

## Confession Admissibility Issues

In the past several years the courts have become more concerned about the issue of false confessions. While the incidence of documented false confessions is rare, more and more jurisdictions are suggesting, if not requiring, interrogators to electronically record interviews and interrogations. With that in mind the courts are carefully examining the interrogator's behavior and assessing the impact of that behavior on the voluntariness of the confession. The following represents a few court decisions regarding unacceptable interrogator behavior.

### California Court of Appeal Finds Confession Involuntary

In the case of *People v. Fuentes* July, 2006 the Court of Appeal, Second District, California found the defendant's confession to be inadmissible because improper promises and threats were made during the interview, both express and implied, which rendered the confession involuntary as the product of coercive police activity. From the Appeal Court's decision:

"In making this argument, defendant focuses on exhortations that even good people can do bad things while intoxicated and that defendant's not being in his "right state of mind" when the incident happened would "help" him. In addition, ***defendant was told that not confronting the situation would be "worse" for him, if defendant lied the case would go "very, very bad" for him, and if defendant kept quiet he could be charged "for something more serious, very ugly." Conversely, if a person tells the truth "it goes much better for them" and "the charges are lowered - a little."*** Finally, ***at least one and one-half hours after the interview started, defendant was given the alternative of spending either "the rest of [his] life" or "five or six years" in jail.*** (emphasis added) He then confessed. In addressing the issue of voluntariness, the trial court concluded that under the totality of the circumstances the "latitude" taken by the police in questioning defendant was permissible. Based on our independent review of this legal issue, we reach the opposite conclusion (and therefore do not need to analyze the separate issue of defendant's Miranda waiver)."

### Massachusetts Supreme Court Decision Provides for Special Jury Instruction When Interrogation is not Videotaped - Discusses Use of Trickery and Deceit

In the case of *Com. v. DiGiambattista*, 813 N.E.2d 516 (2004), the Massachusetts Supreme Court stated that "... ***when the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care.*** (emphasis added) Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the

absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt."

In examining the use of trickery and deceit the Court stated that misrepresenting evidence "does not necessarily compel suppression of the statement." Also, the court said that "We do not suggest that an officer's use of the standard interrogation tactic of "minimization," by itself, compels the conclusion that a confession is involuntary." ***However, what seemed to disturb the Court the most was the apparent reference to counseling which they felt "implicitly suggested to him that "counseling" would be an appropriate avenue for him to pursue after making a confession." In other words, if he confessed he would get counseling instead of jail.*** (emphasis added).

### Wisconsin Supreme Court decision

In the case of State of Wisconsin v. Jerrell C.J., July 2005 the Wisconsin Supreme Court found that:

- juvenile's written confession to police was not voluntarily given;
- following the arrest of a juvenile, ***the failure of police to call the juvenile's parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel*** (emphasis added) will be considered strong evidence that coercive tactics were used to elicit the juvenile's incriminating statements; and
- pursuant to Supreme Court's supervisory power to ensure fair administration of justice, all custodial interrogation of juveniles shall be electronically recorded where feasible, and without exception when questioning occurs at a place of detention.

### Appellate Court Upholds Suppression of Juvenile Confession

In the case of *State v. Westmorland* Dec. 14, 2006 the Illinois Appellate Court, Second District, upheld the trial court's decision to suppress a 17 year old defendant's confession, focusing on the officer's failure to afford the defendant any "concerned adult" protections. Here is an excerpt from their decision:

***"The aspect of the interrogation that we find most significant is the total failure by the police to afford defendant any of the "concerned adult" protections explained above. The detectives made no attempt to locate defendant's parents before or during the interview nor did they afford him the assistance of a juvenile officer. They also refused defendant's two requests during the interview to speak with his mother.*** (emphasis added)

Here, the police refused defendant's two requests to contact his mother and made no effort themselves to contact defendant's parents before or during the interview. As in *Knox*, there was no juvenile officer present during the interview to offset the absence of a parent. We recognize that defendant was given *Miranda* warnings and did not receive any promises or threats. The same, however, was true of the respondent in *V.L.T.* and the defendant in *Knox*, but in neither case did this fact override the coercion that the court found in the remaining circumstances. Likewise, the provision of *Miranda* warnings and the absence of promises or overt threats did not ameliorate the pressure brought to bear on defendant, a 17-year-old who was "immature" for his age and became "terrified" while in custody when his two specific requests to contact a parent were refused and when Galason raised his voice to him and said, "I don't give a shit if you

go to jail or not.” If section 5-405(2) of the Act and the parallel common-law protections are to have real force, we cannot countenance the police action in this case but must find that defendant's confession was involuntary.”

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To be sure, in the experience of most professional interrogators the frequency of false confessions is rare. When we do learn of them, however, the interrogation tactics and techniques should be scrupulously examined, as well as the circumstances surrounding the interrogation. When this has been done, there are four factors that appear with some regularity in false confession cases:

- The suspect is a juvenile; and/or
- The suspect suffers some mental or psychological impairment; and/or
- The interrogation took place over an inordinate amount of time; and/or
- The interrogators engaged in illegal tactics and techniques

### ***Juveniles/Mental Impairment***

Every interrogator must exercise extreme caution and care when interviewing or interrogating a juvenile or a person who is mentally or psychologically impaired. Certainly these individuals can and do commit very serious crimes. But when a juvenile or person who is mentally or psychologically impaired confesses, the investigator should exercise extreme diligence in establishing the accuracy of such a statement through subsequent corroboration. In these situations it is imperative that the interrogator does not reveal details of the crime so that they can use the disclosure of such information by the suspect as verification of the confession's authenticity.

When a juvenile younger than 15, who has not had any prior experience with the police, is advised of his Miranda rights, the investigator should carefully discuss and talk about those rights with the subject (not just recite them) to make sure that he understands them. If attempts to explain the rights are unsuccessful, no interrogation should be conducted at that time. The same is true for a person who is mentally or psychologically impaired.

### ***Threats/Promises***

A review of available information in false confession cases has revealed that in many of the interrogations, investigators engaged in impermissible threats and promises. Examples of these statements include:

“You're not leaving this room until you confess.”

“If you tell me you did this you can go home and sleep in your own bed tonight (when such is not the case).”

“You will be sentenced to the maximum term unless you confess.”

“With the evidence that we have, there's no doubt that you will be convicted of this. The only question is how long you are going to sit in jail.”

“If you don’t tell the truth I will get your children turned over to protective services and you’ll never see them again.”

“The other guys want to charge you with 1<sup>st</sup> degree murder but if you tell me it was just manslaughter nothing bad will happen to you.”

It goes without saying that in the questioning of a criminal suspect no professional interrogator should engage in any illegal interrogation practices, including any threats, promises of leniency or the exercise of any physically abusive tactics. Furthermore, the rights of the suspect should be scrupulously respected.

### ***Theme Development***

It has been suggested by some that the interrogator’s effort to develop a theme during the interrogation is not just offering the suspect a moral excuse for his criminal behavior, but is actually offering the suspect a promise of reduced punishment. Here are several quotes from our books that clarify this issue:

Excerpts from Criminal Interrogation and Confessions (4<sup>th</sup> edition, 2001 Inbau, Reid, Buckley and Jayne)

- “During the presentation of any theme based upon the morality factor, caution must be taken to avoid any indication that the minimization of the moral blame will relieve the suspect of criminal responsibility.” (p.235)
- “As earlier stated, the interrogator must avoid any expressed or intentionally implied statement to the effect that because of the minimized seriousness of the offense, the suspect is to receive a lighter punishment.” (p.246)
- “In applying this technique of condemning the accomplice, the interrogator must proceed cautiously and must refrain from making any comments to the effect that the blame cast on an accomplice thereby relieves the suspect of legal responsibility for his part in the commission of the offense.” (p. 263)

Excerpt from The Investigator Anthology 2000 Jayne and Buckley

- “During theme development, caution must be exercised, however, not to tell the suspect that if the crime was committed for a morally acceptable reason that the suspect will be accorded leniency.” (p. 414)

### ***Alternative Questions***

In The Reid Technique the alternative question should never threaten consequences or offer promises of leniency. The following are **improper** alternative question examples:

“Do you want to cooperate with me and tell me what happened, or spend the next five to seven years behind bars?” (improper)

“Do you want to be charged with first degree murder, which will mean life in prison, or was this just manslaughter?” (improper)

“Are you going to get this straightened out today, or do you want to spend a few days in jail to think about it?” (improper)

There has been the suggestion by some critics of police interrogation techniques that the alternative question – “Was this your idea or did your buddies talk you into it?” is potentially dangerous because it only offers a suspect (including an innocent one) only two choices, both of which amount to an admission of guilt. This criticism ignores the obvious third choice which is to deny any participation in the commission of the crime that is under investigation.

However, there is an additional issue raised by some critics about the alternative question – namely, that saying “Was this your idea or did your buddies talk you into it” is essentially the same as saying “If this was your idea you are going to spend time in jail, but if your buddies came up with the idea you will not go to jail.” This theory is called “pragmatic implication” and was developed from a study in which college students read various transcripts of interrogations and then speculated on the type of punishment the suspects would receive based on the interrogation process used. This concept has never been empirically proven. It is only the product of laboratory research based on college students’ expectations of appropriate punishment for suspects who had been interrogated with two different approaches.

The courts have rejected the idea that a confession is inadmissible if a suspect confesses because he harbors some internal hope that his confession may lead to a lesser sentence.

*State v. Nunn* - “...even if a suspect ...influenced perhaps by wishful thinking ...assumed that he would get more lenient treatment...[this] would not, as a matter of law, make the confession inadmissible.”

*R. v. Rennie* - “Very few confessions are inspired solely by remorse. Often the motives of the accused are mixed and include a hope that an early admission may lead to an early release or a lighter sentence.”

*R v Oickle* - The Supreme Court of Canada indicated that the type of alternative question we suggest does not create an inadmissible confession, and offered a clear test of whether or not an implied threat or promise crosses the legal line: “The most important decision in all cases is to look for a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or a promise.”

### ***Confession Corroboration***

As we have stated earlier, it is imperative that interrogators do not reveal details of the crime so that they can use the disclosure of such information by the suspect as verification of the confession’s authenticity. In each case there should be documented “hold back” information about the details of how the crime was committed; details from the crime scene; details about specific activities perpetrated by the offender; etc. The goal is to match the suspect’s confession against these details to establish the veracity of the statement. It should be remembered, however, that suspects do not always tell us the complete truth and do not always remember all of the details of a crime they committed.

Excerpt from Criminal Interrogation and Confessions (4<sup>th</sup> edition, 2001 Inbau, Reid, Buckley and Jayne)

- "... it is also a fact that most confessors to crimes of a serious nature will lie about some aspect of the occurrence, even though they may have disclosed the full truth regarding the main event. They will lie about some detail of the crime for which they have a greater feeling of shame than that which they experienced with respect to the main event itself." (p. 253)

Excerpts from The Investigator Anthology 2000 Jayne and Buckley

- "Lies of justification and omission are commonplace in written confessions. Many of these lies represent the suspect's attempt to present his crime in the most favorable light, others have a more direct bearing, such as protecting the name of an accomplice or concealing involvement in another crime." (p. 472)
- "Some confessions contain misinformation because of the suspect's perceptual distortions. During a kidnapping and murder of a child, the suspect may have vivid recollections of committing the crime, but have no specific recollections of the clothes the child was wearing." Many crimes are committed when the suspect is experiencing intense emotions (fear, anger, frustration). Just as victims tend to focus on the robber's weapon during a robbery, the emotions a guilty suspect experiences can bias attention and memory retrieval of specific details. As cognitive psychologist Daniel Schacter writes, "When a person has actually experienced trauma, the central core of the experience is almost always well remembered; if distortion does occur, it is most likely to involve specific details." Searching for Memory: The Brain, The Mind and the Past 1996 (p.473)

Nevertheless, when significant and substantial contradictions exist between the known facts about the crime and what the suspect describes in his confession, extreme care must be exercised in accepting the confession's validity.

### ***Factors to Consider***

With the above discussion in mind, the following represents some factors to consider in the assessment of the credibility of a suspect's confession. These issues are certainly not all inclusive, and each case must be evaluated on the "totality of circumstances" surrounding the interrogation and confession, but nevertheless, these are elements that should be given careful consideration:

1. The suspect's condition at the time of the interrogation
  - a. Physical condition (including drug and/or alcohol intoxication)
  - b. Mental capacity
  - c. Psychological condition
2. The suspects age
3. The suspect's prior experience with law enforcement
4. The suspect's understanding of the language
5. The length of the interrogation
6. The degree of detail provided by the suspect in his confession
7. The extent of corroboration between the confession and the crime
8. The presence of witnesses to the interrogation and confession

9. The suspect's behavior during the interrogation
10. The effort to address the suspect's physical needs
11. The presence of any improper interrogation techniques

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### ***Guidelines for Interrogator Behavior***

In our book, [Electronic Recording of Interrogations](#) we have a specific chapter in which we discuss the investigator's conduct. Here are just a few of the points discussed in the book.

During our interviews with prosecutors in Minnesota who have had experience with recorded interrogations for over a decade they pointed out that the confessions that were ruled inadmissible typically dealt with *Miranda* issues as opposed to tactics used by the interrogators. Consequently, when recording in a custodial situation be sure to

- Document the suspect's understanding of his *Miranda* rights and establish a voluntary waiver

While the United States and Canadian Supreme Courts have supported the interrogator's use of deception during the interrogation (for example, misrepresenting an accomplice's statement), the interrogator should balance the wide latitude that the courts afford regarding the use of deception against the jury's perception of taking unfair advantage of the suspect through deceptive practices. Consequently,

- Any false statement made to a suspect should be defensible in that the investigator can articulate the basis for his misrepresentation
- At all times avoid promises of leniency or threats of harm
- Avoid leading questions in the development of the initial admission of guilt into the full confession – the jury should see the suspect providing the crime details
- Establish with the suspect that they were properly treated; had washroom breaks; etc.

The book, [Electronic Recording of Interrogations](#) can be purchased on line at [www.reid.com](http://www.reid.com).