

Coerced (False) Confessions

I. Introduction, Statistics and Stories

According to the Innocence Project, since 1982 there have been 156 exonerations of which 37 (24%) “confessed.”¹

Steven A. Drizin and Richard Leo analyzed 125 recent cases of proven interrogation-induced false confessions (ie, cases in which indisputably innocent individuals confessed to crimes they did not commit) and how these cases were treated by officials in the criminal justice system.² These 125 proven false confessions should put to rest any doubts that modern psychological interrogation techniques can cause innocent suspects to confess. 86% (or almost 9 of every 10) of the individuals in their sample whose false confessions were not discovered by police or dismissed by prosecutors before trial were eventually convicted.

In the 1980s and 1990s, research by Saul Kassin, Richard Ofshe and Richard Leo confirmed that the common psychological interrogation techniques can erode a suspect’s resistance to the point that even an innocent person will “conclude that confession is both a rational choice and his best option.”³

The problem is especially acute in murder cases where tremendous pressure is put on the police to solve the crime, and this, in turn, leads the police to put tremendous pressure on suspects in the interrogation room to get a confession.⁴ Of the first 123 DNA exonerations, 37 involved murder cases, of which 2/3 involved false confessions.⁵

The Death Penalty Information Center has not done a systematic study of those who “confessed” among those on their list of 118 exonerees.⁶ However, DPIC Director, Richard Dieter, provided this example:

Texas District Judge Bob Perkins ordered Christopher Ochoa’s release from a life sentence after DNA tests proved his innocence. Judge Perkins stated that Ochoa “suffered a fundamental miscarriage of justice.” In 1988, Ochoa and Richard Danziger were convicted of rape and murder and were sentenced to life imprisonment. Ochoa says he only confessed to the crime, and implicated his then-roommate Danziger, after prosecutors threatened him with the death penalty. “There is no way to explain what happened here without pointing out one of the real problems with the death penalty,” said attorney Barry Scheck, co-founder of the Innocence Project at Cardozo Law School, “We have a man who gave a false confession and testified falsely against another man in order to avoid execution.” Interestingly, in 1998, Achim Josef Marino, who is serving a life sentence for an unrelated offense, sent a letter to then-Governor George W. Bush, confessing to the crime, but Bush never turned it over to law enforcement authorities. DNA tests now point to Marino as the perpetrator. “It’s a bad feeling knowing [the system] failed,” said Bryan Case, Assistant District Attorney for Travis County, Texas. Danziger, whose lawyers plan to ask for his release, sustained permanent head injuries as a result of being severely beaten in prison.

Additionally, the recent stories and pictures in the news from our military prisons and detention facilities around the world have revealed the CIA and other military and intelligence organizations are actively engaging in the use of various methods of interrogation. Yet it is odd that we, as a society, seem so shocked when coercive interrogation techniques have been recognized in American law for decades.

...While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions,...made the system

so odious as to give rise to a demand for its total abolition. Brown v. Walker, 161 U.S. 591, 596-7 (1896).

And in Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court clearly acknowledged the effectiveness of psychological coercion:

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, “Since Chambers v. Florida, 309 U.S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.” Blackburn v. Alabama, 361 U.S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms...the manuals instruct the police to display an air of confidence in the suspect’s guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reason why the subject committed the act, rather than court failure by asking whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already – that he is guilty. Explanations to the contrary are dismissed and discouraged...The texts thus stress that the major qualities an interrogator should possess are patience and perseverance.

And recently in United States v. Dickerson, 530 U.S. 428 (2000), the Supreme Court explicitly revisited the bedrock principal of Miranda v. Arizona, 384 U.S. 436 (1966) – namely psychological coercion. The decision upheld Miranda as a matter of Constitutional Law, rather than a mere congressional statutory dictate. It texturally reiterated the reality that in today’s world, coercion is the product of psychological tactics, and rarely of physical or bodily abuse.

The body of objective evidence of false confessions from such tactics, is “stock piling at the same time that case law is turning a blind eye.”⁷ Nevertheless, for the average juror, there is still nothing more inconceivable than the notion that someone would confess to a crime that he or she did not commit. Experimental and field studies have demonstrated, that jurors often place almost blind faith in the evidentiary value of confession evidence – even when, the confession was not accompanied by any credible corroboration and there was compelling evidence of the Defendant’s factual innocence.⁸

How and why does this miscarriage of justice occur? One answer may be the tremendous “knowledge gap” about police interrogation practices. Additionally, the United States Supreme Court has instructed lower courts to assess voluntariness by evaluating police interrogation methods and their effect on a particular suspect by looking at the totality of the circumstances (Dickerson). Because most interrogations are not recorded, however, Judges must rely on credibility contests between police officers and suspects. The net result is that the police have largely been able to define the totality of the circumstances by controlling the historical facts that are used by courts to determine if a confession is voluntary.⁹

II. What Can We Do?

A. Learn to Recognize the Interrogation Techniques (e.g. International Association of Chiefs of Police Standards or The Reid Method). This will not only assist in Court, but will help us overcome our personal bias when you first get a “confession case.”

B. Educate the Courts and jurors by crafting cross-examination that exposes the techniques used and your client's particular susceptibility (if any).

C. Consider the use of an interrogation expert at Pre-Trial Motions Hearings and Trial. The time is nigh.

D. Lobby for required taping or videotaping of all interrogations as is the practice in Alaska, Minnesota and Illinois.

III. Constitutional Amendments Implicated

A. **14th Amendment** Seeks to exclude confessions if the will of the suspect is overborne. Inquire into the tactics used by the police officer, whether they are coercive, as well as the personality or background of the individual, and how vulnerable to persuasion.

1. Bram v. U.S. (1897) Promises of leniency overbear the will and are therefore, impermissible;

2. Brown v. Mississippi (1936) Prohibits physical violence under all circumstances;

3. Colorado v. Connelly (1986) Coercion has to come from the police. (Individual was compelled to confess by God);

4. Miller v. Fenton (1985) A § 2254 proceeding. The confession was a product of "intense and mind bending psychological compulsion." The admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review (and therefore not subject to a § 2254(d) presumption).

B. **5th Amendment** The rights of the accused against self-incrimination

1. Miranda line of cases: What triggers Miranda? Custody and interrogation. How are those defined? Custody: Free to leave. Interrogation: Reasonably calculated to elicit an incriminating response.

i. Exceptions to Miranda = gutting of Miranda

a. *Impeachment exception* If somebody confesses in violation of Miranda, their statements can be used against them in a court if they take the stand and what they say is inconsistent with the statement they gave.

b. *Implicit waivers* (Federal standard - North Carolina v. Butler) “Do you understand these rights, understanding these rights do you wish to talk to me?” This is no longer necessary. You can have the reading, then launch straight into the interrogation and the suspect is deemed to have implicitly waived their rights to silence and counsel.

c. *Public safety exception* (NY v. Quarrels) If the police can demonstrate that there was a public safety issue which necessitated their having to interrogate prior to or without reading Miranda warning, that’s fine.

C. **6th Amendment** Right to counsel. In terms of interrogation, it only comes into play if you are being interrogated after indictment, or if the police have been notified pre-indictment that you are represented by counsel.

IV. Police and Special Agent Interrogation Training

A. International Association of Chiefs of Police Standards – Model Policy on Interrogations and Confessions (can be purchased with policy paper for \$9.25).¹⁰

B. Reid Method – Method of interrogation and interviewing. Bible of interrogation called, “Criminal Interrogation and Confessions.”

* Their website, www.reid.com indicates that more than 300,000 professionals in law enforcement and security fields have attended the three-day Interviewing and Interrogation program since 1974.

- * Seminar topics include:
 - Interview and interrogation preparation
 - Distinction between an interview and interrogation
 - Proper room environment
 - Factors affecting a subject’s behavior

- * Behavior symptom analysis
 - Evaluating attitudes
 - Evaluating non-verbal behavior
 - Evaluating verbal behavior
 - Evaluating paralinguistic behavior
 - Reid behavioral analysis interview (trademark)
 - The baiting technique
 - Analyzing factual information prior to the interview
 - Asking behavior provoking questions

- * The Reid 9 steps of interrogation
 - The positive confrontation
 - Theme development
 - Handling denials
 - Overcoming objections
 - Procuring and retaining the suspects attention
 - Handling the suspect’s passive mood
 - Presenting an alternative question
 - Detailing the offense
 - Elements of oral and written statements

- * The Advanced Seminar topics include:
 - Stages of the interrogation
 - Defiant stage
 - Neutral state
 - Acceptance stage
 - Profiling suspects
 - Identifying motives
 - Real need crimes
 - Impulse crimes
 - Lifestyle crimes
 - Esteem crimes
 - Juvenile interrogations
 - Interrogation on multiple crimes
 - Playing one against the other
 - Interrogation on guilty knowledge

The website goes on to report the results of an internal survey which indicated that 95% of the responding individuals reported that using the Reid Technique helped them to improve their confession rate (the majority of the respondents said they increased their confession rate over 25%, and almost a quarter of the respondents said they increased their confession rates as much as 50%).¹¹

C. How do police methods get innocent people to confess? Psychological strategy of getting suspects to move from denial to confession. You want to get the suspect to perceive *that the benefits of confessing somehow outweigh the costs of denial*.

D. Interrogation stages

1. Pre-interrogation interview: Purpose is to establish a rapport, the interrogator wants to ingratiate himself, minimize the differences between

himself and the suspect, and then to get an alibi or an account - a baseline that the interrogator is later going to attack. Communicate to the suspect that the suspect is only here to help the interrogator because the police have this case to put to sleep. Initially, the interrogator wants the subject to believe that there is no risk or jeopardy involved in talking. Interrogators start by surprising the suspect – catch him off guard.

For example, the investigator calls at 6:30 a.m. and says, “I was just driving by, and thought of you as I’m just about to wrap up this case...I’ve talked to everyone else...just wanted to know if you could add anything...although I don’t really need anything else here...” Note: Investigator always tries to set a time for them to come to the police station, “Can you stop by between 10 and 11 this morning before I leave to go fishing?”

i. “Miranda moment”: Once together, Interrogator will use various strategies to move past the Miranda Moment.

a. One is to recast the interrogation as an interview: “Hey I just want to ask you a few questions, but you are free to leave;” or

b. Launch right into questioning after reading Miranda (under Butler), and get a so-called implicit waiver; or

c. Work outside Miranda, and if the suspect invokes it, say, “Hey I can’t use this info, so let’s go off the record.” That information will then be used to impeach the suspect in court, help detectives ID accomplices, recover evidence, etc; and

d. Treat Miranda as a bureaucratic formality, de-emphasizing the significance of Miranda, but give it: “You’ve probably heard this on TV, in fact you could probably recite it to me, and I don’t think its really necessary here, but as a precaution, You have the right to remain silent...”

2. Interrogation. Two steps that underlie logic and sequence interrogation.

i. **Shift the suspect from confident to hopeless**

a. Isolate, dominate and control the suspect. First, the interrogator wants the suspect to know he’s on his turf, inside his interrogation room, isolated from family and friends (but not in custody). He wants the suspect to feel a sense of helplessness. He doesn’t let the suspect sit protected behind a desk or play with a pen to relieve pressure. The interrogator sits 3 feet away, directly in front and gets in suspect’s space and face. The interrogator disorients the suspect at the outset.

b. Constant and unwavering accusations. The interrogator gets the message across to the suspect that he is guilty. The interrogator remains confident that the suspect is guilty.

c. Cut off denials. Interrogators are trained to stick out their arm to physically cut off the suspect when starting a denial. He doesn't let the suspect release the anxiety and doesn't let them commit to the idea that they are not guilty.

d. Voluntariness. Interrogators talk about voluntariness excessively to decondition suspect to the concept, and allow interrogator to later testify he made it clear.

e. Time. Interrogators use the clock as a tool to wear down the suspect.

f. The evidence ploy. Interrogators can lie about evidence, can make up evidence, and most likely to do so when they don't have any evidence on the suspect.

e.g. Demeanor evidence: I can see from your eyes that you are guilty; Physical evidence: suggest police have fingerprints, palm prints, biological evidence (hair, DNA, skin); The "Folder" method – interrogator walks in and plops a thick file on desk (which is likely from another case) suggesting the investigation is nearly complete, so this will be the last opportunity for the suspect.

All of this pressure is very uncomfortable for the suspect. He wants it to end in the worst way, so the Interrogator throws out an occasional lifeline (inducements), and then alternates between the pressure and the lifeline until the suspect “breaks.”

ii. **Inducements** The idea is that if you crash someone’s self-confidence, you break their resistance. If you can get them to stop denying committing the crime and think their situation is hopeless, you can induce them to admit to the crime. You can think of the inducements that police use from low end to high end.

a. Low-end or benign. Typically appeals to the conscience, appeals to God, appeals to religion. “Get this off your chest, you’ll feel better, be a man, the truth will set you free.”

b. Systemic. Focus the suspect’s attention on the fact that they are in the criminal justice system, and their care is going to be processed by people in that system, and how they act inside the interrogation room will determine what happens to them. “This is your only opportunity to tell the truth, otherwise I can’t help you. What will the Judge think.” The goal is to try to orient the suspect to the future and this is his only opportunity to put his case forward in the best possible light and avoid the negative consequences that await him if he doesn’t cooperate and confess.

c. High-end. Implicit promises or threats that convey either benefit if you comply, or harm if you don't. Interrogators accomplish this through "themes." They take the underlying event, and rationalize it somehow. "It's not premeditated murder. It was self-defense." When framed this way, interrogator communicates the idea that the person will receive leniency. Another is suggestions of counseling vs. imprisonment. Threats of higher charges if the suspect doesn't comply. Interrogator will read from a statute book, and then look up and say, "Your son and his schoolteacher will have to testify," or "Your partners' business won't be worth a nickel if you don't do the smart thing here."

1. Guilty vs. Innocent Response. Guilty persons are more likely to find certain inducements persuasive. They know they're guilty, they're more likely to break in response to less pressure than innocent suspects. At some point, innocent suspects know that no matter what I say I am not getting out of here. Then in response to high end inducements, it becomes rational to make a false confession.

2. Who's Most Likely to Falsely Confess.

1) Mentally handicapped: Go through life with certain coping strategies. They pretend to understand things when they don't; they are submissive to authority; they don't

always understand the nature or gravity of certain interactions or situations and are far easier to manipulate. 2) Juveniles. 3) Some persons from other cultures.

3. Types of False Confessions. There are three types of false confessions. *Voluntary false confessions* – crazies who call and confess. *Compliant false confessions* – when somebody complies with the authorities knowing that they are innocent either to terminate what is an intolerably stressful interrogation or because they perceive some kind of reward. *Persuaded false confessions* – This is where somebody confesses after they have come to doubt the reliability of their memory. This is where you hear somebody say, “I don’t remember doing it.” Person has been offered a reason: “you were drunk,” “you blacked out,” “the crime was so traumatic,” “you’re experiencing post-traumatic stress disorder,” etc...

4. How do we Know False Confessions Occur.

- 1) The crime never occurred – dead person shows up alive.
- 2) Physical impossibility – person was in Boston when crime occurred in Chicago.
- 3) Scientific exoneration – DNA.
- 4) True perpetrator is caught many years later exonerating the person who falsely confessed to the crime.

5. Consequences. Everyone is biased – police close cases and ignore conflicting evidence, prosecutors charge higher degrees of the crime making the confession the centerpiece of their case, defense attorneys pressure their clients to take a deal, juries weigh confessions conclusively.

V. Exposing the Coerced Confession

A. At the Motions Hearing

1. Carefully cross-examine the interrogator (make sure all interrogators are subpoenaed – don't let a case agent who wasn't there testify from the report of others) on the tactics used in this interview.

2. Inquire about interrogation training, and use the standards and techniques from IACP and/or "Reid School" to formulate your questions.

3. Call an expert. Argue that psychological coercion has been long recognized by Courts as having as much potential for abuse as physical torture, and this Court needs an expert to opine on whether this interrogation went too far, just as a fingerprint expert could opine on the procedure used in lifting a latent print.

B. At trial – When the confession will come in, call an interrogation expert to explain the methods used, arguing it goes to the weight of the evidence. Failing that, again cross-examine on the methods taught and the methods used in your particular case, use the clock yourself, so the jury can "feel" the pressure.

Contact me with the results of your efforts so I can update this information.

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FOOTNOTES

- 1 Innocence Project of New York, (212) 364-5360, <http://www.innocenceproject.org>
- 2 The Problem of False Confessions in the Post-DNA World. Drizin and Leo, 82 North Carolina Law Review 891 (March 2004)
- 3 Richard J. Ofshe & Richard A. Leo, The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions, 16 Stud. L. Pol. & Soc'y 189, 195 (1997)
- 4 See Footnote 2
- 5 See Footnote 1
- 6 Death Penalty Info Center, rdieter@deathpenaltyinfo.org
- 7 "Coerced Confessions: The Eighth Circuit Trilogy" Janice M. Symchych, 10/29/04, MACDL
- 8 Steven A. Drizin, Marissa J. Reich; Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness, 52 Drake L. Rev. 619 (2004)
- 9 See Footnote 8
- 10 International Association of Chiefs of Police – theiacp.org or 1-703-736-6767
- 11 John E. Reid & Associates, Inc., www.reid.com, (800) 255-5747

OTHER RESOURCES

- Special thanks to Sarah Aho McGillis, Gislason & Hunter, L.L.P., Minnetonka, Minnesota – a great teacher, a great lawyer and a great help
- Law of Confessions (2nd Edition) Nissman and Hagen Clark, Boardman, Callaghan (2004)
- "The Expendable Man," Margaret Edds, NYU Press (2003)