

Recording Police Interviews Must Be Mandatory

By Stephen A. Drizin

When Jeannette Popp's daughter was murdered, her whole world turned upside down. When the police told her that Christopher Ochoa had confessed the brutal details of the rape and murder for which he later pled guilty, she was relieved to know that at least the killer was off the streets and that justice had been served. Or so she thought. Twelve years later, DNA evidence proved that Ochoa's confession was false and identified the true killer, a man who had continued to rape women while Ochoa sat in prison for a crime he did not commit.

Why did Ochoa confess to a crime he did not commit? Because the police threatened him with the death penalty.

False confessions are a serious problem in our criminal justice system. According to data collected by the Innocence Project, 183 men and women have been exonerated by DNA evidence, approximately 24 percent of which have been wrongfully convicted based on false confession evidence. Richard Leo, a law professor at the University of San Francisco Law School, and I documented 125 proven false confessions, most of which occurred in the past decade and 81 percent of which involved the crime of murder.

Jeannette Popp and Ochoa testified before the California Commission on the Fair Administration of Justice on the problem of false confessions and the one reform that advocates suggest could help remedy it — mandatory electronic recording of custodial interrogations. Last month, the commission issued its final recommendations, urging legislators to make electronic recording of custodial interrogations mandatory. Recording interrogations will not rid the criminal justice system of false confessions — as long as police officers are allowed to use psychologically coercive interrogation tactics against suspects, false confessions will remain — but it will enable police officers, prosecutors, defenders and judges to better assess the reliability of confession evidence before false confessions can ripen into wrongful convictions.

The best way to assess the reliability of confession evidence is to subject the confession to a simple



test. Did the confession contain nonpublic details of the crime that only the true perpetrator could have known? Police officers, when briefing the press about investigations, are trained to hold back certain information about the crime to guard against the possibility that attention-seekers and persons with mental illness will cobble together details from public sources and falsely confess to crimes. Police are also trained to hold back information from suspects during interrogations. If the suspect volunteers these "nonpublic" details, police can be fairly certain that the suspect committed the crime. Other indicia of reliability include whether the suspect can lead the police to corroborating evidence like a murder weapon or blood-stained clothes and the extent to which the suspect's narrative of the crime fits the objectively knowable facts of the crime.

As a rule, focusing on such nonpublic information is a good way to distinguish reliable from unreliable confessions. The problem is that in the absence of a recording of the entire interrogation, there is simply no way of knowing whether this nonpublic information was inadvertently or intentionally suggested by law enforcement officers to the suspect.

In many of the DNA exonerations that involve false confessions — we now know with certainty that police officers fed nonpublic facts to innocent suspects.

For Earl Washington of rural Virginia, it was the location of a blue, blood-stained shirt left by the killer at the crime scene. For Douglas Warney of Rochester, N.Y., it was the fact that the victim was cooking chicken at the time of his death and that he was wearing a red-striped night shirt. For Ochoa, it was the details of the sexual assault. These facts — which police claimed were nonpublic and could only have been known by the true perpetrators — gave the false confessions of Warney, Washington and Ochoa some credibility and made it easier to convict them (and in Washington's case, sentence him to death). If not for DNA evidence, all three men would still be serving time for another man's crime.

Never mind that the confessions of Washington, Warney and Ochoa were replete with errors (which the true killers would not likely have made). The confessions were rescued by the few key facts the men supposedly got right. When the cases went to trial, prosecutors simply portrayed the men as liars, dismissing the errors as evidence that the men were unwilling to come clean about what really hap-

pened. And when the cases reached the appellate courts, it was the "nonpublic" facts that again led courts to uphold their convictions.

The fact that detectives suggest "nonpublic" facts to suspects does not mean that they are out to frame innocent suspects. In most cases, the detectives believe the suspect is guilty and in their zeal to solve the case, they let such facts slip out. Take the case of David Allen Jones, a mentally retarded man who implicated himself in the murders of three prostitutes under questioning by the Los Angeles Police Department in 1992. In his first interview, which was unrecorded, a detective showed Jones pictures of the crime scene. Not surprisingly some of the details from these photographs surfaced in Jones' second confession which was taped. These statements helped convict Jones who served nearly 12 years in prison before DNA evidence exonerated him and identified the true perpetrator, a serial killer named Chester D. Turner.

The DNA exonerations and cases in which we have transcripts prove that the problem of police suggestion occurs with alarming frequency. But these cases are only the tip of the iceberg. In most confession cases, there is no DNA and there are no recordings. When these cases come to court, months or even years after the interrogations, detectives testify that the suspect confessed these nonpublic details, without interruption or prompting. Defendants remember it differently, claiming that they were fed facts by the detective. Juries believe the detectives and convict the defendants. Given what we now know about the prevalence of false confessions and the problem of police suggestion, we can no longer let the fate of these defendants rest on the frailty of human memory. The time has come for California to join the ranks of Illinois, Maine, New Mexico, Minnesota, Alaska, New Jersey, and Wisconsin, all of which now require recording.

Stephen A. Drizin is the legal director of the Northwestern University School of Law's Center on Wrongful Convictions. He frequently blogs about the topic at: <http://blog.law.northwestern.edu/bluhm/false-confessions/>.