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Agency Mission

To enhance the quality of justice throughout Wisconsin by providing high quality, compassionate, and cost-effective legal representation; protecting the rights of the accused; and advocating as a criminal justice partner for effective defender services and a fair and rational criminal justice system

“But we’ve always done it this way!” A Progressive Approach to Police Interview and Interrogation Training

By: Detective John Tedeschini*

At a seminar I attended not long ago in the United States, I sat, mouth agape, as I, along with the rest of the room, was instructed in how to establish dominance over a suspect within the first minute of an interview. This technique included overemphasizing your importance (“I have been sent by the governor . . .”), purposely calling the suspect by the wrong name, confusing them about which chair to sit in, and engaging in a game of continual one-upsmanship (“You have three children? Oh, I have four.”). Sadly, this was yet another example of how entrenched what I will call *traditional* North American interview and interrogation techniques remain. Moreover, this was typical of the lack of progress I have witnessed with respect to law enforcement interview and interrogation training since being sworn in as a police officer in 1993.

Clearly, the application of effective and well-informed interview and interrogation techniques with suspects, victims, and witnesses is crucial to the proper administration of justice. This makes the role of training police investigators pivotal. It is disconcerting then that a recent study found the type and amount of training received by a sampling of Texas police officers over the course of their careers was outdated and virtually void of any discussion of social science research findings (Colwell, Miller, Lyon, & Miller, 2006). Accordingly, there have been

calls for the implementation of training programs that reflect scientific findings over the conventional wisdom (Blair & Kooi, 2004; Watkins & Turtle, 2003; Williamson, 2006).

From my standpoint as a Canadian practitioner and instructor of interview and interrogation training, there are remarkable similarities on both sides of the border when it comes to how officers learn their craft. Presumably, these similarities are linked to the long history and availability of commercial training programs in the USA and Canada and through the culture of policing that sees techniques, like interrogation, being continually passed on from senior to junior investigators (Ofshe, 2007).

After 15 years of policing, I am grudgingly thankful I have had, for lack of a better word, the *benefit* of some hard learned lessons confirming that detecting deception is not as methodical and simplistic a process as was previously believed and accepted. In effect, I have been forced to critically analyze what I have been taught in the past, and indeed what I was now teaching my fellow police officers with respect to traditional North American interviewing and interrogation practices. Upon reflection, it is obvious that the time has come for North American law enforcement to collectively recognize, encourage, and adopt other models, techniques, and ideas that continue to fall by the wayside because of an emphasis on a commercialized approach to training and a general ignorance of the vast body of social science research available. I fully realize that some of my colleagues may see advocating such a shift as a naïve and overly lofty goal. However, as I now I tell the classes I instruct, incorporating research findings and the lessons learned from the past into interview



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and interrogation training is the progressive and responsible thing to do.

In this article I will provide an overview of the primary changes I have made in my own police service's training program over the last 5 years to incorporate research findings into the curriculum. While all of these advancements have been incorporated into our week-long Forensic Interviewing course for detectives, some are also provided to members at the constable rank by way of recruit training lectures, investigative skills courses, and workshops.

Combating the Confession Culture

I should point out at this time that, like hundreds of thousands of other law enforcement officers and private sector investigators, I was trained in the Reid Technique of interview and interrogation at an early stage of my career. I should further state that I applied the technique religiously and went on to instruct many of the same principles in our in-house training courses.

Due to the Reid influence, our original training programs focused on and encouraged subjecting suspects to the psychological processes of isolation, confrontation, and minimization (Feld, 2006). Moreover, we were training our officers that, for example, denials by a suspect during and interrogation must be shut down at every turn. As a result, I found myself imploring to those I later trained, "the only time you want to let the suspect talk in an interrogation is when they are ready to confess." This was called the 95% rule. In other words, in an interrogation – unlike an interview – you did 95% of the talking. With this type of approach being advocated and utilized over the years by thousands of other trained investigators across North America, it should come as no great shock that research has suggested the existence of a *confession culture* in the police investigative process that has contributed to miscarriages of justice (Savage & Milne, 2007). It has also been suggested that the strict adherence to a confession-oriented style of interrogation not only promotes human rights abuses, it may also conceal what

amounts to a lack of competency in interviewing techniques (Williamson, 2006). In this respect, police investigators have, in my opinion, rightly been criticized for their failure to recognize their primary responsibility—that of information-gatherers (Shuy, 1998).

When police officers concentrate solely on obtaining a confession, impartiality soon takes a back seat to bias. It is disconcerting how pervasive guilt presumptive interviewing is among police officers. I can attest to this problem because I have had the unique opportunity to regularly observe other investigators at work in the interview room, be it live or via recordings. More importantly, I was a classic offender myself. Confident in my lie detection abilities—after all I had taken lots of courses—at times the interview was simply window dressing for the interrogation to follow. I can distinctly recall some investigations in the early stages of my career where my focus was solely on the end product: a confession. The fact that I entered the interview with a classic case of confirmation bias is only clear now. If there is a silver lining to these hard lessons (it is humbling to find out you have interrogated an innocent), it is that they now act as excellent training tools, particularly in the tunnel vision and investigator bias training components which I will later explain in more detail.

To combat the confession culture, our members are now encouraged to adopt more of an information-gathering approach (Williamson, 1993). That is, in addition to interviews of witnesses and victims, the custodial interviewing of suspects should also primarily involve the gathering of information or "the examining and adding to the existing evidence" (p. 89). However, to accomplish this task there is the uphill battle of weaning members off of the *behavioral analysis* style of interviewing that was formerly taught. Coincidentally, a paper has recently been published to address some of the criticism, largely emanating from the research community, which surrounds this approach. The paper, *The behavioural analysis interview: clarifying the practice, theory and understanding of its use and effectiveness* (Horvath, Blair & Buckley, 2008)

provides some current insight into this widely used interviewing approach. To their credit, the authors (among them, the president of John E. Reid and Associates, Inc., Joseph Buckley) conclude the paper by encouraging further research on the approach to win the trust of practitioners “who, on a daily basis, have to address the common but difficult task of lie detection” (p. 116).

Information Over Behavior

The behavioral analysis approach—which has been cleverly likened to the creation of “human lie detectors” (Leo, 2004, p. 64)—has for the most part been set aside in favour of encouraging our members to understand and appreciate that information is power. Information gleaned from well-planned and well-executed interviews has the power to better identify both the guilty and the innocent. Instead of analyzing behaviour and diagnosing the suspect in question as truthful or deceptive, ideally it is *evidence* arising from the information obtained that forms the basis for informed decision making. Turning back to my own hard learned lessons in the investigative process, I would suggest there exists a disproportionate number of other police officers who, in utilizing a behavioral analysis approach, also made a significant number of diagnostic errors. These errors led to innocents being unnecessarily interrogated and lend credence to the contention that police interviews indeed “may well constitute one of the most important conversations of an interviewee’s life” (Haworth, 2006, p. 740).

Not unexpectedly, the interrogation of an innocent has several negative consequences. Firstly, false confessions occur because of a police decision to target an innocent suspect (Davis & O’Donohue, 2003). Secondly, the interrogation of an innocent has the potential to turn what I will call from a police investigator perspective a cooperative suspect (i.e., one who waives their rights and agrees to give a statement) into one who decides to invoke their right to counsel upon being accused and interrogated for the crime in question. A suspect’s decision to stop talking will, in all likelihood, preclude the option of a follow-up interview. This can have serious ramifications if no pertinent information (i.e., to

refute or confirm an alibi) has been obtained up to this point. A third negative outcome is the potential for creating and fostering a lack of public trust and confidence in the police and their practices.

Although unrelated to the consequences of diagnostic errors, another reason that an information-gathering approach is preferred is that it places less stress on the interviewer. This point really speaks to the need of getting back to the core skills of interviewing (Schollum, 2005) which are now stressed throughout the week-long course. The core skills include “preparation, rapport building, effective questioning, and active listening” (p. 102). I should also add that I am of the opinion that a behavioral analysis approach places a huge amount of stress on the interviewer. This stress effect was strikingly obvious in the practical scenarios that were held on the last day of the original week-long course. It was not uncommon to observe the interviewer freeze up as they tried to execute all the intricacies taught during the week which included analyzing the verbal and non-verbal behavior of the suspect (in this case a classmate), processing their response and structuring the next question while having to make contemporaneous notes! With the benefit of hindsight, it is patently obvious that it was asking far too much of a novice interviewer, let alone an experienced one, to effectively apply such a technique.

Unfortunately, the misguided concept that the analysis of verbal and non-verbal behaviour can reliably detect deception still remains popular among many investigators. Studies have consistently shown (DePaulo, Lindsay, Malone, Muhlenbruck, Charlton, & Cooper, 2003; Vrij, 2004) that while there are some cues liars are *more likely* to exhibit, there is in fact no written, spoken, behavioral, or physiological cue that is unique to lying. As prominent deception researcher Aldert Vrij (2000) puts it, “there is nothing like Pinocchio’s nose” (p. 24). This point is critical. If it is not recognized and understood by interviewers, frequent and damaging errors will continue to occur. Turning back to the commercialization of training in North America for a moment, it would surely be ruinous—both for one’s

reputation and financial health—to include research findings in your training program that run contrary to promises of exceptional lie-detection abilities.

Let me be clear that I am not about to contend that a blanket move to an information-gathering approach will totally negate the possibility of an innocent being subjected to an interrogation. As in any approach, there exist limitations. For example, in child abuse cases, it has been my experience that it is not uncommon to have no version of events to develop because of a lack of any forensic evidence and because the suspect is adamant that the child's allegation simply did not happen. However, the awareness and timely application of an information-gathering approach would surely lessen the negative consequences, encourage rather than discourage communication, and allow an interviewer to better execute and concentrate on the task at hand. Furthermore, given that the perceived strength of evidence has been shown to be one of two main factors (the other is the seriousness of the offence) that influence a suspect to confess (Vrij as cited in Hartwig et al., 2005) then it follows that the more information gathered throughout the investigative process the better chance a confession will be obtained. Finally, the potential for validating an innocent suspect's version of events through the gathering of information should also not be underestimated.

In addition to advocating a greater use of an information-gathering approach, there are several other topical issues that should, in my estimation, be present in any police interview and interrogation training program. These include instruction on tunnel vision, investigator bias, and false confessions. Each of these components are now included in our week-long course and are presented as explained below:

Tunnel Vision and Investigator Bias

The very notion of a Reid interrogation therefore, expressly embraces the foundational problems with tunnel vision—a premature conclusion of guilt, and an unwillingness to consider alternatives. In this context, however, the tunnel vision is not inadvertent, but deliberate; police are taught that this is the way

to advance their investigation. Cognitive biases are openly encouraged. (Findley & Scott, 2006; p. 335)

Education respecting tunnel vision:

One component of educational programming for police and Crown counsel should be the identification and avoidance of tunnel vision. In this context, tunnel vision means the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information. (Recommendation 74 from the Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin, 1998)

The role of police tunnel vision as a contributory factor in miscarriages of justice cannot be overstated. One of the key recommendations at the conclusion of Canada's Kaufman Commission into the conviction of Guy Paul Morin (Kaufman, 1998) was that education about tunnel vision should be incorporated into police training programs.

To set up the tunnel vision and investigator bias training components, I begin by taking the class step-by-step through one of my own investigations. What is valuable about this particular exercise is that it allows the class to take the same journey with tunnel vision and related biases that I did. It is also intended to humanize the training to some extent in that it is a co-worker who is humbled rather than a faceless outsider. When the exercise comes to an end, the guilty party is ultimately identified as among the least likely of the original four suspects. Most importantly, the guilty party also provided a corroborated confession. There is the intended shock and surprise among the police officers in the class, which is exactly what I felt as an investigator at the time. I have found that this exercise provides for an excellent opening discussion and underscores how, regardless of seniority and experience, tunnel vision is indeed part of our "psychological makeup" (Findley & Scott, 2006, p. 307).

Following the conclusion of the initial exercise, one PowerPoint slide is dedicated to the significant contributory factors of miscarriages of justice (which includes tunnel vision) as laid out by the late retired police officer, forensic psychologist, and author Tom Williamson (2006, p. 160). They are:

- “junk” forensic science;
- abuse or misuse of informants, including jailhouse snitches;
- manipulating witnesses to refute alibi evidence;
- misuse of offender profiling techniques;
- poor skills for interviewing witnesses and suspects;
- fabrication of evidence (perjury) or ‘gilding the lily’;
- misconduct by lawyers; and
- the psychological vulnerability of many suspects
- unprofessional relationship between corrupt cops and bad lawyers;
- “Cop culture” where loss of objectivity and bad judgment manifest themselves in either ‘tunnel vision’ or what some have called ‘noble cause corruption,’ which is simply an attempt to control criminal activity by criminal or unconstitutional methods.

What follows on the next slide displayed on the screen at the front of the class are pictures of Thomas Sophonow (www.gov.mb.ca/justice/publications/sophonow/toc.html), David Milgaard (www.milgaardinquiry.ca), and Guy Paul Morin (www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin) - all subjects of commission of inquiries in Canada. Members are then invited to put a name to each face. Interestingly, I have found that rarely, if ever, are members able to identify those on the screen before them. Training material then shifts focus to a brief analysis of the Guy Paul Morin case with emphasis on the recommendations arising out of the 1400 plus page Kaufman Commission report.

Instruction then segues into an explanation of investigator bias which is defined to members as “the tendency to perceive interview suspects as guilty” (Meissner & Kassin, 2004, p. 89). The existence of

an investigator bias effect has been a personal interest of mine such that I have done some informal (and certainly less than empirical!) studies with classes of police officers on the subject (Tedeschini, 2007). I am left, based on my own experiences, observations, and a review of the available research, with the opinion that investigator bias is indeed a pervasive but overlooked problem among police officers at all levels of seniority.

Next, a demonstration with a class member is utilized to show how the three-step chain of events involved in behavioral confirmation (Kassin, Goldstein, & Savitsky, 2003) applies to a police interview dynamic. Two other research studies then play an important part in the dual training component of tunnel vision and the investigator bias effect. The first is the fascinating paper *Motivational Sources of Confirmation Bias in Criminal Investigations: The Need for Cognitive Closure* (Ask & Granhag, 2005). Some key points of the paper, which are of obvious value to the class of detectives, are included in a handout. Some points are also incorporated into the exam that is held at the end of the week. These key points include:

- Criminal investigation is a theory-driven activity. Investigators are guided in their search for and evaluation of evidence by their preliminary theories or hypotheses regarding how and by whom a crime was committed.
- Such working hypotheses are not always based on solid facts surrounding a case, but sometimes on the expectations and preconceptions of the investigators.
- An investigator’s motivation to arrive at a definite conclusion regarding a case (i.e., need for cognitive closure) is an important contributing factor in this regard.
- There are three factors in the police environment that foster a tendency of confirmatory investigation strategies. They are: time pressures, a police culture that is characterized by norms that promote decisiveness, and that an investigator’s prior

commitment means they are then less likely to admit to having made a mistake.

The second paper, *Why Experts Make Errors* (Dror & Charlton, 2006), provides a rather compelling case for the insidious nature of bias in forensic identification contexts. The study involved six fingerprint experts who were unaware they had previously examined and either identified or excluded the same sets of prints. Additionally, on the second presentation the prints included “biasing contextual information” (p. 600). Examples of this included statements such as “suspect confessed to the crime” and “suspect was in police custody at the time of the crime” (p. 608). Finally, a control set of prints with no biasing information was also presented to the same group of experts. The results of the study revealed that fully *two-thirds* of the experts changed their decisions. As Dror and Charlton aptly concluded, “fingerprint and other forensic experts are not immune to such psychological and cognitive factors” (p. 612).

To conclude, some suggested solutions and management practices to consider, as presented in *The Multiple Dimensions of Tunnel Vision in Criminal Cases* (Findley & Scott, 2006), are highlighted. Portions of this important and comprehensive examination of tunnel vision are also included in a class handout. While there is certainly no cure-all to the twin dangers of tunnel vision and investigator bias, being informed, aware, and collectively committed to countering these dangers is a necessary first step for investigators.

False Confessions

On our most recent course I began this training segment by giving a brief talk about Jeffrey Deskovic’s wrongful conviction which saw him languishing in prison from the age of 17 until his exoneration in November of 2006 at the age of 33 years (Snyder, Mcquillan, Murphy, & Joselon, 2007). Most importantly, I was able to relate the impact of Deskovic’s brave, eloquent, and moving account of his false confession and subsequent wrongful conviction. Deskovic was the keynote speaker at the excellent “Conference on

Interrogations and Confessions—A Conference Exploring Current Research, Practice and Policy” which was held in El Paso, Texas, in September 2007. This is but one example of how police training of any sort should seek to incorporate current events and research to have the desired impact and effect.

Typically, introduction to the false confession training component begins with an overview of Kassin and Kiechel’s famous Alt Key study (1996). Given the audience, it is not surprising that the reaction to my explanation of the study has been somewhat less than receptive over the years. In fairness, I can attest to similar feelings when I first began teaching this component (the false confession component was first introduced in 2003 and was much less comprehensive in scope) because it is difficult, especially from a practitioner’s perspective, to not question the link between a low-stakes laboratory experiment and that of an actual high-stakes police interrogation.

Subsequent PowerPoint slides speak to the important and committed work in the area of false confessions by the likes of Richard Leo, Steve Drizin, Gisli Gudjonsson, and the aforementioned Saul Kassin. The significance of confessions as having more impact on jurors than any other form of evidence—even when the confession is believed to be coerced—is presented and followed by the typology of false confessions. At this juncture, members are provided with examples of what constitutes voluntary false, coerced compliant, and coerced internalized false confessions as well as reasons someone might provide each type.

An overview of the 1989 Central Park Jogger rape, arguably the most high profile of all false confessions cases, is then presented to the class. Discussion on this case acts as a natural introduction into suspect vulnerabilities which include: age, mental capacity, and physical and psychological state at the time of interrogation. Like the tunnel vision and investigator bias component, several questions related to false confessions are included on the final exam.

It has been my experience since incorporating this component that it is arguably the hardest to sell to police officers. I suspect it is because each individual member struggles, like I did, to come to terms with why someone would confess to a crime they didn't do. As a result, I was not overly shocked when, during our most recent course, I overheard one detective say to another that, regardless of what had been presented, they still found it hard to fathom a person would confess to something they did not do.

In addition to advocating more of an information-gathering approach and the inclusion of training components on tunnel vision, investigator bias, and false confessions, two additional components deserve mention.

The Defense Perspective

When reviewing the course evaluations over the last 3 years or so, time and again our defense perspective presentation has received the most positive feedback. I am indebted to Alex Pringle, Q.C., for regularly volunteering his time to present on our training courses. Pringle has been practising as a defense lawyer for over 30 years and for the past 25 has also taught various courses at the Faculty of Law at the University of Alberta. More recently, Pringle represented the original defense counsel at the Commission of Inquiry into the Wrongful Conviction of David Milgaard. Pringle's experience with the inquiry is somewhat fortuitous as, in keeping with the general theme of the course, it allows for what amounts to an insider's account of a miscarriage of justice. His captivating account to the class of the road to Milgaard's wrongful conviction sends the desired powerful message about the dangers of tunnel vision as they relate to criminal investigations.

During the remainder of his presentation, Pringle also offers important insight into statement admissibility, court testimony, and other related legal issues from an experienced defense lawyer's perspective. As I previously stated, this has always been a popular component of the course which is unusual in some respects as there tends to be an unfortunate undercurrent among some of an us-versus-them

relationship between police and defense lawyers. Thanks to Pringle's experience, natural charm, and oratory skills, I am of the belief that the incorporation of this defense perspective component has, to some degree, helped bridge this gap.

Eyewitness Evidence Considerations

For the first time ever, the most recent detectives' course saw a psychologist invited in as a guest lecturer to present on considerations surrounding eyewitness evidence. Given that eyewitness misidentification has been shown to be among the most prevalent factors in wrongful convictions (Wells, Memon, & Penrod, 2006), it is only prudent that this issue be included in a police training program. Largely working from key points of *Eyewitness Evidence: Improving Its Probative Value* (Wells et al.), issues such as cross-race identification, stress, weapon focus, and photographic line-ups are raised and discussed within the class.

Also included was a *hidden scenario* in an effort to try to highlight some of the underlying issues surrounding eyewitness identification. The day prior to the training lecture, I selected a male subject from the hotel lobby due to his rather distinct appearance (he was carrying several cases and was dressed in layered clothing). After agreeing to participate in the scenario, and unbeknownst to the class, our accomplice proceeded to enter the meeting room, walk to the front, and in a confused manner ask if he was in the Buffalo meeting room. On cue, I then stepped forward and escorted him out of the room while telling him in earshot of the class he was actually in the wrong location but that I would be glad to assist him. The next day, the psychologist brought up the *stranger* who had walked into the wrong room the day prior and asked for the class to provide a description. While far from empirical, it was still turned into a useful and interesting exercise, particularly when examining some of the identifying factors that were either included or missed altogether by the class.

Conclusion

The training components I have outlined above are not intended to be a panacea for the problems that inherently exist in the investigative process. They can however, act as a logical and necessary starting point for any police interview and interrogation training program that seeks to move beyond the attitude of “we’ve always done it this way.” Challenging the conventional wisdom, while not always the popular, sometimes is the progressive and responsible thing to do.

Disclaimer

The views and opinions expressed reflect the personal opinion of the author and do not necessarily reflect opinions of the author’s employer.

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Selling Confession: The Interrogator, The Con Man, and Their Weapons of Influence

By: Deborah Davis, Ph.D.*

Psychologically speaking, a successful interrogation is analogous to selling a resident of the Yukon air conditioning in January; for a suspect to acknowledge a criminal act involving negative consequences requires that the suspect believe a confession is in his best interest. Jayne, B. C., & Buckley, J. P. (1999). The investigator anthology (p. 207)

With just a few minor changes of terminology, the boys...got basic training in criminal interrogation. Indeed, the principles involved in selling a product door to door are similar to those described in this text for eliciting confessions from criminal suspects. The investigator's "product" is the truth, and a successful interrogator sells it in quite the same way as these boys were taught to sell newspaper subscriptions. Inbau, Reid, Buckley & Jayne (2001). Criminal interrogations and confessions. (p. 211)

...a salesman, a huckster as thieving and silver-tongued as any man who ever moved used cars or aluminum siding, more so, in fact, when you consider that he's selling long prison terms to customers who have no genuine need for the product. Simon, D. (1991) Homicide: A year on the killing streets. p. 213 (describing the police interrogator)

These colorful depictions of the interrogator, his goals, and his methods suggest that he shares much in common with the accomplished conman or salesman. Indeed, as popular interrogation manuals suggest, the interrogator, in order to induce a suspect to confess against his self-interests, must convince the suspect of the exact opposite of the truth, and of what common sense would suggest. Through, in effect, an extended "anti-Miranda warning," the interrogator works to convince the suspect that everything he says -preferably including a detailed confession to the crime at hand-can and will work to his benefit, whereas denial or failure to talk to his interrogator can and will be held against him. But how, exactly, does he do this? And how does the interrogator's technique resemble that of a car salesman or conman?

Setting the Stage

Influence professionals of all stripes--whether interrogators, salesmen, conmen, Madison Avenue advertisers, or even our own pesky children--universally recognize that persuasion is easier if the target's

natural resistance can be undermined. Attempts to persuade, when offered in the proper context, by the proper agent of influence, on the properly "softened-up" target will be far more persuasive. Known by social influence experts as "pre-persuasion," this stage-setting can entail multiple points of attack, including choosing the physical setting, establishing the "credentials" or trustworthiness of the agent of influence, manipulating the emotional or physical status of the target, "framing" the issues or "setting the agenda" of a meeting or interaction, and many other relatively subtle tactics. All such tactics



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essentially "soften-up" the target in one or more respects.

Interrogators recognize that to maximize the likelihood of confession, they can motivate the suspect via two pathways: increasing stress, discomfort or anxiety to motivate escape at any cost; and/or leading the suspect to the apparently rational conclusion that confession is in his best interest. Thus, a criminal suspect can be rendered more vulnerable to the interrogator's influence via one or both pathways.

If he lacks physical strength and stamina, he may be unable to tolerate a lengthy interrogation or an uncomfortable physical setting, and, failing to recognize his own ability to stop the interrogation by invoking Miranda rights, he may view confession as the only or most effective way to terminate an intolerable situation. If his mental abilities are compromised through physical or emotional distress, severe fatigue, intoxication or other impairments, he will be less able to critically evaluate what he's told, to remember reasons why he should not believe it, or to identify alternative ways to handle the situation—and therefore will be more susceptible to persuasion. If the interrogator appears to be friendly, sympathetic, and motivated to help the suspect, the suspect's motivation to resist him will be undermined. And finally, if the interrogator can successfully frame the issues and evidence the suspect will consider such that they exclude the possibility of establishing innocence (the clearly most desirable alternative), it is that much easier to sell confession as the best available alternative. These are the goals guiding the interrogator's attempt to set the stage to his advantage.

Maximizing Physical and Emotional Distress

"The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment." (*Miranda v. Arizona*, p. 465)

A common cause of confession, whether true or false, is inability to tolerate short term distress in

order to maximize long term outcomes. Suspects become willing to comply with interrogator demands in order to escape what they find to be an intolerable situation; and as the stresses of the interrogation mount, they become increasingly unable to think and reason rationally about what is actually in their best interest, or how much long term damage will result from confession. Recognizing these effects of distress, but faced in the post-Miranda era with the specter of exclusion if a confession is elicited via obvious physical or emotional abuse, modern interrogators must turn to less obvious subtle ways to increase discomfort or distress.

Though deprivation of basic physical needs such as nourishment, sleep or safety from physical abuse may be grounds for exclusion, subtle inducement of discomfort can go completely unnoticed. Popular interrogation manuals include such recommendations for accomplishing this goal as deliberately uncomfortable chairs, uncomfortable temperatures, and bare unattractive settings. Although unlikely to be recognized by courts as a cause for exclusion, such physical discomfort can significantly add to suspects' overall level of distress. As the interrogation proceeds, distress is typically further enhanced by such factors as continuing social isolation, the fact of being accused, fear of eventual consequences, and the aversive nature of the interrogation tactics themselves.

Interrogators may also benefit through their choice of when to interrogate the suspect. Many suspects are interrogated at the very time at which they are most compromised. Some are interrogated shortly after they have found their loved ones dead, and therefore are emotionally shocked and severely distressed. Others are interrogated when severely fatigued, sleep-deprived, or intoxicated. Each of these impairments undermines the ability to endure further distress or to think and reason adequately. And, although interrogators can choose to delay until the suspect is less compromised, they commonly proceed to interrogation knowing that the suspect will be more vulnerable to influence when physically or emotionally weak. Although a fatigue-inducing 20 hour interrogation may be regarded by courts as

indicative of coercion, an interrogation that begins with a suspect already fatigued by 20 hours of hard work is unlikely to be considered coercive. Thus, the interrogator is better able to take advantage of existing impairments than to induce them himself.

Establishing the Power and Beneficence of the Interrogator

From the lowliest panhandler to the loftiest marketing professional, agents of influence are aware of the importance of the personal characteristics of the persuader. They will be most effective when appearing to possess characteristics consistent with the message they promote. When attempting to influence others to give him money, a panhandler will be most effective when appearing genuinely poor and unable to work - such as, for example, apparently being blind or missing a limb. The opposite will typically be true of an investment counselor, who would benefit from the appearance of competence and effectiveness when arguing that he can obtain impressive returns on the target's investments. Both would benefit from likeability and the appearance of trustworthiness. The panhandler should appear to genuinely need the money (not as an imposter posing as the disabled in order to con trusting marks); whereas the aspiring investment counselor should appear to be honest and trustworthy (not as someone who may intend to embezzle or cheat the investor). And both are likely to be more effective if they are likeable and pleasant, gaining the good will of their targets.

Taking such lessons to heart, the criminal interrogator presents himself in a manner that both undermines resistance to persuasion and directly facilitates it. First, contrary to widely held expectations that interrogators will be hostile and threatening, they are instead trained to make use of the "liking" principle of influence (likeable sources of influence are generally more effective). Since a suspect's natural inclination may be to distrust the intentions and motives of his interrogator, the interrogator must work to overcome the resistance such feelings would tend to create. Making himself likeable is part and parcel of this process. To accomplish this, the interrogator will typically engage

in a pre-interrogation stage in which the suspect is questioned in a non-accusatory fashion about his own background, acquaintance with the parties or situation involved, and so on. One of the most effective ways to promote liking of oneself is to express liking, admiration and approval of others. With this in mind, the pre-interrogation interview is done in a very friendly and often chatty fashion, in which the interrogator may flatter the suspect and project a sense of similarity and common ground with the suspect in order to develop trust and rapport. To minimize resistance throughout the interrogation, this friendly, sympathetic demeanor is typically maintained even when the interview proceeds into the accusatory interrogation.

In some cases, the "sympathetic-detective" (good cop) may be presented in contrast to the bad cop (the Mutt-Jeff technique), which can direct resistance toward the bad cop, further lessening resistance to the "good" cop.

The interrogator further casts himself as sympathetic toward the suspect and as trying to help him get the most desirable long term outcomes—a strategy we have dubbed "The Sympathetic Detective with the Time-Limited Offer." The time-limited offer refers to the detective's stated desire to help, along with his admonition that he cannot help the suspect unless the suspect "tells the truth" (i.e., confesses).

The detective also typically states or implies that once the interrogation is completed the case will be handled by others with less sympathetic views or motivations, and therefore failure to confess and explain during the interrogation will do far reaching damage to the suspect's case. The following is typical of the "Sympathetic Detective" strategy:

"Have you ever heard the saying opportunity knocks once? That means, you know, we all get one chance. Everybody gets one chance. Okay? And after that one chance comes it doesn't come back. And that---right now is your chance."

"Look Areal, you seem like a nice stand up kind of guy, no murderer. This is probably a situation

that you didn't realize you were getting into..didn't plan. You know, I think this thing bothers you a lot. And I think you probably got a pretty good heart, and I think you relive this thing and I think you think about it a lot...I don't think you're a cold blooded killer, or I know you're not a cold-blooded killer. I think you feel bad about this, you know. I see there's a lot of pain inside you. I can see that. I mean you feel bad..But you know, shit happens. I'd like to help you, man. I have my own conscience, okay? And I got to look at myself in the mirror. I got to know before I leave here I did everything that I could to see you get on the right track so you don't have to go down for something you didn't do. But if I'm wasting my time with you, tell me now. I don't have to sit here and talk to you. I'm-I'm concerned about you. But if you don't tell me the truth, there's no reason for me to be here. I got a wife and family at home and I can just go home to them."

"All I know is this thing won't go away. If you want people to believe this was a plan...but this is your chance. This is your opportunity to put your side on the table... I've been doing this for a long time, and I've seen a lot of guys, young guys like you, make big mistakes. Okay? And I'm very concerned that you're going to make the biggest mistake of your life. ...I believe you will tell the truth. But I am worried when you're ready to tell the truth it just might be too late. Either way stuff's gonna happen, you know, the legal process, the wheels are turning right now and we want to give you the opportunity to come forward and tell us your side of the story before it's too late and we just take it for, you know, I mean, we're trying to give you the benefit here. We're trying to give you the opportunity to come forward and tell us what happened, your side of the story versus the other side. Right now we're just talking. I'm not upset with you. I know what you're saying to me. But when I stop talking to you, they're going to do what they have to do. Okay? And then decisions are going to be made. Okay? And we're not going to be talking to you anymore. There's nothing that you're going to

have to say that the DA's going to be interested in hearing. They'll just go with the information they got."

Notice the many tactics contained in this monologue. The detective tries to make Areal believe he likes him, thinks he is not a criminal, and would like to help him in order to make Areal like and trust him. But he warns Areal that this is a time-limited offer, making use of the "scarcity" or "deadline" technique so pervasively used by retailers, and salesmen of all kinds (Buy this time share today at the discounted price of \$250,000-tomorrow it will be back to the regular price at \$300,000; Buy the TV, available only during the two-day sale at this price; Buy the condo and get the free cruise available only while you are at this presentation, etc.). He emphasizes that this is Areal's opportunity to tell his side, his "one chance"--an opportunity that he implies will be permanently lost once the case is handed off to the DA.

He invokes the reciprocity principle of influence. That is, people are more likely to comply with a request if the agent of influence has first done something for the target, which induces feelings of obligation to reciprocate that benevolence--for example, the vacuum salesperson who vacuums the carpet of the target before attempting to complete the sale; or the aluminum siding salesman who offers a free gift for the homeowner who agrees to listen to the salespitch. The interrogator invokes this reciprocity principle by saying that he is essentially doing the suspect a favor by forfeiting time with his family in order to try to help the suspect--that he does not need an explanation of what happens for his own purposes, since he already has all the necessary evidence to prove guilt. He is only there to give the suspect a much needed opportunity to explain himself. The resulting feelings of obligation can pressure the suspect to confess in order to fulfill the need to reciprocate the detective's kindness.

But among the most important messages conveyed by such a detective monologue is the invocation of the "authority" principle of persuasion (we are more likely to comply with requests and to believe

information offered by a person with apparent authority or expertise). The Sympathetic Detective and Set-up Strategies (next paragraph) are crucial to establishing authority---that is, the idea that the detective is someone who knows what is helpful to the suspect, and someone who CAN personally help the suspect. The "Sympathetic Detective" strategy is crucial for the detective to establish a foundation against which the arguments he will later bring to bear will appear to make sense. In practice, this consists of two vital ideas-(1) that there are choices to be made about how to handle the situation that will be determined by what happens between the suspect and interrogator during the interrogation; and (2) that there may be a way to minimize the consequences of the alleged act, even if the suspect admits involvement. That is, the "Sympathetic Detective" strategy helps to establish the interrogator as a legitimate authority with control over the suspect's long term outcomes, one likely to be more beneficent than those the suspect would have to deal with after the interrogation, and therefore one whose help the suspect should take advantage of.

These conclusions are reinforced by a second strategy, one we've dubbed "The Set-up Question." The popular Reid 9-Step method of interrogation includes the admonition to ask the suspect a question such as the following:

"Tell me Jack, what do you think should happen to the person who did this thing? Should he just go straight to jail, or are there some circumstances in which he should maybe get counseling or help, not go to jail, get some help instead?"

Although interrogators view this as a test of guilt (alleging that a guilty person should recommend clemency, whereas an innocent should recommend jail), such a question clearly conveys the message that the possibility of clemency exists, that there are choices about how to deal with a guilty perpetrator. This reinforces the message of the "Sympathetic Detective" strategy that the interrogator has choices about how to handle the suspect, including choices

of both whether to file charges at all, and if so what specific charges. Our own research has shown that observers exposed to an interrogation including either the "Sympathetic Detective" strategy or the "Set-up Question" are significantly more likely than those exposed to interrogations without these strategies to believe the detective has choices between specific charges and letting the suspect go without charges or sending him to counseling. Further, the "Sympathetic Detective" strategy renders them more likely to believe the detective likes the suspect, wants to help him, and will try to help him get the best outcomes. Together, such beliefs effectively set the stage for the detective's remaining tactics to persuade the suspect to confess.

Framing the Issues and Agenda

Those of us who lived through the 2004 presidential campaign can easily recognize the powerful effects of Republican George Bush's strategy to frame the primary issue of the campaign as one of national security. The infamous "circling wolves" ad of the 2004 campaign exemplified the Republican focus on raising fears of terrorist attack to increase support for Republican candidates. Republicans are generally perceived as more effective on issues of national defense, and to the extent the public can be led to focus on national defense as the primary issue, Republicans garner more votes.

Even in the present context of 2008, when public opinion has shifted against the Iraq war, Democratic candidate Hillary Clinton once again raised the specter of terror with her now infamous, but discouragingly effective, "3 am" ad inquiring who one would most trust to answer the phone when something scary and bad has happened in the world-with apparently devastating effects for Barack Obama. But Republicans remain those the public perceives as strongest on national defense, and Republican candidate John McCain may have been the ultimate beneficiary of her strategy. A March, 2008 poll indicated that voters' answers to the "3 am" question favored John McCain (45%) over either Clinton (27%) or Obama (18%) (Newsweek, March 17, 2008, p. 41: Always Their Own Worst Enemies, by Evan Thomas).

Proper framing of the issues is particularly effective when enacted under conditions in which one also controls the agenda. The importance of agenda setting has been illustrated in the context of jury research, for example, in that the foreman can dramatically affect verdicts through the organization or agenda of the deliberations. Depending upon the initial distribution of juror opinion, for example, an immediate vote may result in more or less likelihood of a defense verdict than a call to first discuss the evidence. A foreperson who agrees with a substantial majority favoring guilt will do better to call for an immediate show of hands, whereas one who disagrees with that majority would do better to call for a detailed review of the evidence before any vote.

Police interrogations are designed to both set the agenda and frame the issues in a manner to facilitate confession.

Taking Innocence off the Table: The "Borg" Maneuver

"Resistance is futile!" The Borg

Quite rightly, interrogators realize that a suspect's natural tendency will be to deny guilt, and that if a suspect believes there is a chance of establishing innocence he will push that agenda and argue vociferously with his accusers. To avoid this situation, interrogation tactics are designed to, from the outset, deny the suspect any hope of exoneration. Step 1 of the popular Reid 9-Step Method, "Positive Confrontation" - or what we call the "Borg Maneuver" - begins this process of dashing all hope of exoneration. The suspect is to be told firmly and confidently that the results of "our" investigation have clearly shown that you are the one who.... (committed the crime in question). The Inbau et al. (2001) manual recommends that the detective bring props supporting his apparent "evidence" of guilt-such as a full folder (apparently full of evidence), or bags of "evidence" such as hairs, bullets, slides of blood, or a lineup with the suspect's picture circled and so on. He may also confront the suspect with real or fabricated evidence of guilt,

such as alleged failed polygraph results, statements of alleged co-perpetrators, eyewitness identifications, claims of trace evidence such as fingerprints, DNA or hair fibers. The goal of this confrontation is to sweep away resistance that would naturally arise and be fueled by hopes of exoneration, and turn the suspect's attention to the issue of how to minimize the consequences.

Recognizing that if guilt is established, another apparent reason, or "pretence," for the interrogation will be needed, the interrogator is advised to make one or more "transition statements" (from interview and confrontation to interrogation) that explain the remaining goals.

"..if there is no doubt as to the suspect's involvement in the crime, the investigator should not require any further statements from the suspect to prove his case. Therefore, not only does the transition statement have to offer a legally permissible reason for the suspect to confess, but it also must establish a pretense for the interrogation other than to elicit a confession." Inbau et al. (2001), p. 224

Therefore, having cited the evidence of the suspect's guilt and confidently asserted that the investigation clearly implicates the suspect, the detective sets the new agenda.

Reframing the Issues: Focus on Consequences

Essentially, the interrogator recasts the purpose of the interrogation from "investigating guilt" to "deciding what to do about it". He "argues against self-interest" (we are more persuaded by those who apparently have nothing to gain by persuading us), saying that he doesn't need a confession from the suspect since guilt is already proven. He then lays out the new agenda, claiming "we're not here to find out whether you did it. We're here to find out why you did it, and what kind of person you are" (thereby clearly implying that such things matter). The Inbau et al (2001) manual recommends such statements as the following:

"The reason I wanted to sit down and talk with you about this is to find out what the circumstances were surrounding this thing. The reason why someone did something is often much more important than what he did." 225

"Now Sam, there is absolutely no doubt that you did this. What I need to establish with you right now is what kind of person you are." 225

"Joe, The only reason I'm talking to you now is that we don't know how many other homes in that area you have entered. There's no question that you went into the home on Wilson Avenue last weekend. My concern is that we have over 20 unsolved burglaries within a two-mile radius of that home...Now if you're involved in all those other 20 burglaries, quite frankly, I wouldn't expect you to say anything. But, Joe, if you're not involved in all of those others, if it was a lot less than 20, we need to know that because it means that there is someone else out there responsible for those. The last thing I want to have happen is for you to be blamed for something you didn't do. That's why I'm talking to you now." 226

(Recommended statements to suspect regarding reasons for the interrogation: Inbau et al (2001), p. 225-226)

Notice, again, the many weapons of social influence included in such statements. The interrogator sets the agenda for what will be discussed, and frames the underlying issues to be addressed by the discussion. Making use of the "psychology of inevitability" (we are less likely to try when success seems impossible), he minimizes resistance by taking innocence off the table ("Now Sam, there is absolutely no doubt that you did this."). Referring to the results of "our" investigation rather than "my" investigation, he lends credibility to his claims of proof of guilt via the influence principle "social proof" (we are more likely to believe something endorsed by more people); and he sets an agenda to discuss issues he casts as relevant to what will be done about the suspect's actions ("We're going to talk about why you did this, and in doing so we're going

to learn about what kind of person you are).

Reinforcing the messages of the "Sympathetic Detective" and "Set-up Question" tactics, he implies there are choices about how to handle the suspect ("The reason why someone did something is often much more important than what he did." "What I need to establish with you right now is what kind of person you are."). Why, after all, would one want to know these things in this legal context if they didn't matter for legal outcomes? All the while, he again "argues against self-interest," and suggests he is there only to help the suspect (The last thing I want to have happen is for you to be blamed for something you didn't do. That's why I'm talking to you now.), further invoking the reciprocity principle to obligate the suspect to talk in return.

Making the Sale

"...a guilty suspect will not easily be persuaded to offer incriminating statements that could potentially lead to losing his job or a prison sentence. The investigator, therefore, must provide a perceived benefit to the suspect for telling the truth." Inbau et al. (2001), p. 221

"... for a suspect to acknowledge a criminal act involving negative consequences requires that the suspect believe a confession is in his best interest." Jayne, B. C., & Buckley, J. P. (1999). The investigator anthology (p. 207)

The preliminary stages of the interrogation are typically successful in convincing the suspect that, as with the traffic cop we can occasionally convince to let us go, the interrogation can be seen as a negotiation in which the suspect provides information or explanations that can result in leniency-even potentially release without charges, as the Set-Up question implies (Are there circumstances in which the person who did this should get a second chance, maybe not go to jail, etc.).

The suspect now "knows" that the detective has significant control over his fate. This renders him particularly motivated to please the detective and get his "help." It renders him very attentive to any cue

that will tell him what he needs to say or do. He "knows" that what kind of person he is and what exactly happened and why he did it can matter. But how? What's the best story to tell? He looks to the "authority" in the room for advice.

The detective, of course, advocates for confession or "telling the truth" (assuming the person is guilty.) To sell this idea, he admittedly must convince the suspect that confession is in his best interests. Knowing that the suspect will be trying to assess the relative costs and benefits of confession versus denial, the interrogator must argue for the alleged "benefits" of confession (and costs of denial) and minimize the apparent "costs" of confession (and benefits of denial). But, since explicit promises of legal benefits or threats of legal costs can be grounds for exclusion of the confession, these arguments must be done through implication, and can be supplemented by reference to non-legal costs and benefits—such as "doing the right thing," "being a stand-up guy and making family proud," or other appeals to moral or social issues.

Minimizing the Costs of Confession

This process begins with the second step of the Reid 9-Step method, which entails suggested scenarios for how and why the event happened that appear less serious, often seemingly not even criminal (such as accidents, self-defense, or apparently justifiable aggression). This process, known as "theme-development," is carried out by the interrogator, sometimes in rather long monologues such as the following "self/family-defense" theme proposed in a gang murder case, where the detective attempts to convince the suspect to implicate his own brother as the shooter:

"When somebody comes running at you and they pretend to have a gun, how long do you wait before you do something?..I keep hearing from different people, it's never, happened to me, but they say somebody knows what they're doing can stab you with a knife faster than you can pull the trigger, okay? And all of a sudden, if you're worried about this guy, and all of a sudden, somebody comes from the side or from the back,

that would get my attention...."

"I worry about taking care of myself, taking care of my family, taking care of my friends. You do what you got to do right then. No difference, okay? Stuff happens sometimes without thinking. Things just happen by themselves sometimes. I know that, okay? You do the best you can to defend yourself. I understand that, okay? That's not a question here, okay? You didn't know it was going to happen. You think it was an accident...So this person was protecting you, correct? Well, I have a few friends but I've only got one family. And I would do anything for my family. If I had to work three jobs, if I had to work 12 hours a day, if I had to give one of my kidneys, I would."

"...What you're telling me sounds kind of like—The Cartwrights? There was three brothers. Horse was the big guy, Adam was the next guy, and Little Joe was the small one. Three brothers all different sizes. All looked different. Believe you me, if there was a fight, they would take care of each other like that. They didn't even have to say a word. If someone hit their brother, they hit one brother, the other two brothers would jump in like that. Family comes first Okay?"

"So you felt threatened. Someone was protecting you. This was not planned out. This was an accident. This is something that happened on its own, and those pendejos are dead, this is what they were doing. They were out screwing around, trying to make something happen, and they made something happen, alright? They made it happen. Who is the guy that was protecting you? You were afraid. He did something to protect you. We know that, okay? You're telling me a brother's not going to take care of a brother? That's no brother if he doesn't. That's bullshit, okay? My brother would do anything for me, okay, anything. And I would do anything for him, okay? Is all we're talking about is your brother protecting your life? Is that what we're talking about?"

"I understand that...You got to stand together. When someone says hey, take care of him. Take care of that for me. Take care of business. Okay. When stuff is happening like that, how long do you wait before you take care of business? You can't wait too long or you're the guy that's going to be in the gutter dead, okay? The guys who didn't belong there started their shit, and they got what-what happens all the time, okay?"

"The person who pulled the trigger that day, that's not what their plan was that morning when they woke up. I know that. To me, that makes a big difference, okay?...So when that person woke up that morning, they didn't decide hey, you know what? I'm going to go kill a couple people today...That's not what they said. Something happened that day and sometimes things just happen by themselves. I understand that, okay? I think this was self-defense. You know your brother. Your brother is not a cold-blooded person. He's not-you know-a cold blooded killer. He probably feels worse than you do. Even if you did shoot somebody, sometimes that happens for a reason. I mean sometimes there's such a thing as self-defense, you know.....Maybe those guys started it, and I believe they did because those guys are knuckleheads. Yeah, maybe they didn't deserve to die. But sometimes, you know, sometimes these guys bring it on themselves."

"I'll give you another little example what I had happen one time when I was investigating a homicide. Um, I had people telling me that this guy pulled a gun and he shot and killed another guy. That's a pretty simple thing, right? I mean, just, "Boom, boom." Pulls a strap, shoots a guy dead. So what do you think about that? What do you think about that guy, the guy who shot the other guy? Stone, cold killer, right? You - that's somebody you probably wouldn't want on the street. You wouldn't want to meet up with that fool, just going to pull a gun and kill somebody right in front of you for no reason. But then pretty soon we found out that the gun that the victim had had fallen in the - storm drain. The

victim had a gun as well. And the victim was pulling this gun when the other guy shot and killed him. That's a little bit different scenario, isn't it? That guy got a voluntary manslaughter. People understood because they have the whole story about what happened out there. And the DA understood when he evaluated the case. And he filed the appropriate charges. That's what we're trying to tell you. We're trying to understand what happened out there so that we can tell the DA what really happened."

Notice the many messages contained in this monologue. First and foremost, the killing is cast as apparently non-criminal, seemingly taking away the potentially devastating costs that would otherwise accompany admission to involvement. That is, the interrogator states that he believes that the suspect's brother did the shooting (apparently negating personal guilt) as a necessary and potentially life-saving defense against a potentially lethal attack initiated by others (self-defense is widely considered non-criminal). The interrogator reinforces the justifiability of the shooting by talking about how any brother would do this for his brother, and if not he's "no brother." He says he would do it for his own brother. In other words, "anyone in your brother's shoes would have done the same thing, including me, and if he didn't he's a bad human being." He invokes images from Bonanza or other TV's shows in which the suspect may have seen many shootings in defense of self or family that resulted in no criminal charges, reinforcing the idea that such acts are not criminal. Further justifying the act, the interrogator says the victims were looking for trouble, started the altercation, and got what they deserved; that the suspect and his brother didn't intend any of this, and that they were the actual victims, who would now be dead if they hadn't defended themselves. He minimizes the seriousness of the shooting, ("Is that all this is?" "I can understand that." He would have done the same thing, etc.). And in the final paragraph, the detective explicitly mentions the connection between the self-defense scenario and potential legal charges, emphasizing the point that one can't get the benefit of such a defense if one doesn't "tell your side of the story."

Having proposed such scenarios minimizing the seriousness of the act in question, the detective will typically go on to state something like "If that's what happened, I can understand that. It's no big deal. But if, on the other hand, (stating a more serious action---e.g., "You shot these guys as a warning to their gang to stay off your territory."), then that's different. I don't want to talk to you anymore. But if (the minimized scenario) is how it happened that's no big deal, we can work with that (implying we can help you if this version is true).

Then, making use of the "contrast" principle (a particular alternative will seem more desirable when contrasted to another that is less desirable than when evaluated with no context), the detective is advised to ask "the alternative question" (Step 7 of the Reid method), which presents two versions of the event (one apparently more serious than the other) and asks the suspect which version is true. The Inbau et al. (2001) manual noted the similarity between this alternative question technique and Step 4 of a 5-Step approach given to one of their sons for selling newspapers: "Close the sale by forcing a decision. Offer the customer two choices of either signing up for a trial one-month offer or, for greater savings, a six-month offer. Never ask, "Do you want to buy the paper?" The interrogator, like the newspaper boy, not only frames the issue (Why and how did you commit this crime?-excluding "Did you commit this crime."), but enumerates the possible positions on the issue (Was it this terrible, legally serious, version? Or, was it this other version, which is "no big deal" that I can completely understand?). For example, the alternative question in the murder case was posed as follows, immediately following the long monologue recounted earlier:

Detective: "Did he shoot these people to kill them? Did he shoot them to scare them? Did he shoot them to protect you? What do you think he would say?"
Defendant: The three one.
Detective: Which one?
Defendant: It was protection.

As in our murder case, themes that minimize the

apparent seriousness of the crime are often very successful in eliciting initial admissions of involvement. Suspects often expect no criminal charges will result, and are often astonished when arrested and charged with a crime. Indeed, reported reasons for confession among true and false confessors alike prominently include the expectation that they will be let go. As many as 40% of confessors have reported in surveys that they confessed in order to be released. Such an apparently irrational belief is the direct reflection of the success of theme development and other tactics in conveying benefits and minimizing costs of confession. Indeed, minimizing themes such as the self/family defense theme in our murder case are understood by those who hear them as promises of leniency, even though courts typically fail to view them as such.

Sometimes the interrogation will stop with such apparently minimal admissions of guilt. Often, however, using the "commitment" principle of influence (Once we have committed ourselves to a course of action by taking any step consistent with it, we are more likely to take other steps toward the same goal.), the interrogators build on the initial admission to successively elicit more damaging versions of the act. These principles are commonly used by conmen and salesmen of all kinds.

For example, using the "foot-in-the-door" technique (Each incremental behavior increases the likelihood of compliance with a more major request), a car salesman might get the target to "just" take a ride in the car, then come into the building, then sit at the negotiating table, and finally purchase the car. In the same way, the interrogator will induce the suspect to first make the apparently minimal admission and then attempt to move him toward more and more serious admissions or versions of the event.

Using the "bait and switch" technique, the store may lure customers to come in with an ad for a deeply discounted attractive item, only to inform them when they arrive that that alternative is "sold out"-but this more expensive item is available and more attractive for X, Y and Z reasons. Or, the car salesman might

practice "low-balling" whereby he lures the customer to the table with the suggestion of an attractive price, only to find that his "supervisor" won't approve the deep discount promised, but can approve a more modest one. Such techniques are commonly practiced and very effective. Once having visited the store or having sat down at the negotiating table, the customer is more likely to make a purchase.

Theme development can be viewed as the "bait" or "low-ball" where the suspect is offered a great deal (extremely low cost) if he confesses by admitting to the minimized scenario. But, the "switch" soon follows, when the interrogator explains why the minimized version just doesn't work, and it must have been a more serious scenario. He may leave the room and come back after pretending to checking new evidence or reports to tell the suspect that the evidence unfortunately just doesn't support the initial version.

For example, in a child molestation case, the suspect first admitted to a minimized scenario in which he says he might have unknowingly touched his granddaughter's genitals while asleep dreaming of his wife. He didn't remember. The detective then directed the conversation to how he "stopped immediately" when he realized what he was doing, and got the suspect to confirm this version. But then, he pointed out that if the suspect didn't remember whether this happened or not, he wouldn't remember stopping when he realized what happened. Then the detective then asked whether the suspect's hand was inside or outside her pajamas.

"What, you don't know? Well, she says you put your hand inside her pants and inserted your fingers into her vagina. Okay, well if you can't, how far do you want to go, if you can't remember. I have to believe what they're telling me, is that what you want? Do you want me to believe what she's telling me and move on? You can't really deny it if you don't remember. I mean, if you inserted your finger into her vagina that's sexual assault...if you were sleeping and you had no idea what happened, then I can't say that's

not true. Alright?"

This led to half-hearted admissions that he might remember. Pretty soon, this was followed by attempts to get the suspect to admit that he knew what he was doing, that he made a mistake that he would take responsibility for. The suspect's counterarguments were met with the detective's question:

"I can't move on until you tell me, look Detective Lampert, I'm not a child molester, you know if..if you're not..Detective Lampert I'm not a child molester, I made this mistake it won't happen, how do I know it's not going to happen again? If you don't know what you're doing, you're sleeping, how..how can you assure me it's not going to happen again?"

Essentially, through a brilliant foot-in-the door, lowballing, bait-and-switch strategy, Detective Lampert herded the suspect into making full admissions of intentional sexual assault, while still managing to convey to the suspect that he would be better off by making such admissions. Although the initial hope that he could claim total lack of awareness of the crime was dashed, he would still expect to achieve the benefit of showing remorse and assuring the detective that it would not happen again (with the associated possibility of being sent to counseling instead of jail - as suggested in the set-up question as well as later in the interrogation); and he would avoid the potential costs of not confessing (as we shortly discuss).

The interrogation so thoroughly overwhelmed the suspect's capacity to track what was happening to him as he was tricked into progressively more and more damaging admissions that he later consistently and vehemently insisted that the videotape and the transcript were "doctored," refusing to believe that he had admitted to what he clearly did say on the record.

Maximizing the Costs of Denial

Defendant: "If you fight a case, you might be free. If you fight your case."

Detective: "Maybe, Maybe not. But if you didn't do anything wrong, you were just at the wrong place at the wrong time, what is it you're going to fight? Fight something that's not there."

Defendant: "My innocence"

Detective: "Innocence from what, Arael? What innocence? Being at the wrong place at the wrong time is not a crime. Fighting with somebody who's fighting with you is not a crime. Attacking somebody-attacking somebody that doesn't mean no harm to you, yeah. That's a crime. What is it-what innocence are you going to be fighting? The only thing you're going to be doing is putting the spotlight on yourself. Saying okay. I got something to hide. That's only going to make people more suspicious of you."

Recall our earlier assertion that interrogation can be thought of as an extended "Anti-Miranda Warning" in which the message is that everything you say can and will be used for your benefit, whereas denial or refusal to talk can and will be held against you. The above exchange is illustrative of many messages interrogators convey concerning the costs of denial. The detective says what many are already inclined to believe-through denial or refusal to talk, you will only make yourself appear guilty. Here the detective even suggests this will cause the investigation to focus on the suspect.

Very often, implied costs of silence or denial are conveyed through the infamous "co-perpetrator" ploy, in which the detective claims that an alleged co-perpetrator has implicated the suspect, and has claimed the suspect engaged in the most legally serious role in the offense.

"And you know what's going to happen after, you know, everybody says exactly what happened and you're---you're back there and you're the one screwing around with this thing. Who do you think they're going to focus their attention on?"

"You got to stand up like..like a man. You just can't lay down there like a dead dog. You got to

stand up. You got to defend yourself. You got to put your side on the table. Otherwise people are going to walk all over you. People are going to point fingers at you. People are going to lie about you. In fact, they're already pointing fingers at you, saying you were the one who started this, who planned it, and the one who made the first shot. But I don't think that's what happened. I think you were just in the wrong place at the wrong time....but if you don't stand up and tell me what really happened, your side of the story, the DA's gonna have to go with the story he's got...."

Here, the detective has essentially threatened the suspect with more serious charges -those appropriate for what the co-perpetrator is allegedly accusing him of-if he fails to offer his "side" of what happened. That is, he must admit he had a role, but can claim a more benign role than he would otherwise be held accountable for.

Another commonly used argument concerns the likely reactions of judge and jury. The idea that no one will believe the person is innocent is combined with arguments concerning how he will be perceived if he continues to deny guilt:

"But if you..if you come in and tell me right now, okay look this might have happened once, I made a mistake, I thought my wife was here, or whatever, I've been drinking..I can understand that, okay? But if..if you sit here and say hey, you know what, that never happened. I never touched that girl, she's lying this and that, the fact is that it's not, I think you're exaggerating the truth okay? Then that makes you look bad.."

"if you can come up and say yeah, this is what happened, you know it was one time, it was a mistake, I knew it was a mistake and I stopped, man I can understand that. But if you don't say anything..then what happens is ..and what happens is, you look like a..you like somebody who's looking..preying on these little girls okay? If you're lying about what happened. That's the perception people get...you understand that,

that's..that's the way people look at ya'."

"Okay, ...if you had twelve people judging you, alright? And you have twelve people listening to your story. Okay? Would you feel better about somebody that..that..that eventually came out and just admitted okay, yeah, I did it but I know it was a mistake afterwards and I didn't do it anymore, or do you think somebody telling me well I was asleep and I didn't know I was doing it and that's how this happened. Uh..who would out you feel better about? The guy that .admitted it happened or would you believe the guy that was telling you that it happened when he was asleep? Would you believe somebody telling you, okay this happened when I was sleeping, two separate times, then I got up both times? And said oh, well it's not going to happen anymore. Or would it make you feel better if somebody said yeah, you know what, I wasn't sleeping, I did it, it was a mistake, I knew it was a mistake and I want to get on with my life. Which one would you feel better about? If you were sitting there looking at somebody else saying these things? Would you feel better about the guy that admitted it was a mistake and just wanted to move on? If I was the Judge if I was somebody looking at you..And I have all this proof, I can prove it happened. And then the guy's that's..that's you right, are telling me okay, well I..I was sleeping and when I woke up and saw I was doing it, I stopped right away. That's not believable okay?"

"I understand what you're saying but I would feel better, I would feel better about somebody saying, hey you know what I was afraid to tell the truth, here's what happened. I did to this girl, it was a mistake and I stopped. And actually you know what? I think I may need some help. I'm afraid to be around children right now because I want to get some help and move on with my life. Can you see how that would..uh..that would make me feel better; how that would make..make you look better?"

The detective has clearly both (1) implied that he will

receive more lenient reactions from judge and jury if he admits deliberately molesting the girl and knows it was a mistake than if he lies by denying intent, (2) reinforced the notion that establishing innocence is off the table, and (3) reinforced the hope that if he admits it he may be even more likely to get the counseling or help or "second chance" referred to in the Set-up Question and throughout the interrogation.

Perhaps the most pervasive "threat" offered by the typical interrogator is the threat of withdrawal of his own support—something likely to be highly valued by the suspect, and something he is likely to try to protect and maintain. Typically, the detective threatens to withdraw his "help" if the suspect refuses to cooperate by "telling the truth."

DET: I'm willing to work with somebody who's willing to work with me. You know what I mean?

Suspect: Yeah.

DET: Where, where, where I can't help someone out is if it looks like they ain't being a hundred percent straight with stuff, all right? You need to try to help yourself here.... You know, right now this thing's in my hand. Okay? To get this thing straightened out with you...But I can't stay here all night. I mean I got a family to go home to. I'm, you know...so I'm going to leave. I can call these other guys and tell them I'm done."

The detective in this exchange reinforces the notion of his own authority to "work with" and help the suspect (get "this thing" "straightened out"), as well as the contingent nature of his offer to help, and emphasizes that the suspect is about to lose his help if he fails to cooperate.

Generally, like promises of leniency, threats of more serious legal consequences are conveyed indirectly and by implication. Nevertheless, they are understood just as clearly as if explicitly stated. The suspect may not know what specific differences in charges there may be, but he clearly receives the message that the charges or outcomes will be more harsh if he doesn't fully admit his role in the alleged criminal behavior.

The Final Product: True and False Confessions

Once the suspect has admitted to some role in the crime, the detective will ask the suspect to put it in writing—stating exactly what happened, often including an apology to the victim(s) and expressions of remorse (which he is led to believe will help him with the DA, judge and/or jury). Unfortunately, much of the information elicited through interrogation is inaccurate. The interrogation techniques are heavily suggestive, and the detective does most of the talking, all the time suggesting to the suspect what he thinks happened. The suspect tells stories based on a mixture of true and false arguments and "evidence" he is confronted with during the interrogation. Essentially, the interrogators knowingly suggest and elicit a great deal of false or misleading information in order to get any kind of incriminating statement from the suspect. While they often believe that this false information will be a "stepping stone" approach to eventually getting the full truth, they underestimate the biasing influences the suspect is subject to, and overestimate the extent to which these biased stories will eventually be cast aside in favor of a fully accurate account.

Unfortunately, the truth may never emerge fully, during the interrogation or ever. False statements can range from full false confessions to horrific crimes, to false implication of others, to false details that can nevertheless affect charges filed against the suspect or others. The co-perpetrator ploy, for example, seems to be heavily implicated in known cases of false confession and false implication of others. Drizin and Leo (2004) identified 125 cases involving known false confessions. For more than 30% of their sample, more than one defendant confessed falsely to the same crime—ranging from 2 to 5 false confessors per case.

Although the steadily increasing tide of DNA and other exonerations of the wrongfully convicted has cast a spotlight on the role of false confessions elicited through the tactics described here, too little attention has yet been paid to the fact that false confessions represent only the tip of the iceberg of

false information elicited through police interrogation. The issue of the "quality" of information elicited via coercive interrogations seems to arise more prominently when involving physical coercion or torture. It remains for law enforcement and the legal community to expand their awareness of the potentially devastating effects of false information to include not just whether a person falsely confessed to a crime, but to encompass the many additional falsehoods affecting the nature of legal charges against the suspect as well as potential charges against others the suspect may implicate. The devil is often in the details, and if the details cannot be counted on neither can we count on a just result.

Suggested Readings

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Motion to Suppress: Attacking the Voluntariness of a Confession in Wisconsin

By: Attorney Alejandro Lockwood*

Wisconsin's policy to require police to electronically record custodial interrogation of persons accused of committing a felony marks an extraordinary evolution in the way the state investigates and prosecutes crimes. Many would describe this development as a revolution in the way our clients have traditionally been treated in interrogation rooms all over our state. There is no doubt that the benefit to our clients will be tremendous. No longer will they be subjected to the tyranny of the interrogation room, where slick well prepared detectives could sew up a confession by using coercive tactics and then lying about what your client said. The new reality is that many investigations will not result in criminal charges and those that are will proceed to trial lacking the essential advantage of a confession.

In those cases where police managed to get a confession, we have the solemn obligation to determine whether they violated the Constitution. Just because some interrogations are being recorded does not mean that the number of motions will decrease. What it means is that we have an obligation to do it better, because the hearing will be less about credibility issues or factual disputes about what was said. We will get a rare chance to argue and prevail on legal substance.

Despite this technological safeguard against coercive tactics, law enforcement will continue to exploit

suspects who are mentally or emotionally vulnerable in order to get a confession and solve their cases. The motion to suppress statement is the best vehicle to ascertain what happened in and out of the interrogation room and will provide you with a preview of the challenges you will face during the trial of a false confession case.

Occasionally, the hearing will reveal glaring mistakes such as the police's failure to read the Miranda warnings, failure to scrupulously honor your client's request not to be interrogated and failure to honor your client's request for counsel. In other circumstances, the hearing will help you uncover important factors such as police use of lengthy interrogation sessions, sleep deprivation and isolation designed to break your client's free will and render him or her more vulnerable and susceptible to police interrogation.

Preparing the Motion to Suppress

Preparing an effective motion to suppress a confession requires groundwork. The following steps can help you determine whether your client fully understood his rights and whether he may have been coerced into confessing.

One of the most important steps to undertake is the client's interview. Start by developing a narrative of his social history. The social history may reveal important features of his personality that may have contributed to your client succumbing to police questioning during the interrogation.¹ Your client's education is an important component of the social history.



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Examining your client's education and I.Q. are important because having a limited education and low I.Q. could render him susceptible to police interrogation.² A low I.Q. could have interfered with your client's ability to understand the Miranda warnings, and also his ability to waive his right to remain silent and his right to counsel. For example, assessing his literacy level is something that can be readily ascertained by having him read a portion of the Miranda warnings and then asking if he can explain to you what those rights mean. Ask about his highest grade of schooling achieved. Find out if he attended special education classes and whether the school made any special accommodation in connection with a learning disability. If he is not of school age, discover how he supports himself. Many of our clients are afflicted with mental disabilities and receive supplemental social security income. It would be helpful to examine Social Security records as they may contain valuable information regarding your client's disability. These records may also reveal a history of alcohol and drug abuse.

You may also discover that English is your client's second language. You have to be especially careful when assessing whether the client is fluent or not. I recommend that you find a person who is fluent in his native language to determine whether your client really understood his constitutional right to remain silent and to have an attorney.³ We cannot disregard the role of culture in the context of the interrogation process when interviewing clients who were born in a foreign country and may not understand some of the fundamental tenets of our constitution. In many countries, criminal suspects do not have the right to remain silent and are presumed guilty. It might be helpful to do some research ahead of time in order to determine the existence of a cultural barrier that may have rendered your client vulnerable and compliant to police interrogation.

Corroboration of what your client has told you about his education and mental health is a critical aspect of the investigation process. Interview his relatives, friends, teachers, school administrators and treatment providers in order to establish the nature

of his mental or emotional vulnerabilities. If there is a lack of treatment records, consult with an expert that could perform an I.Q. or general psychological test. Some psychologists are able to evaluate the suspect's Miranda comprehension and suggestibility to coercive interrogation by administering the Grisso Comprehension and Gudjonson Suggestibility Scale tests.⁴

With the help of your client, recreate a time line of the events that led to his arrest and subsequent interrogation. It might be difficult for him to recreate a traumatic or painful event. For instance, in determining the passage of time in a jail or other detention facility, ascertain whether he could see a clock or a window. A window might allow the client to see whether it was day or night when he was interrogated. Also, find out how many times he was offered food or water during the detention. From time to time, the jail might track your client's movements in and out of the cell to the interrogation room providing a more accurate account of the passage of time and powerful evidence during your suppression hearing establishing proof of your client's lengthy and unconstitutional detention.⁵

Visit the jail or detention facility, in particular the room where the interrogation took place. Take photographs and measure the room. Find out whether the interrogators controlled the temperature of the room by paying attention to the presence of a thermostat and whether there are windows or vents to the outside that if opened might allow the room to get very cold during the winter. The temperature of the room might be self-evident. Make sure to bring an investigator with you so that you have a witness who could testify to this fact. Of course, your attempt to examine the scene of the interrogation should be undertaken after your client's interview. Hopefully, you will be able to elicit from your client information that could help you determine where to most effectively focus your investigation.

Thoroughly research your client's criminal record. If he has been arrested and convicted before, find out if the state relied on a confession to obtain the conviction. In some circumstances, his experience

with police might be very limited, find out if those police contacts resulted in an arrest or charges filed.

It is critical that you conduct an investigation of the individuals who interrogated your client. Talk to other lawyers with clients who may have encountered circumstances similar to those experienced by your client. Utilize Wisconsin Open Record Law⁶ to obtain information from police and fire commissions, disciplinary hearings, and personnel records. Bad cops tend to act consistently and are often involved in civil litigation. Checking to see whether the police witnesses in your case are involved in civil litigation as a result of police brutality claims or other misconduct would provide you with valuable information for your suppression hearing. In some jurisdictions you may be able to subpoena personnel records that might potentially include the training records of the police witnesses, which might also include specific training in interrogation methods and techniques.

The next step is to carefully plan the cross-examination of the interrogators. Often times you are not going to have an electronic record of the event, so you will have to virtually recreate the conditions that existed during the interrogation as best you can with the help of hostile witnesses. Do not be afraid. Think of the cross examination as the deposition of the interrogators before trial. Be prepared, intransigent judges will block every attempt to limit your cross, arguing that you are wasting their time. Many judges believe that once the prosecutor offers testimony that your client has been told or has read all rights and admonitions required in *Miranda* and indicates that he understood them the hearing is over.⁷ They are wrong! Our clients have the right not only to challenge compliance with *Miranda* but also compliance with the 6th Amendment right to counsel and, very importantly, *the right to challenge the voluntariness of their statement*.⁸ In fact, failure to conduct a hearing to suppress the defendant's allegedly involuntary statements to police constitutes reversible error.⁹ The best way to counter misconceptions about confessions is by taking control of the hearing. You accomplish this by

demonstrating your knowledge of the law of involuntary confessions.

Attacking the Voluntariness of the Confession

In order for the court to determine the voluntariness of a confession it has to apply a "totality of the circumstances" test, which takes into account factors such as the personal characteristics of your client and contrast them against the psychological and other external pressures utilized by the police.¹⁰ The totality of the circumstances may indicate that a confession was not voluntary, even though your client read and understood his rights.

Questions regarding the amount of time your client remained in custody before arraignment;¹¹ whether he was allowed to communicate with the outside;¹² whether the police threaten him;¹³ whether he was physically abused;¹⁴ whether police promised leniency;¹⁵ the length of the interrogation;¹⁶ whether police confronted him with fraudulent and improper evidence against him;¹⁷ are all legitimate and necessary areas of inquiry into the voluntariness of a statement.

Many police witnesses will invariably deny using any particular technique or stratagem during the interrogation of a suspect. Questions about the approach adopted by the interrogator during an interrogation of a suspect are important because the approach selected may render the confession involuntary.¹⁸ Police have an aversion to admitting that the interrogation of a suspect is undertaken as part of a systematic plan to extract a confession, because they want to give us the impression that the confession is 100% voluntary. Their adoption of this approach during the hearing is probably helpful to your client but counterproductive to the state particularly in very serious cases where it is unlikely that the interrogator approached the suspect without any or little preparation.

Begin your questions by addressing the interrogator's belief that he is an excellent, knowledgeable investigator. Approach questions about their training from a general perspective

without specifically connecting their training to the interrogation of your client (you can do it later). You may also have information from personnel records about the interrogator's training. Question the interrogator about his knowledge of the case. Find out if they have an opinion as to the strength of their case against your client. Ask the interrogator about previous interrogations and inquire as to how he handled a suspect's denial. Definitely ask how the interrogator moved from a denial to an admission in those cases and eventually in your case.

Many interrogators will readily disclose the use of themes, monologues and stories to get an admission. For example, in a rape case, the interrogator could use the theme of consent to get the suspect to admit to having sexual intercourse with the accuser. In a shooting or stabbing case, the issue of self-defense or defense of others could be presented to the accused to induce him to confess. The use of these techniques during an interrogation could be regarded as "improper police practices" particularly in those cases where you could *show* that your client actually believed that the interrogator's statements discussing the possibility of charging him with a less severe charge, obtaining a lesser sentence from the court as a result of his cooperation, etc., would constitute a coercive promise of leniency.¹⁹

Question the interrogators about factors that would render your client more susceptible and vulnerable to police interrogation. Determine whether he was given food and water.²⁰ Try to get a specific response from the interrogator particularly in those cases where a long, protracted interrogation is alleged. Interrogators are often with your client only during their assigned shifts and may not be aware whether or not he received any food or water during preceding or subsequent shifts.

Pay close attention to events surrounding your client's arrest such as receiving medical attention and medication. Police may have interrogated him while receiving emergency care, before and after surgery.²¹ If this is the case, subpoena the medical records to establish his physical condition. They could also reveal valuable information such as the

types of medications used and prescribed to your client. Consult the Physicians' Desk Reference (PDR), which is the standard prescription drug reference for medical doctors to determine what impact the medication had on him. Of course, these suggestions are merely part of the groundwork you have to undertake if he claims his physical condition played a significant role during the interrogation.

Events preceding the client's arrest and interrogation might show his intoxication.²² It is essential to lay an adequate foundation during the motion hearing to establish that police used his intoxication to their advantage in order to induce a confession. Subpoena all the officers involved in the arrest to ascertain your client's condition at the time of his arrest. Many times, the arresting officers (who are not involved in the interrogation process) will report your client's physical condition at the time of the arrest. Also, various police departments rely on civilian personnel such as police recruits to work the booking rooms. Find out if they prepared any reports concerning the condition of your client during booking. Many police department scrupulously maintain booking records that include physical and mental health information as protection against potential lawsuits. They also perform breathalyzer tests if they suspect the inmate is intoxicated, again to prevent potential litigation. Ask if they have a video camera in the booking room. If he was under the influence of narcotics have him tested for drugs as soon as possible. Ascertain whether he has a documented history of serious alcohol or drug addiction in order to determine whether he experienced alcohol or drug withdrawal during the interrogation.²³ The objective is to present evidence to the court, which shows your client exhibited physical signs of intoxication before and during the interrogation.²⁴

Another important factor that could render your client more susceptible during his interrogation is sleep deprivation.²⁵ You should pay particular attention to this factor when you are alleging that his confession was obtained after being detained for an unreasonable period of time.²⁶ In circumstances where police used relays of investigators to conduct

multiple interrogations over the course of several hours or even days, consider hiring an expert who could testify about the short and long term effects of going sleepless.²⁷ Keep in mind that sleep deprivation is also regarded by many as a form of torture.²⁸

Determine if the police kept any records that could help you recreate not only your client's movement in the jail but also where police kept him during the interrogation process. For instance, the Milwaukee Police Department tracks a suspect's movement in the jail following their arrest and booking by the use of what are commonly known as "movement cards." Have the client specifically describe where he was kept when not being interrogated. It might be a very important fact to discover if he was kept in a booking room surrounded by other inmates without access to a place to rest. Even if the client was placed in an individual cell, your inquiry is not over. I have clients who have painfully described their lockup in a city jail cell as cruel and inhuman. Start by asking whether the cell had a place to lie down. You will often discover that many cells do not have a soft pad but rather hard, cold concrete. Were there any lights in the cell? Was the room lit continuously from inside or from the hallway? When was food or water provided? How many times? Was he allowed to change to clean clothes? What about the ability to bathe or brush his teeth? How many times did police wake your client up?

Attacking the Sew Up Confession

Another important area that you should carefully scrutinize is whether or not your client's interrogation resulted in a "sew up" confession. In Wisconsin, it is generally recognized that although a suspect "may be detained by police and interrogated to secure sufficient evidence to either charge him with a crime or to release him, the police cannot continue to detain an arrested person to 'sew up' the case by obtaining or extracting a confession or culpable statements to support the arrest or the guilt."²⁹ Application of what is now regarded as the *Phillips* rule in circumstances where a suspect has been held in custody for an inordinate amount of time before a

confession is extracted depends on the purpose and legitimacy of the delay.³⁰

Close analysis of the *purpose* and *legitimacy* of the delay is critical to the determination of whether your client should have been released or charged. Your objective during the motion hearing is to elicit facts that will support a finding that the police unreasonably prolonged the detention of your client in order to extract a confession that would "sew-up" the case for the police.

The State has an affirmative obligation to prove that the delay in your case was for a legitimate purpose. Legitimate reasons for the delay include: to verify a defendant's story;³¹ to actually complete the investigation of a crime;³² to locate alibi and other witnesses;³³ to acquiesce to a defendant's request to take a polygraph;³⁴ to detain a defendant pending another charge;³⁵ to provide a defendant with medical attention;³⁶ where defendant confesses to other crimes during the original questioning, or evidence of other crimes is discovered;³⁷ or when the defendant spends most of the time during detention sleeping or visiting relatives.³⁸

Of course, you also need to carefully examine the length of your client's detention.³⁹ The longer the client remains in custody, the stronger the evidence of overbearing pressure to obtain a confession or inculpatory statement.⁴⁰

Attacking the Use of Lie Detection Methods

Although the practice of using lie detection methods such as polygraph examinations and voice stress analyzers in conjunction with the interrogation of suspects are not widely present in many criminal cases, they continue to be an integral part of major criminal investigations involving homicides and sexual assault of children cases.

In Wisconsin, if the post-polygraph interview is so closely related to the mechanical portion of the polygraph examination that it is considered one event, the statements are inadmissible.⁴¹ This is consistent with the general rule that polygraph test

results are completely inadmissible in criminal proceedings.⁴² Whether a statement was made as part of or discrete from the polygraph process is determined upon consideration of the totality of the circumstances.⁴³ Carefully consider the time elapsed between the mechanical or electronic testing and the post-polygraph interview.⁴⁴ For instance, an interview which took place six days after a polygraph examination has been found to be totally discrete from the examination which preceded it.⁴⁵ Other factors you should take into account when evaluating if the post-examination interview was discrete from the polygraph test would be (1) whether the defendant knew the examination was over; (2) whether the defendant had been disconnected from the polygraph machine; (3) whether the post-examination interview took place in a separate location distinct from the location of the polygraph; (4) whether defendant understood that answers to questions asked after the test were separate from the polygraph examination and (5) whether there is a specific chronologically measurable break between the examination and the start of the interrogation.⁴⁶

During your cross of the polygraph examiner/interrogator explore if the examiner specifically delineated the mechanical portion of the polygraph from the interrogation of your client. For example, determine whether, following the mechanical portion of the polygraph exam, the interrogator informed your client of his Miranda rights. Some interrogators might avoid taking this step, because it may send a signal to the suspect that something different is taking place consequently endangering the polygraph stratagem. Your objective is to establish that the interrogator did not act or treat the post-polygraph interrogation as a separate event.

A critical factor to examine is whether the interrogator used the results of the polygraph examination to confront your client. The practice of informing the suspect that he has failed a polygraph test can, under some circumstances, become a coercive tactic designed to make the suspect confess and can undermine the voluntariness of his confession.⁴⁷ Consider the following remark about

the use of lie detection devices as a coercive strategy during an interrogation:

One of the most common and influential evidence ploys involves lie detecting machines—whether polygraph devices or voice stress testers. While the nominal purpose of a lie detection test is to diagnose the subject as truthful or deceptive, the primary function of any lie detector test administered during an interrogation is to induce a confession. By creating the impression that the procedure is infallible and by playing on a suspect’s fear of arrest, the lie detection examination can be a powerful pseudoscientific tool of persuasion and manipulation. . . . The effect of negative lie detector results, in conjunction with other false evidence ploys, can be so devastating that it can actually shatter a person’s belief in his innocence as well as convince him that he will be convicted.⁴⁸

Contrast police use of lie detection devices during an interrogation from those situations in which police confront a suspect with physical evidence such as the discovery of fingerprints or DNA evidence. The detection and removal of a fingerprint during a criminal investigation as an evidentiary item can be subjected to scientific analysis. The results of a polygraph examination, however, so far defy the rigors of strict scientific analysis. In other words, a suspect can physically test the assertion his fingerprints have been found in the crime scene by the scientific method. A suspect, however, would feel powerless to challenge the opinion of the polygraph examiner even if he were factually innocent of the accusation.

No Recording, No Confession?

Invariably, in dealing with electronically recorded interrogations you are going to have to deal with cases where no recording was made because the tape recording broke down, the detective failed to turn it on or the pause button was inadvertently pressed during a critical moment in the interrogation. Courts in Alaska and Minnesota have upheld the admissibility of statements made when no functioning recording device was available;⁴⁹ when there is no evidence that police deliberately failed to start the

recording device;⁵⁰ or when the recording was inadvertently erased or destroyed.⁵¹ Nevertheless, should a statement be admissible at trial when law enforcement willfully and intentionally erased, destroyed or otherwise interfered with the recording of a custodial interrogation?

The answer to this question generally depends primarily on the legislation that mandates electronic recording. Contrast our state policy requiring audio or visual recording of a custodial interrogation of a person suspected of committing a felony with that of our neighbor Illinois.⁵² The law in Illinois mandates that police officers record certain custodial interrogation and establishing that any oral or written statement of an accused shall be presumed inadmissible as evidence in a criminal proceeding for homicide unless “an electronic recording is made of the custodial interrogation” and such recording “is substantially accurate and not intentionally altered.”⁵³

An intentional violation of the Minnesota Supreme Court’s rule requiring electronic recording could potentially result in the suppression of the statement at trial as well: “In the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial.”⁵⁴

Even after we establish an intentional violation of the statute we may not be able to get the statement suppressed as the fruit of the poisonous tree. Unfortunately, the doctrine is a constitutional principle and does not apply to statutory noncompliance.⁵⁵ On the other hand, in our arguments we must insist that the policy concerns expressed in *Jerrell* in connection with juvenile interrogations remain as vital and critical in the interrogation of an adult suspect as well.⁵⁶ Lastly, if you are able to demonstrate the purpose and flagrancy of the official misconduct in the selective

destruction or editing of the electronically recorded confession, ask the court to sanction the state by suppressing any police statement that seeks to recreate that which the police intentionally destroyed.⁵⁷

Conclusion

In a society where police are increasingly under a tremendous amount of pressure to reduce crime and produce results, we have the responsibility to utilize every resource at our disposal to make sure that the principles enshrined in our Constitution are not blatantly ignored and casted aside because it inconveniences the public, police and the prosecutor. We should view our motion practice as a vehicle to redeem not only important constitutional rights, but fundamental human rights as well, which are, after all, essential components of most modern, progressive and just societies.

Endnotes

¹ Police coercion and a defendant’s personal characteristics are interdependent concepts; the more vulnerable a person is because of his unique characteristics, the more easily he or she may be coerced by subtle means. *State v. Xiong*, 178 Wis. 2d 525 (Ct. App. 1993).

² Limited education (8th grade) and low IQ (84) are factors to consider when determining whether the individual is susceptible to police pressure. *State v. Jerrel C.J.*, 2005 WI 105, para. 27.

³ State must prove the sufficiency of foreign language warnings when challenged by non-English speaking defendant. *State v. Santiago*, 206 Wis. 2d 3 (1996).

⁴ The Grisso test evaluates an individual’s competency in regard to a particular stage of trial proceedings. It should include a determination of whether your client possessed the competency to understand his Miranda rights. The Gudjonsson Suggestibility Scale (GSS) is a test that tries to measure how susceptible your client is to coercive interrogation.

⁵ *Phillips v. State*, 29 Wis. 2d 521 (1966); *Wagner v. State*, 89 Wis. 2d 70 (1979).

⁶ Wis. Stat. § 19.35

⁷ *State v. Mitchell*, 167 Wis. 2d 672 (1992) (prosecutor can establish prima facie case of compliance with *Miranda* if defendant has been told or has read all rights and admonitions required in *Miranda*).

⁸ Wis. Stats. § 971.31(3), (4); *Miranda V. Arizona*, 86 S. Ct. 1602 (1966); *State v. Jerrell C.J.*, 2005 WI 105.

⁹ *State v. Monje*, 109 Wis. 2d 138 (1982).

¹⁰ *State v. Hoppe*, 2003 WI 43; *State v. Clappes*, 136 Wis. 2d 222 (1987).

¹¹ *Wagner v. State*, 89 W2d 70 (1979).

¹² *State v. Hunt*, 53 Wis. 2d 734, 745 (1972); *State v. Whitman*, 160 Wis. 2d 260 (Ct. App. 1991); *Phillips v. State*, 29 Wis. 2d 521, 535 (1966).

¹³ *Arizona v. Fulminante*, 111 S. Ct. 1246, 1253 (1991).

¹⁴ *Hill v. State*, 91 Wis. 2d 315 (Ct. App. 1978).

¹⁵ *Pontow v. State*, 58 Wis. 2d 135, 139 (1973); *State v. Nicholson*, 187 Wis. 2d 688 (Ct. App. 1994); *Turner v. State*, 76 Wis. 2d 1, 22 (1977) (statements that cooperation with authorities will result in a benefit to the confessor such as in the declaration “if you would confess we would see that you get help for your sexual problem” do not create “compelling pressures which overcome the individual’s will to resist”); *State v. Deeds*, 187 Wis. 2d 630 (Ct. App. 1994); *State v. Edwardsen*, 135 Wis. 2d 208 (Ct. App. 1986).

¹⁶ *Phillips v. State*, 29 Wis. 2d 521, 535 (1966); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (questioning suspect for excessively long time without a break); *Jerrell C.J.*, 2005 WI 105, para. 35 (suspect left alone in interrogation room for two hours, then questioned for 5.5 hours leading the suspect to wonder if interrogation will ever cease); *State v. Farias-Mendoza*, 2006 WI App 134 (leaving the suspect isolated in a locked room for five hours then entering the room and immediately asking suspect to offer DNA exacerbated his illegal detention).

¹⁷ *Turner v. State*, 76 Wis. 2d 1, 20-22 (1977) (confronting defendant with information such as fingerprints, hair samples “does not amount to the utilization of overwhelming force or psychology”); *State v. Albrecht*, 184 Wis. 2d 287 (Ct. App. 1994) (even though police deceived the defendant into believing that a fictitious crime organization would help him flee the state in order to induce an admission from the defendant, the deception was deemed to create “a self-imposed coercive element” that did not destroy the voluntary nature of his admission).

¹⁸ *Commonwealth v. DeGiambattista*, 813 N.E. 2d 516 (MA 2004) (intensive use of the Reid method by repeated use of minimization techniques such as police suggestions to defendant that he committed crime because he was under stress, his desire to commit crime understandable and that he had no intent to hurt anyone could, under a totality

of the circumstances analysis, render the confession involuntary).

¹⁹ *State v. Owens*, 148 Wis. 2d 922 (1989); *State v. Edwardsen*, 135 Wis. 2d 208 (Ct. App. 1986).

²⁰ *Phillips v. State*, 29 Wis. 2d 521 (1966).

²¹ *Renner v. State*, 39 Wis. 2d 631, 636 (1968) (the state has the burden to show the voluntariness of a statement given to police before and after surgery).

²² *State v. Clappes*, 136 Wis. 2d 222 (1987) (keep in mind, however, that the fact that suspect may be intoxicated during the interrogation does not render the statement involuntary in every circumstance).

²³ *State v. Hoppe*, 2003 WI 43.

²⁴ *State v. Shaffer*, 96 Wis. 2d 531, 543-544 (Ct. App. 1980).

²⁵ *State v. Hunt*, 53 Wis. 2d 734 (1972).

²⁶ *Reimers v. State*, 31 Wis. 2d 457 (1966).

²⁷ Menachem Begin, the Israeli prime minister from 1977-83, was tortured by the KGB as a young man. In his book, *White Nights: The Story of a Prisoner in Russia*, he wrote of losing the will to resist when deprived of sleep.

“In the head of the interrogated prisoner, a haze begins to form. His spirit is wearied to death, his legs are unsteady, and he has one sole desire: to sleep... Anyone who has experienced this desire knows that not even hunger and thirst are comparable with it.

“I came across prisoners who signed what they were ordered to sign, only to get what the interrogator promised them.

“He did not promise them their liberty; he did not promise them food to sate themselves. He promised them - if they signed - uninterrupted sleep! And, having signed, there was nothing in the world that could move them to risk again such nights and such days.” (Menachem Begin, *White Nights: The Story of a Prisoner in Russia*, trans. Kafie Kaplan (Jerusalem: Steimatzky, 1977)).

²⁸ <http://www.smh.com.au/news/National/Sleep-deprivation-is-torture-Amnesty/2006/10/03/1159641317450.html>

²⁹ *Phillips v. State*, 29 Wis. 2d 521, 535 (1965); *State v. Wagner*, 89 Wis. 2d 70, 75 (1979) (The *unreasonable* detention of an individual before release or initial appearance before a judge “constitutes a denial of due process under Art. I, sec. 8, of the Wisconsin Constitution and renders inadmissible any confession whether voluntary or involuntary, obtained from the suspect during the detention.”)

³⁰ *Wagner*, 89 Wis. 2d at 76 (courts have failed to establish “a set period of time beyond which the suspect must either be released or charged. The

accepted analysis is to allow post-arrest detention if it is (1) for a “proper purpose” and (2) “the period of detention is not unjustifiable long under the circumstances of the case.”)

³¹ *State v. Hunt*, 53 Wis. 2d 734, 742 (1972).

³² *Id.* at 77.

³³ *State v. Wallace*, 59 Wis. 2d 66, 79 (1973).

³⁴ *McAdoo v. State*, 65 Wis. 2d 596, 607 (1974).

³⁵ *Id.* at 609.

³⁶ *Briggs v. State*, 76 Wis. 2d 313, 324-25 (1977).

³⁷ *State v. Herrington*, 41 Wis. 2d 757 773 (1969).

³⁸ *State v. Estrada*, 63 Wis.2d 476, 491 (1974).

³⁹ In *Wallace*, the period of detention in issue was approximately fifty-one hours. *See Wallace, supra*, at 77. In *McAdoo*, the period of detention was five days-but from the time of the arrest until he was charged, the defendant was held in custody on a valid commitment. *McAdoo, supra*, at 609. In *Wagner*, the period of detention at issue was approximately twenty-eight hours. *Wagner, supra*, at 76. In *Phillips*, the period of detention was three hours. *Phillips, supra*, at 535. In *Klonowski v. State*, 68 Wis. 2d 604 (1975), the period of detention was approximately 24 hours. *Id.* In *Krueger v. State*, 53 Wis. 2d 345 (1971), the critical period of detention was fourteen hours. *Id.* at 355. In *Estrada*, the period of detention was fourteen hours. *Estrada, supra*, at 490.

⁴⁰ *Phillips*, 29 Wis. 2d at 536.

⁴¹ *State v. Schlise*, 86 Wis. 2d 26, 43-44 (1978).

⁴² *State v. Dean*, 103 Wis. 2d 228, 279 (1981).

⁴³ *Barrera v. State*, 99 Wis. 2d 269, 288-89 (1980).

⁴⁴ *See Schlise* at 42.

⁴⁵ *Id.* (citing *Turner v. State*, 76 Wis. 2d 1, 19 (1977)).

⁴⁶ *State v. Greer*, 2003 WI App 112; but consider *State v. Johnson*, 193 Wis. 2d 382, 389 (Ct. App. 1995) (even if the suspect has been disengaged from the polygraph machine and interrogated in a separate room any reference to the test and its results to the defendant constitute a significant factor).

⁴⁷ *See People v. Higgins*, 239 Ill. App. 3d 260, 272 (Ill. App. Ct. 1993) (the defendant did not make any inculpatory statements until after he had been told that the polygraph examination revealed he was not telling the truth).

⁴⁸ Ofshe and Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *Denv. U.L. Rev.* 979, at 1036, 1040 (1997).

⁴⁹ *State v. Schroeder*, 560 N.W. 2d 739, 740-41 (Minn. Ct. App. 1997).

⁵⁰ *State v. Miller*, 573 N.W. 2d 661, 674-75 (Minn. 1998).

⁵¹ *Bright v. State*, 826 P.2d 765, 773-74 (Alaska Ct. App. 1992).

⁵² 968.073 and 972.115 Wis. Stats; *but* consider the impact of law enforcement intentional failure to electronically record the interrogation of a juvenile suspect pursuant to the Wisconsin Supreme Court’s supervisory power requiring that in order for a juvenile suspect’s confession to be admissible in court the police must tape record the interrogation whenever feasible and without exception in a place of detention. *State v. Jerrell C.J.*, 1005 WI 105.

⁵³ *See, e.g.*, 725 ILCS 5/103-2.1(b) (2004).

⁵⁴ *State v. Scales*, 518 N.W.2d 587, 592 (Minn.1994).

⁵⁵ *United States v. Montgomery*, 390 F.3d 1013 (7th Cir. 2004).

⁵⁶ *State v. Jerrel C.J.*, 2005 WI 105.

⁵⁷ *State v. Amundson*, 69 Wis. 2d 554, 575-580 (1975). ■

Cross Examining Police in False Confession Cases

By: Attorney Deja Vishny*

Many criminal defense lawyers are filled with dread at the idea of trying a confession case. We think the jury will never accept that people give false confessions. We worry that jurors and courts will always believe that because our clients gave a recorded confession, they must have committed the crime. Our experience in motion litigation has taught us that judges rarely, if ever, take the risk of suppressing the confession particularly when a crime is horrifying and highly publicized.

Since the advent of mandatory recorded interrogation in juvenile and felony cases we have been lucky enough to be able to listen to the recording and pinpoint exactly how law enforcement agents are able to get our clients to confess. No longer is the process of getting a confession shrouded in mystery as the police enter into a closed off locked room with a suspect who is determined to maintain their innocence and emerge hours (sometimes days) later with a signed statement that proclaims "I did it". However, defense lawyers listening to the tapes must be able to appreciate the significance of what is being said to cajole a confession.

The lawyer handling a recorded interrogation case should always listen carefully to the recording of the entire interrogation as early as possible in the case. There have been many occasions of discrepancies between how a police officer will characterize the confession in testimony or a written report from how

the statement was actually developed and what the tape shows the client's actual words were.

Preliminary Steps

The first step for lawyers defending a confession case is to educate themselves as much as possible about police interrogation. The lawyer should learn exactly how police interrogate suspects in their jurisdiction. The most common police interrogation technique currently used in the United States is the "Reid Technique". Anyone who wishes to learn how this interrogation technique is practiced can easily do so. The John E. Reid & Associates company website, www.reid.com, contains a wealth of information about this method. Anyone can order their basic book, widely considered "the Bible of interrogation", *Criminal Investigation and Interrogation*¹, directly through their website. This book is also available in university and law libraries. The book outlines the Reid technique: first interviewing suspects to assess guilt and then moving on to the "nine steps" of interrogations. The site contains an archive of articles entitled "investigators tip" discussing specific recommendations that Reid & Associates make in applying the technique. The web site also lists dates and locations where the three to four day Reid seminar is taught; these are open to any person who pays the fee. Many law enforcement departments in Wisconsin send officers to be trained at one of these seminars or have adapted Reid materials in their in-house training programs.

Most jurisdictions that do not use the Reid technique use a similar method of interrogating suspects. Police interrogation is usually based on combining the tools of minimization and maximization².



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Understanding how these tools work in tandem with each other is crucial.

The best way to learn how law enforcement in your jurisdiction are taught to interrogate suspects is to either make an open records request for or subpoena the training records of the detectives involved in your case. These materials are invaluable tool which enable you to learn how interrogation techniques are taught and used by police. It can also be helpful to consult with a recently retired officer who is well versed in local interrogation practices.

After learning the local interrogation practice from the law enforcement point of view, one should learn what social scientists have concluded from the study of interrogation and obtaining false and coerced confessions. An excellent starting point is Gisli H. Gudjonsson's, *The Psychology of Interrogations and Confessions: A Handbook* (John Wiley & Sons, 2003).³

Client Interview

It's easy to conclude there is no need to interview your client about the interrogation process since it was recorded. While the tape will *per se* answer some of our questions, there is still much to talk about. The comprehensive interview should include taking the client's social, medical, educational and criminal justice system history. Questions regarding pre-interrogation events such as the arrest, booking procedure and pre-interrogation detention in a holding cell or jail should be asked. It is important to know if your client was under the influence of any medications, alcohol or conversely if they were deprived of prescription medications before and during questioning.

It is important to interview the client about how s/he interpreted the various police questions, monologues and that were employed in the interrogation process. This begins with having the client tell you their understanding of the Miranda warnings given and their rights once the warning was administered. These warning are often read extremely quickly with little to no attempt on the part of the interrogator to

determine if the client has even a rudimentary understanding of what the rights mean.

Lawyers should play the tape for their clients, interrupting frequently to ask questions about how the client felt about what was going on in the process as it unfolded. We need to find out why our client made denials, how they felt when their denials were rebuffed and why they changed their story to ultimately give a confession.

Not everything in the interrogation process may be taped. Be sure to inquire as to what gaps exist in recording: were there conversations as your client was moved from a holding cell to an interrogation room, during trips to the bathroom, etc. Ask about polygraph procedures as well; pre and immediate post polygraph conversation may not be recorded. Be sure to discuss this and find out details of the pre-test interview, what questionnaires were completed and documents were reviewed with the client before the test as well as what the client was told about the test results.

If the interrogation was videotaped, inquire how the client felt as officers moved closer to him or had any physical contact with him during the interrogation. Many jurisdictions are only audio taping interrogations. We must detail all of the non-verbal aspects of the interrogation, such as a description of the room, positioning of the parties and how the positions changed as the interrogation progressed.

Other Pretrial Preparation

The lawyer should attempt to verify as much as possible about what occurred during the interrogation process that is not on the recording. Police departments often maintain time records of when a person is taken to and returned from the lockup to the interrogation room. Records may be kept of meals provided, phone calls and medications. You should also investigate whether there are previous complaints against or discipline of the law enforcement interrogators.

Sometimes client's friends and relatives may be able to verify your client's story. Often they will have

contacted the police department to find out what happened to the suspect under arrest. They may have had contact with the interrogating detectives and obtained some information about the interrogation from them. An investigator can interview other persons who were interrogated by law enforcement in the same case. Be sure the investigator interviews these witnesses not only about their knowledge of the crime but of the police interrogation techniques that were used in their own interrogations.

Every recording must be closely analyzed in conjunction with the rest of the discovery in the case. Determine what facts or events in the recording were provided by the investigators to your client. Take note of all leading questions that were used. How did the interrogators “correct” what the client said if it didn’t match the other case evidence. Is the client’s really telling their own story or merely acquiescing to what the police told them happened? Is what the client stated vague stated in conditional terms such as “I could have... I might have”? Does the statement contain any new information that was unknown to the police prior to the interrogation? If it did, be sure to find out if any attempts were made to verify the information produced from the questioning and if so, what was learned.

Anyone defending a false confession case should consider retaining experts. Successful litigation may require hiring two different types of experts. A clinical psychologist should examine the client and determine what if any particular characteristics the client has which render him particularly vulnerable to police interrogation techniques. The clinician will conduct a clinical interview of the client and after discussion with the lawyer can administer tests such as an IQ test, general personality functioning tests, the Gudjonsson suggestibility scale⁴ and the Grisso Miranda comprehension test⁵.

However, many false confessions occur with people who are not developmentally disabled, mentally or unusually suggestible.⁶ A clinical psychologist cannot complete the picture of why a client gave a false confession; one should retain an expert such as

a research psychologist or social scientist who is well versed in the literature of false confessions. This expert will be able to teach you, the court and ultimately a jury how police interrogation techniques elicit false confessions.

Bringing a pretrial motion to suppress is essential in every confession case, no matter how certain you are that the motion will be denied. The accompanying article by Alejandro Lockwood outlines what these motions are and how to litigate them.

The Trial

Prosecutors consider confessions their *piece de resistance* and the key to victory in the trial. Defense counsel must begin counteracting the effects of the confession in every phase of the trial, beginning with voir dire.

Many courts put severe restrictions on the time allotted for voir dire, forcing defense lawyers to carefully maximize the precious minutes they have. Get right to the heart of the matter by telling the jurors that the prosecution will present your client’s statement and let them know that this is a false confession. The jurors should be questioned as to whether they believe false confessions exist and under what circumstances they occur. Many jurors are familiar with this; in all likelihood someone will be able to share knowledge they have with the other jurors about false confessions. Counsel should move to strike any juror for cause who doesn’t believe that false confessions exist and won’t seriously consider it a possibility in the case.

The false confession should be discussed from the beginning of the opening statement. Make the police interrogation the centerpiece of the opening statement. Detail the techniques that were used; there should be plenty of ammunition that can be used from the recording. The jurors should be told in story form how the interrogation techniques led the client to falsely confess. Let the jury know what the expert witnesses will tell them about how interrogation techniques can lead to false confessions and what vulnerabilities your client has. Be detailed!

A good opening statement will prepare the jurors to be skeptical of the confession and police testimony.

Using exhibits will make an interrogation come alive and better enable the jurors to understand the situation the client was in. One of the most effective tools is to recreate the interrogation room in the well of the courtroom, using masking tape to mark off the exact dimensions of the space the client was in when subjected to interrogation. You can then cross examine the detectives in this space as well as use it demonstratively during opening statement and closing argument. Enlarged photos of the interrogation room and a time line to visualize the lengthy and repeated interrogations are also helpful exhibits.

Preparing for Cross

In preparing to cross examine the interrogating officers, it is important to marshal all of the data gathered in the recording, motion hearing, interrogation training records, records of police discipline, your client's version and whatever other sources you have to prepare the cross examination. Having an accurate transcript of the entire interrogation process is an absolute must! It can take an outstanding secretary about eight hours to transcribe one hour of a recording. You cannot rely on simply having your secretary or a court reporter transcribe the tape and plan to review it a few days before trial. You must carefully review the recording and transcript together to make sure the transcripts is as complete and accurate as possible. Since sound quality may be very poor, this may require multiple listening sessions in order to point out corrections to the transcriber, who must then re-listen to the tape with the corrections in order to certify its accuracy.

Once you have the transcript you can use it to prepare your cross examination. Count up the number of times your client denied committing the offense. Police can no longer get away with testifying that they don't know, or just a few, when there are in fact many denials. Other details of the interrogation should also be analyzed in their totality: the number of times the police cut off or interrupted

the client's denials by telling the client they didn't believe them, how many times they told the client they had a strong case, the false evidence ploys, explicit and implicit claims that confessing would be helpful, number of references to what the DA or court will do and how the client could only help himself by making admissions. Be sure you are prepared to exactly document what facts the police revealed to the client about the case that became the foundation of the false confession. Familiarize yourself with the exact questions asked: how many times did the police ask leading questions that implied or suggested the "correct" answer or gave the client a few options to select from.

You will want to get these points across smoothly in your presentation before the jury. As you prepare your cross, be ready to impeach the detective on every point you wish to make. You must know the exact start and end time of each portion of impeachment. It is best to prepare individual sound files of each bit of impeachment that can be replayed in court for a seamless cross examination. Because the recordings are difficult to understand for the uninitiated ear, each of these sound bites should be accompanied by a separate transcript with enough copies available for the jury to read along.

Cross examination occurs in chapters. Here you want to create chapters to show tell the story of the interrogation and how it elicited a false confession.

The cross examination must be done in pinpoint fashion, asking only precise leading questions that will not leave room for the detectives to maneuver in. Of course, most detectives will try to wiggle out of direct answers, but you will have the tape to impeach them (as well as the transcript of the pretrial motion hearing).

The goal of the trial cross-examination is to persuade the jurors that the police interrogation techniques were able to overcome an innocent's person resolve and make them think it was in their best interest to give a confession to a crime they didn't commit. The prosecutor will have presented the interrogation as an "interview" where the police

politely asked questions and the client came forward with the true story of his guilt in the case. You must remove the sparkle from this story and establish that this is a fictional version of what occurred in the interrogation room.

Active listening during cross is crucial to success. Police are trained witnesses and are used to giving general, vague and evasive answers to lawyers' questions. Many times lawyers are too busy sticking to a pre-planned agenda and are ready to move on, only to later realize they haven't really pinned down the detective or achieved their goal. Listen carefully, be prepared to depart from your agenda and ask follow up questions to enforce the point you are trying to make.

Crossing the Detectives

It is best to begin with generalities. A few general questions about the detective's training will pin down that he adheres to what he has taught. Only after getting agreement that they heed and utilize training in all aspects of police matters (e.g. specifics such as crime scene investigation, use of service weapons and witness interviewing) should you obtain agreement that they are trained in interrogation of suspects. While this seems like a very boring way to begin a cross examination, it can become useful at a later point for impeachment. Many detectives deny using the Reid technique or other methods as a means to induce a confession, claiming that they "learned interrogation through on the job experience" or have "developed their own style". Jurors will be skeptical of the detective who claims to pay close attention and make use of training in every subject but claims to ignore or neglect his training during the interrogation of a suspect he wrongfully concludes is guilty. At the same time, it can open an opportunity to argue that the detective is a rogue cop, failing to follow safeguards that the training has put into place to avoid obtaining a false confession.

Trial counsel should know exactly what role the detective played in the overall case investigation. You must establish that the detective had knowledge about the case and thus would have been able to

inform the innocent suspect of enough facts to get a false confession. The best way to do this is review in detail exactly what the detective knew about the case and what his or her source of information was. Later, when questioning the detective about overcoming your client's denials, you can talk about how the police told the client that they had a "strong" case, and use the details of their knowledge.

You may want to then get the detective to state that prior to beginning the interrogation, he or she had an opinion that your client was guilty. You must be careful with this question; if there is any suppressed or inadmissible evidence in the case you will not want to ask this because it can and undoubtedly will open the door to the admission of such evidence. If all of the known facts are going to be admitted, then the detective will probably deny having this opinion and answer the question by stating that they wanted to "find out the truth". This is a good opportunity to launch into your questions detailing how the truth couldn't be that the client was elsewhere, a victim of mistaken identity, framed by a lying snitch, or whatever your defense may be. When the detective agrees that he thought none of these possibilities were true he will look less believable to the jury because he refused to answer your question in a straightforward manner.

Create chapters on the overall picture of the criminal investigation as it existed before the interrogation. Point out what the "perfect" case would look like and contrast it with the case that the police actually had at the time. For example, if there is an eyewitness to the crime who was not able to identify your client in a photograph, question the detective about this. Question them about the discrepancy between what the witness' original description of the perpetrator and your client's physical appearance, or the different descriptions of the perpetrator or the event by the various witnesses. Discuss the lack of physical or documentary evidence, how a gun wasn't recovered, there was no DNA or fingerprints, etc. Ask about the credibility deficiencies of witnesses who were on drugs, have criminal records or motives to falsely accuse your

client of the crime. Try to get the detective to agree that the pre-interrogation case against your client was weak; even if the officer won't agree with you, the jury will get the point.

Question the detective about the difference between an interview and an interrogation. Since these are terms of art in police training and practice, the witness can acknowledge that at some point he conducted an interrogation, not an interview of the client. This will make the prosecutor's repeated references to what happened when the detective "interviewed" the client seem disingenuous.

Paint a word picture of the interrogation room, using the exhibits you have prepared so the jury can visualize it. This is a good time to break out a roll of masking tape and recreate the exact measurements of the room in front of the jury.

After setting the scene, question the detective about the total control the police maintained over this environment: only they could lock and unlock the door, provide food and water to your client, let him use the bathroom, let him take medication, let him communicate with the outside world (which they of course did not permit), leave the room or go to sleep. Detail how the police physically positioned themselves vis-à-vis the client, their movements during the interrogation, and how and why they touched the client. Ask about their tone of voice and how it varied during the interrogation. Be sure to elicit a description of the extent to which the client was held incommunicado from the outside world; if the recording reveals that the client wanted to make a phone call, point out how the police deferred the request until after the interrogation was over.

Make the amount of time come alive by figuring out the total interrogation time of your client in seconds. Have the detective take a watch with a second hand and wait in silence until a minute has passed. A minute of dead time in the courtroom will seem to go on forever and you can use this to vividly illustrate how much time was spent interrogating your client.

You can point out that the police have been trained in the legal elements of crimes and defenses and are able to tailor their questions to obtain details that can match a crime or a particular lesser offense.

If the detective ever did undercover work during the course of his or her career, you may also want to cross examine them about how successful their work was in that area. This can be used to later point out that they were successful in deceiving your client when they adopted a phony empathetic persona or presented false information to him in the interrogation.

Detail each phase of the Reid or whatever technique was used in the interrogation. Point out how many times the client denied the crime and how did they handle the denials. What evidence did the detectives tell the client they had against him? Describe any specific evidence ploys such as bringing in a thick folder claiming it was the evidence in the case or state that they had eyewitnesses? Note any claims of DNA or other "foolproof" scientific evidence and whether the police engaged in puffery or outright deceit. The recording may reveal that the detectives posed the existence of such evidence in hypothetical terms, such as "what would you say if I told you that your DNA and blood from the scene is being tested at the crime lab right now". This is a move right from the Reid playbook; it should be pointed out that this method is used so detectives can deny in court that they lied to the client about non-existing evidence.

Explore the interrogation themes. If the detective claims he doesn't know what you mean by this, briefly explain what a theme is and ask if he or she used it. There are specific themes recommended for various crimes that can be found in interrogation training materials or are published by Reid & Associates and other trainers. Go through these themes and give an accounting of how the detective used these in the interrogation process. Point out that these themes are designed to make the client believe that if they confess they will be prosecuted on a less serious charge than what the evidence looked like without the confession. The detectives

may deny this was the purpose of the utilized themes. Use specifics from the recordings to show how the disingenuousness of this response.

If the detectives deny deliberately using bait questions or themes in the interrogation, this is a good place to use their training materials as an exhibit. Point out the detective earlier told the jury that training was important. Show how the training they received correlates to the exact techniques they used in the interrogation room. Demonstrate to the jury that the entire interrogation was manipulated to obtain a confession from your client

What you are essentially trying to get the interrogators to tell the jury is how they deliberately moved your client from a denial to an admission of involvement in the crime. Often the recording will reveal that detectives told the suspect to “tell the truth” or they just wanted to get the truth. Point out in cross that they had already decided that the truth could not be that your client wasn’t involved, had an alibi, was an innocent bystander, or whatever facts point to innocence in your case.

Breaks during interrogation are almost always for the benefit of the interrogators, not the client. Discuss what particular strategies going into the interrogation and what the detectives did during breaks to strategize the interrogation because the client was not making any admissions up to that point.

If your client has particular vulnerabilities such as mental or physical health issues, developmental disabilities or is a juvenile, you should explore what the police knew of these. Point out their lack of special education or training in this area and how they failed to alter their standard interrogation operating procedures to take the problem into account.

After completing the cross chapters on how the police obtained your client’s admission of involvement, explore how they developed the post-admission narrative. Use specifics from the recording to show about how they led the questioning of the client. If there are points in the

tape where the client claimed one version and they informed him that things occurred differently or that this explanation was “not the truth” point this out. You must show the jury in blow-by-blow detail how the police shaped the statement.

If the police obtained a written summary confession after developing the post-admission narrative be sure to take this on in the cross examination. The written summary will undoubtedly fail to document the many twists and turns that occurred during the questioning. You must show the jury that the statement is a product of what the police chose to write; they decided to write out the statement at a point they felt would suit their needs and failed to truthfully reflect the actual conversation that took place in the interrogation room. Most written statements have cross-outs which are then “corrected” and initialed by the client. This is another technique straight from the Reid training. The detectives will probably claim this was not manipulated by a genuine error on their part. Show the jury that the cross outs are not true errors, but deliberate errors on the part of the detectives to get the client to initial various pages. If the crossed out words are correctly used or spelled and the substitute language is erroneous; this can also be used to impeach this claim.

Often police investigations come to a halt once a confession is obtained from the suspect. Point out the lack of investigation to corroborate the confession and that good police work would entail verification of a confession. You may want to reinforce this by questioning other detectives in the case who were not involved in obtaining the confession.

All good cross examinations should end on an important point you want to drive home to the jury; in the case of a false confession, the statement usually deviates significantly from the true facts or physical evidence in the case. This is a key fact you must emphasize that to the jury. Contrast each false detail with the known evidence to show that the client did not commit the crime but was manipulated during the interrogation process. Reinforce this by

playing the recording of each obviously false statement.

The Defense Case

Clients should be prepared to testify at the trial. There is no bright line rule for whether or not a client should testify in a false confession case but you may not be able to complete the true picture of what occurred without the client telling their story.

Sometimes this story can be told strictly through cross examination and expert testimony. Some clients will only damage themselves by taking the stand; there may be otherwise inadmissible facts the jury will learn of only if the client testifies. But there can be many advantages to having the client testify. The jurors will want to know what the client has to say about the interrogation process and how they were led into giving a confession. The client's version can fill in the gaps as to anything that occurred which is not on tape. The client can explain the range of emotions they felt during the interrogation and why they chose to do something so harmful as to give a false confession.

An important caveat: the client must be well prepared to testify. Good preparation must include reviewing the event in detail; the client is part of the team and should have a good understanding of the important points you will be bringing out. Being ready for cross-examination is a must- the client should be asked all the questions you anticipate the prosecutor will raise at the hearing. The best practice is to prepare the client for the prosecutor by bringing in another lawyer to conduct a practice cross, simulating the actual prosecutor's demeanor and style of questioning.

Expert testimony can also be an important part of the defense case presentation to the jury. Whether or not testimony by a clinical psychologist will be helpful is dependant on the outcome of the evaluation and particular vulnerability of the client. Testimony by a social psychologist about interrogation techniques and false confessions should be proffered whenever a foundation has been laid for the testimony by evidence (on cross or direct) that similar interrogation techniques were used to obtain the confession. There is no Wisconsin case

law on the admissibility of a social science expert in a false confession case, though there is favorable 7th Circuit case law on the admissibility of this evidence⁷; other jurisdictions' case law varies greatly. For this reason, you and the expert should prepare a persuasive offer of proof and brief the admissibility of the expert's testimony, making constitutional as well as statutory arguments in favor of admissibility.

Closing argument gives you an opportunity to unleash your creativity. Close powerfully: reenact the interrogation and play the roles of the interrogators and your client. Give the jury an opportunity to understand how the techniques that were used in your case coerced your vulnerable client to believe that it was in his or her best interest to make a false confession.

Whenever we try cases, there are no guarantees. Hopefully in this new era of DNA exonerations, the automatic assumption that whenever a person confesses they must be guilty is over. Careful preparation, well-crafted trial techniques and passion for the cause of the innocent client will help to tip the balance in favor of acquittals when we go in the courtroom to battle one of these cases.

Endnotes

¹Fred E. Inbau, et. al., *Criminal Interrogation and Confessions* 5 (Aspen Publishing, 4th ed. 2001).

²For a discussion of minimization and maximization see Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim L. & Criminology 429 (1998) or Saul Kassin & Gisli Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psychol. Sci. Pub. Int. 33 (2004).

³The body of literature about interrogation and false confessions is growing rapidly. A few other helpful readings are: Richard Leo, *Police Interrogation and American Justice* (Harvard University Press, 2008); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979 (1997); Steven A. Drizin & Richard A. Leo, *The Problem of*

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⁴The Gudjonsson Suggestibility Scale (GSS) is an instrument that intends to measure individual differences in interrogative suggestibility (Gudjonsson, 1984a; 1992; 1997). The GSS measures two different aspects of interrogative suggestibility, the tendency to give in to leading questions (Yield) and the tendency to shift responses under conditions of interpersonal pressure (Shift). The GSS consists of a narrative paragraph that is read out to the subject, who then reports all he or she recalls about the story. Following this, the subject is asked a number of questions about the story, some of which are misleading. Next, the subject is told in an authoritative manner that he or she has made a number of errors and must answer the questions for a second time. Yield refers to susceptibility to suggestive questioning, while Shift pertains to pressured suggestibility, i.e., the tendency to change answers as a result of social pressure.

⁵The Grisso Instrument for Assessing, Understanding & Appreciation of Miranda Rights test consists of four parts: Part one tests a person's ability to explain accurately, in his or her own words, what aspects of the *Miranda* warnings mean; part two tests 'recognition' of *Miranda* rights, part three tests comprehension of the vocabulary used in the warnings. The fourth part involves pictures and stories about fictional persons being interrogated and tests a person's ability to recognize, during an interrogation, the function of the *Miranda* warnings.

⁶See for example Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891 (2004). This study found a disproportionate number of juvenile, developmentally disabled and mentally ill false confessors, however in the majority of the cases studied none of those factors were present.

⁷See *U.S. v. Hall*, 93 F.3d 1337(7th cir. 1996), on remand at 974 F. Supp. 1198 (C.D. Ill. 1997). For a review of some of the federal and state court decisions see Nadia Soree, *Comment: When Innocents Speak: False Confessions, Constitutional Safeguards and the Role of Expert Testimony*, 32 Am. J. Crim. L. 191(Spring 2005). ■

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