isolated acquittals in the District of Arizona should not, in my view, lead the Department to institute a policy 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 all investigative agents around the country.[1]

Although one could reasonably argue that a pilot program could be instituted to study *whether* recording "works," a pilot program in one district will not give the Department any useful measures of success. Measuring the success of such a program by, for 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. Accordingly, it will never be clear whether a recording did or did not lead to a particular disposition or sentence in a case. 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. For example, should the district be one in which the local and state agencies record interrogations? Should the district be large or small? Should there be two offices selected so that one can operate as a "control"? Should the selected district be one in which there are many prosecutions under the Assimilated Crimes Act? Should all target interviews be recorded or only those involving certain serious felonies? Should the recordings be surreptitious or overt? Given these variables and the resulting unlikelihood that the experience of one district could be usefully extrapolated to others, the disruption to multi-district and task force investigations that could result from the implementation of a pilot program – not to mention the expense of instituting such a program – is not, in my view, worth the potential benefit.

IV. Summary

Given the numerous, legitimate reasons for either recording or not recording a particular target's statements in any particular case, the Department should refrain from instituting a policy that either creates the presumption that recording is necessary and warranted (like the Arizona policy) or creates the presumption that recording is unnecessary or dangerous (like the FBI policy). I therefore recommend that the Department not authorize the USAO's request to initiate a pilot program. I would also recommend that the Department encourage its investigative components to leave the case-specific decision about whether to record a statement in any particular circumstance to the discretion of each agent, who should be encouraged to consult with his or her supervisor and assigned prosecutor.

Doesn't your solution of case-by-case lend itself to easy attacks in the cases where recording ~~would~~ isn't done? Agent has to answer questions on why no recording

[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.

A) Proposal - no meaningful metrics - to look at results

- defacto becoming new basis on which to suppress statements

strengthen class of cases

For 1) current posture - some kinds of prosec which are benefitted

2) current posture of discretion - SPC (heavily against presumption) - at least "[illegible] FBI" [illegible]

3) can't develop any real experience

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, DC 20530

July 7, 2006

MEMORANDUM

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

Michael Elston
Chief of Staff
Office of the Deputy Attorney General

FROM: Mythili Raman MR
Senior Counsel to the Deputy Attorney General

SUBJECT: Recommendations for Implementation of Pilot Program Instituting Mandatory Recording Policy in the District of Arizona

You have asked me to consider what, if any, changes should be made to the mandatory recording policy proposed by United States Attorney Paul Charlton in the District of Arizona, if the Department approved the implementation of a pilot program in Arizona to test that policy. I have set forth below some recommendations concerning the scope of the exception to the recording policy, and the manner in which the success of the policy should be measured at the end of a one-year pilot program.

I. Proposed Modifications to the Exception to the Recording Policy

A. The Current Policy

The recording policy currently proposed by the United States Attorney's Office for the District of Arizona provides as follows:

> **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.

(emphasis added).

B. Proposed Expansion of the Exception to the Recording Policy

I recommend that if the Department were to approve a pilot program implementing the USAO's policy, the stated exception to the policy be modified and expanded to address concerns about (1) the rigidity and limited scope of the current exception to the policy, and (2) the implicit assumption in the current recording policy that an AUSA and USAO supervisor could decline prosecution of an otherwise strong case solely based on an agent's failure to record a statement. Specifically, I recommend that the exception to the policy be amended 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.

As seen above, the first proposed amendment to the recording policy's exception expands the circumstances under which an agent may invoke the exception to the recording policy. In the current version of the recording policy, the exception to the policy is triggered only in instances "where a taped statement cannot be reasonably obtained." That language suggests that the exception to the mandatory recording policy 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 must immediately begin 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. My suggested amendment provides flexibility to the agents – in consultation with an AUSA – to decide not to record a statement in such circumstances.

My second proposed modification to the recording policy's exception is the deletion of the sentence which 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 give the USAO 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 perhaps should be accepted for prosecution even absent a recorded statement.

II. Measuring the Success of the Pilot Program

The purpose of instituting a pilot program like the one proposed by the USAO would be to evaluate, at the end of a year, whether the program was successful in the District of Arizona and then to evaluate whether the program should be implemented in other districts. In response to the Department's request for a proposal on how the USAO would evaluate the pilot program, Paul Charlton has indicated that the USAO would take the following steps: (1) the USAO would track pleas 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 the "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 poll juries after verdicts 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.

These proposals provide a good start for evaluating the success of a pilot program. I recommend, however, that the following additional factors be considered and tracked in evaluating the success of any pilot program that may be implemented:

1) In addition to tracking 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. Accordingly, to address that concern, it will be essential to measure not only the number of convictions, but also whether the USAO was forced to "plead down" the case to something less than the most serious count charged in the indictment.

2) One of the possible benefits of the recording policy is that defendants, when confronted with their recorded confessions, may elect to plead guilty rather than proceed to trial. Accordingly, the USAO should make every effort to track whether the trial/guilty plea ratio is affected by the implementation of the recording policy.

3) 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.

4) 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. Those potential law enforcement "costs," which necessarily would not be reflected in the number of convictions or pleas, include (a) whether a significant number of targets decline to give a statement when faced with a recording device that they may have otherwise given; (b) whether a significant number of targets "negotiate" with agents about what they will or will not say when the agents insist on recording the statements; (c) whether a significant number of 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, in my view, must be tracked in evaluating any successes and failures of the pilot program.

5) Assuming that the Department adopts the USAO's view that each agency should have a "control" squad that continues to operate under each agency's current recording policy, it will be important at the conclusion of the pilot program to make comparisons *between* agencies, because the "control" groups from each agency necessarily will be using a different standard for recording during the one-year trial period. 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 proposed recording policy is more effective than any existing policy of any particular agency, it will be crucial that the evaluation of the program include a discussion about whether the recording policy affected cases investigated by each participating agency in a different way.[1]

6) Finally, as discussed yesterday, 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. For the same reason, it would be wise for a Department component to compile the questionnaires and the statistics, and then prepare a report on the implementation of the program. Given the wide divergence of views about this pilot program – with the USAO strongly in favor and the agencies strongly against – it would be unwise for either the USAO or the agencies to take the lead on drafting the final report on the benefits and costs of the program. The report generated by the Department should, of course, be circulated to the USAO and agencies for comments.

III. Summary

The evaluation of a pilot program like the one proposed by the USAO in the District of Arizona is necessarily a difficult undertaking, precisely because the benefits and costs cannot be easily quantified. This difficulty is compounded by the fact that, as noted in my first memorandum describing the proposed pilot project, there are widely divergent views on the potential benefits and costs of the USAO's proposed recording policy. Accordingly, if the

[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.

Department approves the implementation of a pilot project, I strongly recommend that the USAO and the Department fully include the investigative agencies in the process of implementing and monitoring the program.

Department Of Justice
Deputy Attorney General
Control Sheet

Date Of Document: 07/18/06
Date Received: 07/18/06
Due Date: NONE

Control No.: 060718-6342
ID No.: 433295

From: RAMAN, MYTHILI, SENIOR COUNSEL TO DAG

To: DAG

Subject:
PROPOSED PIOLT PROGRAM IN DISTRICT OF ARIZONA IMPLEMENTING MANDATORY RECORDING POLICY.

Executive Reviewer; Elston, Michael Due: 07/18/06

Instructions:

Action/Information: Signature Level: DAG

From: Elston, Michael Assign: 07/31/06 Due: NON To: Tenpas, Ronald

For your review and recommendation.

From: Tenpas, Ronald Assign: 08/01/06 Due: NON To: Elston, Michael

It's a close call but I recommend that the DAG permit the one year pilot to occur, subject to modifications suggested by Mythili Raman. If DAG approves, I recommend we immediately engage OLP (and maybe BJS) to begin formulating the process for evaluating the pilot at its conclusion.

From: Elston, Michael Assign: 08/03/06 Due: NON To: McNulty, Paul

I recommend approval of the Arizona pilot program as narrowed/modified by Mythili's memo.

From: McNulty, Paul Assign: 01/22/07 Due: NON To: Elston, Michael

In light of Paul C.'s departure, should this initiative still go forward?

From: Elston, Michael Assign: 03/16/07 Due: NON To: Raman, Mythili

Please advise on whether a. this should go forward and, if so, b. in AZ or another district.

File Comments:

Department Of Justice
Deputy Attorney General
Control Sheet

Date Of Document: 07/18/06
Date Received: 07/18/06
Due Date: NONE

Control No.: 060718-6342
ID No.: 433295

From: RAMAN, MYTHILI, SENIOR COUNSEL TO DAG

To: DAG

Subject:
PROPOSED PIOLT PROGRAM IN DISTRICT OF ARIZONA IMPLEMENTING MANDATORY RECORDING POLICY.

Executive Reviewer; Elston, Michael Due: 07/18/06

Instructions:

Action/Information: Signature Level: DAG

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From: McNulty, Paul Assign: 01/22/07 Due: NON To: Elston, Michael

In light of Paul C.'s departure, should this initiative still go forward?

File Comments:

To Mythili: Please advise on whether
a) this should go forward and, if so,
b) in AZ or another district.

Elston 15 March 07

Department Of Justice
Deputy Attorney General
Control Sheet

Date Of Document: 07/18/06
Date Received: 07/18/06
Due Date: NONE

Control No.: 060718-6342
ID No.: 433295

From: RAMAN, MYTHILI, SENIOR COUNSEL TO DAG
To: DAG

Subject:
PROPOSED PIOLT PROGRAM IN DISTRICT OF ARIZONA IMPLEMENTING MANDATORY RECORDING POLICY.

Executive Reviewer; Elston, Michael Due: 07/18/06

Instructions:

Action/Information: Signature Level: DAG

From: Elston, Michael Assign: 07/31/06 Due: NON To: Tenpas, Ronald

For your review and recommendation.

From: Tenpas, Ronald Assign: 08/01/06 Due: NON To: Elston, Michael

It's a close call but I recommend that the DAG permit the one year pilot to occur, subject to modifications suggested by Mythili Raman. If DAG approves, I recommend we immediately engage OLP (and maybe BJS) to begin formulating the process for evaluating the pilot at its conclusion.

From: Elston, Michael Assign: 08/03/06 Due: NON To: McNulty, Paul

I recommend approval of the Arizona pilot program as narrowed/mofied by Mythili's memo.

File Comments:

Mike, In light of Paul C.'s departure, should this initiative still go forward?

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

July 18, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: Mythili Raman MR
Senior Counsel

SUBJECT: Proposed Pilot Program in District of Arizona Implementing Mandatory Recording Policy

PURPOSE: For decision on whether to approve pilot program.

TIMETABLE: As soon as practicable.

Summary of Memorandum

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 described in Section I of this memorandum, the FBI, DEA, ATF and USMS are uniformly opposed to the implementation of the recording policy for a variety of reasons – some that reflect an opposition to the specific policy suggested by the USAO in Arizona, and others that reflect an opposition to the implementation of any mandatory recording policy.

In order to accommodate the USAO's request that a pilot program be approved, but given the many valid concerns voiced by the investigative agencies, I recommend, in Section II of this memorandum, that before the pilot program is implemented, the language of the recording policy be amended in order to provide more flexibility to the agencies to decline to record statements where recording would be counterproductive to law enforcement goals – for example, where a target may be unwilling to give a recorded statement but may be quite willing to give an unrecorded statement. Additionally, in Section II, I recommend that the recording policy be amended to clarify that an agency's failure to record a statement will not necessarily result in a unilateral decision by the USAO to decline the case for prosecution, as there may be many cases in which the evidence of a defendant's guilt is strong even absent a recorded statement. In such a circumstance, the declination of that case for prosecution – simply because it violated the USAO's recording policy – would not be in the government's best interests.

In Section III of this memorandum, I have set forth some suggestions about how to evaluate the pilot program at the end of a one-year trial period, which suggestions are intended to be responsive to the concerns of the USAO and the agencies. Among other things, I recommend that the Department, rather than the USAO itself, conduct the study of the pilot program at the end of the one-year trial period. I also recommend that the study focus not only on factors that are easily quantified – such as the number of convictions or guilty pleas – but also on the costs and benefits of the program that may not be so easily quantified – such as whether the recording policy gives the public a greater confidence in federal law enforcement (a benefit), or whether a significant number of defendants decline to cooperate with the government after an arrest because of their fear that their recorded statements would put them in harm's way (a cost).

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

A. The Recording Policy

The recording policy proposed by the USAO provides as follows:

> **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.

Although 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," he did not identify any specific examples of what he viewed to be acceptable exceptions to the policy.

B. The USAO's Reasons for Implementation of the Pilot Program

In requesting that the Department approve the pilot program, USA Charlton has articulated a number of factors favoring a mandatory recording 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 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.

APPROVE:_____

DISAPPROVE:_____

DATE:_____

Concurring Components
None

Non-Concurring Components
None

[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.

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

July 18, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: Mythili Raman MR
Senior Counsel

SUBJECT: Proposed Pilot Program in District of Arizona Implementing Mandatory Recording Policy

PURPOSE: For decision on whether to approve pilot program.

TIMETABLE: As soon as practicable.

Summary of Memorandum

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 described in Section I of this memorandum, the FBI, DEA, ATF and USMS are uniformly opposed to the implementation of the recording policy for a variety of reasons – some that reflect an opposition to the specific policy suggested by the USAO in Arizona, and others that reflect an opposition to the implementation of any mandatory recording policy.

In order to accommodate the USAO's request that a pilot program be approved, but given the many valid concerns voiced by the investigative agencies, I recommend, in Section II of this memorandum, that before the pilot program is implemented, the language of the recording policy be amended in order to provide more flexibility to the agencies to decline to record statements where recording would be counterproductive to law enforcement goals – for example, where a target may be unwilling to give a recorded statement but may be quite willing to give an unrecorded statement. Additionally, in Section II, I recommend that the recording policy be amended to clarify that an agency's failure to record a statement will not necessarily result in a unilateral decision by the USAO to decline the case for prosecution, as there may be many cases in which the evidence of a defendant's guilt is strong even absent a recorded statement. In such a circumstance, the declination of that case for prosecution – simply because it violated the USAO's recording policy – would not be in the government's best interests.

In Section III of this memorandum, I have set forth some suggestions about how to evaluate the pilot program at the end of a one-year trial period, which suggestions are intended to be responsive to the concerns of the USAO and the agencies. Among other things, I recommend that the Department, rather than the USAO itself, conduct the study of the pilot program at the end of the one-year trial period. I also recommend that the study focus not only on factors that are easily quantified – such as the number of convictions or guilty pleas – but also on the costs and benefits of the program that may not be so easily quantified – such as whether the recording policy gives the public a greater confidence in federal law enforcement (a benefit), or whether a significant number of defendants decline to cooperate with the government after an arrest because of their fear that their recorded statements would put them in harm's way (a cost).

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

A. The Recording Policy

The recording policy proposed by the USAO provides as follows:

> **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.

Although 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," he did not identify any specific examples of what he viewed to be acceptable exceptions to the policy.

B. The USAO's Reasons for Implementation of the Pilot Program

In requesting that the Department approve the pilot program, USA Charlton has articulated a number of factors favoring a mandatory recording 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 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 (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: 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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Sent: Tue Jun 06 09:05:02 2006
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Sent from my BlackBerry Wireless Handheld

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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 imput 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 imput 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: 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

U. S. Department of Justice

United States Attorney
District of Arizona

2 Renaissance Square *(602) 514-7500*
40 North Central Avenue, Suite 1200 *FAX (602) 514-7570*
Phoenix, Arizona 85004-4408

cc: TEPAS

February 9, 2006

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

Dear Mr. Landrum:

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

06-213

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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 inadmissable. 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

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* 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

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 Neztsosie* (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

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[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 <u>all</u> 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

Valerie Caproni
General Counsel

Encl.

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

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