

## ***Crossing Police in Confessions Cases***

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Many lawyers feel intimidated when it comes to crossing law enforcement officers in a confession case. We all know that the police are going to tell the jurors that they were just out to get the truth and solve what is often a horrible or violent crime. Research shows that the presence of a confession has a strong influence on jurors, making them more likely to convict the accused. Fortunately, now that interrogations are generally recorded, at least in serious cases, we are able to best bring out how police coerced and intimidated our client into making a false confession.

Any lawyer handling these cases must learn about how police interrogation works, how it induces false confessions, who is most susceptible to confessing falsely, how to unmask police pretending to be experts through cross examination and how to work with experts to debunk false confessions. This outline will address these issues.

Most police officers are taught to interview and interrogate suspects by using the Reid method or some variation of it. The Reid method was developed by John Reid and Fred Inbau to interrogate suspects by using psychological methods instead of using physical pressure after the United States Supreme Court declared that torture was an unacceptable means of getting a confession. *Brown v. Mississippi*, 297 U.S. 278 (1936).

The method was considered so psychologically coercive that the United States Supreme Court referred to it in the Miranda decision. Reid and Inbau are long gone, but their method lives on. You can learn about the Reid method in depth by reading their book, *Criminal Interrogations and Investigation*, now in its fifth edition. It can be purchased on their website, [www.reid.com](http://www.reid.com), on [www.amazon.com](http://www.amazon.com) or check out a copy at your local university or law school library. Reid and Associates trains law enforcement officers all over the country in this methodology; a copy of their seminar schedule can be found on their website. They will admit any paying customer to their seminars, including criminal defense lawyers.

The Reid method advertises that it divides questioning of suspects into two sections – it begins with a non-confrontational interview called the Behavior Description Interview (BAI) and once the police officer has assessed that the suspect is untruthful, proceeds to part two, interrogation. However, the BAI ends with what Reid calls “bait questions”, which are a coercive technique where the detective makes the suspect believe that they have a very strong case against them, and their situation is hopeless. Here are the three phases of a Reid based interrogation

## Part One: Amateur Psychologist - The Behavior Description Interview

The BAI is a short (20-45 minutes) non-accusatory interview used to determine if suspect is “truthful”. The BAI consists of 17+ “Behavior Provoking” questions and the police interviewer then makes a truthfulness decision based on assessment of verbal and non-verbal responses to questions.

The 17 Questions are:

1. What is your understanding of the purpose of the interview.
2. We are investigating \_\_\_\_, if you did \_\_\_\_ you should tell me now.
3. Do you know who did \_\_\_\_?
4. Who do you think did \_\_\_\_? Tell us your suspicion even if wrong. Promise confidentiality.
5. Is there anyone you know who you would rule out?
6. How do you feel about being interviewed for this?
7. Do you think that \_\_\_\_\_ really occurred? If suspect was accused: Is accuser lying?
8. Who would have the best opportunity to do \_\_\_\_?
9. Why do you think someone did \_\_\_\_?
10. Did you ever think about doing \_\_\_\_ even though you didn't?
11. Why wouldn't you do something like \_\_\_\_?
12. What do you think should happen to the person who does \_\_\_\_?
13. How do you think the investigation results will come out for you? Or willingness to take polygraph and how they think it will turn out.
14. Do you think the person who did \_\_\_\_ deserves a second chance?
15. Alibi/account of events
16. Did you tell anyone you were here today? Who? etc.
17. Bait question. (see sec. II)

As you can see, many of these questions have nothing to do with actually investigating a crime.

The Reid school claims that the interviewer can evaluate the verbal and non-verbal answers and accurately determine if the subject is lying. They teach that truthful subjects will be composed, interested, concerned, realistic, cooperative, give direct & spontaneous responses, make specific denials and use of accurate language, are open, helpful, sincere, express confidence in the investigation's outcome, and voice a desire for punishment of perpetrator.

They claim that deceptive subjects will make passive denials, use "guilty" phrases such as: "Oh you're kidding"; "to the best of my memory"; "that's as far as I can recall". They claim guilty subject will act confused; disinterested; claim mental blocks; be irrational; give one and two word answers to questions; blame others; give contradictory explanations, lie by referral (I already told...); lack confidence in investigation results; minimize the offense; endorses light punishment or feel the offender should have a second chance; are overly polite; uses permission phrases and show a lack of emotion.

They claim that liars can be spotted based on the grammar of denials. They teach that truthful persons say, "I didn't..." compared to liars who don't use contractions, in other words, stating "I did not..." is a sign of being deceptive.

Reid acknowledges that both truthful and untruthful person may exhibit anger, surprise, nervousness and fear.

**Analyzing the Non-Verbal Responses: A Foray into Junk Science.** The Reid school teaches police officers to reach the following conclusions after the behavior description interview:

Police should analyze the interviewee's rate of speech claiming the truthful person will increase their rate of speech and raise vocal pitch while the deceptive person will decrease speech rate, pitch and clarity fall off and they will stop/start their responses.

As to posture and body: The truthful are upright, open, relaxed, lean forward occasionally, frontally aligned with interviewer and make casual posture changes, while deceptive people: retreat, slouch, act frozen, their heads and body slump, exhibit guarded and defensive body language such as placing their hand over their mouth, cross their arms, make erratic and rapid posture changes, make "erasure" signs after false denials and have dry mouth.

Reid claims that in normal conversation persons make eye contact 30-60% of the time but deceptive persons avert their gaze. They promote concepts of neurolinguistic programming: subjects who break gaze and look to the right are liars, those who look left are truthful.

All of the above is considered junk science by other researchers. A leading researcher in deceptions, Aldert Vrij, has reached the opposite conclusions regarding symptoms of untruthfulness. His book, Detecting Lies and Deceit, Pitfalls and Opportunities, Wiley Series in Psychology of Crime, Policing and Law, 2d Ed 2008, contains an extensive discussion which debunks myths about the conduct of liars.

There are many law enforcement departments that use all or part of the nine steps of interrogation but do not follow the Reid interview protocol.

## **Part Two: Con Artist - The Bait Question**

The Reid school uses a bait question as final question in the interviewing process. They evaluate answer using same criteria as other interview questions as well as whether bait question causes suspect to change their version of events and if they give a delayed response to the bait question.

This involves the use of an evidence ploy- a claim of real or false evidence. They “educate” the suspect before they bait – meaning tell the suspect that science will allow them to match physical evidence in suspect’s possession to crime scene evidence. This may involve the use of props such as thick file, news articles about other cases, etc. The investigator must be careful to use bait questions that the suspect can’t see through; the suspect should be told the investigation is ongoing and the interviewer should not pin himself down on having the evidence because the suspect may ask to see it.

Police are taught to phrase bait questions as “Is it possible that...” to testify that they didn’t lie to suspect but asked the suspect a hypothetical.

Some Bait Question examples:

- Would there be any reason that person A says they saw you take the money?
- Would there be any reason why the footprints taken in the mud at the scene would match yours? Why would the mud on your sneakers match the DNA of the mud where the crime occurred?
- Why would a video surveillance tape of the building that burned down show you in the area?
- Is there any reason why the blood found at the scene will show your DNA when it comes back from the lab?

After asking the bait question, the investigator concludes the interview; he leaves briefly and may confer with colleagues. He will then return to the interrogation room and begin the interrogation, using what the Reid school labels as the nine steps of interrogation.

## **Part Three: the Nine Steps of Interrogation**

When the interrogation starts, the tone of the conversation will shift to being accusatory. The steps are:

1. Directly and positively present the suspect with the statement that he is considered to be the perpetrator. Says things such as:
  - “Our investigation shows that you are the person who \_\_\_\_\_”.
  - Begin standing, four to five feet from suspect (social zone).
  - Avoid realistic words –e.g. “You took” (not stole); “you made her have sex” (not raped); “you caused death” (not murdered).

- Firm tone of voice.
- Transition: from dominance to empathy, sit down, move closer, begin step two.

## 1. **Theme Development: The essence of the Reid technique**

The Reid Official Explanation of theme development is that the interrogator is to express a supposition about reasons for the crime's commission whereby the suspect is offered a moral excuse (affix moral blame on the victim, accomplice, circumstances, etc.) so he can accept his conduct and admit to the crime. The theme centers on how the interrogator believes that the suspect's actions are not so bad and juxtaposes it against more aggravated conduct. Interrogators are taught to use storytelling that contains theme to get suspect to buy into theme. Some common types are:

- Use of fictitious or true stories in which interrogator relates that he worked on a similar case, using minimization, person denied crime at first, then a "happy ending", after person confessed.
- Use of first person themes where interrogator tells of similar experience, tries to bond with suspect through this story.
- Use of "role reversal" – put suspect in position of decision maker- two people who committed similar crime – one had the "prove it" attitude, other was sorry and explained circumstances – ask "who would you want to talk to?" and point out that suspect is acting like the "prove it guy". Avoid making suspect the judge/jury – it just reinforces legal consequences. No explicit mention of leniency.

During the theme development part of the interrogation, the interrogator is taught to use an empathetic tone and move closer to the suspect. They are to give the suspect the impression that it is helpful to confess to the thematic behavior that is being offered. This is coupled with repeating the bait evidence and interrogator's assertions of absolute confidence that suspect is guilty and cornered.

Interrogators will use language which implies that interrogator will be able to help the suspect if he confesses – but the interrogators are trained to avoid legally explicit terms. For example, they are taught to say:

- "We're here to work with you" - not "to help you".
- "Once they told the truth, the weight of the world was off their shoulders" or "they learned from the experience"- not a specific outcome.
- Tell suspect they may be afraid of jail but either way, a decision will have to be made and here is their chance to tell their side of story.

The Reid school has developed specific themes for different crimes. Some theme examples are:

- Theft –Needed \$ for a good reason, being exploited by boss, it began as borrowing and you intended to repay.
- Sex Assaults- blame victim's behavior, style of dress, overly mature or seductive child, poor parenting.
- Homicide – deceased began a fight, was a bad person, drug dealer, stole from you.

- All cases – suspect was intoxicated, under stress, not acting normally.

### 3. Handling Denials

The basic method is to dominate the suspect and cut off his repetition or elaboration of denial and return to the theme. They will say things such as, “I’m thinking you did (worse thing) and I’ll have to investigate ... I don’t even have to or need to talk to you to prove this but I thought I’d give you a chance to tell your side of the story...“I think you’re stonewalling me- I thought well of you before but now I’m thinking poorly of you.” The interrogator will reveal evidence – or false evidence- if absolutely necessary.

Cutting off denials is premised on the belief is that the more a person is allowed to deny a crime, the harder it will be to get an admission.

### 4. Overcoming Objections.

This is not the same as a denial – an objection is a denial coupled with a suspect’s statement about his own character, for example, “I couldn’t have done this, it violates my religion”. Reid advocates listening and incorporating this into the theme. For example, the interrogator may respond by saying, “Of course, I know because you’re a religious person, you would never do this intentionally; it must have been an accident”.

### 5. Procurement and retention of the suspect’s full attention

The interrogator is to get closer, pat the suspect’s shoulder and act sympathetic.

### 6. Handle suspect’s passive mood.

The interrogator views this as the time that the suspect is giving up on resisting the interrogation. It provides the opportunity to move in and get the admission by use of step seven.

### 7. Present the alternative question.

When the interrogation believes that he has worn down the suspects denials and can get an admission to the criminal conduct, he presents two alternatives – a “bad” one and a “lesser” one based on the theme. Both are guilt choices. The “bad” reason must be bad enough that suspect could not admit to it and the desirable alternative seems good. If this doesn’t work and the suspect continues to deny here, the interrogator is to return to the theme and try to develop new ones.

### 8. Have suspect orally relate details.

An admission is not enough; now police must obtain a confession. They are taught to continue to avoid legal terminology, get the suspect committed to admission and description of the offense and obtain details.

### 9. Convert the statement to writing.

Classic Reid instruction teaches that an interrogator should write the statement, making deliberate errors to be corrected and initialed by the suspect. The suspect should be invited to write a letter of apology. In the era of recorded confessions, this rarely occurs.

Here are some other suggestions the Reid school makes about conducting interrogations:

- Conduct interrogation in private, without distractions.
- Investigator should dress in “plain clothes”- no uniform or conspicuous signs of being in law enforcement.
- Know the details of the crime.
- Learn details about the suspect during the interview. Appeal to their personal values.
- Keep pencils and paper out of sight during interrogation (it reminds the suspect of the legal significance of what’s happening).
- Have Miranda warnings given by someone other than the interrogator.
- Physical proximity to suspect should shift at critical moments; move in closer.
- Seek an admission of lying about some incidental aspect of the event.
- Have the suspect put himself at the crime scene or in contact with the victim or occurrence.
- If the suspect has a fear of embarrassment, promise that *you* will not tell the person they are afraid of being embarrassed in front of.
- Play one co-defendant against the other.
- Use leading (cross examination) questions to get agreement on as much as possible, bringing them down the pathway of “yes” answers.
- Compliment suspect on their past acts and traits.
- If suspect gets up to leave, talk to empty chair.

Part of the confidence that Reid has in their instructions is their belief that they know the confessions they obtain are true. According to them police must obtain dependent and independent evidence for confession to be valid. Dependent evidence are facts that only true perpetrator would know and must have been withheld from suspect during the interrogation. Independent evidence is something that interrogator didn’t know before the interrogation which can now be verified.

Reid acknowledges that their interrogation tactics can lead to false admissions, but they claim that strict use of their technique, including this step, will prevent false confessions)<sup>1</sup>. Of course we know this is not true.

### **Real world police tactics**

While some police departments may adhere strictly to the Reid methodology, it is much more common for law enforcement interrogators to adopt parts of it. Many skip the BAI or only use portions of it. Other common interrogation methods are using fabricated forensic and eyewitness evidence, subjecting the suspect to a polygraph or voice stress analyzer and telling them they failed the test.

Another technique is to tell a suspect who says, “I know I didn’t do it, I have no memory of it” that they were on drugs, alcohol or are so upset that they’ve suppressed the memory of the offense. Some interrogators alternate a “good cop – bad cop” and conduct relay interrogations. When a suspect is interrogation multiple times, they are often interrogation by detectives on different shifts and thus sleep deprived.

Interrogators often tell the suspect that they want to “help him”. This is expressed as the suspects is helping himself out by confessing and the detective will then be able to explain things to the prosecutor or judge. These implied promises of leniency are designed to make the suspect feel it’s in his best interest to confess and many police officers go farther than what Reid trainers advocate. The handbook that Reid trainers use at their seminars explicitly instructs interrogator to not tell a suspect they are helping him, which makes for great impeachment material.

Another common tactic is for the interrogator to tell the suspect that if he sticks with his story, he will be looking a very lengthy sentence, but if he cooperates, he is likely to only be found guilty of a less serious crime. The Reid handbook explicitly states that the use of this type of “alternative question” should not be used.

### **Deconstructing Interrogation: What Science Teaches us about Interrogation and False Confessions**

The two key elements in interrogation as outlined above are maximization and minimization. Police maximize the evidence against the suspect by use of both the bait question (evidence ploys) and a discussion of how the crime is extremely serious and will result in a severe punishment. They use theme development to offer a version that minimizes the suspect’s involvement in order to get an admission of guilt through the use of the alternative question. Finally, they must put together a post admission narrative that describes the suspect’s participation in the crime. When this is done through leading questions and feeding facts, the result is a false confession designed to match the facts of the crime.

Richard Leo and Steven Drizin have analyzed these methods and explain that when police interrogators elicit false confessions, they commit three errors. These are:

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<sup>1</sup> “The Importance of Accurate Corroboration within a Confession”, December 2004 monthly investigator tip at [www.reid.com](http://www.reid.com).



- **Misclassification:** The interrogator wrongly interprets a suspect's behavior as a sign of guilt. For example, the officers who interrogated Brendan Dassey<sup>2</sup> interpreted his socially awkward behavior and cognitive deficits as signs he was struggling with guilt and withholding information about the crime. However, Dassey's school records revealed that he exhibited these behaviors since childhood and suffered from a learning disability, was in special ed classes, and had trouble understanding vocabulary in addition to his socially awkward behaviors.
- **Coercion:** Police use coercive methods of interrogation designed to make the suspect feels hopeless and that confessing is the only way out of a horrible future in prison.
- **Contamination:** Police inadvertently or intentionally inform the suspects of the crime facts which are then regurgitated into a confession.

In the past 20-30 years, numerous researchers have studied the phenomena of false confessions and published article about their findings. Here is a partial list of reading materials to get you started researching this area:

- Drizin, S. and Leo, R., The Problem of Police-Induced False Confessions in the post- DNA Age, 82 N.C.L.Rev. 891 (March 2004).
- Kassin, Drizin, Grisso, Gudjonsson, Leo, & Redlich (2010), police-induced Confessions: Risk Factors and Recommendations, 34 Law and Human Behavior 3-38 (2010). [This is an official White Paper of the American Psychology-Law Society).
- Richard Ofshe and Richard Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. UL Rev. 979 (1997).
- Richard Leo, False Confessions: Causes, Consequences, and Implications, J Am Acad Psychiatry Law 37:332–43, 2009.
- Saul Kassin and Gisli Gudjonsson (2004) The Psychology of Confessions: A Review of the Literature and Issues, vol 5 No.2 psychological Science in the public Interest.
- Leo, R.A. and Drizin, S.A., The Three Errors: Pathways to False Confessions and Wrongful Convictions, in *Interrogation and Confessions: Research, Policy and Practice* (edited by D. Lassiter and Christian A. Meissner) (American psychological Association, 2009).
- Brendon Garrett, [Convicting the Innocent: Where Criminal Prosecutions Go Wrong](#), Harvard University Press, 2012.
- James Trainum, [How the Police Generate False Confessions: An Inside Look at the Interrogation Room](#), Rowman & Littlefield, 2016.
- Leo, Richard A., *Police Interrogation and Suspect Confessions* (May 1, 2018).

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<sup>2</sup> Brendan Dassey was accused and convicted of being a party to the crime of killing a woman tother with his uncle, Steven Avery. Dassey was a juvenile at the time. The Dassey/Avery case was the subject of a documentary, [Making a Murderer](#). Dassey's confession was determined to be involuntary in a habeas action; that decision was overturned by the Seventh Circuit in *Dassey v. Dittman*, 877 F.3d 297 (7<sup>th</sup> Cir. 2017), *cert. den.* 138 S. Ct. 2677.

- Eric Miller & Tamara Lave, eds., *The Cambridge Handbook on Policing in North America* (Cambridge University Press, 2019, Forthcoming); Univ. of San Francisco Law Research Paper No. 2018-09. Available at SSRN: <https://ssrn.com/abstract=3176634>
- Saul Kassin, *Duped: Why Innocent People Confess - and Why We Believe Their Confessions*, 2022.

## **Juvenile Confessions**

Juveniles are considered to be more easily coerced into confessing. *State v. Jerrell C.J.* 699 N.W.2d 110 (Wisc. 2005). Special caution is to be exercised when assessing voluntaries of juvenile confessions – the condition of being a child renders one uncommonly susceptible to police pressure. *Id.* See also *Hardaway v. Young*, 302 F.3d 762 (7<sup>th</sup> Cir. 2002); *Gallegos v. Colorado*, 370 U.S. 49, 53-55 (1962); *Halley v. Ohio*, 332 U.S. 596, 599-601 (1948).

## **Defending a Confession Case: Develop a Theory of the Case**

### **Preliminary Steps**

Educate yourself about how police in your jurisdiction interrogate suspects and get confessions. Obtain police training materials by subpoena or open records is critical; you will want to use these in cross examination. Make sure to get the training materials that were distributed to the interrogators in your case before they conducted the interrogation. If materials have been updated or changed, get those as well- this could be useful if they used an interrogation technique that is no longer taught. Sometimes it is helpful to consult with recently retired police officers about how a department trains detectives and conducts interrogations.

Interview your client thoroughly about the interrogation process as early as possible in the case. If the interrogation is unrecorded you have to reconstruct what occurred. Have the client prepare a timeline regarding the interrogations and obtain details about the interrogations. Use your knowledge of interrogation techniques and ask about specific techniques that law enforcement use in your jurisdiction.

If the interrogation is recorded, have it transcribed and play the recording for your client with a draft of the transcript in hand – transcriptions of interrogations are difficult to produce and often contain inaudible portions your client can help to clear up. Interview your client about what he was thinking and feeling as the interrogation progressed. Ask why he decided to cave into the pressures of interrogation. Find out how your client provided the details that were incorporated into the confession. Also- there may be important details that occurred off tape, such as conversation on the way to the interrogation room. In some cases, a client tells interrogators they don't want to answer questions, the interrogation is terminated, an off tape discussion occurs and the recorded interrogation resumes. Be sure to find out details of what occurred during that time.

Gather information about your client after interviewing him. You will want to obtain the following records: school including IEPs and testing, medical, psychological, SSI, prison and juvenile corrections, juvenile and adult criminal case information, employment.

Gather evidence to corroborate as much as you can about what the client tells you about the interrogation. View the interrogation room(s) just as you would any other crime scene. Measure and photograph the rooms. If your client was subjected to multiple interrogations and not taken to jail cell where he could sleep, document jail cell proximity and get photos of that area as well. Investigate whether any administrative rules concerning jail conditions were violated.

Research the officers involved. Compare notes with other attorneys in the jurisdiction about the practices of the police detective in obtaining confessions. Get transcripts of other suppression hearings where the detective(s) testified. Research officer using legal search engines, public records, open records of department discipline and determine if the detective was involved in any civil cases as a party. Ask prosecutor and move court for *Brady/Kyles* evidence and obtain police personnel files to establish an officer's unlawful or inappropriate practices or violations of departmental rules.

Review the interrogation line-by-line. Make three lists:

- Coercive methods: Note every coercive technique from the mildest to the most blatant.
- True and false statements: False confessions will often contain factual inaccuracies or assertions that don't make sense.
- Contamination: You must account for where each fact in the statements come from. Is it a fact that the police mentioned during the interrogation? Was it in the press? Was your client a witness but not a participant? Did the true perpetrator tell your client about the crime? Were the things your client said just unlucky guesses?

### **Expert Witnesses in False Confession Cases:**

There are various types of experts available to testify in false confession cases. These are:

**1. Clinical Psychologists.** Once you have amassed the data, hire a clinical psychologist to perform an evaluation of your client both for his ability to comprehend and waive Miranda warnings and vulnerability to confession falsely. Provide the expert with the following materials so they will be prepared for the testing and client interview:

- Copies of your client's statements whether written or recorded, including transcripts.
- Law enforcement reports regarding the interrogation.
- Enough case materials or a case summary so the psychologist understands the allegations.
- A summary of information from your client interviews regarding the interrogation and pre-interrogation events.
- A summary of your client's social history.
- All of the records you have gathered concerning your client.

A psychologist's evaluation will consist of both interviewing your client and performing psychological tests. Some tests, such as those that measure intelligence like the Weschler Adult Intelligence Scale (WAIS) and personality such as the Minnesota Multiphasic personality Inventory (MMPI) are common to many forensic psychological evaluations. There are very few tests that measure specifically for vulnerability to interrogation. These tests are comprised of various sections, some of which will have greater relevance to issues concerning voluntariness than others. For example, the WAIS-Iv measures both verbal and performance IQ: the verbal score is the most germane to suppression issues in confession cases.

There is one set of tests, the Gudjonson Suggestibility Scale (GSS) and the Gudjonson Compliance Scale (GCS), which can be administered in evaluating confession issues. These tests can be used when challenging the truthfulness of a confession but may be useful in the voluntariness context as well. The GSS measures a person's tendency to be influenced by leading questions and to change answers in presence of mild interrogatory pressure (Gudjonson, 1984; 1992; 1997); the GCS measures the extent to which a person just complies with a request. The GSS is the more commonly used (and considered the most useful) of the two tests.

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 aloud to the subject, who then reports all he or she recalls about the story. Following this, the subject is asked several questions about the story, some of which are misleading. Next, the subject is told in an authoritative manner that he or she has made several 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 because of social pressure. A high score indicates that a client is very suggestible to police interrogation practices.

If you suspect your client suffers from brain trauma, consider hiring a neuropsychologist instead of or in addition to a clinical psychologist. This doctor will perform additional specialized tests that can measure other cognitive deficits such as memory impairment or ability to understand,

concentrate and process information. This doctor will be able to testify about a physiological basis for your client's deficits, which is impressive to a court evaluating your client's vulnerability to interrogation.

In some cases, you may want to retain a psychiatrist in addition to a psychologist. psychiatrists cannot administer psychological tests to your client. However, if your client has any major mental diseases, such as schizophrenia, which are treated with medications, you may need psychiatric testimony, particularly if medication deprivation or medication side effects impact your client's susceptibility to police interrogation. psychiatric testimony also may be helpful if your client was not taking prescribed psychotropic medications or was withdrawing from heroin, alcohol or another addictive substance, which rendered him particularly vulnerable. Since a psychiatrist is a physician, they will be in a good position to testify about the impact of mental illness, lack of medications or withdrawal on both the body and the mind during interrogation, and cite medical studies on the effect of these impairments. There are also diseases which impact mental status, such as dementia or congestive heart failure, in which a psychiatrist's medical training is helpful.

Any doctor you hire should perform tests to detect malingering and be able to defend the results and explain why they were not faked by your client (as a prosecutor may argue).

## **2. Medical Experts**

Be sure not to overlook any physical problems your client may suffer from that can impact his vulnerability to interrogation. Most police interrogations are conducted at the police department and your client is kept in a temporary holding facility until a confession is obtained. These facilities usually lack medical staff, and your client may be denied their regular medications while being interrogated. Even routine medical problems which are easily treated with medications can be problematic when a person is subjected to interrogation and deprived of medications. For example, if a person is an insulin dependent diabetic and not given their regular medication, high blood sugar levels can cause a great deal of discomfort. Experts such as neurologists or endocrinologists may be called to testify about this condition. If your client takes regular pain medication and was not provided it during interrogation, they may have succumbed to interrogation just to get pain relief.

If there are medical issues in the case, be sure to provide your expert with all relevant information. This includes records from the holding facility regarding food, beverages and (lack of) medications provided to your client. If your client suffers from a painful physical condition, such as a back injury, get detailed information and photos of the bedding and cell other specifics about the location in which he was held.

## **3. Experts on Coercive Police Interrogation**

Another expert you can call is a social psychologist or sociologist with knowledge of the coercive nature of police interrogation. These types of experts are not clinical psychologists; they do not interview and conduct tests on your client. They review the police interrogation and advise you on what coercive techniques were used by law enforcement with your client, and how such techniques can overbear a person's will and coerce a confession. One published

case in which such an expert testified is *State v. Sawyer*, 561 So. 2d 278, 287 (Fla. 1990). The court noted that the defense experts “expressed a unanimous view that Sawyer’s confession was coerced by the cadre of detectives, who worked for sixteen hours nonstop, successfully applying various psychological techniques to produce a confession.”

Prosecutors frequently object to the admission of this expert testimony, arguing that it does not meet the *Daubert* or *Frye* standard for admissibility. Some appellate courts have upheld a trial court’s discretionary finding excluding such experts at trial. For example, in *People v. Kowalski*, 821 N.W.2d 14 (Mich. 2012), the trial court held that the expert testimony regarding research on false confessions is unreliable because it doesn’t study random samples of both true and false confessions and, thus was inadmissible under Rule 702<sup>3</sup>. In *U.S. v. Benally*, 541 F.3d 990 (10th Cir. 2008), the court declined to admit such expert testimony on the grounds that it essentially vouched for the credibility of the defendant. However, even some of the cases where the appellate court upheld a trial court’s exercise of discretion to not admit the testimony to a jury discuss the fact that the research on false confessions is ongoing and, under appropriate circumstances, false confession expert testimony could be relevant to a defendant’s case and helpful to a jury. *Commonwealth v. Hoose*, 5 N.E.3d 843 (Mass. 2014).

The picture is not all bleak for the defense; this testimony was found admissible in *Cain v. Burge*, Slip op., p. 6, Case No. 102-C-8996 (N.D. Ill. May 10, 2013 Westlaw 1966381, N.D. Ill. 2013; *Shelby v. State*, 986 N.E.2d 345, 368-369 (Ind. Ct. App. 2013); *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996); *Lapointe v. Comm’r of Corr.*, 316 Conn. 225 (Conn. 2015); *People v. Evans*, 141 A.D.3d 120 (NY App. Div. 2016), *United States v. Whittle*, 2016 U.S. Dist. LEXIS 109631 (WD KY 2016). *McCloud v. State*, 208 So. 3d 668 (Fla. 2016). In *United States v. Ganadonegro*, 805 F. Supp. 2d 1188 (D. NM 2011), the court excluded expert testimony regarding the credibility of the defendant’s confession but admitted testimony as to the lack of voluntariness of the statement.

Regardless of the published case law, trial courts are admitting this testimony much of the time it’s proffered. Dr. Richard Leo, one of the leading experts in this field, has testified in over 30 states, including in 101 pretrial suppression hearings, and estimates that 95% of the time courts admit his testimony. Leo and other experts’ social science research is cited extensively in *United States v. Preston*, 751 F.3d 1008 (2014), in relation to how police interrogation techniques can overwhelm mentally challenged persons who are highly suggestible.

**4. Police Practices Expert.** Police officers often wrap themselves in “training and experience” to claim that their interrogation techniques are proper and that they obtained an accurate and reliable confession. A police practices expert who has studied interrogation techniques and false confessions can debunk this. There are not many experts available; however Wicklander - Zulawski & Associates is an interrogation consulting firm (<https://www.w-z.com/>) headed by David Thompson, a police practices expert who can provide expert testimony on false confessions and the Reid Technique.

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<sup>3</sup> The court did allow a clinical psychologist who examine the client to testify about his vulnerability to making a false confession.

## **Theory of the Case**

Once you have amassed all the facts you are ready to develop your theory of the case. What is the story of the case that you want to tell your jurors? Since a theory must incorporate all facts beyond change in a case, you have to own the confession. The worst thing you can do is to be afraid of the confession. Your theory must put the confession forward front and center as a false story which is wholly the product of police interrogation. Work with your list of coercive techniques and contamination as you create your trial story; the coercive techniques are why your client gave a false confession; the contamination is the proof that the confession is false. Own the confession in every phase of the trial. Tell the jurors in the voir dire that your client falsely confessed; ask them what they know about false confessions. Find out which jurors believe that it is impossible for an innocent person to confess to a crime they didn't commit and strike them. Take the confession head on in your opening statement. If there's a tape you may want to play it in opening. During opening, cross and closing play the parts of the tape that are most powerful to support your theory of the case. Re-enact the key parts of the interrogation in opening and closing. Get the defense point of view out front at the very first opportunity of the trial.

## **Pretrial Motion Hearings**

Pretrial motion to suppress confessions are rarely successful but an important part of preparation for trial. Litigation voluntariness pretrial gives you an opportunity to cross examine the police, which is crucial pretrial preparation, especially in unrecorded confession cases.

The base issue in voluntariness is whether the statement given to police is the result of the uncoerced free will of the suspect. Coercion by a state actor is a necessary element before a statement is found to be involuntary. *Colorado v. Connelly*, 479 U.S. 157 (1986). If there is coercive police conduct, then the court is to examine and balance defendant's personal characteristics against the degree of coercion that was exerted.

## **Suppressing Confessions Due to Contamination**

Recorded interrogation has demonstrated that these police claims are not always accurate. Many recordings have revealed substantial contamination in police interrogations as detectives inform suspects that their answers to questions don't match the evidence and shape the suspect's answers to conform to the facts known to the investigating law enforcement officers. The advent of DNA evidence has again raised concerns among the judiciary about the problems of coercion and false confessions. In *Corley v. U.S.*, 556 U.S. 303 (2009), the court noted, "there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed, see, e.g., Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. 891, 906-907 (2004)."

Contamination renders a confession extremely unreliable. Even though there is no current case law, when law enforcement is the provable source of contamination in a confession, bring a motion to suppress on the grounds that the contaminated interrogation violates your client's right to due process. A parallel legal doctrine from which you can draw an analogous argument is suppression of an eyewitness' identification due to undue police suggestiveness.

Eyewitness identification, like false confessions, is recognized as a leading case of wrongful convictions. Recognizing that law enforcement can contaminate accurate identifications through unduly suggestive lineup procedures, in *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), the United States Supreme Court held that “reliability is the linchpin in determining the admissibility of identification testimony”. If an identification procedure is unduly suggestive, an in-court identification is only permitted if the prosecution can demonstrate an independent source for the identification, so that their identification is reliable notwithstanding the improper police procedures.

Move the court to adopt a similar two step analysis in deciding whether to admit a confession into evidence. If you can show that your client’s confession was contaminated by the interrogating detectives, argue the statement can only be admitted if the state shows an independent basis for believing the confession. Unfortunately, it is virtually impossible to develop this level of proof in an unrecorded confession. But if the interrogation and confession in your case is recorded from start to finish, the opportunity exists to support your motion with this high degree of specificity.

Another approach is to argue that a contaminated confession has little to no probative value and thus should be excluded under Fed. Rule. Evid. 403 because the probative value is substantially outweighed by the danger of unfair prejudice. Argue to the court that (a) the relevancy of a confession is determined by corroborating evidence; (b) the details of the confession must correspond to or “fit” the crime; and (c) if the facts fit, they must not be the product of police feeding the suspect the facts or other contamination which gave rise to a false confession in your pleadings, show that the true facts come from police contamination and enumerate the false facts that are uncorroborated or contradicted by the evidence in the case. Argue that the confession has very low probative value because of the combination of contamination and inaccuracies but is very prejudicial because of the high conviction rate when confessions are introduced. See Saul Kassin, Why Confessions Trump Innocence, The American Psychologist, September 2012. Cite the latest statistics regarding exonerations in which there was a false confession (available from The Innocence Project, [www.innocenceproject.org](http://www.innocenceproject.org)). An excellent article to assist you in framing the issues is: Leo, Neufeld, Drizin & Taslitz, Promoting Accuracy in the Use of Confession Evidence: An Argument for Pre-Trial Reliability Assessments to Prevent Wrongful Convictions, 85 Temple L. Rev. 759 (2013).

## **Cross Examination at Trial**

To win a confession case, you must persuade the jury not only the confession is coerced **but also that it’s false**. The key to proving a confession is false is to show the jury how the confession became contaminated by police interrogation. You must account for the source of each and every fact in the confession – whether from police suggestions, “lucky” guesses, media coverage, and client’s information obtained from true perpetrator, client was present but only a witness, etc.

You must answer the question – why would someone confess to a crime they didn’t commit. You must show the jury how and why the false confession occurred.

All phases of the trial are crucial; ask about false confessions in voir dire, make the interrogation techniques and the false confession a centerpiece of your opening statement, have client testify if able to, prepare jury instructions on false confession.

Here are the chapters for cross examination of the interrogator. As you can tell many of these are the same as the motion cross, but now with a different emphasis.



- Training. A good starting topic is how the interrogator was trained in the use of his weapon, the importance of the training and how it's useful in his profession. Follow up with questions about training in other areas of law enforcement such as witness interviewing, preserving evidence, identification procedures, obtaining confessions from suspects, etc. Get detective to agree that he's done well in training, received written training materials and follows what he's been taught.
- If applicable, go through special training and experience detective has in fooling people, e.g. working undercover in drug investigations. Have them admit they are good at this.
- Go through particularities of the crime scene and detective's familiarity with it, whether from personal observation, witness interviews, or shift briefings. Show that the detective knew all the facts and could feed them to defendant for factual part of confession, if confession matches known crime facts; or that the confession does not match known facts/physical evidence.
- Go through the specifics of what the detective has been taught in police training that are relevant to the methods used to get the confession in your case. If you have the training materials, also lock in testimony using these. Use the information you developed from the motion hearing about the interrogation methods actually used by the detective with your client.
- Establish that interrogation of suspects is a crucial part of the job. For example, in a homicide case sometimes the only witnesses are the perpetrator and the deceased. Or that witnesses can lack credibility.
- Point out the interrogator's purpose in talking to client was to get a confession. Invariably the detectives will deny this and state that they were interested in getting the truth. You can then take facts of your defense and say, "the truth couldn't be (factA), (fact B) (fact C). They will of course say those things couldn't be the truth. Then repeat- their purpose in talking to your client was to get a confession. They will repeat that their purpose was to get the truth. You can ask questions such as, they weren't there, they didn't have a video recording of the crime, they have no personal knowledge of what occurred. See if their interrogation training materials ever talk about getting a confession; if so, use that for impeachment.
- You may want to ask them if they already had an opinion of his guilt. That's why client was arrested and read Miranda warnings. Use this to show bias and prejudice. If their opinion is based on unreliable evidence, such as a lying incentivized witness, this is helpful. However, this can open door to suppressed or inadmissible evidence as well as having police talk about all the evidence they amassed against your client. Don't ask this in cross if doing so will be harmful.
- Contrast the number of detectives in room, their size, strength & power compared to client. Paint a word picture of the interrogation room. If the video is helpful, show it while you talk about this.

- Use demonstrative evidence to show the coercive environment. Recreate the interrogation room in front of the jury on the courtroom floor with masking tape, chairs using the exact dimensions. Use the videos if helpful.
- Show that interrogators controlled the environment and made all decisions. When the client came into and left the interrogation room, was able to eat, sleep, and use the bathroom. Establish that client was isolated from outside world. No access to telephone, family, friends, etc.
- Detail all the time it took to get the confession, and if there is a written statement, contrast with how long it takes to read the written statement to the jury or to write out the statement. If this interrogation is not recorded, point out that detective failed to write down both all the things he said while interrogating client and what the client said.
- Go through the bait questions asked if applicable. Point out any lies that were explicit or implicit. Detail the specifics of misrepresentations that were used to induce the confession, like claims of fingerprints, eyewitnesses, etc. Get the detective to agree he did a good job to get client to believe these misrepresentations were true.
- Go through the evidence that the detectives brought into interrogation to induce a confession – from vague items like the thick police case file filled with reports to photos, witness statements, etc.
- Show that law enforcement officers have specialized legal knowledge and used it to get a confession. Go through the themes that were developed. Point out how the themes downplayed seriousness of crime compared with a much worse version.
- Ask about their use of leading questions or questions that suggest only 2-3 answers in the interrogation. Example: Did he get out of the driver or passenger side of the car? If the right answer was passenger, your client had a 50% chance of getting it right. If you do this, be sure to distinguish how leading questions in a courtroom such as those you're asking are different because the prosecutor can object and the judge can disallow any unfair leading question, unlike during an interrogation.
- Alternative question that was used.
- Impeach with training materials if cop refuses to acknowledge use of Reid-type techniques. This is a win-win for you. If the cop acknowledges techniques such as telling client he had absolute confidence in client's guilt, using bait questions and theme development that minimized the client's culpability, then you can argue this is how a false confession was obtained. If detective claims he didn't use these techniques, you can argue he deviated from acceptable police practices which are designed to prevent false confessions.

- Show the opportunity to engage in coercive behavior – physical abuse, threats, promises of leniency and that detective would be in trouble for doing so. They could lose promotions, their job, even be charged with a crime. Note: this is only useful where client tells you that this type of coercion occurred and it's part of your case theory, where there's no recording of this interaction.
- If client has particular vulnerabilities – mental illness, retardation, etc. – point out either the detectives were unaware of this, ignored it or that they have no expertise in this area (especially if you're calling an expert). Show they didn't modify their conduct – for example they read the client standard Miranda warnings when he only had a first grade reading level. If police knew this, show they took advantage of client.
- Unrecorded Interrogations: show all the opportunities that were available to take statement in the client's exact words- having client write out statement himself, taping or videotaping and this wasn't done. Point out the language of the statement is the detective's words, not the client's.
- Unrecorded Interrogations: Point out no taping and the ease and low cost of recording and storing interrogations in the digital era. If there are other occasions where the department records, point this out. Examples:
  - Police discipline interviews are recorded in many locations per union contract
  - Wiretaps, wired confidential informant.
  - Recordation in specific case types but not this type.
- Unrecorded Interrogations: Show that they can't recall many things that happened during the interrogation. The decision not to record resulted in jury not getting all the information.
- Get acknowledgement that false confessions exist. They can be checked against known physical facts. Physical facts/scientific evidence not susceptible to the procedure of interrogation. Point out lack of follow up after they got the confession or that the investigation ended.
- Highlight implausible or inconsistent aspects of the confession. Show the confession doesn't match crime facts- or only matches facts that were known to police at time of interrogation, which may later have been proven to be incorrect.
- Get the interrogator to agree they would never feed facts to someone they are interrogating. Point out the reason they won't- because they could obtain an untruthful statement/false confession. They play the tape segment where they told details to the client or corrected the client's incorrect answer. Be sure to highlight all contamination that took place during the interrogation.

## **Jury Instructions**

The following is suggested language you can use to craft a jury instruction in a confession case.

*You have heard evidence that the defendant gave a statement of confession to the police. As you evaluate the defendant's statement, you should think carefully about what happened before, during and after the police interviewed the defendant. Considering these issues may help you to determine how much weight to give to the defendant's statement in reaching your verdict. Consider the following questions:*

- 1. What happened before the police interrogated the defendant?*
- 2. What happened during the police interrogation of the defendant?*
- 3. What did the defendant say that can be evaluated after the police interrogation?*

### **CONSIDERATIONS BEFORE THE INTERROGATION**

*One consideration before the interrogation is the Miranda warning. The law requires that police must tell suspects their rights when they make an arrest. This is called the Miranda warning. The Miranda warning informs suspects that:*

- They have a right to remain silent;*
- Anything they say can be used as evidence against them;*
- They have the right to an attorney during questioning;*
- If they cannot afford an attorney, the state will provide one at no cost;*
- They can stop the questioning at any time.*

*The police must give the Miranda warning before they question a suspect. The police should confirm that the suspect can understand these rights. The police should try to identify and correct for any factors that might affect the suspect's ability to make a voluntary and accurate statement. Common factors include youth, mental illness, intoxication, and language barriers. The police, for example, may need to locate an appropriate adult or attorney, allow the suspect time to "sober up," or provide an interpreter.*

### **CONSIDERATIONS DURING THE INTERROGATION**

*There are several issues you may choose to consider that can occur during the interrogation. First, you should consider whether the police electronically recorded the interview. The best practice is for the police to record any interrogation with the suspect from beginning to end with a video- or audio-recorder. A recording preserves the evidence that was gathered during the interrogation.*

*You can also consider whether the police recorded important details of the suspect's custody, such as access to food, drink, sleep, or other people (such as family, or a lawyer). Evidence about the suspect's*

*custody can help you to evaluate the fairness of the interrogation and the voluntariness of the defendant's statement.*

*You can also consider the length of the interrogation. An interrogation that lasts more than a few hours can wear down suspects. This can make it more likely for them to falsely admit guilt. In your evaluation of the defendant's statement, you can also consider what was said during the interrogation. It is illegal for the police to make a suspect confess against his or her own will.*

*You may consider whether the police communicated any threats or promises to the suspect during the interrogation.*

*Police cannot legally make direct threats of punishment or promises of leniency (such as a lighter sentence), to a suspect. Threats can make a suspect feel trapped or hopeless. Promises can make a suspect feel that admitting guilt will help avoid or minimize consequences.*

*Police can legally make indirect (implied) threats and promises. For example, the police might tell a suspect that they have established guilt, but that they still want to talk to the suspect about why the crime was committed, and what "kind of person" the suspect is. This implies to the suspect that such information could affect what happens next. The use of indirect threats and promises should be evaluated carefully because the suspect could believe that falsely admitting guilt is the only way to avoid or minimize consequences.*

*You may also consider whether the police used any deception. For example, sometimes the police lie to a suspect about "evidence" that was not confirmed or did not actually exist. Although this practice is legal, you should evaluate police deception carefully. Suspects sometimes falsely admit guilt because they feel helpless, confused, or trapped by the "evidence" that they believe could be used against them.*

*You should think about where the defendant's statement came from, and how and where the details in the statement came from. You should consider whether or not the police contaminated the statement by revealing non-public details about the offense. For example, the police should not try to fill in details which the suspect can't remember or describe the crime scene or show crime scene photos to the suspect. The suspect alone should explain how and why the crime occurred.*

## **CONSIDERATIONS AFTER THE INTERROGATION**

*After the interrogation, the police should not stop the investigation because they obtained a suspect's statement. Rather, they should investigate all new information.*

*As with all evidence in this case, you should analyze the defendant's statement carefully. Consider whether other evidence, such as eyewitness evidence or physical evidence, supports the statement. You should also consider whether the defendant's statement was voluntary and reliable.*

*I have provided you with information to help you evaluate the evidence in this case, including the defendant's statement of confession. When you evaluate the defendant's statement, remember to consider what happened before, during, and after the police interviewed the defendant.*

*The defendant may not be convicted of any crime based on his out-of-court statement alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime was committed. That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt.*