

I Object!

– James Eckert, Esq.

Recording Interrogation

In Disney World, the great majority of rides and shows can be taped, so you could have video of almost all your vacation. Numerous birthday parties, anniversary parties and other events are taped. Security cameras are all over. Every cellphone is a potential source of incriminating evidence, ask Michael Phelps (among others). When they interrogate a suspect, are police really the last people on earth to worry about how hard it is to record something, when everyone else is worried about how easy it is?

No. They are not. Police have made a conscious choice to present the jury with a written statement whose contents are controlled by police, rather than a videotape whose contents are not. You never know what a suspect is going to say, but you always know whether you want the jury to hear it. Or not. So despite the fact that it is harder to produce a written statement than it is to simply videotape the entire event, police choose the former. It takes more effort, but the result is a document which contains the highlights of the interrogation, a Reader's Digest condensed version, whatever will help police most.

Defense motion papers should request suppression for failing to record, but we can also request a lesser, perhaps more obtainable, form of relief: an adverse inference charge. The jury should be told, because they will not otherwise know, that they may infer from the failure of police to record the interrogation that such a recording would be adverse to the position of the prosecution. The jury need not draw this inference, it is permissive. However, unless the judge informs the jury of this choice, they will not know it exists. You can try telling them in summation, but I don't think that will go far in the absence of such an instruction.

In the absence of a recording, we cannot know in what way a recording would fail to corroborate the police testimony. Perhaps the defendant's statement was different from the written statement in subtle but important ways. Perhaps police left out details which do not help their cause, or factors which might indicate guilt only of a lesser. Perhaps the circumstances of the interrogation make the statement less credible or otherwise less valuable to the prosecution. Where the defendant held out for a long time, maintaining his innocence, allowing the jury to see the process of wearing him down would not help the DA's case. Which would affect a jury more, hearing that a defendant was questioned for a few hours, or sitting through those few hours until half the jury is ready to confess themselves? Which conveys the truth? Confessions are like laws and sausage, they are less edible if you see how they are made. Something like that. There are numerous reasons for the police not to want the jury to see the interrogation, in the absence of a recording, we don't know which one is present in which case.

This is not just for appeal, though we're happy to raise the issue where it is preserved. Given the right case and the right judge, we might get a ruling which permits a jury to draw

an inference adverse to the prosecution. It would not take many such rulings to change the way things are done. It might only take one.

(If you would like a proposed adverse inference instruction, please contact the Public Defender's Office.)