



# Wisconsin Criminal Justice Study Commission

## *Position Paper on False Confessions*

### I. Introduction

Nancy DePriest was raped and murdered in Austin, Texas in 1988, as she prepared to open the Pizza Hut restaurant she managed.<sup>1</sup> The brutal attack shocked the surrounding community. There were no obvious suspects and few leads, but the public quickly began pressuring police to solve the crime and take the perpetrator off the street.

Christopher Ochoa lived in Austin, but he had no prior criminal record, and did not know DePriest. Several weeks after the murder, Ochoa and a friend, Richard Danziger, went to the Pizza Hut where DePriest was murdered. Employees overheard the two men asking questions about the crime and alerted police, who brought Ochoa and Danziger in for questioning.

Over two 12-hour interrogation sessions, detectives repeatedly told Ochoa that they knew he had murdered DePriest. They cut off and ignored his repeated denials. They lied to him, telling him they had strong evidence of his guilt. The detectives also told him that he would face the death penalty if he did not admit to the crime. Believing he had no other choice, Ochoa eventually broke down. He signed a lengthy confession, written by the detectives and including details that only the police and the true perpetrator would have known. He was then charged with DePriest's murder.

Ochoa was assigned a court-appointed attorney. In his first conversations with the attorney, Ochoa proclaimed his innocence and asserted that his confession was false. Ochoa's attorney did not believe him, and did not conduct any investigation. Instead, his attorney repeatedly pressured Ochoa to plead guilty in order to avoid the death penalty. Seeing no other option, Ochoa pled guilty. As part of the plea deal, he testified against Danziger, admitting his own guilt and incriminating Danziger. Both men were convicted and sentenced to prison.

More than 12 years later, a serial rapist named Achim Marino contacted authorities and stated that he alone had killed DePriest. But Marino was ignored because Ochoa's confessed seemed airtight. Ochoa's new attorneys, despite being told by the trial attorney that there was "not a chance" that Ochoa was innocent, arranged for DNA testing on semen found in the rape kit.<sup>2</sup> DNA testing indisputably identified Marino as DePriest's killer. Ochoa and Danziger were released. Ochoa went on to become a lawyer; Danziger, however, suffered permanent brain damage from an incident that occurred while he was in prison.

<sup>1</sup> Unless otherwise noted, all facts concerning DePriest's murder and the ensuing prosecution are drawn from Keith A. Findley & John A. Pray, *Lessons from the Innocent*, WIS. ACAD. REV., Fall 2001, at 33.

<sup>2</sup> Keith A. Findley and Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis.L.Rev. 291, 332.

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Justice Study  
Commission

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Ochoa's case is not the only one of its kind. Recent exonerations, many through DNA testing, have made clear that false confessions occur more often than one might expect and play a substantial role in wrongful convictions. Of the first 177 DNA exonerations, 41 (23%) involved an interrogation-induced false confession.<sup>3</sup> And researchers have documented many other proven false confessions in non-DNA cases.<sup>4</sup> In Illinois, out of 42 people wrongly convicted of homicide since 1970, approximately 60% (25/42) falsely confessed.<sup>5</sup> These cases, however, are only part of the picture, because they represent only the number of discovered false confessions. The total rate of true and false confessions is unknown.

At the same time, common sense and experience suggest that the vast majority of confessions are true. Police interrogation, which has long been a staple of the American criminal justice system, is a necessary element of crime-fighting. Because not all cases contain physical evidence, interviewing suspects and witnesses is sometimes the only way to solve a crime. And even in cases that do have the potential for other kinds of evidence, resource limitations and public pressure for speedy apprehension of the guilty make interrogation a necessity.<sup>6</sup>

Thus, while we should be confident that most confessions are accurate and that police interrogation will remain a central part of our criminal justice system, we should also acknowledge the reality of false confessions and the risk factors that make them more likely. Moreover, although false confession-based wrongful convictions may often begin with police interrogation,<sup>7</sup> they occur due to a breakdown of the entire criminal justice system. Such wrongful convictions involve failures by prosecutors, defense attorneys, judges, and juries. Everyone in the criminal justice system has a role to play in preventing false confession-based wrongful convictions. This Position Paper provides information and recommendations—aimed at all parts of the criminal justice system—to ensure the reliability of interrogation evidence and the reliability of the outcomes based on that evidence.

## **II. Categories of False Confessions**

Over the past twenty years, social scientists have been studying the phenomenon of false confessions, in an attempt to understand why false confessions occur and how they can be prevented. The following account of the research is not meant to imply that this Position Paper fully agrees with or adopts all the conclusions of the research community. Indeed, scholars and criminal justice practitioners do not unanimously agree on the causes of false confessions or ways to

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<sup>3</sup> Richard A. Leo and Steven A. Drizin, et. al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 484 (hereinafter "Leo & Drizin, 2006").

<sup>4</sup> Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891 (2004) (hereinafter "Drizin & Leo, 2004").

<sup>5</sup> Rob Warden, *The Role of False Confessions in Illinois Wrongful Murder Convictions Since 1970*, <http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions2.htm>.

<sup>6</sup> This is not meant to imply that police interrogators are unconcerned with false confessions. Like all others in the criminal justice system, police work hard to avoid wrongful convictions. But it cannot be ignored that police face pressure to solve crimes quickly.

<sup>7</sup> As discussed further below, not all false confessions occur in response to police interrogation. One kind of false confession, seen most often in highly publicized cases, occurs when a person (often a mentally ill person) spontaneously confesses to a crime without police questioning.

prevent them. This section aims to inform criminal justice practitioners about influential research, without necessarily adopting or endorsing that research, in the hope that practitioners can make their most informed decisions about policies and procedures in the field.

Researchers have isolated 3 kinds of false confessions: 1) voluntary false confessions, 2) coerced-compliant false confessions, and 3) coerced-internalized false confessions.<sup>8</sup> Voluntary false confessions sometimes occur in highly publicized cases, such as the recent JonBenet Ramsey case, in which a man confessed without any police interrogation but was released when the confession proved unreliable.<sup>9</sup> Coerced-compliant confessions occur when a suspect under interrogation chooses to falsely confess in order to end a stressful interrogation or to receive some benefit, such as a reduced charge. Coerced-internalized confessions occur when a suspect under interrogation comes to falsely believe that he/she may have committed the crime but cannot remember doing so, often because of the influence of drugs or a mental illness.

The three categories described in the false confession literature pertain mainly to cases in which the perpetrator's identity is in doubt. But interrogation evidence often plays a critical role in non-identity cases, such as those where the main issue is self-defense or consent. The sections below, which address causes and remedies for "false confessions," apply to non-identity cases as well as cases in which identity is the main issue.

### **III. The Causes of False Confessions**

#### **A. The "Rational Choice" Model of False Confessions**

Researchers have analyzed the three categories of false confessions in an attempt to understand their causes and prevent them. As to the first category, voluntary false confessions are difficult for the criminal justice system to prevent, because the system is not involved in eliciting these kinds of confessions (although, as discussed later, the criminal justice system can minimize the consequences of these false confessions by recognizing their falsity before a wrongful conviction occurs). Moreover, voluntary false confessions are rarer than the other two categories. For these reasons, scholarly research has largely ignored voluntary false confessions.<sup>10</sup>

To address the causes of the two more common categories of false confessions (coerced-compliant and coerced-internalized), scholars have developed the "rational choice" model of false confessions, which posits that some suspects falsely confess because the process of interrogation convinces them that confessing is the most rational choice under the circumstances.<sup>11</sup> This can occur, for example, when an innocent suspect believes that the police have strong evidence against him/her and that confessing is the only way to avoid the most severe penalty. Or, it can occur if an innocent suspect, wanting to end a stressful interrogation, believes that she will

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<sup>8</sup> Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook*, John Wiley & Sons, 217-243 (2003).

<sup>9</sup> Motivations for voluntarily false confessions include: a desire for notoriety, a desire to expiate guilt over previous transgressions, and a desire to protect the real criminal. *Id.* at 194-5.

<sup>10</sup> *But see Id.* at 194-5, 197-8, 218-224.

<sup>11</sup> Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *Denv. U. L. Rev.* 979 (1997).

be unable to convince the interrogator of her innocence and confesses out of the belief that she will be able to prove her innocence later in court.

## **B. The Role of Confrontational Interrogation Techniques in False Confessions**

Based on the rational choice theory of false confessions, researchers have argued that confrontational interrogation techniques—the most prominent of which is known as the “Reid Technique”—risk eliciting false confessions from innocent suspects.<sup>12</sup> The architects of the Reid Technique describe it as a two-stage process: 1) a non-accusatory interview, and 2) an accusatory interrogation.<sup>13</sup> During the non-accusatory interview, the interviewer asks the suspect questions—both biographical questions about the suspect and questions about the suspect’s involvement in the crime—and evaluates the suspect’s responses for signs of deceptiveness.<sup>14</sup> In particular, the Reid Technique teaches interviewers to utilize “behavior symptom analysis,” which means looking for behaviors such as lack of eye contact, shifting posture, and fidgeting, in order to determine whether the suspect is being deceptive.<sup>15</sup>

If the non-accusatory interview and other investigation lead the interviewer to believe that the suspect is guilty, then the interviewer conducts an accusatory interrogation.<sup>16</sup> Unlike the non-accusatory interview, in which the interviewer tries to elicit as many verbal and non-verbal responses from the suspect as possible, an interrogation is dominated by the interrogator, with the goal of getting the suspect to incriminate himself. An interrogation typically begins with a technique sometimes called “maximization,” which is an elaborate process designed to break down the suspect and make him believe his situation is hopeless because he inevitably will be convicted.<sup>17</sup> The interrogator instills this hopelessness by repeatedly stating his absolute certainty in the suspect’s guilt, cutting off all denials of guilt, and confronting the suspect with evidence, whether real or fabricated.<sup>18</sup>

Building on this foundation of hopelessness, the interrogator then employs strategies designed to convince the suspect that, given the irrefutable evidence of guilt, confessing is the best option available. These strategies have collectively been labeled “minimization,” because they typically consist of one or more of the following: 1) minimizing the moral culpability of the offense by suggesting a rationalization or justification, such as self-defense or provocation, in the hope that the suspect will confess if he believes the interrogator sees the crime as justified, and 2) convincing the suspect that confessing will minimize the consequences—with the legal system, family members, or simply the suspect’s own conscience—of having committed the crime.<sup>19</sup>

### i. Behavior Symptom Analysis

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<sup>12</sup> Saul M. Kassin, *On the Psychology of False Confessions: Does Innocence Put Innocents at Risk*, 60 *American Psychologist* 215 (2005)(hereinafter, “Kassin 2005”).

<sup>13</sup> Fred E. Inbau, et. al., *Criminal Interrogation and Confessions (4<sup>th</sup> Ed.)*, 5, Aspen Publishing (2001).

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.* at 6, 121-143.

<sup>16</sup> *Id.* at 8.

<sup>17</sup> *Id.* at 212-216.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

False confession researchers have criticized several aspects of the Reid Technique as raising the likelihood of eliciting false confessions. First, researchers have criticized “behavior symptom analysis,” the process of “human lie detection” that directs interrogators to evaluate suspect’s non-verbal behavior in order to evaluate truthfulness, and, in turn, to determine which suspects should be interrogated following the non-accusatory interview. Researchers have pointed to laboratory research suggesting that people are not capable of detecting deception at rates substantially better than chance.<sup>20</sup> Thus, researchers have suggested that behavior symptom analysis can lead interrogators astray, causing them to misinterpret innocent behaviors as deceptive and to proceed with interrogations of innocent suspects.

Others have argued that the laboratory research criticizing “human lie detection” may not apply to the real world of police interrogation for two reasons.<sup>21</sup> First, some have argued that the research criticizing “human lie detection” does not replicate real-world conditions because the subjects in the laboratory studies did not have the same motivation as real suspects to lie convincingly. Second, some argue that the interrogators in laboratory studies had less information about the suspects than real interrogators.

## ii. Deception

Researchers have also criticized the practice of deceiving suspects about the evidence against them. Although deception is not barred under current caselaw,<sup>22</sup> deception is a recurring factor in interrogation-induced false confessions: false evidence ploys—in which the interrogator falsely tells the suspect that evidence has incriminated him—were used in many of the proven false confession cases.<sup>23</sup> False evidence ploys may increase the risk of false confessions because, consistent with the “rational choice” model of false confessions, such ploys lead the suspect to believe that the police have strong evidence against him, that he will be unable to prove his innocence, and that confessing is therefore the only choice available for avoiding the harshest punishment.<sup>24</sup>

Using false evidence ploys has other downsides. Some consider lying to be morally wrong in any context. Others argue, more narrowly, that lying by police reduces public trust in law enforcement. Finally, deception has practical risks: experienced interrogators have found that fabricating evidence may allow a suspect to catch the interrogator in a lie, thus reducing the chances of eliciting a confession.

For all these reasons, interrogators who intend to use false evidence ploys should consider the many potential downsides of doing so, and should consider whether other techniques

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<sup>20</sup> Kassin, 2005 at 217.

<sup>21</sup> Fred E. Inbau, et. al., *Criminal Interrogation and Confessions (4<sup>th</sup> Ed.)*, 124-5, Aspen Publishing (2001).

<sup>22</sup> *Frazier v. Cupp*, 394 U.S. 731 (1969); *State v. Triggs*, 2003 WI App 91, 264 Wis. 2d 861, 663 N.W.2d 396; *State v. Woods*, 117 Wis. 2d 701, 725, 345 N.W.2d 457 (1984).

<sup>23</sup> See Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 *Fordham Urb. L. J.* 791, 830 (2006).

<sup>24</sup> Saul M. Kassin, *The Psychology of Confession Evidence*, 52 *Am. Psychol.* 221, 222 (1997)(hereinafter “Kassin, 1997”); Laboratory research supports this conclusion. See Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 *Psychol. Sci.* 125, 126 (1996); see also Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 *Psychol. Science* 481, 484 (2005).

are sufficient. Interrogators who rely on false evidence ploys should be prepared to justify why such ploys were necessary in a particular case.

Experienced interrogators appear to agree that false evidence ploys are relatively rare. However, milder forms of deception appear to be more common. For instance, interrogators sometimes suggest that a certain kind of forensic evidence—such as fingerprints or DNA—exists and will soon be tested, when in fact there is no such evidence. False confession researchers generally agree that this technique is less risky than false evidence ploys, although it still carries some risk because it may lead an innocent person to falsely confess due to the belief that forensic testing will eventually prove his/her innocence.

Interrogators also frequently rely on a related—though not explicitly deceptive—technique in which the interrogator asks the suspect, “Is there any reason that your fingerprints would be at the crime scene?” The risk of this technique depends largely on how the suspect interprets the question. If the suspect interprets the question as a declaration that the police *have already found* the suspect’s fingerprints at the crime scene, then the technique has the same effect as a false evidence ploy. If, however, the suspect understands that the police have *not* found the suspect’s fingerprints at the scene, then the technique would seem to present little risk of a false confession.

### iii. Duration of Interrogation

Researchers have also argued that the duration of interrogations plays a role in false confessions. Research suggests that most interrogations are short, with suspects providing information in less than thirty minutes.<sup>25</sup> But a high percentage of proven false confessions occurred after unusually long interrogations. One study of 125 proven false confessions found that, of the 125 in which the length of the interrogation was recorded, the average length was 16.3 hours.<sup>26</sup> A long period of interrogation causes fatigue and stress, exacerbates feelings of hopelessness, and may contribute to a false confession from a suspect looking for any way to end an interrogation.

Although it is difficult to define a rigid limit on duration for all interrogations, interrogators should be aware of the risks involved as an interrogation grows longer. In some cases, such as complex cases with multiple witnesses, multiple offenses, and multiple suspects, there may be ample justification for a lengthy period of interrogation, or for repeated interrogations. But in other cases, a lengthy interrogation may be unnecessary, and may needlessly raise the risk of a false confession.

### iv. Suspects’ Characteristics

Finally, research suggests that the risk of false confessions related to the above factors multiplies with certain kinds of suspects, such as juveniles, the mentally ill, or suspects with low

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<sup>25</sup> See John Baldwin, “Police Interview Techniques: Establishing Truth or Proof?,” 33 *British Journal of Criminology* 325, 331 (1993)(hereinafter “Baldwin, 1993”).

<sup>26</sup> Drizin and Leo, 2004 at 948-950.

intelligence or drug and alcohol addictions.<sup>27</sup> In Drizin and Leo's 2004 sample of 125 proven false confessions, approximately 1/3 (40) were juveniles, and 22 of these 40 juveniles were under the age of 15.<sup>28</sup>

With regard to mental illness and drug and alcohol addiction, a large percentage of suspects have such problems. Many of these suspects are nonetheless able to understand their rights and make competent decisions, and therefore mental illness and addiction should not automatically prevent interrogation. However, interrogators should at least be aware that suspects with such problems may be more vulnerable to false confessions, particularly if the mental illness or addiction is severe and if the suspect is affected by it at the time of the interrogation.

### **C. Alternatives to Confrontational Interrogation Techniques**

In part as a response to the problem of false confessions, and in part because of new requirements for electronic recording of interrogations (discussed below), law enforcement entities in the United States and other countries have begun exploring alternatives to confrontational interrogation techniques.

#### i. Neil Nelson's R.I.P. Technique

Neil Nelson, a Commander with the St. Paul, MN, Police Department, has developed an interrogation technique tailored to electronic recording.<sup>29</sup> Nelson's technique, which he calls the RIP technique (for "Rapport", "Investment", and "Partnership"), is less confrontational than the Reid Technique, and relies instead on the theory that suspects who are encouraged to describe and explain their version of events will incriminate themselves with provable lies. Thus, unlike the Reid Technique, Nelson does not cut off denials, but instead encourages suspects to talk and provide as many details as possible.

Nelson had several reasons for developing his technique. First, when Minnesota implemented electronic recording, Nelson found that confrontational techniques sometimes led jurors to distrust or dislike police interrogators. Nelson's technique, in contrast, portrays the interrogator as fair and professional. Second, Nelson found that, especially when dealing with hardened criminals, confrontational interrogation techniques rarely succeeded in getting a suspect to admit involvement in the crime. Instead, Nelson learned to prove the suspect's guilt by eliciting lies, which he argues are often just as incriminating and persuasive as an actual confession. Nelson emphasized that electronic recording, combined with his method tailored to the recorded environment, has increased law enforcement's ability to prove cases.<sup>30</sup>

#### ii. The British Approach

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<sup>27</sup> Kassin, 1997 at 224; Drizin and Leo, 2004 at 963-975.

<sup>28</sup> Drizin and Leo, 2004 at 944.

<sup>29</sup> See <http://www.neilnelson.com/>.

<sup>30</sup> As part of its effort to aid the implementation of electronic recording, the Wisconsin Department of Justice brought Nelson to Wisconsin in 2006 for a series of training sessions with Wisconsin investigators.

In the 1990's, the British implemented a new system for interviewing suspects, named "Investigative Interviewing," in order to emphasize a transition away from "interrogation." "Investigative Interviewing" rejects the confrontational approach taught by the Reid Technique.<sup>31</sup> It resembles Neil Nelson's approach in some ways—the goal is to elicit a detailed version of events from the suspect, rather than to persuade the suspect to confess.

British authorities implemented "Investigative Interviewing" in response to high profile false confession cases. Furthermore, the architects of "Investigative Interviewing" argued that studies of actual interrogations suggest that confrontational interrogation techniques are unnecessary to eliciting incriminating statements, and actually inhibit interrogators from obtaining useful information from the subject.<sup>32</sup> In evaluating the success of "Investigative Interviewing," British commentators have stated that the technique has not reduced law enforcement's ability to convict the guilty, and has resulted in increased professionalism on the part of investigators as well as an improved public perception of the police.<sup>33</sup>

In addition to implementing "Investigative Interviewing," British courts and legislative bodies also instituted restrictions on interrogation practices. British courts have prohibited false evidence ploys.<sup>34</sup> Legislative regulations require that, in order to interrogate a juvenile or a mentally ill or "mentally vulnerable" person, interrogators must either ensure that an adult advisor is present during the interrogation or be able to demonstrate that the interrogation is necessary to prevent imminent harm to persons or property.<sup>35</sup> The regulations state that interrogations with such persons should be conducted with "special care" because of the risk that the suspect will provide unreliable information.<sup>36</sup>

#### **D. The Importance of Corroboration**

Experienced investigators have long emphasized the importance of corroborating the details of a confession through independent investigation. This means evaluating whether the confession 1) contains details that only the true perpetrator would know, 2) leads police to evidence of which they were previously unaware, or 3) contains errors that do not match the known facts of the crime.<sup>37</sup> Corroboration allows an investigator to have confidence that the suspect who has confessed is the true perpetrator, and it also strengthens the persuasiveness of a confession in the eyes of a jury. On the other hand, errors in a confession may be useful in identifying false confessions.

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<sup>31</sup> See Tom Williamson, "Towards greater professionalism: minimizing miscarriages of justice," in "Investigative Interviewing: Rights, Research and Regulation," edited by Tom Williamson, Willan publishing (2006)(hereinafter "Williamson, 2006").

<sup>32</sup> Baldwin, 1993 at 332-335.

<sup>33</sup> See generally Williamson, 2006.

<sup>34</sup> See *R v Mason* [1987] 3 All E.R. 481; *R v Kirk* [2000] 1 WLR 567.

<sup>35</sup> Police and Criminal Evidence Act, Code C, "A Code of Practice for the Detention, Treatment, and Questioning of Persons by Police Officers"§ 13.1.

<sup>36</sup> *Id.* at § 13B.

<sup>37</sup> These three elements of corroboration are the same as those set forth in the new admissibility test proposed in Leo & Drizin, 2006.

The proven false confession cases underscore the importance of independent corroboration. In some of the false confession cases, such as Chris Ochoa's, the suspect signed a confession written by police, in which the details came not from the suspect but from police knowledge of the crime. In other cases, such as the infamous Central Park Jogger case, the confessions of five teenaged boys did not match each other in many details and contained significant errors that did not match the known facts of the crime.

To avoid these problems, researchers and experienced investigators have emphasized the importance of eliciting a detailed "post-admission narrative" from a suspect who has confessed. If a suspect provides a detailed account of the crime before he/she could have learned such details from other sources (such as the police or the media), it becomes much easier to evaluate the trustworthiness of the confession by comparing it to the known facts of the crime.

Investigators who search for independent corroboration will also avoid a phenomenon known as "tunnel vision" that can set in after a suspect has confessed. "Tunnel vision" describes a set of cognitive tendencies that lead people to seek out and filter information in a way that confirms pre-existing beliefs.<sup>38</sup> In the context of a confession, it is natural for an investigator who has elicited a confession to believe that the confessor is the perpetrator. But investigators who search for independent corroborating evidence will be more likely to exhaust independent sources of evidence, and therefore more likely to discover those rare cases in which a suspect has falsely confessed.

#### **IV. Ineffectiveness of Existing Safeguards against False Confessions**

The criminal justice system already has several safeguards that are designed, at least in part, to prevent false confessions from leading to wrongful convictions. These existing safeguards range from the relatively old (court-made rules embodied in the *Miranda* and voluntariness tests) to the relatively new (new laws requiring electronic recording of custodial interrogations in certain cases).

##### **A. The *Miranda* and Voluntariness Tests**

Several constitutional rules restrict the use of confession evidence in court. First, a confession is inadmissible if it was taken in violation of *Miranda v. Arizona*, which requires that, before interrogating a suspect, police advise the suspect that he/she has the right to remain silent and the right to an attorney. If the police fail to advise the suspect of these rights, or if the suspect invokes his/her rights but the police continue questioning anyway, statements made during questioning are inadmissible in court.

In addition to the *Miranda* rule, confession evidence is admissible only if the confession is voluntary. Courts have deemed confessions "voluntary" as long as the suspect's will was not overwhelmed by police interrogation.<sup>39</sup>

<sup>38</sup> Keith A. Findley and Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis.L.Rev. 291, 292.

<sup>39</sup> *Colorado v. Connelly*, 479 U.S. 157 (1986).

Although the *Miranda* and voluntariness rules were designed, at least in part, to ensure the reliability of confession evidence, those rules have been ineffective in preventing false confessions.<sup>40</sup> There are several reasons for this. First, many innocent people waive their *Miranda* rights and participate in interrogation.<sup>41</sup> Some do so because they fail to understand *Miranda* warnings—studies show that people (especially those with low intelligence, the mentally ill, drug/alcohol addicts, and juveniles) often fail to understand the warnings.<sup>42</sup> Other innocent people waive their *Miranda* rights because they believe they have nothing to hide and will be able to convince authorities of their innocence.

Similarly, the voluntariness rule has been ineffective at preventing false confessions, primarily because courts almost never conclude that a defendant confessed involuntarily.<sup>43</sup> Indeed, under the “rational choice” model of false confessions, most false confessions are the result of a voluntary choice made in order to improve the suspect’s situation, and it therefore should not be surprising that the voluntariness doctrine does little to address the false confession problem.<sup>44</sup>

## V. A New Safeguard: Electronic Recording of Interrogations

Under recent changes in the law, police are now required to electronically record custodial interrogations of juveniles in all cases, and custodial interrogations of adults in felony cases.<sup>45</sup> Failure to record in juvenile cases will result in suppression of the confession at trial. Failure to record in adult cases will result in a jury instruction stating that electronic recording is state policy and the failure to record can be used in evaluating the evidence.<sup>46</sup>

Electronic recording should reduce the chances of suspects falsely confessing, and should help juries recognize and reject false confessions. Electronic recording should help prevent suspects from falsely confessing by deterring the use of overbearing interrogation techniques. Recording will remind police that certain interrogation techniques will not be viewed favorably by judges and juries. Recording should help prevent juries from convicting based on false confes-

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<sup>40</sup> See Kassin, 2005.

<sup>41</sup> Leo & Drizin, 2006 at 497.

<sup>42</sup> Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe*, 41 Am. Crim. L. Rev. 1277, 1291 (2004); see also Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134, 1161 (1980).

<sup>43</sup> See e.g. Leo & Drizin, 2006 at 498-501.

<sup>44</sup> Although *Miranda* and the voluntariness doctrine are staples of American law, other countries take a different approach to regulating interrogation. In Italy and Spain, for example, statements made during custodial interrogation are inadmissible unless an attorney was present during the interrogation. Stephen C. Thaman, *Miranda in Comparative Law*, 45 St. Louis L.J. 581, 591-3 (2001). In Great Britain, an extensive body of statutes, court cases, and administrative regulations restricts interrogation techniques in a manner that places much greater emphasis on the reliability of the confession. See Police and Criminal Evidence Act (PACE), 1984; PACE Code C, *A Code of Practice for the Detention, Treatment, and Questioning of Persons by Police Officers*; see also Tom Williamson, *Towards greater professionalism: minimizing miscarriages of justice*, p. 150-153 in *Investigative Interviewing: Rights, Research and Regulation*, edited by Tom Williamson, Willan publishing (2006); see also Peter Mirfield, *Silence, Confessions, and Improperly Obtained Evidence*, p. 99, Oxford University Press (1997);

<sup>45</sup> Wis. Stat. §§ 938.195(2)(a) and 968.073(2).

<sup>46</sup> Wis. Stat. § 972.115(2)(a).

sions by revealing the process that led to a confession, and by settling disputes over whether a suspect's statement was actually incriminating.<sup>47</sup>

Although electronic recording takes important steps toward addressing false confessions, it may not completely solve the problem. First, because the remedy for failing to record in adult cases is a jury instruction, not suppression, unrecorded confessions will still reach juries on rare occasions.<sup>48</sup> Because even unrecorded confessions are very powerful evidence, jurors may still convict despite the jury instruction concerning the failure to record. Second, the proven false confession cases demonstrate that jurors will sometimes convict based on a false confession even if the confession is recorded. In the famous "Central Park Jogger" case, for example, juries believed the false confessions even though they were recorded.<sup>49</sup> For all these reasons, new electronic recording provisions will help address, but not solve, the problem of false confession-based wrongful convictions.

## V. Can the Judicial Process Prevent False Confessions from Becoming Wrongful Convictions?

As the previous sections suggest, once a false confession has been elicited, it usually results in a wrongful conviction because a confession is such persuasive evidence. For this reason, it makes sense for researchers and criminal justice practitioners to concentrate on addressing the risk factors that contribute to false confessions and thereby aim to prevent false confessions from occurring in the first place. This has naturally led to a focus on police interrogation.

However, it is important to remember that police interrogation is only the first step in a false confession-based wrongful conviction. Much more must happen—through the actions of many other participants in the criminal justice system—before a false confession becomes a wrongful conviction. Specifically, the protections of the judicial process, which exist primarily to ensure the conviction of the guilty and prevent the conviction of the innocent, must fail to prevent a false confession from becoming a wrongful conviction. Such failures of the judicial process take several forms.

### A. The Role of Prosecutors

After the police have elicited a confession from a suspect, the prosecutor must decide whether to charge the suspect based on the confession and the other evidence in the case. Since

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<sup>47</sup> See generally Thomas P. Sullivan, *Police Experiences with Electronic Recording*, 2004, <http://www.law.northwestern.edu/wrongfulconvictions/Causes/CustodialInterrogations.htm> (last visited 1/27/07). In addition to supporting the state policy of electronic recording, the Wisconsin Criminal Justice Study Commission also supports law enforcement efforts to adequately fund electronic recording initiatives. Because the current state funding will not completely cover law enforcement expenses, the Commission may be willing to assist law enforcement entities in explaining the importance of additional funding to local governments. To request a letter of support or other information, law enforcement entities should contact the Commission's staff attorney, Byron Lichstein, at 608-265-2741.

<sup>48</sup> Law enforcement agencies appear to strongly believe that the prospect of a jury instruction on the failure to record will provide a powerful incentive to record, thereby ensuring recording of most interviews.

<sup>49</sup> Timothy Sullivan, *Unequal Verdicts: The Central Park Jogger Trials* 50 (1992).

most prosecutors will only charge a suspect if they believe the suspect is guilty, this effectively means that the prosecutor must believe the false confession before charging the suspect. Thus, the natural question for prosecutors is how to distinguish a false confession from a true confession.

There is no foolproof method for detecting whether a confession is true or false, and therefore prosecutors should approach such assessments cautiously. As a starting point, prosecutors should have an awareness that false confessions, counter-intuitive though they are, do occur in rare cases. This awareness will allow prosecutors to at least consider the possibility of a false confession.

Furthermore, apart from acknowledging the possibility of false confessions, prosecutors should be aware of certain factors which can improve their ability to separate true confessions from false confessions. First, prosecutors should consider the characteristics of the confessor. The following groups appear more likely to falsely confess: the mentally ill, people with low intelligence, juveniles, and people with drug/alcohol addictions.<sup>50</sup>

Second, prosecutors should consider the events that led to the confession. This includes whether the confession came in response to interrogation, and, if so, what interrogation techniques preceded the confession. For instance, very long interrogations, or interrogations in which the police used false evidence ploys against the suspect, may present risk factors that raise the likelihood of a false confession. Similarly, confrontational techniques (such as the Reid Technique, described above) may be more likely to elicit false confessions than non-confrontational techniques.

Finally, prosecutors should consider the content of the confession, and, more specifically, how the confession fits with the other evidence in the case. Prosecutors should evaluate whether the confession provides details that would only be known by the true perpetrator and that match the known facts of the crime.<sup>51</sup> Prosecutors should be wary of confessions that provide details that do not match the known facts of the crime. Furthermore, prosecutors should evaluate whether the confession leads police to previously unknown evidence.

In rare cases, an analysis of the above factors may lead the prosecutor to conclude that a confession is suspect and that more investigation is warranted.

In the age of electronic recording, prosecutors will have to decide at what point during a case to review the recording of an interrogation (and, therefore, to review the circumstances of the confession to evaluate its truth or falsity). Because the recording will help the prosecutor determine the suspect's likely guilt or innocence, it is preferable for the prosecutor to review the recording before the charging decision. This is particularly the case if the confession is the sole or primary evidence against the suspect. Reviewing the recording before the charging decision will make it possible for the prosecutor to request further investigation while witnesses and evi-

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<sup>50</sup> Kassir, 1997 at 224; Drizin and Leo, 2004 at 944, 963-975.

<sup>51</sup> See Leo & Drizin, 2006, in which the authors advocate for a new confession admissibility rule that turns largely on the extent to which the confession provides details that match the known facts of the crime and/or leads police to previously unknown evidence.

dence are still fresh, and to obviate the need for future expenditure of resources if the prosecutor determines that charges are not warranted. It should be recognized, however, that resource and time limitations will often make it very difficult for the prosecutor to review the recording before the charging decision.

## B. The Role of Defense Attorneys

Like police and prosecutors, defense attorneys have a substantial role to play in preventing false confession-based wrongful convictions. Studies have shown that poor representation by defense attorneys is a critical factor in wrongful convictions.<sup>52</sup> In the case of false confessions, the problem is sometimes that defense attorneys fail to entertain the possibility that the client's confession was false and that the client is innocent. This can occur even in the face of a client's persistent assertions that the confession was false.<sup>53</sup>

Unlike other system actors, the defense attorney is not free to disregard a client's claim of innocence. In any case in which the client insists that the confession is false, the defense attorney should treat it as such. The defense attorney should then make reasonable efforts to investigate and discover evidence supporting the client's story, and zealously present the client's version to the judge or jury (with the rare exception for when the lawyer knows the client plans to commit perjury<sup>54</sup>). Failing to acknowledge the possibility of a false confession can lead a defense attorney to fail to file appropriate motions challenging the admissibility of the confession.<sup>55</sup> It can also lead a defense attorney to pressure an innocent client into a guilty plea, or to fail to present a viable false confession theory to the judge or jury.

Even if the defense attorney entertains the possibility that his/her client falsely confessed, the defense attorney must still avail him/herself of all the potential tools for persuading the fact-finder. Defense attorneys must be familiar with the literature on the psychology of false confessions, and must find a way to present that information to the fact-finder. At a minimum, this means eliciting testimony, from both the client and the police, about the client's mental state and the circumstances of the interrogation, thus conveying the process by which a false confession could have occurred. In some cases, defense attorneys may find it necessary to call an expert witness to testify about the risk factors that can lead to false confessions.<sup>56</sup> In other cases, the defense attorney may choose to request a special jury instruction informing the jury about factors relevant to evaluating the reliability of a confession.

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<sup>52</sup> See Innocence Project, available at <http://www.innocenceproject.org/causes/badlawyering.php> (last visited 1/27/2007).

<sup>53</sup> This was powerfully illustrated in the case of Christopher Ochoa, a Texas man who falsely confessed to a rape and murder. When Ochoa's post-conviction attorneys contacted his trial attorney to inquire about Ochoa's claim of innocence, the trial attorney said there was "not a chance" that Ochoa was innocent. Keith A. Findley and Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis.L.Rev. 291, 332. DNA testing later proved Ochoa's innocence. Ochoa later said that he pled guilty only because his persistent claims of innocence were repeatedly dismissed by his trial attorney.

<sup>54</sup> See *State v. McDowell*, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500.

<sup>55</sup> Such motions might rely on familiar grounds such as *Miranda*, voluntariness, or electronic recording. More rarely, a defense attorney may move to exclude a confession based on rule 904.03, see *State v. Moss*, 2003 WI App. 239, ¶ 21, or a defense attorney may move for an acquittal post-conviction based on insufficient corroboration. See *State v. Barth*, 26 Wis. 2d 466, 132 N.W.2d 578 (1965).

<sup>56</sup> See e.g. *United States v. Hall*, 93 F.3d 1337, 1345-6 (1996).

### C. The Role of Judges and Juries

Judges typically decide defense motions to suppress confessions under three doctrines: *Miranda*, voluntariness, and electronic recording rules. As explained above, a judge's assessment of the trustworthiness of the confession technically does not factor into the decision under any of these three doctrines. Thus, it might appear that judges' legal rulings are unaffected by recent revelations concerning false confessions.

On the contrary, there are several ways in which judges must consider the reliability of confession evidence. First, under the centuries-old "corroboration rule" for confession evidence, a confession must be supported by other evidence that corroborates a "significant fact" of the confession.<sup>57</sup> Under this rule, the test is whether the non-confession evidence is significant enough to produce confidence in the truth of the confession.<sup>58</sup> Thus, under this rule, judges are explicitly required to evaluate the truthfulness of confessions.

Similarly, judges may sometimes be asked to suppress confessions under Wis. Stats. § 904.03, which excludes evidence whose probative value is substantially outweighed by the danger of unfair prejudice. Wisconsin courts have previously concluded that confession evidence may be vulnerable to suppression under § 904.03.<sup>59</sup> In such cases, judges must evaluate the probative value of the confession, at least in part by considering its reliability.

Additionally, judges (particularly appellate judges) commonly evaluate the reliability of confessions when they analyze harmless error or prejudice under the ineffective assistance of counsel test in confession cases. In such cases, appellate courts determine whether a confession is sufficiently strong evidence to obviate the need for reversal of a conviction. Such determinations require appellate courts to assess the reliability of confessions.

Finally, judges must evaluate reliability considerations in ruling on motions for expert testimony or special jury instructions. In such cases, judges must determine whether juries need additional assistance in evaluating the reliability of a confession. In making such determinations, judges should be mindful that confessions are extraordinarily powerful to juries, because of the truism that no innocent person would falsely confess. The question for judges, then, is whether the traditional mechanisms of the adversary process, such as cross-examination and jury instructions, are sufficient to educate the jury. In answering these question, judges must themselves consider the factors relating to the reliability of the confession.

For these reasons, judges, like prosecutors and defense attorneys, must recognize the reality (albeit rare) of false confessions and the factors (described above) that impact the reliability of confession evidence.

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<sup>57</sup> *State v. Barth*, 26 Wis. 2d 466, 132 N.W.2d 578 (1965). At the time of this writing (January, 2007), the Wisconsin Supreme Court is currently considering a case dealing with the corroboration rule, *State v. Bannister*, 2006 WI App 136 (petition for review granted).

<sup>58</sup> *Id.*

<sup>59</sup> See *State v. Moss*, 2003 WI App. 239, ¶ 21.

## VI. Conclusion

All criminal justice practitioners have a stake in ensuring the reliability of confession evidence. Although false confessions are counterintuitive, DNA exonerations and social science research have revealed that they do occur and are sometimes the result of rational choices made during interrogation. Moreover, existing safeguards (in the form of the *Miranda* and voluntariness rules) have proven insufficient to prevent false confessions. Our criminal justice system's ability to prevent false confession-based wrongful convictions depends in part on accepting the possibility of false confessions, understanding the risk factors correlated with false confessions, and considering factors useful to evaluating whether a confession is true or false.

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Deputy Chief Brian O'Keefe, Milwaukee Police Department  
Detective Dorothy Doheny, Madison Police Department  
Joseph Buckley, President, Reid & Associates  
Ken Hammond, Director of Law Enforcement Education, Wisconsin Dept. of Justice  
Lieutenant Dale Okray, Portage County Sheriff's Department  
Professor Richard A. Leo, University of California-Irvine  
Professor Saul M. Kassin, Williams College  
Professor Steven A. Drizin, Northwestern University

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