MEMORANDUM

TO: Drafting Committee on Electronic Recordation of Custodial Interrogations Members, Advisors, and Observers

FROM: Andrew E. Taslitz, Reporter

DATE: October 8, 2008

RE: *Social Science Memorandum on the Impact of Cautionary Jury Instructions Concerning the Unexcused Failure to Record the Entire Custodial Interrogation Process*

I. *Introduction*

This memorandum will briefly review the relevant social science concerning the likelihood that cautionary jury instructions can improve jurors' ability to determine the credibility, voluntariness, accuracy, and weight of a confession where there was an unexcused police failure to record the entire interrogation process. This memorandum concludes that jury instructions are unlikely effectively to remedy the harm to the accuracy of the fact-finding process stemming from the unexcused failure to record. Instead, jurors are likely to give even false and involuntary confessions substantial weight, creating a grave risk of convicting the innocent.

Although I know of no published studies directly addressing the impact on jurors of cautioning them that the police were obligated to record, inexcusably failed to do so, and, therefore, deprived the jury of important information, such as tone of voice and demeanor, in determining the truthfulness and voluntariness of the confession or addressing some similar cautionary instruction for failing to record, there is ample empirical data in three other relevant, informative areas: (1) the effectiveness of cautionary instructions in general; (2) the effectiveness of cautionary instructions in an

analogous area raising innocence concerns – namely, concerning the accuracy of eyewitness identifications; and (3) the effectiveness of cautionary instructions aiming at improving jurors' ability accurately to assess the value of a confession but where the presence or absence of recording of the entire interrogation process is not flagged as an issue. In each of these three areas, there is reason to believe instructions are rarely helpful in improving jury accuracy, suggesting that they would be equally unhelpful in doing so when aimed at the unjustified failure to record the entire interrogation process.

Each of these three respective areas of research are summarized below. For the sake of brevity, I have minimized footnotes to those situations where I believe that a citation is absolutely necessary.

II. *The Social Science Summarized*

A. *Social Science on Jury Instructions in General*

Jury instructions as traditionally crafted are often ineffective or operate in ways other than those intended. That does not mean that jury instructions never alter verdicts. Rather, the impact on verdicts varies with the type of instruction (prohibiting certain uses of evidence versus providing information to improve the jury's processing of evidence that it has already heard) and its subject matter (for example, nullification, reasonable doubt, joinder, expert witnesses, eyewitnesses).[1] Nevertheless, much of the research is not encouraging. Jurors frequently misunderstand instructions, even though they often

[1] *See* James R. P. Ogloff & V. Gordon Rose, *The Comprehension of Judicial Instructions, in* PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 407, 408 (Neil Brewer & Kipling D. Williams eds., 2005).

believe the contrary.[2] Thus jurors cautioned to ignore evidence heard but ruled inadmissible are in fact likely to pay *more attention* to the evidence with the cautionary instruction than without it.[3] Jurors are equally incapable of abiding by limiting instructions abjuring them to use evidence solely for one purpose but not another—again, even when they are unaware that they are doing so.[4]

These conclusions do not mean, however, that these sorts of instructions have no effect on jury behavior. Notably, an instruction to ignore inadmissible evidence is used during deliberations by some jurors to shut down mention of such evidence by other jurors.[5] Preventing open discussion likely does *not*, however, "stop individual consideration of the information."[6]

There are a number of reasons why jurors do not understand instructions. First, the instructions themselves are usually given in legalese not readily comprehensible by laypersons.[7] Second, instructions are generally delivered *only* orally when written versions, illustrative material, repeated exposure, and persistent attempts at mastery are needed to learn new material.[8] Third—and this will prove to be especially important

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[2] *See id.* at 425 ("Evidence gathered from real jurors and judges and from the laboratory has produced convergent results demonstrating that no matter how it is measured, jurors appear largely incapable of understanding judicial instructions as they are traditionally delivered by the judge.").

[3] *See* RANDOLPH JONAKAIT, THE AMERICAN JURY SYSTEM 203 (2003).

[4] *See id.* at 203-04 (making this point); Michael Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISCIPLINARY L.J. 26 (1997) (concisely summarizing the research on limiting instructions concerning a wide range of topics).

[5] *See* JONAKAIT, *supra* note 4, at 200.

[6] *Id.*

[7] *See* Ogloff & Rose, *supra* note 1, at 425-26.

[8] *See* JONAKAIT, *supra* note 3, at 210.

here—jurors tend to interpret jury instructions in ways that are consistent with their own commonsense notions of justice.[9] Relatedly, there is significant empirical evidence suggesting more broadly that jurors also interpret jury instructions to reflect their pre-existing beliefs about the content of the law.[10] These observations are not problematic if jurors' pre-existing beliefs and commonsense notions of justice correspond to the law, or even if they bring about the results that the law dictates, albeit getting to those results by ways not contemplated by the strict letter of the law.[11] But when these cognitive forces lead to outcomes contradicted by the law, policymakers have good reason to be concerned.[12]

What, if anything, can be done to improve this state of affairs? One strategy is to draft clearer instructions consistent with psycholinguistic theory. But, "[a] great number of studies have examined the effect of redrafting instructions . . . , and generally reported *improved* comprehensibility but still relatively low [absolute] levels of understanding."[13] Researchers have found evidence supporting two explanations for those modest effects: first, that some legal concepts are themselves ambiguous and complex, necessarily requiring interpretation, even when stated in relatively "plain" language; second, that jurors better understand well-crafted instructions when they are consistent with jurors' preconceptions, intuitions, and notions of commonsense justice but not when lay and

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[9] *See* Ogloff & Rose, *supra* note 1, at 426.

[10] *See* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 160 (2007).

[11] *See* JONAKAIT, *supra* note 3, at 215.

[12] *See* Ogloff & Rose, *supra* note 1 at 426.

[13] *Id.* at 427 (emphasis added).

legal conceptions conflict.[14] Some researchers have suggested that the latter problem might be addressed by additional instructions informing jurors of their likely natural decision-making strategies and understandings, why they hold them, what alternative approaches the law requires, and how to get there.[15] But there is too little available research to make confident judgments about the success of such an approach.

Experimental data has also shown that giving "pre-instructions" earlier in the trial has either minimal or no impact on jury understanding and compliance.[16] Likewise, "most studies have discovered no improvement" in juror comprehension from providing them with written copies of instructions,[17] though jurors do make heavy use of such instructions and struggle mightily as a group to give them a clear, shared meaning.[18] It is important to stress that too few studies have been done on the cumulative effect of combining several or all proposed remedies. But a very small number of studies have suggested, for example, that combining pre-instructions with juror note-taking *might* improve juror understanding and performance.[19] Some other researchers, relying on a growing but still small body of experimental evidence and field studies, have suggested that more radical changes are needed, such as giving jurors an outline of the charges and a document addressing the methodology they are to use in deliberations, while also using

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[14] *See id.* at 427-28.

[15] *See id.* at 426.

[16] *See* JONAKAIT, *supra* note 3, at 215. But there are some studies finding an impact of pre-instructions on understandings of reasonable doubt and related concepts and on resulting verdicts. *See* Ogloff & Rose, *supra* note 2, at 432.

[17] *Id.* at 211.

[18] *See* VIDMAR & HANS, *supra* note 10, at 164-68.

[19] *See* Ogloff & Rose, *supra* note 1, at 430, 432.

flow charts and decision-trees, as well as computer-animated audio-visual explanations of legal topics.[20] But, even if more research adds support for these changes, they are well beyond the charge of this Committee and are of such a magnitude that they are likely to engender stiff political resistance.

B. *Analogous Studies Promoted by the Innocence Movement*

Concerns about wrongful convictions of the innocent are among those at the heart of this Committee's charge. In one other area given empirical attention concerning wrongful convictions—errors based upon eyewitness mistakes—significant research has been done on the value of jury instructions alone as a way of improving jurors' ability to spot mistaken identifications. The results have been discouraging.

Two leading experimental psychologists in this area, Brian Cutler and Steven Penrod, indeed concluded that "the experiments we have reviewed . . . provide little evidence that judge's instructions concerning the reliability of eyewitness identification enhance juror sensitivity to eyewitness identification evidence."[21] Changing the timing and content of instructions did not improve juror performance.[22] In a few instances juror skepticism was enhanced by cautionary instructions, "but the effect . . . [was] not systematic."[23] Moreover, the most well-known judicially-crafted instruction, the *Telfaire* instruction, in fact had *ill* effects. Explain Cutler and Penrod,

> [T]he evidence indicates that the *Telfaire* instructions—perhaps because they confuse jurors—actually *reduced* juror sensitivity to witnessing and

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[20] *See id.* at 434-38.

[21] BRIAN CUTLER & STEVEN PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 263 (1995).

[22] *See id.*

[23] *Id.*

> identification conditions compared to uninstructed jurors. Indeed, to the cynical reader, careful scrutiny of these results—especially a comparison of conviction rates in good eyewitnessing conditions for uninstructed versus instructed jurors—will suggest that the defense should be especially eager to request *Telfaire* instructions when an identification has been made *under good witnessing conditions*![24]

Accordingly, these researchers conclude, "judges' instructions do not serve as an effective safeguard against mistaken identifications and convictions . . . ."[25] Although Penrod and Cutler wrote these words in 1995, the current state of the research continues to support their conclusions.[26]

C. *Studies Concerning Interrogations*

A variety of studies have been done concerning whether instructions improve jurors' ability accurately to determine the voluntariness of a confession or to ignore or properly weight an involuntary confession.[27] These studies, though not specifically involving videotaping the entire interrogation process, are similarly discouraging.

Mock jurors faced with scenarios involving an officer's threatening punishment if the suspect does not confess do find the confession involuntary, the defendant not

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[24] *Id.*

[25] *Id.*

[26] *See, e.g.*, Ogloff & Rose, *supra* note 1, at 427-28 (noting a more recent experiment in which cautionary eyewitness instructions enhanced juror memory of the factors they should consider in evaluating eyewitness testimony, *yet jurors still accurately remembered only 29% of those factors!); But cf.* Christian A. Meissner & John Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces*, 7 PSYCHOL., PUB. POL'Y & L. 3, 25 (2001) (optimistically suggesting that *properly-drafted cautionary eyewitness instructions* may modestly aid juror performance, especially concerning "own race bias"—the greater difficulty witnesses have in accurately identifying those of another race—but not marshalling evidence that experimental data has yet borne out this optimism). It is also worth noting that many judges are likely highly resistant to giving even modestly scientifically-informed cautionary juror eyewitness instructions. *See* Ogloff & Rose, *supra* note 1, at 4124-15 (describing supporting study).

[27] *See* G. Daniel Lassiter & Andrew L. Geers, *Bias and Accuracy in the Evaluation of Confession Evidence*, *in* INTERROGATIONS, CONFESSIONS AND ENTRAPMENT 197, 198-200 (G. Daniel Lassiter ed., 2005) (summarizing these studies).

guilty.[28] But when officers use "a 'soft-sell' technique in which the interrogator tries to lull the suspect into a false sense of security by offering sympathy, tolerance, face-saving excuses, and even moral justification, such as by blaming a victim or accomplice, by citing extenuating circumstances, or by playing down the seriousness of the charges,"[29] mock jurors *do* judge "the confession to be less than voluntary" yet, nevertheless, view "the confessor as largely culpable for the crime."[30]

Researchers find similar results when officers make promises of leniency rather than threats.[31] In a series of experiments, researchers tried to reduce these effects via judicial instructions. One variant directed jurors to ignore a confession they considered coerced; a second variant defined "coercion" and explained why it risks unreliable confessions; a third variant defined coercion and emphasized its unconstitutionality and unfairness; and a final variant defined coercion and emphasized both its unfairness *and* risk of eliciting false confessions.[32] The first three variants had *no* effect on jurors' judgment of voluntariness or on their verdicts.[33] The last variant did, however, lower judgments of voluntariness where confessions fit criteria of legal coercion, *but the jurors convicted anyway*.[34] These studies did not, however, allow mock jurors *to deliberate*.

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[28] *See id.* at 198.

[29] S. M. Kassin & K. McNall, *Police Interrogations and Confessions*, 15 L. & HUMAN BEH. 231, 235 (1991).

[30] Lassiter & Geers, *supra* note 27, at 198.

[31] *Id.*

[32] *See id.* at 199.

[33] *Id.*

[34] *See id.*

Yet later experiments involving deliberations, and even involving instructions given immediately before the relevant testimony, were equally unsuccessful "in eliminating the tendency to give inappropriate weight to self-incriminating statements that were legally involuntary."[35] Likewise, another set of experiments varied the degree of pressure to confess: a high-pressure version in which the suspect was handcuffed, verbally assaulted, and threatened with a weapon; a low-pressure version free of these factors; and a no-confession version in which the defendant denied committing the crime.[36] Despite recognizing the first version as eliciting a "clearly coercive" confession, the jurors' conviction rate remained significantly higher than that in the no-confession circumstance.[37] More importantly here, "a straightforward admonishment from the judge to disregard the coerced confession did not eliminate its tendency to boost guilty verdicts, thereby demonstrating the power of confession evidence to influence jury decision making even when it logically should not."[38] Two leading researchers in the field conclude that these studies, taken as a whole, "unequivocally demonstrate that people did not necessarily evaluate and use confession evidence in the way prescribed by law."[39]

There is thus reason to worry that the efficacy of cautionary instructions concerning the failure to videotape the entire interrogation process will likewise be minimal or nil. Although I know of no studies on this specific question, studies have

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[35] *Id.*

[36] *See* S. M. Kassin & H. Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule,* 21 L. & HUM. BEH. 27, 27-46 (1997).

[37] *See* Lassiter & Geers, *supra* note 27, at 199-200.

[38] *Id.* at 200.

[39] *Id.*

been done on whether jurors' ability to watch a videotape improved their ability to differentiate true from false confessions. One study found that in several conditions "[o]bservers were no better than chance at differentiating true from false confessions" where participants were induced into false-confessions by persons whom they did not realize were confederates in an experiment.[40] However, that study and a few others found that cameras *focused on the interrogator* did lead jurors to become "relatively better at identifying false confessions than those who evaluated the confessions" in other formats.[41] Some researchers even argue that a camera focused on the interrogator alone and not the suspect is likely to improve accuracy in divining false confessions even more than would an equal camera focus on both suspect and interrogator.[42] Other researchers interpret the data differently, however, concluding that the best approach is to "have multiple cameras focusing equally on the detectives and the suspect to capture the totality of the encounter and minimize biased interpretations of the evidence,"[43] an approach that also should further purposes other than jury accuracy, such as improving prosecutor and judicial efforts to screen false confessions in the first place. If, therefore, watching videotapes, and, even then, only when recorded from the proper angles, is one of the few ways to improve juror accuracy regarding the value of confession evidence, it is hard to see how a simple caution to view unrecorded confessions skeptically is likely to achieve a similar improvement in accuracy.

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[40] *Id.* at 209.

[41] *See id.* at 208-09.

[42] *See id.* at 210-11. These researchers indeed believe that the equal focus approach is harmless, the suspect-focus approach harmful, and only the interrogator-focus affirmatively helpful in separating true confession wheat from false confession chaff. *See id.* at 208-11.

[43] LEO, *supra* note 1, at 205.

III. *Conclusions*

Jury instructions alone are unlikely to improve jurors' often poor performance in judging the voluntariness and accuracy of confessions. Accordingly, when police fear of jury instructions fails to deter their violating a mandate for electronic recording of the entire interrogation, cautionary jury instructions will do little to protect the innocent or the coerced. Even if violations of the mandate turn out to be rare, the risks to the innocent and to constitutional values where such violations do occur counsel against the notion that cautionary instructions are a "remedy" of any sort. A "remedy" must repair or correct a wrong, and cautionary instructions probably do no such thing.

Experimental work, archival studies of false confession cases, and public opinion surveys all converge on the same conclusion: confessions are a uniquely powerful form of evidence that jurors are loath to ignore and for which they have great difficulty in properly discounting their weight, even when the confession is involuntary.[44] So powerful is this evidence that jurors even allow it to outweigh strong evidence of the suspect's innocence.[45] Richard Leo, perhaps the most prodigious social scientist writing about confessions, and certainly one of the most well-respected, flatly declares: "If the defendant's case goes to trial, the jury will treat the confession as more probative of his guilt than any other type of evidence (short of a video-tape convicting him of the crime) . . . ."[46] Once a confession is admitted, therefore, any single remedy for jurors' commonsense belief in the powerful weight to accord such confessions is likely to be of

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[44] *See id.* at 250-51.

[45] *See id.* at 250.

[46] LEO, *supra* note 1, at 250.

little, if any, benefit, in improving jurors' ability to acquit the innocent.[47] To hope that jurors who hear a suspect's confession but do not see the entire interrogation process leading up to it will accurately discern the truth based upon a mere cautionary instruction is to replace science with wishful thinking.

[47] I have emphasized the words "any single remedy" because, as I explained in the *Issues Memorandum* dated October 7, 2008, combining cautionary instructions with appropriate expert testimony may *together* have some beneficial effect, though, as I discuss in that companion memorandum, I do not think that even that combination is adequate to protect the innocent when electronic recording inexcusably fails to occur.