The Jury EXPERT
from NOVEMBER/DECEMBER 2012
Volume 24, Issue 5
The Art and Science of Litigation Advocacy
A publication of the American Society of Trial Consultants Foundation

"Only the Guilty Would Confess to Crimes"

Understanding the Mystery of False Confessions

By Douglas L. Keene and Rita Handrich

"I would never confess to something I didn't do!"

IT IS NATURALLY hard to understand why anyone would confess to a crime they had not committed. Yet, in North America we can trace false confessions back to at least 1692 and the Salem Witch Trials where "large numbers of mostly women were tried for witchcraft on the basis of confessions extracted by torture and threats" (Kassin, 2010).

More than 300 years later, people continue to falsely confess to crimes ranging from academic cheating to murder. But the mystery of why someone would falsely confess persists. Unlike the Salem Witch Trials, most false confessions today are provided under psychological duress, but without torture or threats of physical harm. Do the generally accepted modern police methods still produce false confessions, or does the responsibility for false confession fall entirely on the confessor?

There is a tendency to believe "others" might well confess under duress--but most people think they, themselves, would never do such a thing (Horgan, Russano, Meissner & Evans, 2012). This belief illustrates the reality that most of us have no idea of what it feels like to undergo an interrogation. More than 80% of those taken into custody by the police waive their Miranda rights (Sangero & Halpert, 2011).

> **"In any kind of interrogation, anybody with any common sense wouldn't agree to confessing to a murder. I mean that is... that is absurd."—Mock juror**

To better understand the psychological experience of interrogation subjects, a recent experiment was designed to simulate a police interrogation and resulted in 81% of the subjects designated as "innocent" waiving their right to silence while only 36% of those designated "guilty" did the same (Kassin, 2008). This is very similar to the numbers waiving their rights in actual custody situations, and comports with the general impression that "if you have nothing to hide you have no reason to insist on legal counsel". Kassin, a leading researcher in the false confessions area, refers to this as the innocence-confession paradox--wherein the Miranda warning does not protect those most in need of protection--the innocent.

Innocent people think, since they did nothing wrong, that cooperating with the interrogators will simply expose their innocence. Instead, waiving their right to silence exposes them to the risk of false confession. Those who have a criminal past

are much less likely to waive their right to silence (Sangero & Halpern, 2011).

> **"Your parents do that to you growing up. I mean your brother is not going to tell on himself. I have never once said, 'All right, I did it', when I didn't do it. Not once. I don't care how much she told me that he has done told on me, I am in trouble, it would be easier if I would go ahead and admit it."—Mock juror**

Still, why would anyone confess to something they have not done? If you believe justice will prevail, why would you confess, especially to a very serious crime? There are a number of possible reasons, but the most compelling relates to the power of the interrogation process. The majority (about 65%) of suspects in custody either "fully or partially confess" to the police (Redlich, Kulish & Steadman, 2011). Something powerful clearly happens during the interrogation process itself.

The Innocence Project has cleared 297 former prisoners found guilty via trial in the criminal justice system. Their FAQ on false confessions offers the following summation of false confessions:

> *"Over 25 percent of the more than 290 wrongful convictions overturned by DNA evidence in the U.S. have involved some form of a false confession."*

Why Do False Confessions Occur?

When someone confesses to committing a crime, it only stands to reason that they are guilty. After all, why would they confess if they didn't do it (Adams, 2011)? The common sense of this is so powerful that juries tend to weigh the confession (even if recanted after legal counsel is provided) as the single most compelling piece of evidence. Saul Kassin lists the three major forms of false confessions:

1. **Voluntary confessions:** This is a confession made to protect someone else, made because you are delusional and believe you did the crime, or made to attract attention to yourself. Examples include the 200 people who confessed to kidnapping the Lindbergh baby, or more recently, John Mark Karr's confession to killing JonBenet Ramsey or Amanda Knox's false confession to and subsequent conviction for murdering her roommate in Italy. [Kassin says the police do a good job of identifying these false confessions and they are unlikely to result in wrongful convictions.]
2. **Internalized false confessions:** This type of confession can happen when interrogation eventually persuades the accused they did something that they objectively know did not occur. If the suspect is a juvenile, mentally handicapped, experiencing extreme grief, or sleep-deprived–under the pressure of the interrogation session, they can actually come to believe they committed the crime and thus confess. [This type of confession can and has resulted in wrongful convictions.]
3. **Compliant false confessions:** Finally, the largest category of false confessions occurs when (even though the confessor knows he or she is innocent) they break down and give a confession to escape the interrogation process itself. [Kassin says the boys confessing to raping the Central Park Jogger are an example of this sort of confession. They were tried, found guilty in 1990 and imprisoned until the actual rapist confessed in 2002 and DNA evidence showed him to be the real perpetrator.]

But what could possibly happen in the interrogation process that would lead one to the point of confessing to, in many cases, heinous crimes? While there are certainly personality variables that play into false confessions, most people in the legal system (judges, attorneys and jurors) under-estimate the power of the situational forces acting upon police suspects. Even "normal" people without impairments that reduce resilience (like mental illness) can be worn down by an interrogation and give false confessions (Davis & Leo, 2012).

What an innocent (and many guilty) interrogation subject wants to do is to explain their innocence, and be reassured that their explanation is valid. The "wearing down process" in interrogation thwarts such attempts on the detainee's part. Instead, the interrogation focuses on the detainee's wish to be understood, but from the perspective of guilt: how they want to be seen as cooperative, how they want to share with the interrogator a less culpable sense that the detainee must have been caught up in the moment and behaved atypically. As part of this process, the interrogator reassures them that they will be seen as a better person if they cooperate, that the legal outcome could be improved if they confess, or tells the detainee that co-perpetrators, if any, are also being interrogated and that he or she may want to assign blame to them before they assign it to the detainee (Davis & Leo, 2012).

> **"They never even gave him a psych evaluation. Like they just kept battering him in the interrogation room and just on and on and on. I mean anybody is going to be mentally broke down or emotionally broken down after so long."—Mock juror**

If the interrogation process continues without food, drink or sleep, "a perfect storm of glucose depleting stress, fatigue and sleep deprivation" occurs. Even if offered food or drink, a detainee may be too anxious or overwhelmed to accept. This results in poor decision-making, cognitive decline and over-reactivity to stress (Davis & Leo, 2012). This experience [shared by detainees and soldiers] has been studied in combat situations and is also described as the "fog of war".

The more depleted the detainee becomes, the less compelling the arguments of the interrogator need to be in order to persuade. Further, as they become more depleted, their ability to perceive manipulation by interrogators also declines. In this distorted environment, detainees are more likely to blindly see what the authorities are saying as a simple reality from which there is no escape (Wentzel, Tomczak & Herrmann, 2010).

Without a clear-headed act of will (which is undermined by

the stress and circumstances of interrogation), the easiest path for a detainee is to do or say whatever must be said to make the interrogation stop (Davis & Leo, 2012).

Other researchers refer to the state of mind during a difficult interrogation as "interrogation myopia" (Scherr & Madon, 2011). When under the stress of the interrogation, all the detainee can "see" is the short-term situation in which they feel trapped. Their decisions are thus driven in-the-moment and not by their long-term interests. In academic research, when participants are falsely accused of having engaged in cheating--their ability to understand Miranda warnings was significantly lower than those not accused of cheating. Being falsely accused, which happens during the interrogation of those who falsely confess, causes tremendous stress and interferes with comprehension of the warnings meant to protect the innocent. The detainee simply doesn't "hear" or understand the words being said to them. It all seems unreal since they know they are innocent and a horrible mistake is occurring.

Additionally, the expectation of a lengthy interrogation has been found to exacerbate the vulnerability of the detainee to make short-sighted decisions about confessing falsely to simply avoid the ongoing (and seemingly never-going-to-end) interrogation (Madon, Yang, Smalarz, Guyll & Scherr, 2012). This short-sightedness is thought to be particularly likely among innocent detainees as well as those with psychological or cognitive vulnerabilities. The innocent presume their innocence will prevail and that a false confession will be proven false in the long run and, in the short run, the interrogation will end. Those with psychological or cognitive vulnerabilities tend to be impulsive and that can also lead to a false confession due to the pressures felt in the interrogation room.

"In regards to this 'confession' that I made last night, I want to make it very clear that I'm very doubtful of the verity of my statements because they were made under the pressures of stress, shock and extreme exhaustion."
—Amanda Knox

Finally, contrary to popular belief and what we see on weekly television crime shows, the administration of the Miranda warning is not at all standardized. Warnings differ across jurisdictions in the United States in length, reading difficulty and whether they are administered verbally or in writing. Further, if the police interrogators minimize the importance of the Miranda warnings, it can send the message to the suspect that waiving their rights is in their long-term interests--even though it most assuredly is not (Scherr & Madon, 2011).

Interrogation Process Errors and Investigator Bias

While police investigators estimate about 5% of the confessions they elicit are actually false confessions, scholars reviewing field studies estimate a false confession rate ranging from 42% to 76%. There is, of course, no way to reliably estimate the actual rate of false confessions, but it is thought higher than commonly believed (Davis & Leo, 2012).

There are three errors that are most prone to lead to a false confession (Adams, 2011).

1. **Misclassification error:** The investigator enters the room believing the suspect is guilty (sometimes due to evidence or a "hunch").
2. **Coercion error:** The interrogator accuses the suspect of committing the crime and makes implied or direct threats to convince the suspect it is better to confess now to quickly end the stress of the interrogation (necessarily without regard to the long-term consequences of confession).
3. **Supplying key details:** The interrogator knowingly or unknowingly provides the suspect with key non-public details of the crime which the suspect then incorporates into a false confession.

What researchers refer to as "investigator bias" is a key factor in false confessions. If the detainee is examined with an intent to simply gain information, they are less likely to confess, either truly or falsely. But if the investigator approaches the interrogation believing the detainee is guilty, the ensuing interrogation is more pressure-filled and coercive. This results in the innocent detainee (who is likely to waive their rights) being at increased risk for false confession due to the pressure of the interrogation process.

"The police probably put him between a rock and a hard place, like, 'You are going to be convicted anyways. If you go to trial, even though you didn't do it, you will be convicted. If you are convicted, you will get twenty years. If you tell us you did it, then we can get you eight years.' So it is more like, 'Well, I would rather leave for eight years than twenty'."
—Mock juror

Using the interrogation strategies of minimization or maximization (e.g., the suspect being led to believe that punishment will be more lenient or more stringent, respectively) was found to increase the incidence of false confessions. Further, using these common interrogation strategies increased the likelihood of false confession from innocent suspects, but had no impact on confessions being elicited from guilty suspects (Narchet, Meissner & Russano, 2011). When the interrogator has drawn conclusions prior to the interrogation itself, the value of the resulting interrogation is greatly reduced.

Investigators are able to lie [use "deceptive strategies"] to suspects. One version of this is a strategy called "the bluff". The bluff consists of the interrogator pretending to have evidence without actually claiming the evidence implicates the suspect.

In research studies, the bluff results in innocent participants falsely confessing. However, the actual bluff effect hypothesis was identified from retrospective reports of those who had actually falsely confessed. Police investigators believe that the bluff will elicit confessions from the guilty (who believe they have been found out) but not the innocent (who know full well that any evidence would not implicate them). The reality may be quite the opposite since the innocent person believes the

bluff implies future exoneration from suspicion.

> *"Todd Johnson, who was ultimately acquitted, had confessed to his wife's murder after 19 hours of interrogation when police said that they found blood in his car to be sent to a laboratory for DNA testing. Knowing that the blood could not be his wife's, this defendant explained later that he confessed because he was exhausted and knew that the test results would show his innocence," (Missouri v. Johnson, 2001).*

This logic was also revealed in the case of Jeffrey Deskovic. During a 6-hour interrogation, police asserted that they had collected DNA at the rape and murder scene for testing. At that point, despite—or because of—his innocence, Deskovic confessed and was later convicted. After his exoneration, he explained why he confessed: "Believing in the criminal justice system and being fearful for myself, I told them what they wanted to hear." Knowing that the DNA testing would show his innocence, he said, "I thought it was all going to be okay in the end". Interestingly, there was DNA evidence in this case and the test did exclude Deskovic. He was tried anyway, however, and convicted by a jury. Sixteen years later, he was released when the DNA was matched to the actual perpetrator (Perillo & Kassin, 2011).

Another deception often used in interrogation is the "false evidence ploy". The false evidence ploy consists of either demeanor evidence ("I can see the guilt on your face"); testimonial evidence ("We have witnesses/video placing you at the scene"); or scientific evidence ("We have DNA/fingerprints/forensic evidence"). Deception increases the rate of false confessions (Forrest, Woody, Brady, Batterman, Stastny & Bruns, 2012).

Overall, two factors appear to be associated with the elicitation of false confessions: using psychologically manipulative techniques (e.g., minimization, maximization, the bluff, false evidence ploys) and the documented individual differences (poor health, young or old age, limited intellect, mental impairment) that leave some more vulnerable than others to falsely confessing (Narchet, Meissner & Russano, 2011; Perillo & Kassin, 2011). In proven false confession cases, the accused experiences the police methods as unbearable pressure, and confess in spite of what they knew to be the truth (Redlich, Kulish & Steadman, 2011).

Who Falsely Confesses?

In addition to the situational stressors to which anyone is susceptible, there are also certain groups of people who are more likely to falsely confess. Researchers refer to these people as being more vulnerable to external pressure and therefore, especially vulnerable in the interrogation room. Who are they?

Those who are young, intellectually impaired, low in self-confidence, naïvely believing in the positive intent of the interrogator, mentally ill, dependent or anxious, those who wish to please others, the angry, the extraverted, and those taking psychiatric medication in the year prior to the false confession (Davis & Leo, 2012; Perillo & Kassin, 2011; Redlich, Kulish & Steadman, 2011; Sangero & Halpert, 2011). Two other groups are also at risk for false confession: the innocent and African American or Hispanic detainees.

> **"To actually admit to a murder, something had to occur during that interview for him to start following what they wanted him to say. I mean you know if you killed somebody or not, you don't miss that. You know without a doubt. So what happened during those hours that made him finally say, 'Okay, yes, I will say I did it'?"—Mock juror**

The innocent detainee has a naïve belief in justice prevailing and so they waive their Miranda rights and behave in a forthcoming and cooperative manner with interrogators. Ironically, laboratory research indicates that mock interrogators conduct even more pressurized interrogations when paired with an innocent suspect who is adamant in their denial of wrong-doing (Perillo & Kassin, 2011). In other words, the louder the detainees protestations of innocence, the more interrogation pressure results.

African American and Hispanic detainees are at risk of false confession simply because they feel that many will believe they are guilty due to stereotypes associating their racial groups with criminal behavior (Davis & Leo, 2012; Najdowski, 2011; Vrij, 2008). Thus, while in the interrogation room, they experience anxiety, and behave in ways that may be suspicious to the interrogator (smiling, moving their hands, controlling speech, avoiding eye contact, speaking in a higher pitched voice) as well as engaging in more deceptive behaviors when interacting with the police than do White American detainees (Najdowski, 2011).

This experience is not solely those of adult minority males. In a sample of individuals wrongfully convicted and later exonerated--85% of the juvenile false confessors were African American, while somewhere between 53% and 73% (data had to be extrapolated from various sources) of the adult false confessors were African American (Najdowski, 2011). When the 2011 US Census reports only 13.1% of the population is African American--the proportion of African Americans falsely confessing are highly skewed. Multiple researchers believe this over-representation of minority detainees falsely confessing reflects their sense of hopelessness and futility in overcoming the stereotypes of their racial groups.

Why is It So Hard to Distinguish Between False and True Confessions?

This is actually an oddly simple answer. False confessions and true confessions look very alike--particularly when there is no video of the interrogation itself (Redlich, Kulish & Steadman, 2011). False confessions occur for every type of crime--not just very serious crimes. Research has long shown that humans are very poor at detecting deception, even after being trained. People typically are only about 54% able to distinguish truth from lies when not using specialized techniques for detection deception, or essentially no better than random chance. This

number is no higher for police detectives who specialize in lie detection. Even researchers often cannot distinguish between lies told by experienced criminals and the truth (Willën & Strömwall, 2012).

"But the whole confession part just angers me, because obviously if he wouldn't have confessed and had stood his ground, we probably wouldn't be here. So I don't think he was coerced in any, I mean obviously pressured, but forced to say he did it? No." —Mock juror

Yet we persist in our beliefs that we, ourselves, can detect deception much better than can others. We hear this belief routinely from our mock jurors who rely on nonverbal cues (such as eye contact or fidgeting).

In truth, the main strategy that increases your accuracy in detecting deception is when you rely on content as opposed to behavioral cues. Liars often contradict themselves. According to recent research, those who rely on content do the best in identifying deception while those who rely on signs of shifty behavior do no better than chance (Hamezelou, 2012). Lies are best detected by transcript, not by tape.

Sangero & Halpert (2011) list multiple reasons that jurors and the courts are largely unable to identify the false confession.

1. A belief that "If you confess, you must have done it."
2. Police investigators, prosecutors, jurors and even judges are are unable to distinguish between truth and lies.
3. Confessions are contaminated with disclosure of undisclosed details (also known as "non-public details") of the crime by police investigators. Sometimes it is done consciously and sometimes without being aware. The detainee then incorporates these facts into the false confession, making them appear to be aware of information that would only be known to the guilty.
4. "Inside information" that's been incorporated into the false confession is seen as supporting the truth of the confession. If inaccurate details are included in the confession--the tendency is to dismiss them from consideration.
5. Little attention is paid to denials of having committed the crime--whether those denials come after the confession or were consistently made throughout interrogation prior to the ultimate confession.
6. Even when the defendant has falsely confessed to other crimes, the current false confession is still used (if there is no proof the defendant did not commit it) to obtain a conviction.
7. Errors tend to propagate throughout an investigation, and can distort the reasoning of subsequent efforts by police and prosecutors. For instance, if there is an error in a statement made during an initial interview, and a witness later attempts to correct the impression, the statement is often seen as truth, and the effort to correct it is seen as a sign of guilt.
8. The system is not self-correcting. The law enforcement system considers itself highly redundant. The expectation is that if one department (the investigators, for example) force a false confession--another department (the prosecutor, the jurors, the appeals court) will identify that error and the innocent false confessor will not be imprisoned. In truth, the various departments of law enforcement are dependent on each other and tend to support the pre-existing errors rather than reviewing evidence individually and coming to separate conclusions. That is, the prosecutors rely on the police investigators (who come before them) and on the judges (who come after them) to prevent wrongful convictions. The judges tend to rely on the prosecutors and police investigators and assume they have produced the guilty rather than the innocent for trial. The appeals judges tend to rely on lower court judges.

"They say, 'Why confess if you didn't do it?' But they don't have the whole understanding of what I was going through at the time. It's like, yeah--I wanted to get it over with, get home, and get some sleep." He laughs softly. "Eighteen years and nine months later, I finally get to go home." —Frank Sterling

Finally, in a particularly cruel twist, the advocates for the accused themselves are often involved in the wrongful conviction. According to preliminary results of an archival review of the first 273 DNA exoneration cases from the Innocence Project files, there was more likely to be "bad lawyering" (9.1% vs 3.4%) and "government misconduct" (21.2% vs 15.5%) in false confession cases. Further review shows false confessors are more likely to plead guilty (25.97%) than those who do not confess (3.78%). Pleading guilty makes it impossible to ask for a new trial and makes it very difficult to obtain post-conviction case review and assert one's innocence at a later date (Kassin, 2012). Yet the decision to plead guilty is one made in close consultation with one's defense attorney.

"Thus, from the moment critical errors are committed (the innocent targeted, a confession forced or contaminated), all these dependent systems collapse, leading in the final analysis to a wrongful conviction." [snip] When a false confession "occurs, in most cases it leads to a wrongful conviction" (Sangero & Halpert, 2011).

It is as though there is a "corroboration inflation" (Kassin, 2012) when a false confession occurs. Other evidence is interpreted (or rather re-interpreted) in a manner that supports the confession. File review has shown repeated instances of evidence contamination in those cases where there is a false confession. English courts require confessions be corroborated by other independent evidence. In the US, however, if other evidence could have resulted in a conviction, the admission of a false confession is viewed as "harmless error" (Kassin, Bogart & Kerner, 2012). This review of the research clearly indicates that a false confession is far from harmless error.

Rather, it results in a cascade of additional errors that greatly increase the prospects of a wrongful conviction. And it isn't just

academic research on undergraduates or mock juror studies that confirm this result, nor is it merely actual jurors who are interviewed post-verdict. It's judges too!

> "Recently a doctoral student at John Jay and I collected some data with judges—one hundred thirty-two judges, to be precise, from three different states. We found exactly the same pattern in this sample as we have with mock juries. Even in cases where judges ruled that a highly coerced confession was not voluntary by law, they continued to use that confession as a basis for conviction. Drawing on criminal justice statistics involving proven false confessions, Professors Steven Drizin and Richard Leo found that among innocent confessors who pled not guilty and went to trial, approximately four out of five were convicted. 'Here's the reason why I think these safety nets are doomed to fail and why I often ask the questions: What in God's name does it take to exonerate an innocent confessor? How can we get judges, juries, and other decision makers past the commonsense judgment that only perpetrators confess?' " (Kassin, 2010; see also Wallace & Kassin, 2011).

In one study of the effects of confession, false confessors are four times more likely to receive a prison sentence than true confessors (Redlich, Kulish & Steadman, 2011). They examined a group of 65 people who confessed. Thirty-five of them later said (in effect) "Wait-- that confession was false and I didn't do it." Thirty of them confessed, but continued to argue for their innocence on other grounds. The study was a retrospective analysis of criminals with mental health issues. A careful look at the differences between the two groups showed that those who later said that their confessions were false were questioned more times, took longer to confess, perceived the evidence against them to be weaker, and felt higher levels of external pressure to confess. And ultimately, those who recanted were found guilty of the charged offenses 4 times as often.

The Cascade of Errors That Follow a False Confession

The preceding section illustrates what researchers call a "cascade of errors" that typically occur following a false confession. Reviews of actual cases show between 73% and 86% of false confessions lead to wrongful convictions (Sangero & Halpert, 2011). Additionally, cases based on confession only (with no supporting evidence) were more likely than typical eye witness cases to contain forensic science errors--67% versus 45%--and to be accompanied by information errors--24% versus 6% (Kassin, Bogart & Kerner, 2012). There are multiple hypotheses (Kassin, Bogart & Kerner, 2012) as to why the cascade of errors occurs following a false confession:

1. When witnesses know about the confession, they form a firm belief that the defendant is guilty. They then see proof of their accuracy due to confirmation biases resulting from their newly-formed belief in the guilt of the accused. A confession is not merely a key data point; it overwhelms the entire data landscape. Knowledge of the confession may result in an increased desire of witnesses to aid the prosecution and the police. Research shows that not only do we tend to see what we expect to see, we also tend to see what we want to see.
2. Police and prosecutors may seek support for previously taken, recanted or disputed confessions by inadvertently (or perhaps consciously) leading witnesses to falsely identify their suspect in a lineup.

"The police say, "We did nothing wrong." A confession kind of steered them in a different direction, but obviously, there couldn't have been any physical evidence to tie him to it. So I guess you would have to say, the prosecutors did a very good job and the defense attorneys did a poor job."—Mock juror

Some researchers believe the evidence corruption problems are likely under-estimated:

> *"At present, only anecdotal data are available on this point. In one case, for example, John Kogut, who was eventually exonerated on the basis of DNA evidence, had alibi witnesses who withdrew their support once told by police that he had confessed. In a second case, Barry Laughman confessed to rape and murder. When two witnesses insisted that they had seen the victim alive after the confessed murder, police sent them home and said that they must have seen a ghost" (Kassin, Bogart & Kerner, 2012).*

The 1989 case of 17-year-old Marty Tankleff, who was wrongly convicted for the murder of his parents, illustrates the point. During a five-plus hour interrogation, the lead detective outright lied to Tankleff about the evidence—e.g., claiming that his hair was found in his mother's grasp and that his father, who was in a coma, regained consciousness and identified his son as the attacker. By citing the most trusted source in his life, police led Tankleff to wonder if he had blacked out and murdered his parents, ultimately leading him to question his own innocence. On the basis of a confession he gave but quickly retracted, Tankleff was convicted. Nineteen years later, his conviction was overturned and all charges were dismissed (Firstman & Salpeter, 2008).

Very recent research (Chrobak & Zaragoza, 2012) also illustrates that even when people fabricate explanations for memory gaps (aka "make things up") if the explanation contains a causal element they are likely to incorporate that fabrication into their own future retellings of the story. There is no sense that they are any longer making things up--the fabrication becomes part of the memory, part of the story we tell.

We simply long to know "why" things happen or "why" someone chose to behave in a certain way. In other words, what is recalled about a memory may not be the memory itself but what we recalled on a subsequent telling or retelling! This finding can have disastrous impact on the detainee who has falsely confessed. When witnesses hear that someone has confessed, they may (without consciously understanding what

they are doing) refine their recollection to support the believed-to-be true but actually false confession (Bridge & Paller, 2012).

What We Do Know About True and False Confessions

While the legal system has grave difficulty distinguishing between true and false confessions, there are some things we actually do know about the differences between true and false confessions. What we know (from research) is displayed in tabular format below for ease of comparison and review.

False Confessions	True Confessions	Research Conclusions
Typically result from the experience of external pressure (such as police interrogation).	Typically result from the experience of internal pressure (such as guilt, shame or feeling caught by the weight of the evidence).	Focus on interrogation techniques that increase internal pressure on suspects (Horgan, Russano, Meissner & Evans, 2012).
Contain more self-deprecations and doubts about own testimony. These are emotionally-based indicators.	Contain more unexpected complications in story. These are cognitively-based indicators.	Criminals tell convincing lies (Willëm & Strömwall, 2012) so proceed with caution.
Short-term gain in stopping interrogation, threats, protecting the true perpetrator as reasons for confessing.	Guilt & honesty, perceived proof against them, and confusion and ignorance as reasons for confessing.	False confessors more likely to claim external pressures while true confessors identify internal pressures as reason for confessing (Hamezelou, 2012; Redlich, Kulish & Steadman, 2011).
False confessors were interrogated more often.	True confessors were interrogated less often.	External pressure of repeated interrogations can lead to false confessions (Hamezelou, 2012; Redlich, Kulish & Steadman, 2011).
False confessors were interrogated for longer periods of time (sometimes for days).	True confessors were interrogated for shorter time periods.	The length of interrogation wears down the detainee and results in false confession (Garret, 2010).
False confession interviews were far more likely (12%) to be 4 hours or more in length.	True confession interviews were only 4 hours or more in length 7% of the time.	Most interrogations only last 1 to 2 hours and 3 to 4 hours is seen as sufficient for longer interrogations (Redlich, Kulish & Steadman, 2011).
False confessions were made significantly later in the interrogation process.	True confessions are made earlier in interrogation.	External pressure increases the number of false confessions (Redlich, Kulish & Steadman, 2011).

Suggestions for Decreasing Rate of False Confessions

After reviewing the literature, Sangero & Halpert (2011) believe a confession should only be viewed as corroboration of other key evidence, if any exists. Doing otherwise, which is common practice in the US, raises too much risk for the acceptance of a false confession, which is four times more likely to result in wrongful conviction. Essentially, Sangero & Halpert suggest up-ending the process so that a confession is considered last and not first on the road to prosecution and ultimate conviction. Other recommendations for decreasing the incidence of false confessions follow.

Training: Preventing false confessions begins with training. It is not, in most cases, due to police or prosecutorial misconduct. "That's what makes these cases so terrifying. These people are innocent, and yet the cases against them appear to be very strong because what happened in the interrogation room was not documented." (Adams, 2011).

Helping investigators understand techniques for increasing internal pressures rather than less reliable external pressure would

reduce false confessions. Building an evidence trail that does not rely on a recanted confession would further reduce error.

> **"I think the other thing he has to be careful about too is there are so many precedents and if you start doing this, like you said, because you don't want to give him too little, because then everybody is going to say, 'Well, I will just wrongfully say I did this and then five or ten years down the road, I can get $20 million or $5 million'." —Mock juror**

Banning Deception: Saul Kassin suggests banning the use of deception and outright lying during interrogation.

"I don't have a problem with confrontation using real evidence. But, once you confront a suspect with false evidence, you're treating the innocent just like the guilty. Once you do that, even the innocent are going to get really anxious and start looking guilty. It's a cycle that goes nowhere good.

Instead of lying, police often use bluffing. They don't say, "we have your DNA." Instead they say, "we picked up DNA and sent it to the lab." Kassin used to think this was a good approach. But now he notes that although bluffing can prompt the guilty to confess in order to cut a better deal, it can backfire when it comes to someone who is innocent. In this instance, innocent people often believe that the evidence will exonerate them, which paradoxically makes it easier for them to confess."

Videotaping: Many researchers suggest videotaping all interrogations, and not just the resulting confession. It is much easier for prosecutors, investigators, jurors and even judges to assess the validity of a confession if they can view a videotape of how the confession was achieved (Kassin, 2010). However, when videotaping it is critically important to pay attention to camera angles as how the videotape is shot can result in differences in guilt presumption (Lassiter & Meissner, 2010)! Specifically, research shows that when after a confession and retraction—a confession video only trained on the defendant is seen as more convincing/persuasive than one that displays both the defendant and the detective. Clearly, this is not an area of defense control–courts and law enforcement authorities who are committed to reducing false confessions would need to adopt different standards. It is also true that interrogation videotaping will provide defense counsel more material to work with in attempting to criticize police methods, which police and prosecutors will understandably resist. On the other hand, videotaping all interrogation sessions also offers police videotaped proof of legal interrogation practices when accused.

Using Transcripts: Research has also found focusing on content rather than suspicious or shifty behavior is the best way to identify deception. If interrogation sessions are transcribed, there are ample opportunities for counsel to show deception, coercion, threats and intimidation--or conversely, the lack thereof.

> **"I mean they have got to pressure you, and put pressure on you. But if you are innocent, you shouldn't feel any pressure. You should just stand your ground, 'No, I didn't do it, no, I didn't do it,' and be emphatic about it. So nobody could coerce me to say I committed murder if I did not do it. I don't care what you said was going to happen if I didn't." —Mock juror**

Shortening Interrogation Sessions: As interrogation sessions lengthen, the incidence of false confessions rises. Perhaps the simplest reform is a limitation on length of interrogation. This is not a new suggestion as a 6 hour limit was suggested back in 1997 and prominent interrogation manuals suggest 4 hours or less (Davis & Leo, 2012).

Avoid Presuming Guilt: Finally, maintaining curiosity rather than presuming guilt is imperative in the interrogation process. Much research shows that the presumption of guilt results in a more pressure-filled interrogation process which, in turn, leads to an increase in false confessions. Instead, researchers recommend that you presume the suspect is innocent and attempt to consider how an innocent might think during interrogation.

> **"He confessed and I still don't know why he confessed. Obviously, I think we all can assume that he was scared or lacked intelligence, I don't know. I don't know. So I am just more and more confused."—Mock juror**

Juror Education: While it is not typically allowed (or if allowed, the bar is set very high), there is ample evidence that teaching jurors about the possibility of false confession (by summarizing the research) may raise considerable doubt regarding the certainty of conviction (Blandon-Gitlin, Sperry & Leo, 2011; Forrest, Woody, Brady, Batterman, Stastny & Bruns, 2012; Sangero & Halpert, 2011). As shown in the mock juror comments throughout this paper, it is an automatic reaction to presume that you would never, ever confess to a serious crime unless you are guilty. The research itself offers a counter-intuitive conclusion.

This paper offers an overview of some perspectives drawn from the research on false confessions, and strategies for reducing their occurrence. Our goal in presenting this material is not to obstruct authorities from catching and convicting criminals, but to minimize error. In other words, to maximize the probability of getting it right, when both public safety and individual rights are at stake.

Photo illustration by Brian Patterson of Barnes & Roberts. Original image from 1949 film, "Knock on Any Door."

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Rita R. Handrich, Ph.D. joined Keene Trial Consulting in 2000 and has since worked on cases ranging from medical negligence to commercial litigation and intellectual property disputes. She is a psychologist with extensive experience as a testifying expert witness, management consultation and training in the multi-generational workplace. In addition to providing trial consulting services through KTC, she is Editor of The Jury Expert. Rita is a frequent contributor to "The Jury Room" – the Keene Trial Consulting blog [and ABA Blawg 100 honoree for 2010, 2011 and 2012].

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We asked four trial researchers and experts to respond to Douglas Keene and Rita Handrich's article. Saul Kassin, Walter Katz, Karen Franklin, and Larry Barksdale share their thoughts below.

Saul Kassin is a Distinguished Professor of Psychology at John Jay College of Criminal Justice in New York. Several years ago, Kassin pioneered the scientific study of false confessions, research for which he received a presidential award from the American Psychological Association. Currently funded by the National Science Foundation, he is senior author of a 2010 White Paper entitled "Police-Induced Confessions: Risk Factors and Recommendations."

Saul Kassin responds:

A new Ken Burns documentary just opened in theaters around the world. It's called The Central Park Five and it tells the story of five boys, 14 to 16 years old, who confessed in 1989 to the infamous rape of a young female investment banker who was jogging in New York's Central Park. Four of their confessions were on videotape—and they were compelling. At the time, the crime was considered one of the most heinous in the city's history. Within 72 hours, as the world watched, the NYPD had solved it.

The boys were promptly tried, convicted, and sentenced to prison for varying amounts of time. And almost no one blinked—until 2002, when Matias Reyes—a serial rapist serving a life sentence—stepped out from the shadows of prison and proclaimed that he alone was the Central Park jogger rapist. When the District Attorney's office pulled out their case file to re-examine the evidence, they discovered that the DNA taken from the rape kit thirteen years earlier had indeed belonged to Reyes. He, not the boys, was the rapist. They were innocent. Their confessions, all five of them, were false.

This case illustrates the two psychology-rich subplots surrounding confession evidence that Keene and Handrich (2012) describe in "Only the Guilty Would Confess to Crimes". Encased by their question, "Why do false confessions occur?" the first subplot concerns the psychology of social influence and decision-making and the interrogation tactics that police are trained to use to get suspects to waive their Miranda rights and confess. Keene and Handrich note that interrogation can wear down just about anyone, producing a state of short-term or myopic decision-making. Some suspects are particularly weak and malleable—notably, juveniles, people with cognitive deficiencies, and people who are compliant, anxious, delusional, suggestible, or otherwise psychologically disordered. Still, it is important to understand about American police interrogation that it is, at its core, a highly guilt-presumptive process (I have lost count of the number of investigators who have uttered the words "I don't interrogate innocent people")—which explains its often relentless nature, as detectives refuse to take NO for answer, calling the suspect a liar, and plowing forward with accusations and assorted means of trickery and deception.

The inconceivable fact that innocent people can be induced to confess to crimes they did not commit is only half the story. As signaled by the question "Why is it so hard to distinguish between true and false confessions," the second subplot found in virtually all false confession cases concerns the fact that prosecutors, judges, juries, appeals courts, and just about everyone else have the nasty habit of believing false confessions—hence, there are no safety nets among decision-makers in the criminal justice system. Part of the problem is that common sense arms us to trust confessions, which are after all, statements against self-interest. Another part of the problem is that false confessions—just like true confessions—often contain details about the crime that are accurate and not in the public domain, providing alleged "proof" of the suspect's involvement. A third and particularly troubling problem concerns, as Keene and Handrich put it, "The Cascade of Errors That Follow a False Confession." In recent years, my colleagues and I have observed that confessions are so prejudicial that knowledge of their mere existence can taint eyewitness identifications as well as the judgments of forensic science experts. The result is a forensic confirmation bias in which additional errors of evidence multiply the influence of the true or false confession on which they are based.

In addition to describing the limits and pitfalls of confession evidence, Keene and Handrich describe the suggestions for reform that my colleagues and I have proposed over the years. Chief among reforms is to require the electronic recording of interrogations—not just the final confessions, as in the Central Park jogger case, but the entire process that was used to elicit these statements. Just before the Central Park defendants were exonerated in 2002, I wrote an op-ed article in the New York Times in which I noted that "this simple procedural reform will deter police coercion, deter frivolous defense claims of coercion, and enable trial judges and juries to assess the veracity of taped confessions." A dozen states and hundreds of jurisdictions are now taping full suspect interviews and interrogations. New York City added itself to the list this past month. This will help. Keene and Handrich go on from there to describe other suggestions arising from the research community—most importantly, in my view, a ban or at least serious curtailment of the false evidence ploy by which interrogators lie to suspects about eyewitness identifications, polygraph results, forensic examinations, and other allegedly incriminating evidence that does not exist. Outright lies about evidence—which many Americans do realize to be lawful—cause suspects to feel trapped, disoriented, and in need of escape via confession.

To the average person, false confessions are indeed a mystery. In laboratories and field settings, however, and informed by case files from wrongful convictions, psychologists and other researchers have begun to demystify the phenomenon. With help from Keene, Handrich, and others, what we have learned will become matters of public knowledge. With this knowledge, I believe, will come justice.

Walter Katz served for seventeen years as a criminal defense attorney in Southern California first at the San Diego Public Defender and then the Los Angeles County Alternate Public Defender. He left the defense practice in late 2010 to join the Office of Independent Review which manages the oversight and monitoring of the Los Angeles Sheriff's Department and other agencies and has also taught courses in the use of technology and persuasion in the courtroom.

Walter Katz responds:

For a criminal defense trial attorney, the challenge raised by Drs. Keene and Handrich is how to translate the counterintuitive nature of a false confession to a panel of jurors so that the natural tendency to discount such a "don't believe me then, but believe me now" claim is overcome. As the authors point out, however, jurors are not the only actors in the trial process whose natural tendency is to discount the recantation. The police investigator, the prosecutor, the judge and even the defense attorney are all prone to disbelieve the claim of a false confession on its face, but for different reasons. The defense attorney must overcome his or her own assumptions and experiences with the power of the confession to provide an effective defense.

To understand what the defense attorney must do to prepare for this complex defense, it helps to have some insight into how and why the interrogation actually happened. In many cases, the interrogation is the last step of the investigation after the police interviewed witnesses and collected physical evidence. The interrogator will often use the suspect to clean up loose ends, or as I have seen, where there is nothing but a weak identification, the suspect's confession makes the case.

It is important for the trial practitioner to understand how the investigator was trained to interrogate a suspect. It is essential to know the techniques taught by John E. Reid and Associates. The company conducts training seminars, provides expert testimony and publishes materials that are the foundation of police interrogations across the country. Their text book Criminal Interrogations and Confessions by Inbau, Reid, Buckley and Jayne is an absolute must-read as it lays out in stark detail the hows and whys of police interrogations and is forged in the belief there is a "behavioral model of the truthful individual versus the subject who is withholding or fabricating relevant information." If the defense attorney is engaged in a serious case, like a murder trial, it is highly likely that the detectives were trained in the Reid method or at least have read their materials.

While Criminal Interrogations and Confessions spends some time on the notion of false confessions, it treats them largely as a fabricated defense because it views its trained interrogators as having the penetrative insight to distinguish a "good" confession from a "bad" confession. The challenge, of course, is for the defense attorney to try to weigh the claim that a confession is false before embarking on pulling together all the necessary tools to challenge the reliability of the confession at trial.

In a typical trial, the confession is some of the most powerful evidence to present to the jury. Who better, the prosecution will ask, to tell the story than the actual perpetrator? A strong prosecutor will often begin or end her presentation of evidence with the confession as either the springboard for the evidence to follow or as the icing on the cake. It is very dispiriting for a defense attorney to put his or her full effort into challenging the various pieces of evidence coming before the jury knowing that at the end they will hear a recording of the client's confession. It is very important then to remove any preconceptions that the confession is good or bad and carefully examine all the other evidence, the content of the confession and the behavior of the client to determine if challenging the authenticity of the confession in front of the jury is a viable defense. To instead assume that the confession is "good" will undermine the attorney's effectiveness right out of the gate.

It is also critical to know the client extremely well. Because those who are young or who have "psychological or cognitive vulnerabilities," are the most susceptible to provide a false confession, they present the additional hurdle of being some of the more difficult clients with whom to develop a productive attorney-client relationship. It is incumbent on the attorney to develop their trust, because important information will have to be gleaned to effectively challenge a confession's reliability. The attorney will need to obtain the client's consent to obtain medical, behavioral and education records to learn about his or her background in detail. Friends and family will have to be interviewed and the right questions have to be asked of the client. Asking the client whether he ever had a traumatic brain injury may not get the attorney very far, but look out for a far better response rate by asking, "Have you ever been knocked out," or "were you ever in a car accident," or "were you in special ed. in school?"

The criminal defense attorney will also need the right experts. If the attorney is a public defender or a private court-appointed counsel, the options of what psychiatrist or psychologist will be available for the initial evaluation may be limited. Choose a doctor who has worked with and understands the type of client being represented. If the medical records or initial evaluation disclose some cognitive deficit, consideration should be given to seeking the expertise of a neuropsychologist or neuropsychiatrist.

Once the defense attorney is ready to move on from the initial evaluations of the client's behavioral and cognitive qualities, the question becomes to what extent can evidence be established that the confession was indeed false? I would highly recommend that the attorney becomes familiar with the work of Dr. Gísli Guðjónsson who was instrumental in the overturning of two notorious cases in the United Kingdom whose convictions relied on what were later found to be false confessions – the Birmingham Six and the Guilford Four. Dr. Guðjónsson developed the Guðjónsson Suggestibility Scale (GSS), which is designed to measure how suggestible a subject is to coercive interrogations. His The Psychology of Interrogations and Confession: A Handbook is a valuable source. Ask your expert whether they are familiar with the GSS, and whether they have administered it and testified about it before.

In the United States, I am most familiar with the work of Dr. Richard Leo, PhD, JD, who is on the faculty of the University of San Francisco School of Law. He has researched and written

extensively about false and coerced confessions.[1] I have used Dr. Leo in the past as an appointed expert and as a resource for assistance in establishing a false confession defense and have found him to be extremely knowledgeable on the subject and very approachable.

During trial, the defense attorney will be faced with a number of hurdles in seeking to challenge the reliability of the client's confession. Drs. Keene and Handrich alluded to most of them, but I believe that there are three basic components to effectively challenge the confession's reliability:

1. The first obstacle is voir dire. As mentioned, most jurors believe they would never confess to something they didn't do. Potential jurors will have to be carefully questioned to examine whether he or she has sufficient insight to question his or her own pre-conceptions. Asking outright, "do you agree that someone can confess to something he didn't do?" may not be effective as the prosecutor is likely to strike any juror who readily agrees. The attorney may be better off, for example, finding jurors who have a history where either they or a family member has faced the same types of behavioral or cognitive challenges the defendant has dealt with.
2. The attorney has to be ready for an all-out fight to get the confessions expert on the witness stand. From the outset, one has to think about establishing the foundation that the reliability of the confession is at issue and that the proposed testimony is beyond the common experience of a juror so that the expert's testimony will have value. The prosecutor will strenuously argue that reliability of the confession is a matter of "common sense" which, of course, does not require an expert. Many judges are disinclined to allow testimony in areas such as confessions, memory and identification. Thus the defense attorney will have to work hard to educate the judge about the various factors present during interrogations, which only an expert can explain, and how those factors interrelate with someone who shares the suspect's various behavioral or cognitive traits.
3. The attorney will in all likelihood have to prepare his or client to testify to disavow the confession and explain why he originally confessed. The testimony will present a paradox, as the defendant has to cogently explain what occurred during the interrogation that so overwhelmed the natural inclination not to admit to something he is innocent of but, at the same time, the client must not do so well on the witness stand that the jury will conclude that the defendant is too capable to have confessed falsely.

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[1]"False confession" and "coerced confession" are not interchangeable terms. A false confession is where the subject has confessed to a crime they did not actually commit. During trial, the defense will challenge the reliability and weight of that confession. A coerced confession may not be false, but the defense is alleging that it is inadmissible because of the egregious conduct of the interrogators.

Karen Franklin, PhD is an award-winning forensic psychologist in Northern California and an instructor at Alliant International University in San Francisco. She blogs about forensic psychology topics at forensicpsychologist.blogspot.com.

Karen Franklin responds:

Disputed Confessions: The Many Hats of the Expert Witness

This is a terrific overview of a troubling phenomenon that is far more common than most people realize. With its concise summary of current research findings and references, the article should be required reading for criminal attorneys, investigators, judges, law enforcement officials, and students of law and public policy.

The article raises a next question: As a well-informed practitioner, what can you do when confronted with a case in which the confession seems problematic? In what ways might an expert be able to help you explain the confession to a judge or jury, or even help you get it excluded from court altogether?

There are several types of expert evidence that can be introduced in court in cases of disputed confessions. These broadly involve "pure" academic research, clinical assessment, and a combination of the two.

Scientific Research on Confessions and Memory

Expert testimony is considered admissible in court when the subject matter is beyond the ken of the average juror. Police detectives' use of psychologically manipulative techniques that elicit false and unreliable confessions (such as minimization, maximization, the bluff, and false evidence ploys as described in this article) are often subtle and their coercive power is not readily apparent absent specialized knowledge. In addition, most people find it counterintuitive that, absent outright physical torture, a person would confess to a crime he or she did not commit. Thus, expert testimony may be essential in order to educate jurors and judges as to the mechanisms that may produce false and unreliable confessions.

Contrary to Keene and Handrich's assertion that such evidence is "typically not allowed," courts are increasingly recognizing that failure to allow such testimony may contribute to miscarriages of justice. Accordingly, social psychologists have been permitted to present the scientific research on confessions to juries in hundreds of trials (Costanzo & Leo, 2007). However, such proposed testimony is often subjected to rigorous Daubert or Frye evidentiary challenges. Depending in part on the evidentiary standard and case law in a given jurisdiction, such evidence has been excluded in some cases as scientifically unreliable, not generally accepted, or even – in some cases – not beyond the common-sense awareness of the jury (Quintieri & Weiss, 2005).

In addition to testimony on police techniques that may generate false confessions, academic testimony may be desirable to educate jurors about the vagaries of memory. Such evidence can help triers of fact understand how a suspect's memory may be contaminated by being fed false information – either intentionally or inadvertently – by police. Also, as Keene and Handrich note, people may incorporate distortions into their future retellings of a story, becoming oblivious to the fact that their memory is faulty (Chrobak & Zaragoza, 2008).

The Person, the Situation and the Interplay Between the Two

Besides coercive police techniques, the other central element in many false confessions is individual vulnerability, as well summarized here. Indeed, a long line of case law admonishes courts to consider not only an individual's vulnerabilities, but also the specific circumstances of the interrogation, and the interaction between the two (e.g., Crane v. Kentucky, 1986). Thus, as opposed to purely theoretical evidence, courts are even more inclined to allow clinical testimony connecting a confession with the person's individual vulnerabilities.

For a lengthy appellate exposition on the distinctions between pure expert testimony on false confessions and clinical testimony about the defendant's psychological makeup, see Michigan v. Kowalski, 2012, in which the former was ruled properly excludable but the latter was not. The Michigan Supreme Court majority dismissed the dissenters' alarmist rhetoric that allowing clinical testimony would "open up the floodgates for expert testimony" and turn criminal trials into "battles of psychological experts." Rather, they said, such expert testimony is important to furthering a trial's "principal mission, the search for the truth."

As Keene and Handrich explain, among those who are more susceptible than the average person to coercive psychological tactics are young people and individuals with psychiatric and/or cognitive vulnerabilities. For example, developmentally disabled people are not only easily confused, but they are often quite acquiescent, tending to go along with the suggestions of authority figures (Sigelman, Budd, Spanhel & Schoenrock, 1981). Young people, in turn, are not only inexperienced at dealing with police, but they are also notoriously impulsive, often overvaluing immediate rewards over long-term consequences. Thus, they may say whatever they think detectives want to hear just to escape the stressful confines of the interrogation room.

As Keene and Handrich importantly describe, African American and Latino suspects are another group at heightened risk of false confession. Their awareness that their captors will assume them guilty can lead to feelings of hopelessness and heightened anxiety. Paradoxically, this very anxiety can translate into physical behaviors that the interrogator perceives as evidence of guilt, such as fidgeting or avoiding eye contact (Najdowski, 2011).

Psychological evaluations may also be helpful in determining whether an individual has personality traits that are associated with a greater-than-average tendency to accede to interrogative pressure, such as anxiety, dependency or naïveté. In particular, forensic psychologists who specialize in this area may assess for interrogative suggestibility, or the tendency of an interviewee to acquiesce to leading questions, especially after being subjected to negative feedback. Useful in such assessments is a specialized instrument, the Gudjonsson Suggestibility Scales (Gudjonsson, 1997), developed to help identify people who are particularly susceptible to giving erroneous accounts of events when subjected to police questioning.

The clinical evaluator will also assess for temporary psychological states that are known to contribute to false confessions. These include sleep deprivation, intoxication, and emotional states such as sadness, grief or anger.

Evaluations of Miranda Procedure

Distinct from whether a confession is reliable, to be admissible in court it must have been given knowingly, intelligently, and voluntarily (Miranda v. Arizona, 1966). Evaluating whether a criminal suspect understood his rights when he talked to police is a specialized area of forensic practice with parallels to other areas of legal competency, such as competency to stand trial or competency to execute a will (testamentary capacity). Typically, this evidence is presented at a pretrial hearing to determine whether the confession must be excluded altogether because it was illegally obtained.

My one substantive criticism of this excellent overview is that it perpetuates a subtle dichotomy between good (innocent) and bad (guilty) suspects, suggesting that the innocent are in special need of protection from coercive police tactics. In actuality, multiple studies show that about half to three-quarters of all people who are arrested for a crime – and a far higher proportion of juvenile suspects – make incriminating statements to police (Gudjonsson, 2003). The fact that most of these suspects are in fact guilty in no way detracts from their vulnerability. For our Constitutional guarantee of freedom from forced self-incrimination to mean anything, it must apply equally to both the innocent and the guilty.

Indeed, in my work both as a psychologist and as a criminal investigator, I have seen numerous examples of police trampling the rights of suspects, both guilty and not. One particularly egregious practice that is gaining traction in the current repressive climate is the "implicit waiver" technique, which recent court rulings have upheld as legal. Rather than reading a suspect each Miranda right and then checking for comprehension, a detective will race through all of the warnings and then launch directly into questioning, without even perfunctorily asking the suspect if he understands his rights. If the suspect does not object or explicitly voice a lack of comprehension, this is taken as evidence that he understood his right to remain silent, and knowingly and intelligently waived it.

In one recent case that I was involved in, for example, this procedure was used on a 15-year-old Mexican boy of below-average intelligence, for whom English was a second language, and who was intoxicated on drugs and alcohol at the time of his arrest. It is not hard to see how a clinical evaluation and expert testimony might help provide perspective on the legality of the Miranda waiver in such a case.

Evaluation of a defendant's competency to waive Miranda

rights typically includes administration of psychological tests to determine intelligence and to identify any psychiatric impairment. The evaluator also conducts an in-depth interview focused on the exact circumstances of the interrogation and the Miranda admonishments.

Thomas Grisso and colleagues have developed a set of four specific tests, newly revised, to evaluate Miranda waiver competency (Goldstein, Zelle & Grisso, 2012). These tests assess a defendant's understanding of the warnings, ability to communicate that understanding, and appreciation of the purpose of the warnings and the risks inherent in waiving them. Although these tests provide a standardized method of evaluating a suspect's capacities, they do have limitations. Chief among them is the time gap between the interrogation and the forensic evaluation. The defendant may have a greater understanding of his Miranda rights than he did at the time of the interrogation or, alternately, he may have acquired an understandable motivation to distort his prior level of understanding.

No matter what type of expert testimony one is seeking to introduce, and at what stage of the criminal proceedings, it is important to keep in mind that the expert cannot answer the so-called "ultimate issue" of whether the confession is true or false. The expert's role is to provide relevant information about the individual and/or the applicable scientific research, information that can assist the trier of fact in deciding the ultimate legal issues.

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Larry Barksdale responds:

Only the Guilty Confess to Crimes

After 41 years of experience as a law enforcement officer, my perspective on confessing to crimes is based on several assumptions that I believe are widely, though informally, recognized by the law enforcement community.

Assumption 1: There are no absolutes.

No one tells the truth because there is no such thing as the truth. The truth is only what is accepted in court as fact. Research in cognition and perception seem to bear this out as phenomena of the human condition. Law Enforcement officers are therefore in the information gathering business. It is their job to get as much information as possible on a given event. In any event, an interviewer gets only the first best story, or, as it is often facetiously called, the "first best lie." An experienced interviewer knows that there is often more to the story. Witnesses often have additional information to add to the first story. Victims often remember more after time. Suspects change stories just like job applicants reveal more about themselves the longer you talk to them. Ferreting out as much information as possible is the avenue to getting close to a reasonable and believable story. It is the process used by law enforcement officers to get as close as possible to reality.

Assumption 2: Interviewing skills matter.

Interviewing techniques and skills can elicit more information than single direct questions such as, "Did you see anything?" or, "What do you know?" Engaging in verbal and non-verbal feedback cues such as "OK," "Thank you, this helps. Anything else?" and, "What do you think might have happened?" are cues that may help facilitate the information gathering, keep

narrative going and maximize the information. Cognitive interviewing techniques such as telling a story backwards, thinking of color or smells in relation to an event, and thinking of sounds can often help get more information in victim and witness interviews. As examples, simple techniques used by the interviewer to get additional information may be those that play upon a suspect's sense of fairness, persistence and insistence, actually providing information about physical evidence, or allowing a suspect to tell "their side of the story".

Promises, threats, money, and "interviewing and interrogation techniques" can also elicit more information. Inflicting physical pain or communicating the threat of physical pain gets more information as well. Legal and ethical issues may prohibit some interviewer behaviors. I don't mean to lessen the depth or applicability of techniques, or to approve techniques, by the preceding comments, but merely to establish that skill, training and experience often identify those who are able to get more information from an interview or an interrogation. There are enumerable training courses on interviewing and interrogation techniques. It is the mandate of every law enforcement officer to continuously develop their information gathering skills via narrative from people they interview. It is also the mandate, however, to maintain legal and ethical standards during interrogations. There are tactics that may well be very effective—but that are neither legal nor ethical.

Assumption 3: Only the guilty confess.

Another way to think of this is that those who are not involved as perpetrators will provide as much information as they are able to provide when asked to provide the information. Unfortunately, it is a false assumption that all "good citizens" will come forward with any information they might have on an event. Examples of how we expect this to happen are evidenced by the news broadcasts of suspect's descriptions, Facebook and other websites "wanted persons" postings, Twitter crime alerts, and the Crimestoppers programs. Law enforcement officers know, however, that neighborhood canvasses, business contacts, and other sources have information that must be specifically solicited if it one is to get the facts required. All good citizens and not guilty persons do not always come forward voluntarily with information. Sometimes they must be helped to provide that information. The bottom line is that more people who are not guilty provide information than do people who are guilty.

Assumption 4: Everyone has a price tag.

This is a button to be pushed by the interviewer that goes far beyond money alone. Good citizenship appeals, lessening of culpability, money, revenge, spitefulness, fear of exposure or harm to oneself or significant others, self-promotion, sense of guilt, and wanting to get the interrogation over with are some of the buttons that can be pushed to get information. The utility of button-pushing includes the not guilty as well as the guilty. The duty of the interviewer is to be persistent in pushing those buttons to get the maximum information from every source.

Assumption 5: There are rules to play by.

For example, waterboarding is not permitted by civil law enforcement agencies in the United States. Private and public interviewers are trained in the limits of the rules. These rules are not always clear however, and experienced law enforcement officers know that the rules change on a regular basis. In my 41 years as an active law enforcement officer, the required process for Miranda warnings has changed numerous times. At one time there was not a requirement to read Miranda warnings on misdemeanor arrest situations. Few law enforcement officers read Miranda on traffic citation cases if the offense, such as a speeding violation, did not have a penalty that included incarceration.

However, in 2012, on felony and misdemeanor arrests, when the person is in custody or there is a possible jail sentence, the rule is to read Miranda warnings. Twenty years ago, the requirement was to "read" Miranda when an investigation focused upon a person and that person was in custody. Today, the rule seems to be that Miranda only needs to be read if a person is in custody and only if they are not familiar with Miranda rights. Hence, if you are standing on a street corner "talking" and then let the person go, you do not need to read Miranda rights if you can testify you were "only gathering information and had no immediate plans to arrest the person."

When I first started in law enforcement in the late 1960s, it was acceptable to put a pencil between a suspect's fingers and squeeze the fingers to use pain to cause a person to talk. I even recall being told that if a female was resisting arrest or not being cooperative that squeezing and twisting her nipples would make her cooperative. Over the years, I have attended interview and interrogation schools in which several days were spent on developing "lies" that would convince a person that you had information about physical evidence or information from an accomplice or informant. It is not easy to be a good liar. It takes training and practice for most people, because "good" people are raised to tell the truth.

In 2012, in the United States, civil police practices are such that inflicting physical pain or touching intimate body areas are not allowed and would be criminal behavior by the police. Blatant lies that can be construed as coercing a person are often suppressed in a confession. A response to this issue is to say something such as "What would you say if I told you we had your fingerprints that matched, and your DNA is on the bathroom door?" An awareness of the rules, a compliance to the rules, and a willingness to test the boundaries of the rules are the mandate of contemporary law enforcement interviewers, in the quest to maximize the gathering of information.

Assumption 6: Without physical evidence a confession is meaningless.

You do not have a case without evidence. I was told this repeatedly by experienced officers and investigators who were training and mentoring me during my early years as a police officer. Whether you were investigating traffic accidents or helping with a burglary investigation: physical evidence was all-important to a successful investigation. This was advice intended to reinforce the importance of physical evidence

and to justify the time spent to gather and interpret physical evidence.

Confessions were also an important part of an investigation, but evidence was important to corroborate witness, victim, and suspect statements. The idea was that physical evidence and testimonial evidence had to all come together to provide a theory of what took place in a given event. If there was a glitch between physical evidence and stories, including that of a suspect confession, then more information was needed to "prove" the case. A contemporary movement is the concept of "evidence-based" investigation. I wholeheartedly support this orientation towards criminal investigations, but acknowledge that confession are very powerful information in convincing a jury of guilt.

There were mistakes. In my 41 years as an active police officer, I have been involved at least peripherally with well over a dozen cases in which a person was wrongly convicted or falsely accused, or wrongly not accused or wrongly not convicted. Just as there are cases in which a person was wrongly accused and wrongly convicted there are cases in which there was overwhelming information to accuse a person but due to political reasons, lack of oversight, or lack of thorough and competent evaluation of information, there were not legal charges brought in the case.

I totally agree with the authors, Douglas L. Keene and Rita R. Handrich, that people confess to crimes when they did not commit the crime. I accept the reasons put forth as valid explanations of what leads to people confessing to crimes when they did not do the crime. I concur that withholding information that would tend to disprove the validity of a confession is a miscarriage of justice. Inflicting physical pain, deception, psychological abuse, and other acts that fall outside the legal definition as acceptable interview and interrogation behavior have no place in the behavior of the civil police. I wholeheartedly support review, supervision, and punitive personnel actions for law enforcement personnel who violate the rules.

However, the authors also seem to suggest that the primary culpability in cases of false confessions lies with the law enforcement component of the process. I do not agree with this. Outside of intentionally or grossly negligent violation of rules both statutory or administrative, the culpability lies also with the practicing attorneys and the courts.

The police are the primary information gatherers. I submit that putting in place training and practices that negate or lessen the assumptions outlined in my response would serve to minimize the information gathering function of law enforcement. This does not mean that law enforcement should not be kept up to date with research results, legal interpretations, techniques of information gathering, and other methods to improve the information gathering process. I suggest, however, that defense and prosecution components of the process and the courts need to be the watchdogs of rule violations. They need to be proactive in evaluating the information gathering process and in interpreting the information so gathered.

The authors suggest several avenues for decreasing the rate of false confessions: training, banning deception, videotaping, using transcripts, shortening interrogation sessions, avoiding presumption of guilt, and juror education. These are excellent suggestions, but seem to me more directed at handcuffing the initial information gatherers (e.g., the law enforcement component) as opposed to addressing the total systemic response to wrongful confessions leading to wrongful convictions.

As one example, the law enforcement component gathers information from various sources to focus an investigation on a suspect. When it reaches the point that a person is brought in for an interview as a suspect, the mindset of the law enforcement interviewer should be that the person is guilty and that the job is to get the guilty person to provide information that corroborates their guilt. This is not a simple task. Interview and interrogation in a criminal investigation setting can be a physically and mentally demanding process. It is just not a go in, sit down, strike up a casual conversation, read the Miranda warnings, ask "tell me what you know," and then walk away with a successful interview. It can take persuasion, breaking down the tendency of the guilty to not tell on themselves, mental strength to stay with the interview and to be on your toes to interpret and respond to interviewee responses, and finally, the physical energy to stay at the interview for hours. The goal of law enforcement is maximize the information and not act as an advocate for the suspect.

My opinion is that law enforcement interviewers need to believe that "only the guilty would confess to crimes" in order to effectively complete the hard work of information gathering and interviewing. I submit that otherwise law enforcement interviewers are asked to be more soothsayers than information gatherers. They are asked to try to resolve a "cognitive dissonance on the run" in which they continuously evaluate if they are getting a false confession or a true confession and focus more on probative evaluation of information than information gathering. I am speaking here of the actual interview process and not the after-interview evaluation of the evidence.

Training to be aware of false confessions, enhancing interviewing techniques to include an awareness of creating internal pressures, restricting the scope of deception, videotaping interrogations, and use of transcriptions are all suggestions I would support. I don't know though, how you can put a time limit on interviews and how you can enforce banning deception. I suggest that if all interrogations are taped from being to end, without shutting off the tape if there is a break, the courts have the role of deciding if the interrogation was beyond acceptable behavior.

I think litigation against law enforcement agencies for interrogations that go beyond acceptable behavior is a method to enforce reasonableness related to length of time. If a person started to confess after 3 hours and 45 minutes it would not seem good practice to shut down the interrogation at the 4 hour mark. I also don't know how to enforce banning deception. There are many levels of deception. For example, expressing disbelief by facial expression and other non-verbal communication can be a form of deception. I would not condone telling a suspect that "we have your fingerprint on the gun at the scene" if the suspect's fingerprint was not on the gun at the scene. I would support an interrogator saying

something like "How would you explain your fingerprint being on the gun at the scene?". You would expect someone who was not guilty to adamantly say something like "My fingerprint would not be on the gun because I was not at the scene and I don't know what you mean about the gun, because I have never had a gun in my hand." If the person said "I don't know. What gun are you talking about?" there would be a different response than the previous questions. There needs to be room in the interrogation process to pose questions that are probing in order to use the response to help guide the future stages of the interview.

I would like to offer a few additional suggestions for lessening the probability of false confessions.

Involving forensic linguists and techniques of statement analysis can help the information gathering process. A simple process is to ask a person to write out the story of what they know about a certain event. This is a technique useful for witnesses, victims and suspects since it provides a narrative transcript in the words and style of the author. It provides opportunity for analysis in terms of the ability of the author to communicate and put together thoughts; it speaks to the sophistication of the author in using language; and it can suggest areas that warrant exploration in a subsequent interrogation. I have had persons who wrote out a confession who would not talk during a formal interrogation. I have had witnesses for which the handwritten statement indicated a change in thought, and when questioned, the witness provided information that exonerated a person previously thought to be a suspect.

There is ongoing research in statement analysis and in formal forensic linguistic analysis. Law enforcement interrogators, attorneys, and judges should not assume they know all there is to know about language and discount the value of intuitive, pragmatic, and scientific analysis of language. It is also interesting that forensic linguistics have successfully testified to exonerate persons based on linguistic analysis. Dr. Roger Shuy, Dr. John Olsson, and Dr. Carole Chaski are a few practicing linguists who have engaged in forensic linguistic analysis.

Consilience: The concept behind consilience is that all the information must come together to point to a single believable explanation. If this is not the case, there is a need for more information or a better interpretation of the information. The authors have noted the need to focus on physical evidence as the basis for identification of suspects and for assuming guilt. They have suggested that interrogations follow collection of physical evidence. I think this is an excellent theoretical proposition, but I do not think it is a very useful practical process. There is a need, I suggest, for iteration in investigations. Information from interviews and interrogations should feed back into discovering physical evidence, and physical evidence should feed back into guiding interrogations. In other words, the physical evidence and interview and interrogation results should go hand-in-hand throughout the process.

Physical Evidence: The authors suggest a focus on physical evidence. I whole-heartedly agree with this. I would go so far to say that without physical evidence to corroborate a confession, the confession should not be admitted as evidence in a court. The problem with physical evidence is that the system is bogged down due to specialization, compartmentalization, law enforcement heroics and antiquated systems of evidence identification, collection, documentation and evaluation. In many law enforcement jurisdictions uniformed law enforcement officers must wait hours for specialists to come process evidence. Evidence based investigation that starts with the first responder is a viable approach to investigations that puts confessions and information gathering in the proper perspective with the total process.

For example, in many jurisdictions, a law enforcement officer stops a vehicle for erratic driving. The driver gives permission to search the vehicle. The law enforcement officer finds a handgun under the front seat. The law enforcement officer must wait for a crime scene investigator to come to the scene, photograph the vehicle and the position of the handgun, remove the handgun and place it in evidence, wait for the handgun to be examined for fingerprints of trace evidence, wait for information on the status of the handgun as stolen gun or one used in another crime. The uniformed officer must allow someone in the criminal division to follow-up on this information, to do interviews, and prepare any reports for charges. The mere time factor in the log jam of information takes away any element of surprise in an interrogation and the application of internal pressures. It lessens the consilience aspect of information use, and it makes the uniformed officer less of a stake-holder in the successful resolution of the problem.

Let's contrast this process to that of a nearby jurisdiction, where the uniformed officer makes the traffic stop, gets permission with his or her pocket tape recording all conversations and her police vehicle video camera recording all actions. The officer finds the handgun, uses a department-issued digital camera to take photographs, removes the handgun and looks it over for any trace evidence, gets the information on the handgun and runs it to see if it was stolen. Finally, the officer does a quick interview at the scene, with tape recorder running, and then makes decisions on whether to arrest the driver of the car, tow the car, or ask for assistance.

If the person is arrested, the officer follows through with that, and processes the handgun for fingerprints in the field. All the physical information that might apply is readily available for the interrogation, it is timely, and the entire process is in the hands of the police officer who had the most intuitive and realistic information. I submit that in the second scenario the physical evidence is more useful, the interrogation is of a better quality, there is the chance for oversight, less of a chance of officer misconduct, and the entire investigation is more complete. Experience in jurisdictions where there is a generalist officer concept such as just described have borne out this belief.

Physical evidence utility goes beyond the previous street scenario. Efforts to vigorously gather physical evidence are not nearly as robust as they once were. Many jurisdictions have dropped trace evidence efforts and cut back on comparison on footwear impressions, tire track impressions, toolmarks, and fracture matches. The void in physical evidence gathering has not been filled by other practitioners. All lab physical evidence primarily focuses on DNA, toxicology, fingerprints, or firearm examination.

A new model for physical evidence needs to be developed to address the relationship between physical evidence and false confessions. It may be the case that first responders are more in a position to identify, gather, and interpret physical evidence in the comparative evidence genres. I would hate for my DNA to be on a firearm I sold to someone and discover they had used the firearm to commit a crime. I would further hate to be accused of murder in a situation where there were a number of dog hairs on a victim body, and long blue and red cotton fibers on the body but I did not own a dog nor have any clothing that was red or blue. I would further hate for there to be a partial footprint of a waffle stomper shoe pattern when I didn't own such a pair of shoes. I would hate to be accused of the crime because my DNA was at the scene. Let's even say I talked with police and denied involvement but admitted I hated the victim, and the police charged me with a crime but did not consider the dog hairs, shoe impression, and fibers. This would be especially egregious if the person to whom I sold the gun had waffle stomper shoes, a dog, and a University of Nebraska red sweatshirt, blue sweat pants, and had been seen knocking on the back door of the victim's house. Perhaps uniformed officers and detectives can be trained to do an initial evaluation of dog hairs, partial shoe tread marks, and fibers so physical evidence is not overlooked, discounted, and is timely enough to be used in an interrogation.

In conclusion, I think the authors have provided a great service in sharing their research. It should be the goal of all involved in the criminal justice process to be vigilant against mistakenly using false confessions. It is especially important for the law enforcement interrogators to gather all possible information, but to evaluate all confessions in the after-interrogation process.

It is the function of all involved in the criminal justice system to promote the concept of consilience as a component of the vigilance against the generation of false confessions and the misuse of false confessions. I submit that this vigilance is not only something that must be addressed by police behavior, but more importantly it must be addressed and vigorously applied by defense attorneys, prosecutors, and judges.