

**CALIFORNIA COMMISSION  
ON THE FAIR ADMINISTRATION OF JUSTICE**

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**FALSE CONFESSIONS:  
CAUSES, CONSEQUENCES, SOLUTIONS**

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**I. FIRST PART OF PRESENTATION (10 MINUTES)**

**A. Introduction**

Dear Chairman Van De Kamp and Distinguished Members of the Commission,

I am honored to be testifying before this commission on the problem of false confessions and its solutions. My talk will be divided into 2 parts. As I understand the format, the Commission wishes for me to speak for 10 minutes and give an overview of the problem of false confession, followed by Tom Sullivan's talk, then to speak after Mr. Sullivan's presentation for another 20 minutes. I have a few Powerpoint slides that accompany my presentation.

**B) How do we know that false confessions are a problem?**

Ever since American police abandoned the third degree in the 1930s, there has been a great deal of skepticism that innocent people falsely confess. Most American criminal justice officials and lay people believe in what I have called *the Myth of*

*Psychological Interrogation*: that an innocent person will not falsely confess to police unless he is physically tortured or mentally ill. The logical corollary is that mentally normal suspects who confess in the absence of physical torture are presumed guilty. Most lay people believe that innocent people would not falsely confess, especially to a serious crime, because most people cannot see themselves falsely confessing. Because the act of confessing falsely seems irrational and self-destructive, most people do not understand why someone would do such a thing and thus believe it happens rarely, if at all.

So, what do we know about how often false confessions happen?

**TABLE 1: Aggregated Studies of Documented False Confessions**

<u>Author(s)/Year</u>	<u>Number</u> <u>In Study</u>	<u>Number of</u> <u>False Confessions</u>	<u>% Wrongful Conviction</u> <u>Due to False Confession</u>
Bedau/Radelet (1987)	350	49	14%
Leo/Ofshe (1998)	60	60	N/A
Warden (2003)	42	25	60%
Drizin/Leo (2004)	125	125	N/A
Gross Et. Al. (2005)	340	51	15%
Innocence Project (2006)	180	44	24%

Table 1 above lists the six major studies of *aggregated* cases of false confession and wrongful conviction. Bedau and Radelet (1987) studied 350 cases of wrongful conviction in potentially capital cases from 1900-1987 and identified 49 false

confessions, the third largest cause of error in their sample. Leo and Ofshe (1998) identified and analyzed 60 false confession cases in the post-*Miranda* era. Warden (2003) studied wrongful homicide convictions in the State of Illinois occurring after 1970, and found false confessions to be the leading source of error in his study – occurring 60% of the time. Drizin and Leo (2004) identified an additional 125 “proven” false confessions in the post-*Miranda* era. Gross et al (2005) studied 340 official exonerations from 1989-2003, noting that false confessions occurred in 15% of their sample. And the Innocence Project at Cardozo Law School in New York maintains a website of all DNA exonerations from 1989-2006, and false confessions are a cause of the wrongful conviction in 20-25% of the cases.

What do these numbers tell us and what don't they tell us? First, it is important to note that there is some overlap in the studies. In particular, the Drizin/Leo and Gross et al. studies both cite many of the same DNA exonerations that are also listed on the Innocence Project's Websites. Nevertheless, it is fair to say that these studies alone document approximately 200-300 interrogation-induced false confessions (i.e., false confessions that occur in response to a police interrogation, not spontaneously). I believe this is a large enough number to demonstrate that there is a serious problem with interrogation-induced false confession in America (In addition, Steven Drizin, Director of the Center on Wrongful Conviction at Northwestern Law School, and I have collected another 30-35 cases of proven false confession, but we have not yet written it up in a published article), especially because this is almost certainly the tip of a much larger iceberg. Moreover, each of these cases is a tragedy, or potential tragedy, that in my view could have been avoided.

Second, these studies tell us that interrogation-induced false confession is a leading cause of wrongful conviction in America. As we can see from the four studies of wrongful conviction above (as opposed to merely false confession) false confessions cause anywhere from 14-60 percent of the wrongful convictions studied. In Bedau and Radelet's (1987) study, false confessions were the third leading cause of wrongful conviction; in Warden's they were the leading cause. My own sense is that the 20-25% range from the DNA exonerations is likely to be the most accurate in terms of estimating how frequently wrongful convictions are due to false confession.

Third, these studies tell us – quite counter-intuitively – that false confessions appear to occur primarily in the more serious cases, especially homicide and other high profile felony cases. More than 80% of the 125 false confessions documented by the Drizin and Leo (2004) study occurred in homicide cases; Gross et al.'s 2005 study also found that 80% of the confessions in his sample were to murder. In fact, these studies reveal that interrogation-induced false confession may be the single leading cause of wrongful conviction in homicide cases. More than 2/3<sup>rd</sup> of the DNA-cleared homicide cases documented by the Innocence Project, for example, were caused by false confession. This also explains why false confessions are the single leading cause of wrongful convictions in Warden's study (i.e., his study was limited to wrongful convictions in homicide cases).

In short, I believe these studies document that interrogation-induced false confession is a very serious problem in the American criminal justice system and that it remains one of the leading causes of wrongful conviction in America, especially in

homicide and other serious felony and high profile cases. What don't these studies tell us?

They don't tell us the frequency or the precise rate at which false confessions occur in America or the frequency or precise rate at which false confessions lead to wrongful conviction in America. Because no organization tracks interrogation or confession cases, there is no organized database from which to draw the kind of representative sample that would be necessary to make meaningful statistical inferences about true and false confession rates. We do not know whether false confessions occur 1 in 10 cases, 1 in 100 cases or 1 in 1000 cases. At the present time, there is simply no way of knowing the incidence of false confession in America, and any statistical estimate is scientifically groundless. Nevertheless, I believe the six studies (and the 200-300 false confession cases) cited above amply demonstrate that interrogation-induced false confessions occur with troubling, if unknown, frequency in the American criminal justice system and pose a serious problem that demands equally serious policy attention.

### **C) Why Do the Innocent Falsely Confess?**

In light of the Committee's preference that I talk only for 10 minutes before turning the floor over to Tom Sullivan, and then complete my remaining 20 minutes after Mr. Sullivan has finished his presentation, I want to save a fuller discussion about the psychology of false confession until after Mr. Sullivan's presentation. Although false confessions are usually caused by a combination of factors, the short answer is that innocent people falsely confess because of the use of psychologically coercive interrogation techniques and how they interact with a suspect's personality. Usually it is

a combination of the two, though the primary cause is the interrogation methods that elicited the false confession.

In my brief time here, however, I want to focus on a related causal question: what are the sequence of errors that are necessary to produce false confessions leading to wrongful convictions. There are three:

**1) The Misclassification Error:** The first cause in the sequence of decisions and actions that ultimately lead to a false confession and wrongful conviction occurs when detectives erroneously decide that an innocent person is guilty. Whether to interrogate or not is therefore a critical decision point in the investigative process. Absent a classification error at this stage, there will be no false confession or wrongful conviction. Put another way, if police did not erroneously interrogate innocent people, they would never elicit false confessions. This is therefore the first (and most consequential) error in the sequence of mistakes necessary to lead to a false confession and wrongful conviction. I will talk more about this in the second part of my presentation.

**2) The Coercion Error:** Once detectives misclassify an innocent person as a guilty suspect, they will often subject him to an accusatorial interrogation, which is, by definition, a guilt-presumptive process whose goal is to get a confession. As I mentioned a moment ago, once interrogation commences, the primary cause of interrogation-induced false confession is psychologically coercive police methods. By psychological coercion, I mean either one of two things: police use of interrogation techniques that are regarded as inherently coercive in psychology and law: or police use of interrogation techniques that, cumulatively, cause a suspect to perceive that he has no choice but to comply with the interrogators' demands. Usually these amount to the same thing.

Psychologically coercive interrogation techniques include some examples of the old third degree, such as deprivations (of food, sleep, water or access to bathroom facilities, for example), incommunicado interrogation, and inducing extreme exhaustion and fatigue. In the modern era, however, these techniques are rare. Instead, when today's police interrogators employ psychologically coercive techniques, it usually consists of implicit or explicit promises of leniency (in exchange for compliance and confession) or implicit or explicit threats of harsher treatment (in the absence of compliance and confession).

**3) The Contamination Error:** A confession is more than an "I did it" statement (i.e., first admission). It also consists of a narrative that contextualizes and attempts to explain the "I did it" statement. Psychologically coercive police methods (and how they interact with an individual's personality) may explain how and why a suspect is moved, often painstakingly, from denial to admission. But it is the post-admission interrogation process and resulting narrative of guilt that transforms the fledgling "I did it" statement into a fully formed confession. Post-admission interrogation is often leading, suggestive and manipulative; in the documented false confession cases we see over and over again that the interrogators pressured the factually innocent suspect into agreeing to and/or making a confession that is extremely persuasive, at least on its face, because it contains the following elements: a plausible plot-line, motives and explanations for why and how the crime occurred, expressions of remorse and regret, acknowledgements of voluntariness and, perhaps most importantly, inclusion of non-public crime facts that are said to originate with the confessor, not the interrogator(s). I will address this in more depth in the second part of my presentation as well.

#### **D) What are the Consequences of False Confession?**

Finally, I want to briefly discuss the consequence of interrogation-induced false confessions before turning the floor over to Mr. Sullivan.

Confessions are the most incriminating and persuasive evidence of guilt that the state can bring against a defendant. False confessions are therefore the most incriminating and persuasive *false* evidence of guilt that the state can bring against an *innocent* defendant. Former U.S. Supreme Court Justice William Brennan's observation that "no other class of evidence is so profoundly prejudicial" (*Colorado v. Connelly*, 1986) is amply supported by social science research. Confessions exert a strong biasing effect on the perceptions and decision-making of criminal justice officials and lay jurors alike because most people assume that a confession – *especially a detailed confession* – is, by its very nature, true.

A suspect's confession sets in motion a seemingly irrefutable presumption of guilt among justice officials, the media, and the public, and lay jurors. This chain reaction starts with the police. Once they obtain a confession, they typically close their investigation, clear the case as solved, and make no effort to pursue any exculpatory evidence or other possible leads -- even if the confession is internally inconsistent, contradicted by external evidence or the result of coercive interrogation.

The presumption of guilt and tendency to treat more harshly those who confess extend to prosecutors, defense attorneys and judges as well. Once a suspect has confessed, prosecutors tend to charge him with the highest number and types of offenses, set his bail at a higher amount (especially in serious or high profile cases), and are far less likely to initiate or accept a plea bargain to a reduced charge.

Even defense attorneys treat suspects who confess more harshly, often pressuring them to accept a guilty plea to a lesser charge in order to avoid the higher sentence that will inevitably follow from a jury conviction. As the California Supreme Court has noted, “the confession operates as a kind of evidentiary bombshell which shatters the defense” (*People v. Cahill*, 1993).

American judges too tend to presume that a defendant who has confessed is guilty and, accordingly, treat him more punitively. Conditioned to disbelieve defendants’ claims of innocence or police misconduct, judges rarely suppress confessions, even highly questionable ones.

If the defendant’s case goes to trial, the jury will treat the confession as more probative of the defendant’s guilt than any other type of evidence (short of a videotape of the suspect committing the crime), especially if, as in virtually all high profile cases, the confession receives pre-trial publicity. False confessions are highly likely to lead to the wrongful conviction of the innocent. In their study of 60 false confessions, Leo and Ofshe (1998) found that 73% of all false confessors whose cases went to trial were erroneously convicted; this number went up to 81% in Drizin and Leo’s (2004) study of 125 false confessions. These figures are remarkable. If representative, they indicate that a false confessor whose case goes to trial stands a 73% - 81% chance of conviction, despite the fact that he is officially presumed innocent, that he is in fact innocent, and that there is no reliable evidence corroborating his false confession (And these figures are even higher if we include the false confessors in both study who were convicted by plea bargain). As White (2001) notes, “the risk that the false confession will lead to a wrongful conviction is substantial.”

Sadly, if a false confessor is convicted, he will almost certainly be sentenced more harshly, and the likelihood of discovering that his confession was erroneous drops precipitously. At sentencing, trial judges are conditioned to punish defendants for claiming innocence (the logical extension of not accepting the prosecutor's plea bargain and sparing the State the expense of a jury trial) and for failing to express remorse or apologize for his alleged wrongdoings. And once a defendant is convicted and imprisoned, it is exceedingly rare that criminal justice officials will take seriously the innocent prisoner's insistent claim that he confessed falsely and was wrongfully convicted.

## **II. SECOND PART OF PRESENTATION (20 MINUTES)**

### **A) The Psychology of Police Interrogation and False Confession**

Now that Mr. Sullivan has completed his excellent presentation on the benefits of electronic recording for police interrogators, police departments and the criminal justice system, I want to return to some of the issues I was discussing earlier and focus more on the psychology of police interrogation that leads to false confession and then talk about the solutions to this problem. I want to return to the three errors I briefly mentioned earlier (the misclassification error, the coercion error, and the contamination error) as a way of discussing the psychology of police interrogation that leads to false confession, the risk factors and ultimately the solutions to the problem.

#### **1) The Decision to Interrogate**

Again, the decision to make somebody a suspect and interrogate them with the goal of getting a confession is the first and most consequential decision in the sequence of errors that ultimately lead to a false confession and wrongful conviction. Police interrogators are trained to make this decision based on their analysis of the suspect's body language, and often in the false confession cases the person was made a suspect, and then interrogated, because the police thought he (and it is almost always a he) was acting strangely or not how they believe a guilty person would act. American police are taught, erroneously, that they can accurately infer whether a person is lying or telling the truth based on his body language, attitude, demeanor, and style of speech. Some police trainers even boast of extraordinarily high accuracy rates: the Chicago-based firm Reid and Associates, for example, claims that detectives can learn to accurately discriminate truth and deception 85% of the time based on such an analysis.

The deeply ingrained police belief that interrogators can be trained to be highly accurate human lie detectors is both wrong and dangerous. It is wrong because it is not supported by any scientific research; rather, it is based on inaccurate speculation that is explicitly contradicted by the findings of virtually all the published research on this topic. There is no human behavior or physiological response that is unique to deception, and therefore no telltale behavioral signs of deception or truth telling. The same behaviors, mannerisms, gestures and attitudes that police trainers believe are the deceptive reactions of the guilty may just as easily be the truthful (but nervous) reactions of the innocent. Police detectives acting as human lie detectors are therefore relying on verbal and non-verbal cues that are simply not diagnostic of human deception; the studies show that police investigators can accurately distinguish true and false denials slightly more than

50% of the time. The belief that interrogators can be human lie detector is also dangerous for the obvious reason that it can easily lead a detective to make an erroneous judgment about an innocent suspect's guilt based on little or nothing more than his body language and then mistakenly subject him to an accusatorial interrogation that can lead to a false confession.

## **2) The Two Step Process of Interrogation**

Psychological interrogation is a two-step process, and all the techniques of interrogation are designed to fit into this process. The First step is to convince the suspect that he is caught. The police usually accomplish this through 1) repeated accusations (of committing the offense, of lying when denying committing the offense); 2) cutting off a suspect's denials and 3) confronting the suspect with evidence of his guilt (in false confession cases, it is, of course, always false or fabricated evidence, though the suspect does not know that). The goal of this first step is to convince the suspect that he is caught and has no real choice but to admit to the accusations because all the evidence is against him and no one will believe his denials.

The second step of interrogation is to motivate the suspect to believe that it is to his benefit to confess as opposed to continuing to deny or remaining silent. Police offer a suspect reasons or "inducements" to confess. For example, interrogators may suggest that the suspect will feel better by getting it off his chest; or interrogators may suggest that the system (police, prosecutors, judges, juries) are more likely to be sympathetic to his case if he accepts responsibility and demonstrates remorse as against continuing to deny or remain silent; or interrogators may suggest implicit or explicit promises (of release from the interrogation, of reduced charges, of a shorter sentence, or of probation

or mental health treatment instead of prison) and implicit or explicit threats (or higher charges, longer sentence or harsher punishment). In addition, interrogators often suggest scenarios that minimize a suspect's legal culpability in exchange for admitting to the underlying act. For example, interrogators may suggest that if the suspect confesses to killing, the act can be portrayed as an accident or self-defense instead of intentional or pre-meditated or cold-blooded murder if he does not. These scenarios often communicate the functional equivalent of promises of leniency and threats of harm and thus, not surprisingly, are often present in the interrogation-induced false confession cases.

### **3) The Psychology of Compliance and Persuasion**

There are two types of interrogation-induced false confessions: the first is called a *compliant* false confession. The academic terminology is not important, but the underlying ideas and distinctions are for understanding the problem (and the solutions). Individuals give *compliant* false confessions knowing that they are innocent but wishing to escape the stresses, pressures, confinement and psychological coercion of interrogation. Individuals give *compliant* false confessions because they are worn down, can no longer withstand the highly distressing and overwhelming interrogation process; and/or because they wish to avoid an inferred or threatened harm OR to take advantage of a suggested or inferred promise or benefit. Intuitively this is easy to understand. We've all been in situations that have drained or terrified and where we have been pressured to act or say something against our wishes and have been tempted to take the path of least resistance. But not all of us have been in confrontations with authority figures in a confined space as intense as many of the interrogations that lead to false confessions.

Individuals who give *compliant* false confessions are essentially distressed or coerced by an authority figure to the point where they are willing to falsely incriminate themselves in order to put an end to and thus escape the unpleasantness of the interrogation. Once they have decided to give in to the interrogators' demands, *compliant* false confessors typically repeat back the details of the crime that were suggested to them by their interrogators, infer the correct answers or simply guess.

The second type of false confession is more rare and more counter-intuitive. It is called a *persuaded* false confession (sometimes also referred to as an *internalized* false confession in the research literature on police interrogation and false confession). The defining feature of a *persuaded* false confession is that the suspect comes to doubt the reliability of his memory and ultimately makes a confession -- despite the absence of any memory of committing the crime -- in an uncertain belief state with tentative language. In the typical *persuaded* false confession case, the interrogators accuse the suspect of committing the crime, the suspect denies, the interrogator confronts the suspect with false evidence of his guilt (repeatedly), and the suspect denies (repeatedly) but does not know that the interrogators can lie about or make up evidence against him and so believes it to be true. At some point the suspect says he couldn't have committed the crime because he has no memory of doing so, but the interrogator (mistakenly thinking that the suspect is guilty and lying) persuades him that there may be an amnesia-based explanation (e.g., drug or alcoholic induced blackout, post-traumatic disorder, multiple personality, repressed memory, etc) to account for how the suspect could have committed the crime without remembering. Once a suspect is persuaded of this, he confesses in tentatively or speculative language ("I must have done \_\_\_"; I could have done \_\_\_; I probably did

\_\_\_\_), reasoning from logical deduction or inference how and why he must have committed the crime, rather than from actual memory. The *persuaded* false confessor is in an uncertain belief state, temporarily persuaded that it is more likely than not that he committed the crime. Once removed from the interrogation environment, the typical *persuaded* false confessor realizes that he should have trusted his memory not the detectives' assertions of irrefutable (false) evidence against him or amnesia-based explanations for his alleged lack of memory. Once the suspect recants his confession, however, it is usually too late to reverse the chain of actions and events that his confession will now set in motion.

#### **4) Risk Factors**

The idea of “risk factors” of course is a probabilistic concept: just because these factors are present in any given case does not mean that there will necessarily be a false confession, only that it is more likely than if not. In addition, it is necessary to mention that there is no single or unitary cause that leads individuals to falsely confess; there are multiple, related reasons in any given case. However, the risk factors are often the primary or precipitating causes.

There are essentially two types of risk factors for false confessions: interrogation techniques and individual vulnerabilities. The interrogation techniques that are present in virtually all interrogations leading to false confession are: 1) Isolation and confrontation; 2) The false evidence ploy (i.e., confronting the suspect with false evidence of his guilt); and 3) Implicit or explicit promises and threats (or what some researchers call “minimization” and “maximization”). The isolation, confrontation and presentation of false evidence typically causes the suspect to perceive his situation as hopeless; the

implicit/explicit promises and threats typically coerce the suspect to believe that he has no meaningful choice but to comply with the interrogators' demands and confess falsely. In *persuaded* false confessions, there is the additional risk factor of attacking the suspect's confidence in the reliability of his memory, and for this reason some interrogation training manuals explicitly warn police interrogators not to tell a suspect he remembers committing the crime when the suspect insists that he does not.

The second set of risk factors has to do with individual vulnerabilities and susceptibilities. Some individuals have weaker dispositions and personalities and thus are, by their very nature, more suggestible (i.e., likely to trust the assertions of others over their own recollections) and compliant (i.e., likely to do and say what they are told). All of us can be arrayed along a spectrum with regard to these personality traits, with the "Eggshell Plaintiff" (or Woody Allen in the movie *Annie Hall*) at one end of the spectrum and, perhaps, John McCain at the other. There are three groups or types of individuals who are most vulnerable and thus, not surprisingly, disproportionately represented in the false confession cases: 1) the mentally handicapped or retarded (it is important to remember that IQ is a continuum, and this category really refers to cognitively low functioning people, whether or not they technically fall within the definition of mental retardation); 2) juveniles (especially under the age of 16); and 3) the mentally ill. There are well-studied reasons for why these groups are at heightened risk, and I would be happy to talk about them in the question-and-answer period if that is helpful.

It is important to emphasize, however, that most people who falsely confess are mentally normal adults, not cognitively impaired or mentally ill. Interrogation-induced

false confession is not a problem of personality traits or vulnerabilities or weaknesses; it is primarily a problem caused by mistaken investigative judgments, coerced compliance, and, once elicited, a failure in the legal system to prevent the false confession from snowballing into a wrongful conviction.

### **C) Minimizing and Preventing False Confessions: Possible Reforms**

#### **1) Mandatory Electronic Recording**

##### **a) The Problem of Misleading Specialized Knowledge**

Tom Sullivan covered this important reform in great detail in his presentation, and I do not want to duplicate anything he said. However, I do want to discuss one important additional reason for mandatory electronic recording of police interrogations that Mr. Sullivan did not mention, but that I believe this Committee should be aware of and consider. This is what Gisli Gudjonsson has called the problem of “Misleading specialized knowledge.” In most, if not all, interrogation-induced false confession of which I am aware, the interrogators have claimed that the suspect’s confession must be true because it contains non-public crime facts and details that “only the true perpetrator could know.” The false confessor, however, claims that the interrogating detectives pressured and fed the details of the crime to him, which he then regurgitated in his confession statement. Usually, the investigators are believed and the confessor is convicted; when the defendant’s innocence is proven, however, it becomes clear that the confessor, not the investigators, was telling the truth all along.

This assertion by police of misleading specialized knowledge is often enough to make the confession believable despite all the problems we ordinarily see in false confessions (i.e., errors, inconsistencies, contradiction by physical evidence, credible

assertions of threats and promises, etc) because it creates the illusion that the (false) confession must be true. The presence of misleading specialized knowledge will convince the prosecutor to erroneously charge the innocent defendant; the judge not to suppress the confession when there are credible claims of coercion; juries to wrongfully convict; and appellate courts to affirm convictions (because the presence of misleading specialized knowledge makes the error of relying on it harmless).

If we want to prevent false confessions from leading to wrongful convictions, as they inevitably will, then we must mandate electronic recording of all interrogations not only for the many reasons that Tom Sullivan mentioned, but also to make transparent the process through which non-public facts (which are not likely guessed by chance and not the product of pre-existing knowledge) make their way into confessions and then are represented as evidence of the confession's reliability, even though the confession is later shown to be false, and thus the defendant did not "know the facts that only the true perpetrator would know" (at least not prior to the interrogation). This is a huge problem in the documented false confession cases. I want to illustrate with several case examples.

## **b) Case Examples**

### **1) Earl Washington**

In June, 1982, Rebecca Lynn Williams, a nineteen-year-old woman, was raped and murdered at her apartment in Culpeper, Virginia. Ms. Williams was stabbed thirty-eight times by her assailant but lived long enough to tell police that a lone black man, whom she did not know, had raped her. In 1983, police arrested and interrogated Earl Washington, a 23 year old mentally retarded farmhand and day laborer, in a nearby town for a different crime. On a hunch, based on what one of the detectives described as

Washington's nervous body language, the detectives interrogated Washington about the Williams' murder, which Washington confessed to (along with everything else he was interrogated about). The next day he was interrogated again by a second set of detectives. After approximately an hour of interrogation, they wrote a statement in longhand and typed it up for Washington (who could not read well) to sign; this statement, which was written in an open-ended question and answer format, purported to capture what occurred during that hour of interrogation.

Washington's confession contained numerous errors that should have tipped Wilmore and Hart off to the fact that Washington was ignorant of the crime facts. Regardless, the investigators insisted that Washington's confession must be true because he allegedly provided details that only the true perpetrator would know. In particular, the detectives asserted that the following 8 non-public facts in Washington's confession could only have come from the true perpetrator (because they were too improbable to be guessed by chance):

- 1) That the bedroom where the rape occurred was located in the back of the apartment;
- 2) That a shirt believed to belong to the perpetrator was found in the apartment;
- 3) That this shirt was found in the back bedroom;
- 4) That this shirt was found in or on a dresser;
- 5) That this shirt had blood on it;
- 6) That blood believed to have come from the perpetrator was found in the back bedroom;
- 7) That the radio was on during the assault; and

8) That the victim wore a halter-top.

The Washington case is a cautionary tale about the dangers of misleading specialized knowledge in an unrecorded interrogation. The police investigators were not the only ones who argued that Washington must be guilty because “he knew only the facts the true perpetrator would know.” The prosecutor made the same argument to the jury that convicted him and sentenced him to death; and the state attorney made the same argument to the appellate courts that upheld his conviction. Earl Washington spent almost 18 years in prison, 10 of them on death row, and once came within 9 days of execution. Eventually he was exonerated by DNA, pardoned and released from prison. We now know with complete certainty that the 8 facts were fed to Washington by his interrogators, regurgitated back to them in his confession, and then subsequently attributed to him (not the investigators) by everyone in the criminal justice system until DNA proved his innocence and led police to the person who had actually committed the rape-murder of Mrs. Williams. A couple months ago, Washington’s civil lawsuit in Virginia went to trial and he was awarded 2.2 million dollars.

## **2) Bruce Godschalk**

On July 13, 1986 Elizabeth Bednar, a white middle aged widow, was attacked and raped in her bedroom by a stranger who entered her home through an open window at the Kingswood Apartment Complex in King of Prussia, Pennsylvania. On September 7, 1986, Patricia Morrissey, a young single woman who lived in the same apartment complex as Bednar, was also assaulted and raped in her bedroom. After both attacks a sexual assault kit had been prepared and semen samples were recovered. In January

1987, Godschalk was interrogated for two and a half hours and confessed to both rapes; the detectives recorded only the final portion of the interrogation containing his statement. Godschalk described in his confession a number of details that were not publicly known. For the sexual assault of Patricia Morrissey, Godschalk's confession included the following eleven non-public crime facts:

1. That the assailant had been outside the bedroom window watching her
2. That Ms. Morrissey had been reading a magazine while she was lying in bed
3. That there was a light next to her bed, which was on, allowing the assailant to see in
4. That the assailant had sex with her on the bed
5. That she had been wearing underpants
6. That she was on her stomach during intercourse
7. That prior to having sex the assailant removed her tampon and tossed it to the side
8. That she was a brunette with a medium build
9. That the assailant had been very gentle with her
10. That the assailant left the apartment by going out the door
11. That the assailant was chased off a patio by a man prior to the assault

For the sexual assault of Elizabeth Bednar, Godschalk's confession included the following ten non-public crime facts:

1. That the assailant watched Ms. Bednar while she was in the rec-room reading a book

2. That she was wearing a robe
3. That the assailant entered through a rec-room window
4. That the assailant waited until she went upstairs before entering the town house
5. That the assailant went up two sets of stairs before finding her bedroom
6. That the assailant took a pillow from another room before entering her room
7. That the assailant said she told him others lived in the home and that someone could come home
8. That she was nude
9. That the assailant said he had been drinking prior to the incident and that his beverage of choice was beer
10. That the assailant had sex with her on the floor

From the beginning, Godschalk insisted that he was innocent and that the two detectives had coerced a false confession from him. The detectives, however, testified that Godschalk's statement contained information known only to the victims, the police and the rapist, and therefore it was inherently reliable. The prosecutor also argued that Godschalk's confession contained numerous non-public crime facts that originated with Godschalk and could not have been guessed by chance, emphasizing in particular that Godschalk knew that the perpetrator of Ms. Morrissey's sexual assault had removed her tampon and thrown it against the wall. Reading Godschalk's statement to the jury, the prosecutor matched it to the victims' statements, arguing that Godschalk's "guilty knowledge" validated the reliability of his confessions. In May, 1987, the jury convicted Godschalk of two counts of forcible rape and two counts of burglary, and sentenced him

to twenty years in prison. The Pennsylvania Superior Court affirmed Godschalk's conviction on appeal, specifically citing the non-public facts contained in his confession as evidence of its reliability (451 Pa.Super. 425, 1986).

In January 2002, two scientific laboratories conclusively determined that the semen in each of the two rapes had come from the same individual, but that person was not Bruce Godschalk. DNA testing thus established beyond any doubt that Godschalk could not have been the person involved in the rapes, and therefore that his detailed confessions had been false. In February 2002, Godschalk was finally released from prison after serving 15 years of his 20-year sentence for crimes he did not commit. Moreover, we also know that Bruce Godschalk did not know or have any interaction with either Ms. Morrissey or Ms. Bednar, that he had never been to the crime scenes, that he had no pre-existing knowledge of the facts of either burglaries and sexual assaults, and that it would have been impossible for him to guess by chance the intricate details provided in his confession. Therefore logic compels the conclusion that the detectives supplied Godschalk with the numerous non-public crime facts contained in his confessions – highly incriminating details that the detectives (as well as the trial prosecutor, the appellate courts, and the district attorney) repeatedly falsely attributed to Godschalk. The inclusion of these highly incriminating non-public crime facts led not only to Godschalk's wrongful arrest and prosecution, but also to his wrongful conviction and incarceration, the appellate court's denial of the post-conviction challenges to his wrongful conviction, the district attorney's refusal to allow DNA testing for many years after Godschalk began requesting it, and the lengthy delay in Godschalk's release from

prison. After his release, Bruce Godschalk brought a civil suit against authorities and eventually settled for approximately 1 million dollars.

One of the questions that I was asked prior to coming to testify at this hearing was whether the State of California can afford the cost of mandatory electronic recording of interrogations. My answer is: I don't know how the state could *not* afford it. The two cases I've just mentioned cost the states of Virginia and Pennsylvania, respectively, more than three million dollars. You will later hear from Christopher Ochoa, a victim of police coercion, false confession and wrongful conviction and incarceration in Texas, whose lawsuit, combined with that of his co-defendant Richard Danziger, cost the State of Texas over \$14 million dollars. Now that DNA has demonstrated the fallibility of the system and numerous wrongly convicted individuals have been exonerated, and continue to be exonerated (many based on DNA tests; many not), we are beginning to see a wave of civil lawsuits that will cost cities, counties and state municipalities millions of dollars in the coming years. Remember that the best estimate (from the database of DNA exonerations) is that 20-25% of the cases involving wrongful conviction were caused by interrogation-induced false confessions. The best way not only to prevent these injustices and personal tragedies, but also to insure against such civil lawsuits and the inevitable multi-million dollar judgments that will follow, is to have a policy of mandatory electronic recording of interrogation that, as Tom Sullivan pointed out, deters police from engaging in the kinds of interrogations that lead to false confessions and create a record for prosecutors, judges, and juries to rely on, if necessary, to prevent false confessions from leading to the wrongful conviction and incarceration of the innocent.

### **C) Other Possible Reforms**

In my remaining time (assuming there is any), I want to briefly discuss several other reforms that, in addition to electronic recording, may minimize and prevent interrogation-induced false confessions from occurring or leading to wrongful convictions.

### **1) Improving Police Interrogation Training and Practice**

Based on my analysis of numerous published police interrogation training manuals, as well as numerous unpublished police interrogation training materials in the State of California and elsewhere, I believe that many American police detectives are poorly trained about how and why psychological interrogation can, and sometimes does, lead to false confession. This topic is rarely covered in standard police interrogation training. Many investigators therefore do not realize how their commonly taught and commonly practiced methods of psychological interrogation can cause an innocent person to make a false confession. To reduce the number of false and unreliable confessions, police interrogation training needs to be significantly improved in at least three ways. First, contrary to their current training and practice, interrogators need to be taught that they cannot reliably intuit whether a suspect is innocent or guilty based on their hunches about the meaning of a suspect's demeanor, body language and/or non-verbal behaviors. Second, detectives need to receive better training about the existence, variety and causes of interrogation-induced false confessions in the modern era. Third, I believe interrogators need to receive better training about the indicia of reliable and unreliable statements and how to better distinguish between them. I can talk about this more at the question-and-answer period if the Commission is interested.

### **2) Holding Pre-Trial Reliability Hearings**

Steve Drizin, Peter Neufeld, Brad Hall and Amy Vatner have argued in a soon to be released *Wisconsin Law Review* article that courts should hold pre-trial reliability hearings (in addition to the current voluntariness hearings) before admitting a confession into evidence against a suspect. This is consistent with trial courts' role as gatekeepers of reliable evidence in the post-*Daubert* era and would provide another filter to knock a false confession off the path that might lead to a wrongful conviction. We (Leo, Drizin, Neufeld, Hall and Vatner) have also set forth a legal standard for judges to evaluate the admissibility of confession evidence in such reliability hearings. If anyone is interested in seeing this forthcoming law review article, I'd be happy to provide copies.

### **3) Limiting and/or Prohibiting Certain Interrogation Techniques**

#### **a) Promises and Threats**

Another way to prevent false confessions is to more effectively regulate the interrogation techniques that produce them. Modern interrogation methods are sophisticated and psychologically powerful: they are intended to break down a suspect's resistance and elicit his compliance by causing him to perceive that he is trapped, powerless and can only avoid the worst possible outcome by making or agreeing to an incriminating statement, admission or confession. Designed for the guilty, American police interrogation methods invariably lead to some number of false confessions (and wrongful convictions) when they are misapplied applied to the innocent. As we have seen the primary cause of interrogation-induced false confessions in the modern era is psychologically coercive interrogation techniques -- promises of leniency (in exchange for confession) and threats of differential punishment (in the absence of confession), often communicated implicitly or indirectly -- particularly in high profile cases in which

there is no other evidence against the suspect. Appellate courts should create an unambiguous bright line rule explicitly prohibiting any implicit or explicit promises, offers or suggestions of leniency in exchange for an admission; as well as any implicit or explicit threat or suggestion of harm in the absence of an admission.

### **b) Deception**

In addition to excluding confessions elicited by implicit or explicit promises and threats (or their functional equivalent), some researchers, experts and scholars have suggested that appellate courts may wish to revisit the issue of whether (and if so to what extent) deceptive, false, dishonest and/or misleading interrogation techniques should be legally impermissible. Police may lie to and mislead suspects about their role in the interrogation, the facts of the case, and the (real or alleged) evidence against the suspect to elicit an admission; and police may lie to and manipulate suspects during the post-admission portion of the interrogation. It is, of course, legal to do so (see the 1969 U.S. Supreme Court decision, *Frazier v. Cupp*, 1969). Some researchers have argued, however, that police lying about evidence (false evidence ploys) may heighten the risk of eliciting false or unreliable confessions. My own view is that police lying about evidence is a necessary but not sufficient condition for eliciting false confessions from the innocent: false evidence ploys, if believed, contribute to creating the perception that the evidence will objectively establish the suspect's guilt in the eyes of all third parties and thus that he is trapped and powerless to change his fate unless he cooperates with the interrogator. But false evidence ploys usually will not result in false confessions unless they are accompanied by other interrogation techniques that are coercive, such as implicit promises and/or threats. Whether we should permit police deception in the interrogation

room, or what limits we should put on it, is of course a moral, not an empirical, question and policy issue.

### **c) Time Limits**

Courts and legislatures may wish to specify objective time limits for interrogations. Lengthy incommunicado interrogation, as recent research has documented, is far more common in false confession cases. Routine interrogations almost always last less than two hours on average, yet interrogations leading to false confessions often last longer than 6 hours. In my recent study with Steve Drizin of 125 proven false confessions, we found that the average length of interrogation was 16.3 hours (Drizin and Leo, 2004). Longer interrogations appear to increase the risk of false confessions by fatiguing suspects and thus impairing their ability and motivation to resist police pressures. As Davis and O'Donahue (2003: 957) have pointed out, exhaustion "may lead to greater interrogative suggestibility via deficits in speed of thinking, concentration, motivation, confidence, ability to control attention, and ability to ignore irrelevant or misleading information." Specifying a time limit on interrogations of no more than four hours should diminish the risk of eliciting false confessions from the innocent yet not undermine the ability of police to elicit true confessions from the guilty. For as the leading police interrogation training manual, *Criminal Interrogation and Confessions* (4<sup>th</sup> Edition, 2001) points out, "rarely will a competent interrogator require more than approximately four hours to obtain a confession from an offender, even in cases of a very serious nature...Most cases require considerably fewer than four hours" (Inbau, Reid, Buckley and Jayne, 2001: 597)

### **4) Cautionary Jury Instructions**

A final potential reform is the use of cautionary instructions to the jury. In theory such instructions should increase jury sensitivity about the confession evidence they are being asked to evaluate and thus lead to more accurate verdicts and fewer wrongful convictions of the innocent based on false or otherwise untrustworthy confession evidence. Although jury instructions are rare in confession cases, recently two State Supreme Courts have focused on them as a way to reform interrogation practices and guarantee the use of more reliable confession evidence and accurate jury verdicts. In *Commonwealth v. DiGiambattista* (2004) the Supreme Judicial Court of Massachusetts ruled that any confession resulting from an unrecorded interrogation will entitle the defendant upon request to a jury instruction urging caution in the use of that confession. More recently, the New Jersey Supreme Court, in the aftermath of *State v. Cook* (2004) appointed a special committee to evaluate the issue of electronic recording of police interrogations. The committee recommended that defendants in New Jersey be entitled to a cautionary instruction, similar to the one spelled out by the Supreme Judicial Court Massachusetts in *Commonwealth v. DiGiambattista*, in the event that New Jersey Police fail to electronically record custodial interrogations in their entirety.

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