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CIVIL LIBERTIES *By Harvey Silverglate*

Tape Defendant's Statement, or Don't Use It

WHAT DO the Terry Nichols Oklahoma City bombing case, the Ramzi Ahmed Yousef World Trade Center bombing prosecution and the British au pair's homicide trial have in common? In each, the prosecution depended heavily upon the testimony of a police officer or government agent to whom the defendant, in an unguarded moment, made incriminatory admissions.

Those alleged admissions were not captured on tape, but were reconstructed later from the witness' memory or notes. In each case, the defense futilely contested the government's account.

These three recent cases, two in federal court and one in Massachusetts state court, raise an issue that has balanced for decades on the cusp between civil liberties and criminal justice concerns: How can we honor a suspect's Fifth Amendment privilege not to speak to a police interrogator and Sixth Amendment right to the assistance of legal counsel, and how can we protect those who talk without a lawyer present from having their statements transformed from harmless responses to damaging admissions, without a requirement that such interviews be taped whenever possible?

An FBI agent testified that Mr. Nichols admitted that he and co-conspirator Timothy McVeigh had read about making bombs. "He said he and Mr. McVeigh had a curiosity about whether they could build a bomb," Agent Scott Crabtree told the jury. Mr. Nichols did not testify and hence had no opportunity to deny making the damaging statement, but his lawyer tried to demonstrate that the agent took spotty notes and could easily have been misreporting what, if anything, Mr. Nichols actually said.

Bad Old Habit

The exchange highlighted a long-established yet controversial FBI practice. The Bureau almost never tapes witness interviews. Instead, generally two agents conduct interviews, usually with one asking questions and the other taking notes. In this way, if later there is any contest over what the interviewee—by then possibly a defendant—said, it is the word of two agents and a set of notes versus the word of the defendant. And, since many defendants choose not to take the witness stand, the testimony of the agents often stands uncontested.

In the World Trade Center case, a New York Times reporter wrote that "prosecutors were able to augment their case against Mr. Yousef with crucial new testimony" when Secret Service Agent Brian G. Parr testified that Mr. Yousef gave him a detailed and boastful account of his role in the bombing conspiracy while flying with Mr. Parr back to the United States after his 1995 arrest in Pakistan. The alleged admission was devastating, for Mr. Yousef supposedly told Mr. Parr that he had hoped that the bombed building would topple onto the second of the twin towers, causing the collapse of both and consequent death of thousands. U.S. Attorney Mary Jo White described Mr. Yousef's alleged admission as "a brazen, bold statement of terrorism" and Mr. Parr's testimony as "a vital piece of evidence." Since the defendant, who had a prior record, did not testify, there was no sworn denial.

In the trial of British au pair Louise Woodward, a critical piece of evidence came in the form of a police detective's testimony that when he interviewed Ms. Woodward hours after the 9-month-old infant in her care was rushed to the hospital with fatal skull and brain injuries, she admitted having dropped the child in a moment of frustration. (A word of disclosure is necessary here: The author was a member of Ms. Woodward's trial defense team.) A defense line-up of specialists vigorously contested the validity of the prosecution's forensic evidence, so the police testimony was viewed by many trial observers as being of critical, perhaps determinative importance.

Ms. Woodward, unburdened by any prior record or other apparent disability, took the witness stand and admitted giving a voluntary interview to the officer, but denied making the incriminating admission. There was no tape recording, though the officer, on cross-examination, conceded that recorders had been available. Instead, he took with him a junior-grade officer who took notes.

Nobody except the participants in these interviews can gauge for certain the accuracy of the officers' testimony. All we do know is that many defendants are convicted on the basis of testimony by police and agents who recount incriminating admissions. Given the ready availability of inexpensive tape-recorders, it would not be onerous to require that a defendant's inculpatory admission or confession be admitted into evidence only when captured on tape or transcribed and signed by the defendant. This would avoid swearing matches in which a police officer or agent insists that the defendant said something that could even send the defendant to death row, as in the Oklahoma City and World Trade Center cases.

In the search-and-seizure area, Fourth Amendment rights are protected by a long-standing rule that if the officer has a reasonable opportunity to obtain a warrant from a judicial officer but fails to do so, the fruits of the search are inadmissible. Only truly exigent circumstances justify a warrantless search. A similar rule could apply to Fifth and Sixth Amendment rights. What would the criminal justice system have to lose with such a rule, other than the ability to convict people on the basis of statements they perhaps never made? NLJ

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