; Hahn, Paul (USAE0); Finan, Robert (USMS); Earp, Mike (USMS); Charlton, Paul (USAAZ); _Group Listing

Subject: Taping Confessions

Colleagues:

I have taken over shepherding this issue in ODAG, along with Senior Counsel Mythili Raman, in the wake of the combined departures of Bob Trono and Jim Rybicki. Attached you will find a proposal from the District of Arizona submitted to the Deputy Attorney General, seeking permission to operate a pilot program in the District of Arizona in which taping of interviews of investigatory targets would become the presumptive norm, although with exceptions for certain circumstances. Please provide any comments you have regarding this proposal to me by close of business, Tuesday, June 13. If there are comments, I would appreciate it if component agencies could provide a single consolidated response per agency/component -- i.e. one for FBI, one for ATF, etc.

Ron

<<Arizona proposal6.pdf>> <<Arizona proposal1.pdf>> <<arizona proposal2.pdf>> <<Arizona proposal3.pdf>>
<<Arizona proposal4.pdf>> <<Arizona proposal5.pdf>>

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SUBJECT: ELECTRONIC RECORDING OF INTERROGATIONS AND
CONFESSIONS

We have been advised that the Department of Justice (DOJ) is considering whether it is appropriate to promulgate a Department-wide policy on electronic recording (e.g., audio or video recording) of interrogations and confessions. Based on quick research, Illinois, New Mexico and the District of Columbia have recently enacted laws designed to require state and local law enforcement officers to record interrogations and confessions under certain circumstances.¹ ATF does not maintain a policy requiring electronic recording of interrogations or confessions. We understand that no other DOJ bureaus maintain a policy requiring electronic recording of interrogations or confessions. In fact, the FBI's policy is **not** to record, unless a waiver is received from the Special Agent in Charge.

Senior Counsel (Field Operations) advised that ATF's current practice leaves the decision regarding electronic recording of interrogations and confessions to the discretion of the ATF case agent. The case agent may also confer with his/her chain of command and the local United States Attorney's Office. ATF O 3210.7C briefly addresses recording interrogations, however only in the context of Miranda waivers, providing that "such other record of advice and waiver may include, but is not limited to, a sound recording." (Copy attached).

Electronic recording of interrogations and confessions has been addressed in several recent studies.² This topic has received extensive attention from the media and criminal defense bar due to alleged state and local wrongful convictions based on improperly obtained confessions. Quick research reveals that the issue has received little coverage concerning interrogations and confessions at the Federal level.³

While we recognize, in theory, there are several potential positive results which could result from promulgation of a Department-wide policy mandating electronic recording of interrogations and confessions, these results come at the expense of limiting the flexibility of agents to make the determination of the proper course of conduct depending on the particular situation. Rather, than promulgating a 'one-size fits all' approach to

¹ Alaska requires taping of suspects when the interrogation occurs in the place of detention and recording is feasible. Stephan v. State, 711 P.2d 1156 (1985). Minnesota requires taping of in-custody suspects. State v. Scales, 518 N.W.2d 587 (1984).

² William Geller, "Videotaping Interrogations and Confessions," National Institute of Justice, Research in Brief, U.S. Department of Justice, March 1993 (Attached); Report of the (New Jersey) Supreme Court Special Committee on Recordation of Custodial Interrogations, April 15, 2005, available at <http://www.judiciary.state.nj.us/notices/reports/cookreport.pdf>; Northwestern University School of Law, Center on Wrongful Convictions, Police Experiences with Recording Custodial Interrogations, Summer 2004, available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf>; INT'L ASS'N OF CHIEFS OF POLICE, POLICY REVIEW: VIDEOTAPING INTERROGATIONS AND CONFESSIONS (Fall 1998)(Attached).

³ But see H.R. 112, 109th Cong., 1st Sess. (2005) requiring the videotaping of U.S. military interrogations of detainees. The bill is currently in committee awaiting comment from the Department of Defense (DOD).

interrogation, a simpler and more effective strategy would be to provide SA's with additional interrogation and professionalism training in order to minimize any future interrogation issues.

On the other hand, there are also numerous potential negative consequences to an electronic recording policy. For example, suspects who know that they are being recorded may be less likely to speak candidly, or conversely, may "play to the camera," for the attention. If suspects are recorded covertly, once this tactic becomes known through the trial process, any usefulness it had will be lost. Law enforcement interrogation techniques (although completely legal) may still be unsettling for some jurors in video and audio form. Suspects may confess to a crime on the scene or in route to a station or office, well before recording is anticipated. This also raises the logistical questions of what kind of recording (audio or video) will be mandatory, what kind of equipment is required and where must it be present (with every agent/officer at all times, only in the office or station, etc.), what are the costs involved, what taping procedures must be adhered to, tape retention and storage issues, and what uniform training is to be provided and by whom. Technical malfunctions of equipment may create doubts in jurors' minds about what happened after the taping ceased. Further, depending on judicial interpretation, failure to record an interrogation or confession may result in additional "legal technicalities" that could lead to jury instructions harmful to the case at trial or even summary dismissal of criminal charges. Finally, prosecutions may be hampered in joint Federal-state task force operations, where Federal charges are brought following arrest and interrogation by local law enforcement in a jurisdiction where local law enforcement does not electronically record interrogations and confessions.⁴

This is the summary of our quick research. Further research and analysis may be required prior to the enactment of a new policy.

Attachments

⁴ See Commonwealth v. DiGiambattista, 442 Mass. 423 (2004)(holding when police fail to record an interrogation, defendants are entitled to an instruction that the jury should weigh unrecorded statements "with great caution and care.").