Legal Cases Sorted by Category

For many years we have published on our website and through our quarterly newsletter legal updates of cases which address relevant interview and interrogation issues. In this document we have attempted to categorize hundreds of cases into a number of categories for easy reference. We will continue to update this list on a regular basis. ******

We do not offer legal advice, but simply report on court decisions.

*** Please note: the links in this document have been disabled.

Expert testimony on witness credibility

(*Court rules defense expert testimony on the credibility of the victim inadmissible*)

In *State v. Evans* (May 2016) the Missouri Court of Appeals, Western District upheld the lower court's opinion that the defendant's proffered expert testimony on the credibility of the victim was inadmissible. From the Court of Appeals opinion:

Evans contends the circuit court erred in excluding the testimony of Dr. Bruce Cappo, a psychologist who evaluated the victim's medical records. Evans argues that Cappo would have informed the jury about the victim's mental health issues, specifically, her bipolar disorder, and demonstrated that the victim did not accurately perceive Evans's actions due to her disorder.

Cappo's report:
In summary, [the victim]'s various mental health diagnoses very much could affect her ability to perceive, to tell the truth, to know the ramifications of her telling the truth or a lie, and to understanding the consequences of her actions. She could also be prone to exaggeration and an increased need for attention. She may not respond to situations in the same way as an average person because of her mental illness and the rate of occurrence in teens relative to the population is low.

Evans argued that Cappo's testimony was not an impermissible opinion on the victim's credibility but, rather, was merely an explanation to the jury of a matter outside of its understanding: how the victim's various mental health diagnoses affect her ability to perceive and tell the truth. After hearing the parties' arguments and reviewing Cappo's report and the case law, the court ruled that Cappo would not be allowed to testify regarding the victim's credibility. Later, Evans made an offer of proof by submitting Cappo's report. Again, the court sustained the State's motion to exclude Cappo's testimony. Evans argues that the court abused its discretion in doing so.

Missouri strictly prohibits expert evidence on witness credibility because it invades the province of the jury. "Expert testimony that comments directly on a particular witness' credibility, as well as expert testimony that expresses an opinion with respect to the credibility or truthfulness of witnesses of the same type under consideration invests 'scientific cachet' on the central issue of credibility and should not be admitted."…. Thus, in *State v. Taylor,* 663 S.W.2d 235, 241 (Mo. banc 1984), the Court held that expert testimony that the victim had not fantasized the rape and suffered from rape trauma syndrome was inadmissible, as it was an express opinion about her credibility. The Court explained that, " '[o]nce a witness is deemed competent, expert opinions concerning the witness's reliability in distinguishing truth from fantasy are generally inadmissible because such opinions invade the jury's province to make credibility determinations.' "

Based on the offer of proof, Cappo would have testified that the victim had mental health diagnoses that affected her ability to perceive and to tell the truth. This proffered

testimony constituted expert testimony that was particularized to the circumstances of this case, *i.e.,* the victim's mental state in light of her specific mental health diagnoses, and related directly to the victim's credibility. Such testimony would have undoubtedly invested “scientific cachet” on the central issue of the victim's credibility. Because Cappo's testimony would have invaded the province of the jury, the circuit court did not abuse its discretion in excluding it.

(Investigator's comments that he thought the victim was telling the truth during the videotaped interrogation of the defendant did not constitute plain error)

In *State v. Pennington* (June 2015) the Missouri Court of Appeals, Western District held that the admission of police detective's comments that were made during video recorded interview with defendant that in his opinion the victim was telling the truth did not constitute plain error. From the court's opinion:

Pennington does not contest the sufficiency of the evidence. The evidence established that on March 4, 2011, in Platte County, Missouri, Pennington knowingly placed his finger into S.M.'s vagina and that Pennington tried to move S.M.'s hand so that she would touch his penis through his clothing. S.M. was three years and ten months at the time of the incident.

In this case, the videotaped interview of Pennington's interrogation was played for the jury. In the interrogation, Detective Billy Aaron made comments to Pennington regarding S.M., saying that "for her age she's a pretty sharp little girl," "she speaks pretty well," and "I was rather impressed with how well she did speak." These statements did not express any opinion on S.M.'s credibility. The only possible objectionable comment relating to S.M.'s credibility was made when Detective Aaron asked Pennington whether he grabbed S.M.'s hand and moved it towards his erect penis in his lap. Detective Aaron told Pennington, "I really believe you made it to your lap because she remembers that, very quick little girl, she remembers you putting her hand." Detective Aaron further stated, "I know this, 'cause I talked to her, more importantly a forensic specialist talked to her so we know she's truthful."

As a general rule, witnesses "should not be asked to opine upon the truth or veracity of another [witness's] testimony." ... A court, however, does not abuse its discretion in admitting statements made by a detective during a police interrogation when the comments provide a context for the interrogation and the statement is offered for the defendant's statement and not the statements made by the detective... In this case, the circuit court specifically instructed the jury that the evidence of what Detective Aaron said while interviewing Pennington could be considered only for the purpose of giving context to the interrogation.

Moreover, Detective Aaron testified at trial and did not offer any opinion testimony about the accuracy of S.M.'s statements. Indeed, the circuit court instructed Detective Aaron not to answer the State's question about the statements made during the interview because the jury had watched the videotaped interview and it was admitted into evidence.

Given that the jury was instructed to use Detective Aaron's comments regarding the credibility of S.M. solely "for the purpose of giving context and meaning to [Pennington's] responses" and given that Detective Aaron did not offer any opinion testimony about the accuracy of S.M.'s statements at trial, the admission of Detective Aaron's statements did not have an outcome determinative effect on the verdict and was not plain error.

(Testimony by the investigator that the defendant's answers during a police interview were evasive was acceptable)

In *Satterfield v. State* (June 2015) the Indiana Supreme Court found that the detective's testimony, characterizing the answers defendant gave during a police interview as evasive, was admissible as lay opinion testimony. From the court's opinion:

"At trial, Satterfield objected to a detective's characterization of the answers he gave during a police interview as "evasive." Detective Tobias Odom conducted the interview while Satterfield was recovering from his injuries at Wishard Hospital, and he video-recorded their conversation. The State played the entire video at trial. After the video ended, Detective Odom discussed Satterfield's behavior during the interview:
STATE: How would you characterize the answers Mr. Satterfield was giving to the questions you were asking?
ODOM: At times he minimizes his involvement. Maximizes other things.
STATE: When you say he minimizes, what does that mean?
ODOM: We all tend to minimize our--our involvement at times.
STATE: We tend to--to play down the things that make us look bad?
ODOM: Correct.
STATE: And when you say, he maximized, what do you mean?
ODOM: Long answers. Going over the same thing he spoke about when you're not really asking that question.
STATE: Those things which would--tends to create sympathy, or support a certain conclusion? ... By maximizing, do [you] mean long, drawn-out answers about the things that we tend to--to--give us sympathy or support a beneficial conclusion?
ODOM: Could be. Or--or, just not answering the question at hand. You just move--keep moving over the same things over and over again.
STATE: In that sense, would you characterize the answers as evasive ?
ODOM: Yes. Can be.
(Emphasis added.) The trial court admitted Detective Odom's testimony over Satterfield's objection as skilled witness testimony.

Satterfield now argues that the trial court abused its discretion in admitting this testimony for two reasons: (1) Detective Odom was not qualified as a skilled witness to determine evasiveness in an interview under Indiana Rule of Evidence 701; and (2) even if he was, Detective Odom may not offer "human lie detector" testimony about his truthfulness in the interview. Satterfield further contends that this error was not harmless because his behavior and mental state were critical to his insanity defense.

Helpful opinions are not exclusive to experts or skilled witnesses. Any witness "not testifying as an expert"--whether an ordinary lay witness or a skilled witness--may testify "in the form of an opinion" if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or determination of a fact in issue." ..."The requirement that the opinion be 'rationally based' on perception simply means that the opinion must be one that a reasonable person could normally form from the perceived facts...

The premise of Satterfield's first argument is that only a skilled witness may testify that a person is being "evasive." The difference between skilled witnesses and ordinary lay witnesses is their degree of knowledge concerning the subject of their testimony. Neither has the "scientific, technical, or other specialized knowledge" of experts, ... and both ordinary lay and skilled witnesses testify from their perceptions alone, not necessarily established scientific principles, id. Skilled witnesses, though, possess knowledge beyond that of the average juror... This additional knowledge allows a skilled witness to perceive more information from the same set of facts and circumstances than an unskilled witness would. All opinion testimony is helpful, "giv[ing] substance to facts, which [are] difficult to articulate." ...But skilled witness testimony is helpful because it involves conclusions that escape the average observer.

Here, however, the opinion offered by Detective Odom concerning the content of Satterfield's interview questions was no more insightful than what an ordinary lay witness could have observed--it was simply a helpful, tangible summary to articulate his intangible observations.

Similar to the situation in Tolliver, the State asked Detective Odom to characterize Satterfield's responses, and he said that Satterfield failed to answer questions, minimized incriminating information, and maximized harmless information. In this context, the term "evasive" was helpful as a summary of the content and manner of answering questions and nothing more. And he did not overstate his summary--the State was the only party to actually use the word "evasive," and Detective Odom simply responded with, "Yes. Can be." This was a "commonsense conclusion," and "any lay witness might have observed" Satterfield's behavior and reached the same opinion.

Our own review of the video played at trial confirms just as much... The video shows Satterfield answering questions unrelated to the shooting (including the arson) in a calm and coherent manner, and it shows him being hesitant and halting when answering questions related to the shooting. Detective Odom's characterization of Satterfield's alternatively minimizing and maximizing answers as "evasive" is an accurate and helpful summary of our own observations.

This testimony offered by Detective Odom was also not "human lie detector" testimony when understood in the context of his entire testimony and the video itself. No witness may "testify to opinions concerning intent, guilt, or innocence in a criminal case [or] ... whether a witness has testified truthfully." ... Taken alone, the word "evasive" can mean "tending or seeking to evade; not straightforward; tricky...," Webster's New World

Dictionary (Third College Edition) 470 (1998), and "evade" can mean "to be deceitful or clever in avoiding or escaping something."... These definitions could imply an intent to deceive. But "evasive" can also mean "equivocal," without a mendacious intent..... And taken in the context of Detective Odom's entire testimony and the video of the interview, Detective Odom's summary of Satterfield's mode of answering questions--namely, minimizing incriminating information, and maximizing harmless information--was not a statement of his veracity.

In sum, Detective Odom was not an unqualified skilled witness, nor was his testimony inadmissible commentary on Satterfield's truthfulness. Rather, in the context of Detective Odom's entire testimony and in light of our own observations of the video itself, the testimony was admissible as a helpful, "commonsense conclusion" about Satterfield's manner of answering questions during an interview. Because we find that the trial court did not abuse its discretion, we need not conduct harmless error review.

(Human Lie Detector testimony inadmissible)

In *US v. Jackson* (May 2015) the US Army Court of Criminal Appeals ruled "that a U.S. Army Criminal Investigation Command (CID) agent's testimony constituted impermissible human lie detector testimony and that this error materially prejudiced appellant's substantial rights." From the court's opinion:

"Appellant was convicted of twice touching his stepdaughter's genitalia through her clothing at or near Fort Hood, Texas, when she was fifteen years old....

The government called Special Agent (SA) K-O from CID to testify about appellant's confession and the circumstances surrounding her interview and interrogation of appellant. In her opening statement, the trial counsel told the panel that SA K-O would testify that during appellant's confession, his demeanor changed and "it was almost as if he was reliving it."

Special Agent K-O then went into considerable detail describing various verbal and nonverbal signs of deception. A significant portion of SA K-O's testimony was aimed at rebutting any inference that appellant's confession was false, coerced, or otherwise involuntarily made. Special Agent K-O discussed factors that could lead to false confessions, such as hunger, sleep deprivation, lengthy interrogations, yelling, and threatening. She then described how those conditions were not present in appellant's case.

After some time, appellant gradually admitted to SA K-O he touched his stepdaughter. In describing appellant's demeanor, SA K-O said, "it wasn't the same outgoing, talkative guy before [sic]. His voice was lowered. He had this faraway look in his eyes and he was just describing the whole thing. It was strange."

At trial, appellant never raised the issue of human lie detector testimony from SA K-O. Trial defense counsel extensively cross-examined SA K-O. For example, SA K-O agreed that some verbal and nonverbal signs of deception do not necessarily mean someone is

actually being deceptive.

"It is 'the exclusive province of the court members to determine the credibility of witnesses.' " ... Our superior court "has been resolute in rejecting the admissibility of so-called human lie detector testimony, which we have described as: 'an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case.' " ... "If a witness offers human lie detector testimony, the military judge must issue prompt cautionary instructions to ensure that the members do not make improper use of such testimony."

Because appellant did not raise a human lie detector objection to SA K-O's testimony, we review his claim on appeal for plain error.

We must analyze SA K-O's testimony in light of our superior court's recent decision in Knapp. In that case, SA P, an agent from the Air Force Office of Special Investigations (AFOSI), questioned Knapp about having sex with Airman First Class (A1C) ES, who allegedly was too drunk to be conscious or consent..... Special Agent P testified that agents are "trained to pick up on nonverbal discrepancies.... Early on in the interview the accused would not make eye contact with me when we were talking about the sexual intercourse portion." Special Agent P further explained:

That is indicating to me that there is some form of deception going on. Prior to the intercourse, the accused was very detailed, very detail oriented, would look me in the eye, talk to me, and as soon as we got to the intercourse he would look away, look at the wall, look at the floor, not look at [the agents], and then immediately after the sexual intercourse timeframe he would kind of come back to us and be, once again, extremely detailed ... [l]ater on we had to ask him open-ended questions to try to get the truth out from him.... On cross-examination, SA P was asked why the interview did not end after Knapp repeatedly stated A1C ES was awake and willing when they began to have sexual intercourse, and SA P answered, "[l]ike I had stated earlier, sir, I'm trained on picking up nonverbal cues during interviews ... and the accused was giving off several nonverbal cues which made us believe that we needed to dig a little deeper." ... On re-direct examination, SA P testified about "large red sun blotches" appearing on Knapp's face when he spoke about the "actual incident."

Our superior court determined that SA P acted as a human lie detector.....
[I]t would have been permissible for SA [P] to describe Appellant's physical reaction to the interrogation questions.... It also would have been permissible for SA [P] to explain that this reaction caused him to continue questioning Appellant. But SA [P] went too far by declaring that he had been trained to divine a suspect's credibility from his physical reactions to the questioning. This testimony, suggesting that SA [P]'s evaluation of Appellant's denial of wrongdoing was based on his expertise in determining credibility, impermissibly " 'usurp[ed] the [members'] exclusive function to weigh evidence and determine credibility.' " ... The court held SA P's testimony to be plain and obvious error.

Here, in some ways, SA K-O's testimony is worse than SA P's testimony in Knapp.

Special Agent K-O went into significantly more detail about her training and ability to spot verbal and nonverbal signs of deception than SA P apparently did. The testimony presented SA K-O as taking master's level courses with CIA agents at the National Center for Credibility Assessment. She testified about her ability to discern verbal and nonverbal signs of deception. Special Agent K-O told the panel that she would move from interview to interrogation mode when she saw sufficient signs of deception. And, when questioning appellant, she did just that after appellant did not answer well in response to shock-absorbing questions. Special Agent K-O testified she told appellant she thought he was lying when he denied the allegations. While describing appellant's eventual confession, SA K-O stated, "he got this really like faraway look in his eyes like he was reliving it." Finally, SA KO told the panel that she cuts off denials when a suspect exhibits behavior leading her to believe otherwise.

Cumulatively, this testimony constituted human lie detector testimony. Put another way, the human lie detector testimony in this case is not just SA K-O's single line "he got this really like faraway look in his eyes like he was reliving it." ... Following SA K-O's testimony about her ability to spot deception through demeanor, she then testified directly about appellant's demeanor. In ordinary circumstances, evidence about one's demeanor is often admissible.... However, SA K-O presented demeanor evidence through the lens of a human lie detector. Like SA P in Knapp, SA K-O went too far in her testimony.

The error in this case is plain and obvious. " '[A]n error is 'plain' if it is 'so egregious and obvious' that a trial judge and prosecutor would be 'derelict' in permitting it in a trial held today.'... The legal prohibition on human lie detector testimony was plain and obvious at trial and on appeal.)... Special Agent K-O repeatedly testified about her ability to spot deception, told the panel she told appellant she did not believe his denials, and bolstered appellant's confession by stating that he appeared to be "reliving" his crimes while confessing.

After careful consideration, we are convinced that the error was prejudicial."

(Investigator should not be allowed to testify about the defendant's credibility)

In *US v. Hill* (2014) the US Court of Appeals, Tenth Circuit, ruled that, "Admission of expert opinion testimony as to defendant's credibility was plain error warranting reversal of defendant's convictions for bank robbery and related crimes, even though defendant did not testify, where expert's testimony did not involve specialized psychiatric knowledge, but merely asserted opinion as to veracity of explanation that jury was capable of resolving without expert testimony, government's case against defendant was not strong, and there was reasonable probability that but for expert's improper testimony, result of defendant's trial would have been different."

From the court's opinion:

"Stanley Hill appeals following his conviction on several charges related to the robbery of a bank. During trial, Charles Jones, a special agent with the Federal Bureau of

Investigation ("FBI"), testified as an expert. Agent Jones stated that he was trained in "special tactics and ways to identify [ ] deception in statements and truths in statements" and that in his opinion, many of Stanley's … answers were not worthy of credence and "[did] not make sense." Jones claimed that Stanley displayed evasive behaviors "common among the criminal element to keep law enforcement at bay" during an interrogation. When asked about Stanley's statement that he would rather die than face charges, Jones testified, "Never in my career have I seen that with an innocent person." And when the prosecutor asked about Stanley's repeated invocations of God in support of his truthfulness, Jones stated, "My training has shown me, and more also my experience in all these interviews, when people start bringing faith into validating their statements, that they're deceptive. Those are deceptive statements."

Jones also testified about the interrogation of Stanley. He stated that he had attended "two specialized courses in interrogation and interviews, including the Reid school, which is a higher-level school of interrogation and interviewing." He explained:

[T]he Reid school is designed to—as an interview process and interrogation process; part of that is psychological as well. It's much like your five-year-old children and how you can break down a story or you understand what's going on during the process of that interview.

In the Reid school, you're trained on some special tactics and ways to identify on deception in statements and truths in statements. That school is a sought-after school for investigators and interviewers because of the caliber of that training you do get towards that endeavor.

Jones further stated that he had conducted over a thousand interviews as an FBI agent.

The prosecution asked, "in reference to [his] earlier testimony regarding [his] training and experience in interrogating and interviewing," what Jones "based on [his] training and experience" took from the interrogation "as to [Stanley's] truthfulness." Jones responded:

[T]he most difficult thing to tell the difference in is partial truths, ... something that's partly true, that's a lot harder to detect than a flat-out lie or a convicting [sic] truth.

So during the course of that interview, we were able to, as trained eyes, pick out that this isn't—these are partial truths, at best. And several of those are—they're shown through things that are not purposely said or done by the interviewee. They are responses that occur naturally, that's a psychological thing that happens, that we don't control.

For example, in this case, and I've seen it in other interviews, a mumbling of something that they don't want to talk about. You may say, I was at the grocery store at three or whatever or whatever, and you will go away from the question and just discount that as something you don't need to know, Mr. Police Officer. And there was much of that going on throughout the interview, for whatever, or whatever, and whatever with Mr. Stanley

Hill's interview, occurred on a continuous basis, just avoiding—it's a way to avoid the question without just flat out saying, I'm not going to talk to you.

The prosecutor then asked, "In reference to the substance of the responses that were provided ... how does that factor into your observations of whether he's being truthful or not?" She provided Stanley's claim that he planned to babysit his step-sister at the East Pine home as an example of "the substance of responses." Jones answered that Stanley's version of events "does not connect [the] dots," "does not make sense," and was "not something that [he] viewed as reasonable." Specifically, Jones doubted that if Stanley was going to be "responsible for a child," he would immediately fall asleep "and never w[a]ke up while somehow bank robbery money got stuffed in the oven drawer of your house, and then the bank robbers ran away before the police could get there, and you didn't hear anything, but you were waiting on somebody to arrive in this unlocked house in north Tulsa."

Jones then identified several factors that contributed to his opinion that Stanley was being untruthful during the interview. He noted that after Stanley was told that police found items connected to the bank robbery in the East Pine residence, Stanley's story ha[d] to change a little bit. And prior to that, I wasn't sleeping that hard. After that, "to my knowledge," "to my knowledge."

I can't question his knowledge. I cannot say, I know what you knew. But he could evade the question by saying, "well, to my knowledge," because that's something I cannot corroborate. That is a move that is common among the criminal element to keep law enforcement at bay and not be able to determine the actual facts of what happened.

Jones also stated that Stanley's assertions that he "had no will to live" were indicative of guilt, testifying: "I have not seen, in my experience, an innocent person willing to die because they were talking with police officers and FBI agents. Never in my career have I seen that with an innocent person." He continued: "I also don't reasonably believe an innocent person would want to die because they were being talked to by police officers. It doesn't make sense to me." The prosecutor asked if, "in [Jones'] experience, has it been a demonstration of consciousness of guilt that an individual will want to die rather than tell the truth." Jones responded, "In my experience, sometimes people believe death would be better than a long-term prison sentence."

The prosecution also asked how Jones viewed Stanley's "call on his faith or swearing to God" during the course of the interview. Jones testified:

Beyond my own religious feelings towards what he was saying, the training that I've received, that is a common way that somebody with guilt will want to validate the story they're telling you. They can't validate it with facts, so they hope they can get you to believe them, because they're trying to validate their story through a supposed belief.

He may be a God-fearing man, I do not know that, but the truth is the truth. You do not have to back the truth. When I'm asked a question, is the car blue, the car is blue. I don't

have to swear to God. I do not have to bring religion into that statement. The truth is the truth.

My training has shown me, and more[ ]so my experience in all these interviews, when people start bringing faith into validating of their statements, that they're deceptive. Those are deceptive statements.

Defense counsel did not make any objections during Jones' testimony about the truthfulness of Stanley's statements. Jones was the final witness at trial. During closing argument, the prosecutor referred the jury back to Jones' testimony, stating that Jones "in scrutinizing this interview with Stanley Hill ... has to figure out what's truthful in this interview, what's he trying to hide."

Stanley does not argue that Jones was unqualified to offer the opinion he provided, but instead that the subject matter of his testimony-the credibility of another person-may not be addressed by an expert testifying under Rule 702. We agree. As this court made clear … "[t]he credibility of witnesses is generally not an appropriate subject for expert testimony." … There are several reasons for the prohibition against expert testimony on other witness' credibility. Such testimony: (1) "usurps a critical function of the jury"; (2) "is not helpful to the jury, which can make its own determination of credibility"; and (3) when provided by "impressively qualified experts on the credibility of other witnesses is prejudicial and unduly influences the jury." *Id.* (citations omitted).

This testimony plainly violated Rule 702 and our case law interpreting the rule. Even if Agent Jones arguably had "specialized knowledge,"… , on the subject of interrogations, his testimony on Stanley's credibility fails under Rule 702 because it "encroache[d] upon the jury's vital and exclusive function to make credibility determinations, and therefore [did] not assist the trier of fact." … (quotation omitted). He simply informed the jury that Stanley's version of events was unworthy of belief based on his opinion of what is generally "reasonable."

In *US v. Benedict* (2013) the US District Court, D. Minnesota, excluded the testimony of an expert witness on the issue of witness credibility. In their opinion the District Court stated the following:

"While Defendants argue that the proffered testimony of Dr. Neuschatz will be helpful to the jury, the Court disagrees. Based on his affidavit, it appears that Dr. Neuschatz would opine about the "persuasive" and "corruptive" power of confession evidence--i.e., the evidence of cooperating witnesses.... He avers, "Without expert assistance, jurors' abilities to assess the veracity of a witness's testimony are extremely limited." ... The Eighth Circuit has stated that

[b]ecause expert evidence can be both powerful and quite misleading, a trial court must take special care to weigh the risk of unfair prejudice against the probative value of the evidence under Fed.R.Evid. 403. It is plain error to admit testimony that is a thinly veiled comment on a witness's credibility....

..... This is because "[w]eighing evidence and determining credibility are tasks exclusive to the jury, and an expert should not offer an opinion about the truthfulness of witness testimony."

In *US v. Knapp* (2013) the U.S. Air Force Court of Criminal Appeals stated that, "The appellant contends on appeal that the prosecution improperly offered testimony from Agent P that he could tell appellant was acting in a deceitful and untruthful manner when discussing the sexual intercourse because (1) the appellant would not make eye contact, (2) large red blotches would appear on his face, and (3) his commentary became less detailed. He also argues the military judge should have provided a curative instruction to the members on their use of this testimony. When we put the challenged testimony in context and consider the seven factors found in *Jones,* we do not find its admission to be prejudicial error." .

In *State v. Miller* (2012) the Court of Appeals of Wisconsin ruled that comments of detective during video-recorded interview with defendant which was played for jury, stating that defendant was lying during the interview, did not violate the Haseltine rule prohibiting a witness from giving an opinion on whether another witness is telling the truth.

Relying on Haseltine, Miller contends the video should not have been played for the jury because in it Primising tells Miller multiple times he is lying..... Miller points out that Haseltine prohibits a witness from giving an opinion on whether another witness is telling the truth because it invades the jury's role as the sole determiner of credibility. We conclude that because the comments made by Primising on the video were made in the context of a pretrial police investigation and were not made as sworn testimony in court, the Haseltine rule was not violated.

In *Washington v. Barr* (2004) the Washington Court of Appeals found that the testimony by a police officer that in his opinion the behavior of the defendant suggested deception (which he learned as part of the "Reid Investigative Technique") was, in fact, impermissible testimony because it invaded the province of the jury.

Pre-arrest Silence

(Pre-arrest silence cannot be used as substantive evidence of guilt)

In *Commonwealth v. Molina* (November 2014) the Pennsylvania Supreme Court held that "the defendant's right against self-incrimination was violated by use of his pre-arrest silence as substantive evidence of guilt." From the Supreme Court's opinion, here are the case details.

"In this case, a jury convicted Michael Molina (Defendant) of third degree murder and related crimes resulting from the savage beating of Melissa Snodgrass (Victim),

apparently as a result of drug debts owed by Victim to Defendant.

The issue presented to this Court requires consideration of the Missing Persons Unit detective's testimony and the prosecutor's closing arguments regarding the early days of the investigation into Victim's disappearance. Following a lead that Defendant was holding Victim against her will, the Missing Persons Unit detective assigned to the case went to Defendant's house two days after Victim's disappearance. Pamela Deloe, a second primary prosecution witness, answered the door and asserted that neither Victim nor Defendant were at the house. Accordingly, the detective left her card and asked that Defendant call her. Later that day, Defendant called the detective.

The detective testified regarding the phone call from Defendant:

I asked him--well, before I could even ask him if he was aware of [Victim] being missing, he stated to me that there were--that he didn't know where she was. It was out on the street that someone said that he was involved in her being missing and it wasn't him.

Notes of Testimony ("N.T."), Dec. 14-20, 2006, at 480. The detective then inquired as to when Defendant had last seen Victim. He initially responded that he had not seen her for a year and a half, but then he immediately contradicted his statement, claiming instead that he had not seen her for three months. Subsequent to this contradiction, the detective testified that she asked him to come to the police station to speak to her and he refused:
A. Yes. After he stated that, I asked him if he could come into our office and sit down and talk with me about the case, and he refused. He said he refused to come in.

Q. So this contact that you had with him was over the telephone. Is that what you're saying?

A. Yes, it was over the telephone.

... Defense counsel did not object to the reference to Defendant's refusal to come into the office. In due course, the prosecution concluded its questioning of the detective, and defense counsel did not pursue that issue in his cross-examination...
During closing argument, the prosecutor accentuated Defendant's refusal to go to the police station, and when defense counsel objected, the prosecutor stated before the jury that it was not improper to comment on Defendant's pre-arrest silence:

[Prosecutor:] Look also at what happened in terms of the police investigation in this matter. Three days after this young lady goes missing, three days after she goes missing, detectives are already knocking on the defendant's door because of something they heard, maybe he was holding this person against their [sic] will, and he calls the police back and is very defensive. I mean, before a question's even asked, he denies any knowledge or any involvement with this young lady. He makes contradictory statements to the police about when's the last time that he saw her. First he says, "I saw her a year and a half ago." Then he says, "I saw her three months ago." But most telling, I think, is the fact that the officer invited him. "Well, come on down and talk to us. We want to ask you some more

questions about this incident, your knowledge of this young lady," especially because he made these contradictory statements. And what happens? Nothing happens. He refuses to cooperate with the Missing Persons detectives. And why?

Salinas v. Texas

In February 2013, we placed the case on hold pending the decision of the United States Supreme Court in *Salinas v. Texas*, which, *inter alia*, raised a claim regarding the use of pre-arrest silence as substantive evidence. As discussed below, the plurality decision of the High Court in that case did not resolve the issue, but instead affirmed the use of the defendant's silence in a fractured decision. *Salinas v. Texas,* --- U.S. ----, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013). Prior to hearing argument, we allowed the parties to submit supplemental briefing addressing *Salinas*.

Salinas involved a defendant who was interviewed by police regarding a double murder in Houston. At the time of the interview, Salinas had not been arrested nor provided *Miranda* warnings. Initially, Salinas answered the officer's questions. However, when the officers inquired whether the shotgun shell casings recovered from the scene would match Salinas's gun, he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up." .... "After a few moments of silence, the officer asked additional questions, which petitioner answered."

While the High Court had accepted review in Salinas to resolve the split between the lower courts regarding the applicability of the Fifth Amendment to the use of a non-testifying defendant's precustodial silence as substantive evidence of guilt, it eventually divided on how to resolve the case. Three justices in the lead opinion did not speak to the use of pre-arrest silence as substantive evidence and instead dismissed Salina's claims because "he did not expressly invoke the privilege against self-incrimination in response to the officer's question."... Two concurring justices did not address the issue of express invocation, but opined that "Salinas' claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony." .... Finally, four dissenting justices determined that no ritualistic language was needed to invoke the right against self-incrimination, which was implied by the circumstances, and concluded that Salina's right was violated.... Accordingly, as three justices opined that Salinas did not properly invoke his privilege and two justices concluded that the privilege never applies to pre-arrest silence, five justices held that Salinas should not obtain relief. Given the absence of a majority on any rationale, the splintered decision, however, fails to provide guidance as to whether pre-arrest silence is ever protected under the Fifth Amendment if sufficiently invoked or what constitutes sufficient invocation of the right.

... As applied to this case, we determine that Defendant's actions in affirmatively and definitively refusing to come to the police station and ending the phone call were sufficient to invoke his right against self-incrimination and are distinguishable from Salinas's temporary muteness sandwiched between voluntary verbal responses to police questioning. Defendant's invocation is clarified upon consideration of the circumstances

of the case. Regardless of whether Defendant had been officially designated a suspect, the detective's testimony demonstrated that Defendant and the detective were aware during the phone call that "[i]t was out on the street that someone said that [Defendant] was involved in her being missing ." N.T., Dec. 14-20, 2006, at 480. Indeed, the prosecutor's closing argument emphasized the detectives' suspicions, noting that three days after Victim's disappearance, they were "knocking on the defendant's door because of something they heard, maybe he was holding this person against their [sic] will."... Moreover, it appears that the detective's suspicions were further raised when Defendant contradicted himself in regard to when he had last seen Victim, prompting her to request that he come to the station. Thus, at the least, both parties to the phone call were aware that he was suspected in the disappearance of Victim, even though the detective was unaware that the case involved a murder. We conclude that refusing to come to the police station to speak further with a detective and ending the phone call, in light of the circumstances of the case, constitutes an invocation of his right against self-incrimination, even absent a talismanic invocation of the constitutional provision.

Accordingly, we conclude that our precedent, and the policies underlying it, support the conclusion that the right against self-incrimination prohibits use of a defendant's pre-arrest silence as substantive evidence of guilt, unless it falls within an exception such as impeachment of a testifying defendant or fair response to an argument of the defense."

Inappropriate/impermissible investigator statements

In general

(*"How was your Halloween?" was the functional equivalent of interrogation*)

In *State v. Kazanas* (June 2016) the Supreme Court of Hawaii found that a police officer's apparent effort to make small talk and calm the defendant down by asking him how his Halloween went constituted the functional equivalent of an interrogation. From the Supreme Court's opinion:

In this appeal, we decide whether an arrestee not advised of his *Miranda* rights was "interrogated" in the constitutional sense. Briefly stated, Petitioner/Defendant–Appellant Gregory Kazanas ("Kazanas") was charged with one count of Criminal Property Damage in the First Degree and one count of Unauthorized Entry into Motor Vehicle in the First Degree ("UEMV"). The charges stemmed from events alleged to have taken place on Halloween 2011. Kazanas was accused of breaking the back windshield of a car then reaching through the driver's side open window to punch the driver in the face. Kazanas was identified by the complaining witness and arrested. The Honolulu Police Department ("HPD") police officer assigned to accompany Kazanas to Queen's Medical Center knew the reason for the arrest. In an apparent effort to make small talk and calm Kazanas down, she asked him how his Halloween went. During the conversation, Kazanas stated, "If people didn't upset me, I wouldn't have to punch them." The statement was admitted at trial, and Kazanas was ultimately convicted of UEMV.

We hold that, although the officer testified that she did not intend her small talk to provoke an incriminating response, she "should have known that her words were reasonably likely to elicit an incriminating response from the person in custody."… The questioning in this case was reasonably likely to elicit an incriminating response as the events of the night culminated in Kazanas's arrest for UEMV. The officer knew how Kazanas's Halloween went. Thus, her question was reasonably likely to elicit from Kazanas details about the alleged crime. In other words, the police officer subjected Kazanas, a person in custody pursuant to an arrest, to interrogation; accordingly, Kazanas was entitled to be advised of his *Miranda* rights before the small talk conversation began. As Kazanas's right against self-incrimination was violated, his statement should have been suppressed at trial.

(*Court rules that the investigators went too far in lying to the defendant about evidence and insisting that he confess*)

In *Campos v. Stone* (August 2016) the US District Court, N.D. California, ruled that the defendant's incriminating statements were obtained in violation of his due process rights. From the District Court's opinion:

Until the time of his arrest in December 2010, Campos regularly helped out at his wife's home day care facility. His wife had been operating the facility for many years, and Campos had assisted her since 2000. On December 22, 2010, a child at the day care, whose initials are K.M. and who was five years old at the time, told her mother that Campos had touched her genitals under her clothes. After K.M.'s mother called the police, they arrested Campos, brought him to the station, took his fingerprints and a blood sample, put him in an interrogation room, and cuffed one of his hands to a table…. They advised Campos of his *Miranda* rights.

Before the interrogation began, Detective Emilio Perez entered the interrogation room wearing blue rubber gloves, carrying a manila envelope and a cotton swab. Perez proceeded to swab Campos' fingers and hands, then placed the swab in the envelope and left the room. Several minutes later, Perez and another detective, Matthew DeLorenzo, returned and began interrogating Campos. During the interrogation, the investigators reminded Campos they had taken his fingerprints, told him they'd collected DNA from his blood and his hands, and told him they'd also collected DNA and fingerprint evidence from K.M.'s genitals…. They told Campos that the results of the DNA and fingerprint tests were 'going to tell us the truth,' and that if there was a match, they'd know he touched K.M.'s genitals inside her pants…. DeLorenzo was the primary interrogator and asked questions in English; Perez attempted to translate to Spanish for Campos.

The DNA and fingerprint tests were a ruse, and as the Court of Appeal majority noted, that ruse 'was a major theme of the interrogation.'… While the officers were waiting for the supposed 'results' of their tests, they told Campos that the technology was 'very advanced,' that their tests could detect a person's fingerprints on a child's body for up to a month after an incident, and that their tests could even tell which part of a person's body a particular DNA sample came from: from the head, the face, or the hands…. At one point,

the investigators also pretended to go to the laboratory to retrieve the results of the DNA and fingerprint tests, only to return several minutes later and explain they had to wait a little longer for the results to be complete…. Eventually, another officer brought the interrogators an envelope containing the fake test results… Before opening the envelope, the officers said K.M. had told them that Campos touched her 'inside her vagina,' and also 'on her butt.'… Campos denied that he did so… The officers said: 'You need to speak with the truth. This is your last opportunity. Because the D.A. makes the decision. But if you lie to us and that evidence, we're going...we're going to send it and the other thing that you don't say, will look real bad for you.'…. The officers told Campos they were confident that 'your DNA, your finger prints – your normal finger prints and the ones that have your DNA – are going to be on the body of that girl.'… The officers then told him that if the results inside the envelope were blue, this would mean the results were positive.

Then the officers opened the enveloped and announced: 'They're blue. Okay, so you're lying to us. You have to tell us the, the truth.'…. Campos continued strenuously to deny touching K.M.'s genitals... They said to Campos: 'But this is here, it doesn't lie. This doesn't tell us lies, okay. What motive – this is the truth. So you're going to tell me that you didn't do anything and the D.A. is going to see this, what's he going to say? That it's – you're lying.'

Campos continued to insist he did not touch K.M.'s genitals. *Id.* at 507. In an effort to get Campos to reconcile the allegedly irrefutable proof that he'd touched K.M.'s genitals with his story that he did not molest her, the officers introduced the possibility that he'd touched her there by accident: 'So... possibly [it] was an accident that you touched her down there?'… ('Or...maybe it was something that was [an] accident. '). When Campos continued to resist the idea that he touched K.M.'s genitals, even accidentally, the officers said: 'The scientists already have your DNA. If you lie to me, the D.A. isn't going to like that you're lying to me, okay... Nevertheless, when the officers again inquired whether Campos touched K.M. 'in her intimate part,' Campos repeatedly responded, 'no, no.'

At this point it bears noting that the written transcript does not tell the full story of the interrogation. The transcript itself is jumbled, but the video and audio show just how much confusion reigned during the interrogation. The officers were speaking to Campos quickly and loudly. They were often speaking over one another – one in English and the other in Spanish. Some of DeLorenzo's English questions and statements were translated to Spanish by Perez; others were not. When Campos speaks, it is difficult to determine which question or comment he is responding to, because the questions and comments come in such rapid fire succession, with people talking over one another, in different languages. And often when Campos tried to deny touching K.M.'s genitals, the officers often did not let him speak, quickly interrupting him to insist that his response was inconsistent with the scientific evidence and would create problems with the district attorney.

In any event, Campos eventually began to struggle to reconcile the irrefutable scientific evidence (which he clearly believed existed) with his insistence that he did not touch

K.M.'s genitals. He began (at the officers' invitation) to discuss the concept of accidentally touching K.M.'s skin, while continuing to deny touching her on or near her genitals under her clothes… For example, at one point Campos said, 'maybe I accidentally put my hands inside,' but seconds later it became clear he was trying to say that perhaps he touched K.M.'s back underneath her clothes as he was pushing her away from a baby he was holding and that K.M was trying to kiss….. All the while, Campos referred back to the evidence that the officers continued to insist was irrefutable, saying things like, 'that's why my hand evidence comes up,' and 'You've already found my finger prints.' ... The officers were not satisfied with Campos' answers, however, and when he continued to deny he had touched her inappropriately, the officers forcefully responded, 'No, no, no. We want to know the truth.'

Eventually, in response to the officers' continued insistence that the evidence was irrefutable and that he must tell a 'truth' consistent with that evidence, Campos appeared (although it's difficult to know for sure, given the chaotic nature of the interrogation) to allow for the possibility that he could have accidentally touched K.M.'s genitals under her clothes... At one point the officers asked, 'is that possible that when you pushed her it entered from above?' 'Maybe,' Campos responded... They asked, 'could it possibly have been just like that?' Campos responded, 'Maybe, I don't [k]now.' ... They asked, 'But it was an accident[?]' Campos responded, 'Maybe yes.'

Shortly thereafter, Campos stated he needed an attorney, and the officers terminated the interrogation…. He was charged with two counts of sexual penetration with a child ten years of age or younger, … and five counts of committing a lewd or lascivious act on a child under 14 years of age, …..

With respect to the admissibility of his statements to the police, Campos primarily argues that the petition should be granted under section 2254(d)(1) because the Sixth District Court of Appeal majority opinion was contrary to or an unreasonable application of clearly established Supreme Court precedent. Campos is correct to a point – the majority's legal analysis contains various analytical flaws.

For example, although the majority intoned the correct 'totality of the circumstances' standard for assessing the voluntariness of Campos' statement, as the dissenting justice observed, it appears the majority disassociated Campos' personal characteristics from the circumstances of the interrogation.

If that's what the majority was doing, it would be contrary to clearly established Supreme Court case law. Rather than inquiring whether Campos fell below some random threshold level of sophistication, or whether any of the individual tactics employed was problematic in isolation, the majority should have simply inquired whether the will of a person like Campos would have been overborne by the combination of the particular tactics used by the officers, such that he would have been compelled to make the statements about accidental touching that they wanted him to make. 'The due process test takes into consideration 'the totality of all the surrounding circumstances—*both* the characteristics of the accused *and* the details of the interrogation….. For that reason,

‘[c]ourts must 'weigh, rather than simply list,’ the relevant circumstances, and weigh them not in the abstract but 'against the power of resistance of the person confessing.'

A second and related problem lies in the majority's conclusion that the manner in which the officers conducted the interrogation was not unduly coercive. In reaching this conclusion, the majority neglected to recognize that far less coercion is needed to extract an involuntary statement of *this* type. In most cases, when a suspect alleges that the police coerced a statement out of him, the statement is a true ‘confession.‘ By contrast, in this case, although the statements were incriminating, Campos never actually confessed to the crime. Rather, he attempted to reconcile, in response to the officers' demands that he do so, the allegedly irrefutable ‘scientific‘ evidence that he touched K.M.'s genitals with his insistence that he did not molest her. It seems obvious – and counsel for the respondent did not dispute this point at the habeas hearing –that far less coercion is needed before a suspect will start feeling compelled to make a statement of this type. And a person of limited sophistication, such as Campos, is particularly susceptible to this type of coercion. It's one thing for officers to tell a suspect, ‘Your buddy says you did it.‘ Even someone like Campos would conclude he has multiple options for how to respond to that question, such as ‘he's lying,‘ or ‘you're lying.‘ It's quite another thing to insist to someone like Campos, after conducting fake fingerprint and DNA tests, that science has irrefutably proven something he is denying. In that scenario, it's no surprise that someone like Campos would, in response to the officers' insistence that he must at least allow for the possibility of an accident, conclude he has no choice but to do so.

…. In this case, the Court of Appeal majority a made similar, and similarly egregious, factual error in its findings about what happened during the interrogation. Specifically, the majority mischaracterized what the officers were doing when they refused to accept Campos' denials that he touched K.M.'s genitals. In determining that the police officers had not made improper promises of leniency, the majority noted that ‘mere exhortations by interrogators to tell the truth are permissible,‘ and then concluded that the officers' refusal to accept Campos' denials, and their insistence that he provide a statement consistent with the fake DNA and fingerprint evidence, ‘are more properly characterized as urging defendant to tell the truth.‘…. Although it's technically true that the officers made no direct promise of leniency, the majority's determination that the officers were merely ‘urging defendant to tell the truth‘ was an objectively unreasonable characterization of what the officers did in the interrogation. The officers did not merely urge Campos to tell the truth. They insisted, loudly and repeatedly, and in rapid-fire fashion, that he must give a statement consistent with their fake DNA and fingerprint evidence, which they insisted *was* ‘the truth.’

In a similar mischaracterization of the same facts, the majority described the officers as telling Campos that it would look bad for him ‘*if* his statements were inconsistent with the supposed DNA evidence.‘. The majority's use of the word ‘if‘ suggests that the officers were impliedly conceding that Campos' denials might not be contrary to the scientific evidence. But in actuality, the officers repeatedly telegraphed to Campos that it was going to look bad for him *because* his statements were *indisputably* inconsistent with the supposed fingerprint and DNA evidence. Indeed, the officers insisted that the only

way it would not ‘look bad for him‘ was if he *changed* his statements to acknowledge the possibility of an accidental touching.

Insisting a suspect will be in trouble with the prosecutor unless he makes a statement consistent with fake scientific evidence, which the officers repeatedly characterize as the objective ‘truth,‘ is vastly and categorically different from merely urging a suspect to tell the truth in a vacuum. The majority's determination that the officers were merely urging Campos to tell the truth is ‘not a plausible reading of the interview.‘

…. As previously noted, the due process voluntariness test ‘takes into consideration 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.’ …. ‘The determination 'depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.’ It ‘ 'is not limited to instances in which the claim is that the police conduct was inherently coercive,’ but 'applies equally when the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will.'

Campos' statements were not voluntary, largely for the reasons articulated by the dissenting justice in the Court of Appeal. ‘Campos was not sophisticated according to any relevant definition of that term.‘… Campos ‘grew up in Mexico, where he left school in the third grade. He spoke little English, and he had worked as a farm laborer and a forklift driver for most of his life.‘ ... Campos ‘had no criminal record, he had never been arrested, and he had no experience with police interrogations.‘.. . His responses during the interrogation made clear he had no familiarity with the evidentiary matters the officer discussed with him. Nor, contrary to the apparent view of the trial judge and the Court of Appeal majority, is it necessary to conclude that a suspect has some actual disability (say, a learning disability) before considering how the suspect's characteristics interacted with the circumstances of the interrogation. Either way, Campos' personal characteristics ‘made him highly susceptible to the officers' aggressive tactics.‘

To be sure, officers are not barred from using deception. But the law provides that the use of deceptive tactics cuts against voluntariness. ... And the officers' deception must be considered in light of all the circumstances, including the nature of the deception itself. After all, there are different kinds of deception – telling a suspect that his buddy ratted him out is one thing; an elaborate ruse involving fabricated scientific evidence is quite another, particularly when the officers rely so heavily on that ruse, while interrogating a suspect who was so unsophisticated.

Moreover, the interview itself was chaotic and confusing, with the officers frequently talking over Campos and each other. Every time Campos tried to deny that he had touched the victim's genitals (or touched her there other than accidentally), the officers aggressively rejected his statements (often refusing to let him finish his sentences) and told him their tests conclusively proved otherwise. At one point, DeLorenzo interrupted Campos' explanation that maybe he had at most accidentally touched the girl's torso and not her genitals by shouting ‘No, no, no, no, no, no,‘ while leaning forward and wagging

his finger inches from Campos' face…. When Campos again tried to deny that he touched her, DeLorenzo leaned forward further to shut him up, told him to ‘Calm down‘ in Spanish, and again said ‘No, no, no.‘ It was clear from this and many other interactions that DeLorenzo and Perez would accept nothing other than a statement that Campos had touched the victim's genitals at least accidentally. As Justice Marquez explained, the police were ‘unrelenting‘ in their insistence that Campos accede to their version of the truth (‘a version that was, of course, predicated on lies,‘ i.e., the fake forensic evidence), and indeed were actively hostile to any attempts by Campos to give explanations inconsistent with their supposed ‘results.’

And their hostility came with the clear implication that Campos risked harsh consequences if he did not accede to their version of the facts: they repeatedly told him the district attorney wouldn't like it if he didn't tell them something consistent with their DNA and fingerprint evidence. While those invocations of the district attorney were not per se impermissible, it does not follow that they are irrelevant. The officers' message that Campos would be treated more harshly if he did not admit to accidental touching, combined with all the other circumstances, weighs heavily against finding Campos' confused responses to the interrogators were voluntary…

For all these reasons, it should be no surprise that someone like Campos would eventually feel compelled to allow for the possibility of an accidental touching in response to the officers' vehement, often shouted, and frequently repeated exhortations to give a statement consistent with his fingerprints and DNA being on the child's genitals, particularly when he was in close physical proximity to that child on a regular basis. Indeed, under similar circumstances, even a person of greater sophistication and psychological fortitude than Campos could well have felt compelled to allow for the possibility that ‘maybe‘ he could have accidentally touched the victim in some way. As for Campos himself, it is clear that his statements in this case are inherently unreliable and were involuntary under the totality of the circumstances.

(*If invocation of right to remain silent is ignored the resulting confession is inadmissible: “I'm done talking. I don't wanna talk no more.”*)

In *Commonwealth v. Smith* (March 2016) the Supreme Judicial Court of Massachusetts overturned the lower court’s decision that the defendant’s incriminating statements were admissible. From the court’s opinion:

After administering Miranda warnings to the defendant and obtaining his agreement that he understood the warnings and was willing to talk to the police, Tarckini, with periodic questions or statements inserted by Escobar, told the defendant the following: the police had video footage of him sitting in the victim's Lexus and running from that vehicle after the gunshot was heard; there was deoxyribonucleic acid (DNA) and fingerprint evidence belonging to him in the Lexus; people had identified him as the shooter; and the police had recovered his eyeglasses from Madison's apartment with the defendant's DNA on them .

For approximately thirty minutes, the defendant's repeated responses to these assertions by the police were to the effect that he did not know what they were talking about, and he denied knowing the victim or the fact that she had been shot and killed. Then, the following exchange occurred:

Defendant: "I'm done."
Tarckini: "You're done with what?"
Defendant: "I'm done talking. I don't wanna talk no more."
Tarckini: "You don't wanna talk anymore?"
Defendant: "No. 'Cause y'all really don't believe me."
Tarckini: "It's—We already tried to explain that to you, Donovan. I don't think you get it."
Defendant: "Yeah, I understand."
Tarckini: "It's not believing."
Defendant: "I understand, sir."
Tarckini: "It's not believing. It's what we know."
Defendant: "Okay."
Tarckini: "What the facts are."
Defendant: "What the facts show."
Tarckini: "Right."
Defendant: "Right."
Tarckini: "Right?"
Defendant: "Yes."

…Eventually the defendant stated: "I didn't shoot nobody," and then he proceeded to make a series of inculpatory responses to questions by the officers. He described a plan among Ago, Madison, and himself to rob the victim, and detailed what happened after he got into the victim's automobile, including that he was in it on the day of the shooting.

The defendant contends that although he initially waived his Miranda rights, he later invoked his constitutional right to remain silent when he said that he was "done talking," an invocation that the police did not "scrupulously honor."

"It is clear that a defendant has not only the right to remain silent from the beginning but also a continuing right to cut off, at any time, any questioning that does take place." … In these circumstances, the defendant's statement, "I'm done," by itself, was ambiguous, coming as it did as a nonresponse to a long series of statements by Tarckini and Escobar about what the police already knew. In this context, Tarckini's question to the defendant, "You're done with what?" was an appropriate effort to clarify…. But the defendant's immediate and direct answer, "I'm done talking. I don't wanna talk no more," was certainly a clarifying response to Tarckini's inquiry, one that resolved completely the previous ambiguity, and asserted in no uncertain terms the defendant's desire and intention to end the interrogation.

As discussed, when the defendant invoked his right to terminate questioning, the police were required immediately to end the interview. At that point, all questioning should

have ceased, and it follows that the recording of the interview also should have ceased. That is not what happened.

Adherence to the principle that the defendant's constitutional right to cut off questioning must be "scrupulously honored" leads us to conclude that, in the particular circumstances presented here, all portions of the defendant's statement procured after he invoked his right to remain silent were inadmissible, including the volunteered statement.

(*Use of falsified documents purporting to represent the official results of a state-police lab's DNA examination was coercive*)

In *Gray v. Commonwealth* (February 2016) the Supreme Court of Kentucky ruled that the defendant's confession was coerced through the use of false evidence. From the court's opinion:

Interrogators presented Gray a fake document purporting to originate from the Kentucky State Police linking his parents' DNA to his vehicle….. The most troubling claim of error Gray presents to us on appeal is whether the trial court erroneously failed to suppress the confession Gray gave to law enforcement. The Commonwealth does not dispute that interviewers used false statements and fabricated documents as a technique to coax Gray into admitting he murdered his parents….. Police trickery is not new to our criminal procedure jurisprudence, but today's actions exceed any reasonable leeway our case law has previously afforded law enforcement.

A confession obtained by police through trickery is not a new issue for us….. "the mere employment of a ruse, or 'strategic deception,' does not render a confession involuntary so long as the ploy does not rise to the level of compulsion or coercion." In essence, we have refused to hold that intentional police misinformation by itself makes a confession involuntary.

Beginning our analysis of whether Gray voluntarily confessed, we first ask whether the police activity was objectively coercive. The false statements and fabricated documents are critical to our inquiry. Statements deceptively overstating the evidence against a criminal defendant during interrogation fall within the trickery we have traditionally tolerated. *But we have never faced a situation where deceptive interrogation tactics included fake reports made to link DNA evidence to the defendant*. (emphasis added)

Although we must decline to adopt for Kentucky a bright-line rule that the use of falsified documents is objectively coercive in all situations, we think the risk of constitutional infirmity is so severe that a petitioning defendant is entitled to a presumption in his favor. As is the case with other constitutional liberties, here we must place the burden on the Commonwealth to prove it did not abuse its power. When a criminal defendant, like Gray, can establish that the police use falsified documents to induce a confession, we will presume this tactic is unconstitutional until the Commonwealth can firmly establish that the document(s) did not overwhelm the defendant's will and was not a critical factor in the defendant's decision to confess.

(Prosecutor inserts false confession in police interrogation transcript)

In *People v. Velasco-Palacios* (February 2015) the Court of Appeal, Fifth District, California, upheld the lower court's opinion that the prosecutor engaged in misconduct which was "outrageous and conscience shocking" by inserting a false confession into a transcript of the defendant's police interrogation. From the court's opinion:

"On July 9, 2013, defendant was charged with five counts of lewd and lascivious conduct with a child after the daughter of defendant's girlfriend reported several instances of molestation. Deputy public defender Ernest Hinman was assigned to defendant's case. During pretrial settlement talks, Hinman was informed by the prosecuting attorney, Robert Murray, that the People would be willing to accept a settlement offer for a prison term of eight years. Defendant was unwilling to make such an offer, but Hinman continued to attempt to persuade defendant to make a counteroffer and informed Murray that he believed the case would settle.

While Hinman was making these efforts, Murray told Hinman he was considering dismissing the charges against defendant and refiling the charges to allege penetrative acts, which carried a possible life sentence. Murray also informed Hinman that, if the charges were refiled, Murray would be unlikely to accept any plea offers from defendant. After reviewing the evidence, however, Murray was unable to find any evidence of penetration. On October 21, 2013, Murray concluded he could not find evidence to support the greater charges. That same day, Murray provided Hinman with an English language translation of defendant's police interrogation, which had been conducted in Spanish. The translation, however, contained two additional lines, added and fabricated by Murray, which read as follows:

"[DETECTIVE]: You're so guilty you child molester.

"[DEFENDANT]: I know. I'm just glad she's not pregnant like her mother."

Upon receiving the transcript, Hinman informed defendant it included an admission of penetration that could be used to file more serious charges against defendant. Defendant denied making the incriminating statements, and Hinman continued to advise him to make an offer to settle the case.

In the days following his conversation with defendant, Hinman sought to uncover why the incriminating lines were not present in the translation that had been prepared by his office. According to Hinman, the audio recording of the interrogation he received ended abruptly, and he was concerned the People's transcript had been prepared from a different, longer audio recording. Hinman was also concerned about raising the issue to Murray directly, as he did not wish to alert Murray to any incriminating statements Murray may have missed. On October 28, 2013, seven days after Murray provided the falsified transcript, the parties were in court for what was scheduled to be the first day of defendant's trial. Despite this appearance, Murray did not reveal the fabrication to Hinman. The trial was subsequently delayed until November 4, 2013.

On October 30, 2013, nine days after receiving the falsified transcript, Hinman e-mailed Murray to request "the exact CD reviewed by [the People's] transcriber/interpreter," but Murray did not respond to Hinman's request. Later that day, Hinman spoke to Murray in person about the e-mail, and Murray admitted to falsifying the transcript.

Here, the trial court found Murray deliberately altered an interrogation transcript to include a confession that could be used to justify charges carrying a life sentence, and he distributed it to defense counsel during a period of time when Murray knew defense counsel was trying to persuade defendant to settle the case. Further, Murray did not reveal the alterations until nine days later, and only then when he was directly confronted about the fabricated lines by defense counsel. This is egregious misconduct and, as is shown below, it directly interfered with defendant's attorney-client relationship. Because Murray clearly engaged in egregious misconduct that prejudiced defendant's constitutional right to counsel, the trial court was correct in finding Murray's actions were outrageous and conscience shocking in a constitutional sense."

(*"[n]o arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee"*)

In *Garnett v. Undercover Officer C0039* (April 2015) the US District Court, S.D. New York, ruled the following regarding the fabrication of evidence:

"A jury found Undercover Officer C0039 ("UC 39") liable for denial of the plaintiff's right to a fair trial. To do so, the jury found that the officer fabricated evidence. UC 39 argues here that so long as he had probable cause to arrest the plaintiff, he was free to fabricate additional evidence to support a conviction for the charged offense without incurring liability. He further argues that he was free to fabricate evidence without liability so long as the evidence that he fabricated was arguably not admissible as evidence.

These arguments are wrong as a matter of law. The Second Circuit Court of Appeals has clearly held that "[n]o arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee. To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice."...

UC 39 is promoting a devolution of the law from this clear standard. The arguments that he presents profoundly weaken the protection of citizens against the fabrication of evidence by police officers. The arguments are cleverly constructed on the basis of a non-precedential summary order--selectively quoted and interpreted in an ahistorical manner. Still, they are wrong."

(Violation of Garrity rule nullifies admissibility of incriminating statement)

In *US v Goodpaster* (December 2014) the US District Court, D. Oregon, ruled that "Goodpaster's motion to suppress is granted, based on his "penalty situation" argument under *Garrity v. New Jersey*, 385 U.S. 493 (1967), and its progeny." Eric Goodpastor was an employee of the US Postal Service who was suspected of stealing parcels containing prescription drugs mailed to veterans from the U.S. Department of Veteran Affairs. Goodpastor confessed that he had become addicted to his pain medication and, approximately a year and a half ago, had begun stealing packages from the mail that contained medications belonging to and intended for others. From the US District Court's opinion:

"In *Garrity*, a state employer questioning its employees informed them of their right to remain silent--and that if they exercised it, they would be fired.... Faced with the choice "either to forfeit their jobs or incriminate themselves," the employees confessed... The Court held that the state may not put its employees to such a choice and reversed their convictions....

The *Garrity* rule has since been generalized to any situation in which the government seeks to "impose substantial penalties because a witness elects to exercise his Fifth Amendment privilege." ... Thus, "loss of job, loss of state contracts, loss of future contracting privileges with the state, loss of political office, loss of the right to run for political office in the future, and revocation of probation all are 'penalties' that cannot be imposed on the exercise of the privilege."

In this case, Goodpaster was subject to a regulation, 39 C.F.R. S 230.3(a), requiring that he "cooperate with all audits, reviews, and investigations conducted by the Office of Inspector General." The same regulation provides that "failing to cooperate ... may be grounds for disciplinary or other legal action." He was also subject to a workplace policy that required him to "cooperate in any postal investigation, including Office of Inspector General investigations" and that provided for "appropriate disciplinary measures" should he not cooperate....

Where the state has created a penalty situation but wishes to elicit testimony for use in criminal proceedings, it has an easy and effective remedy: Retract the employment-related threat that created the penalty situation. The state need only assure the employee, before it questions him, that he will not be punished solely for asserting his Fifth Amendment privilege. This simple remedy, frequently styled a " Garrity warning" in mimicry of the *Miranda* warnings, has been recognized by both the executive branch and the federal courts. See Wray Memorandum at 466 ("[W]hen a federal employee is interviewed ... by an Office of Inspector General, the agents should provide the employee with an advice of rights form ... commonly referred to as the ' *Garrity* ' warning.")....

The Supreme Court has not yet had occasion to decide what constitutes an effective *Garrity* warning... But the government has several variations at its disposal. The U.S.

Department of Justice offered the following model warning in an attachment to the Wray Memorandum:

*This is a voluntary interview. Accordingly, you do not have to answer questions. No disciplinary action will be taken against you solely for refusing to answer questions.

Wray Memorandum at 468. The U.S. Department of Veterans Affairs OIG, to which SA Epperson belongs, provides the following, somewhat narrower warning:
If you refuse to answer the questions posed to you on the grounds that the answers may tend to incriminate you, you cannot be removed (fired) solely for remaining silent; however, your silence can be considered in an administrative proceeding for any evidentiary value that is warranted by the facts surrounding your case.

To summarize, when a government employee is questioned by his employer, the Constitution does not require the government affirmatively to announce "[w]hether [it] is wearing one hat or the other (or both)." ... But here, by threatening to punish Goodpaster's silence (and not retracting that threat), the Government donned the hat of employer. The Constitution holds it to that choice. Goodpaster's statements are suppressed."

(Confession rendered involuntary when defendant told he could not get a fair trial because of his race)

In *Bond v. State* (May 2014) the Indian Supreme Court ruled that the defendant's confession was rendered involuntary by statements from the detective that due to the fact the defendant was African American he might not receive a fair trial.

From the court's opinion: "But with respect to the detective's statement that Bond might not receive a fair trial because of his race and the likely composition of a prospective jury, our sentiment goes beyond the trial court's "great concern" and the Court of Appeals majority's disapproval of it as being "inappropriate." This is not a police tactic that we simply "do not condone" because it is deceptive. Instead, this was an intentional misrepresentation of rights ensconced in the very fabric of our nation's justice system—the rights to a fair trial and an impartial jury, and the right not to be judged by or for the color of your skin—carried out as leverage to convince a suspect in a criminal case that his only recourse was to forego his claim of innocence and confess. And like Judge Kirsch, we condemn it.

… in this case Bond was intentionally deceived as to the fairness of the criminal justice system itself because of the color of his skin. Regardless of the evidence held against him or the circumstances of the alleged crime, he was left with the unequivocal impression that because he was African American he would spend the rest of his life in jail. Unless he confessed. And in unfortunate days gone by, this might have been the case. But no one wants to go back to such a time or place in the courtroom, and so we will not allow even the perception of such inequality to enter the interrogation room.

Thus, in considering the totality of the circumstances surrounding Bond's interrogation, despite the otherwise permissible conduct by the detective, and despite Bond's apparent

maturity, health, education, and the favorable conditions of the interrogation, this deception by the detective tips the scale to involuntariness."

(Anatomy of a false confession case)

In *Halsey v. Pfeiffer, et al.* (April 2014) the US Court of Appeals, Third Circuit reversed the lower court's decision to grant the appellees a summary Judgment on Halsey's coercion claim. From the Court of Appeals opinion:

"The facts underlying this appeal—many of which are undisputed—are hardly believable. Plaintiff–Appellant, Byron Halsey, a young man with limited education, learned that the two small children for whom he had been caring had been tortured and murdered. He wanted to help in the investigation of these heinous crimes but found himself isolated in a police interview room, accused of the murders, told he had failed a polygraph examination (that we now know he passed), and confronted with false incriminating evidence. For a time he maintained his innocence, but, after being interrogated for a period extending over several days, and in a state of great fear, he signed a document purporting to be his confession to the crimes. Subsequently, he was charged, indicted, convicted, and sentenced to prison for two life terms. But his "confession" contained details that the investigators must have inserted because Halsey could not have known them. And the real killer, though he had a record of sexual assaults, was known to the police, and was an obvious potential suspect as he lived in an apartment next to the one that Halsey, the children, and their mother occupied, avoided arrest despite nervously asking the investigating detectives whether he would be "locked up." Finally, after 22 years the State of New Jersey released Halsey from prison, not because trial error cast doubt on the result of his criminal trial, but because it had been established beyond all doubt that he had not committed the offenses. Except when an innocent defendant is executed, we hardly can conceive of a worse miscarriage of justice.

After his release, Halsey filed this civil action under 42 U.S.C. § 1983 with supplemental state-law claims alleging that state actors and entities involved in his prosecution had violated his constitutional rights. The defendants included, inter alia, defendants-appellees Frank Pfeiffer and Raymond Lynch, the two investigating police officers who Halsey claims (1) fabricated the oral confession that led to the prosecutor filing charges against him, (2) maliciously prosecuted him, and (3) coerced him into signing the fabricated confession, which was the critical evidence at his criminal trial. On appellees' motions for summary judgment, the District Court entered judgment in their favor on all three claims on February 21, 2013, because the Court believed that they had qualified immunity from Halsey's claims. *Halsey v. Pfeiffer,* Civ. No. 09–1138, 2013 WL 646200 (D.N.J. Feb. 21, 2013) (*Halsey*). Halsey then filed this appeal.

We will reverse and remand the case to the District Court for further proceedings. First, we reaffirm what has been apparent for decades to all reasonable police officers: a police officer who fabricates evidence against a criminal defendant to obtain his conviction violates the defendant's constitutional right to due process of law. Second, we reinstate Halsey's malicious prosecution claim, principally because the prosecutor instrumental in

the initiation of the criminal case against Halsey has acknowledged that the false confession that appellees claimed they obtained from Halsey contributed to the prosecutor's decision to charge Halsey, and for that reason we will not treat the decision to prosecute as an intervening act absolving appellees from liability. Moreover, without that false confession, there would not have been direct evidence linking Halsey to the crimes so that the prosecutor would not have had cause to prosecute Halsey. Therefore, the District Court should not have held on the motions for summary judgment that appellees had a probable cause defense to Halsey's malicious prosecution claim. Third, we conclude that because the evidence was sufficient for a rational jury to find that appellees, who had interrogated Halsey for many hours, had coerced him into signing the false confession, the Court should not have granted appellees a summary judgment on Halsey's coercion claim."

In examining the coercion claim, the court stated, "The final aspect of the disposition of appellees' motions for summary judgment that we address is the dismissal of Halsey's claim that appellees coerced him into adopting a confession that they fabricated and by doing so denied him due process of law. The parties sharply dispute how we should resolve the appeal on this issue because, on one hand, the record contains evidence that appellees forced Halsey to sign the incriminating statement by overwhelming his will to continue denying his involvement in the crime but, on the other hand, there is no indication that appellees physically abused Halsey or even tricked him into signing the statement. Our review of the record, considered in the light most favorable to Halsey, convinces us that there is enough of a factual issue to warrant the conclusion that the District Court should have denied the motions for summary judgment on the coercion claim.

The District Court seemed to have viewed the interrogation process as a string of separated events, beginning with appellees questioning Halsey, proceeding with Propsner entering the room to review Halsey's statement, and culminating with Halsey signing his confession. It appears that, to the Court, appellees' conduct during the first stage of the process had no bearing on the resolution of the coercion issue because Halsey signed the confession later without objecting to the process's earlier aspects.

Our precedent forecloses the adoption of this compartmentalized view of the interrogation process in which a court considers the material events independently or disjunctively rather than as connected episodes in an ongoing process. In *United States ex rel. Johnson v. Yeager,* 327 F.2d 311, 314 (3d Cir.1963), we reversed the denial of a habeas corpus petition that a defendant in state custody, Wayne Godfrey, had filed. Godfrey had been interrogated for many hours, deprived of sleep and counsel, and, contrary to state law, had not been taken "promptly" for a hearing before a magistrate judge following his arrest. The bulk of Godfrey's interrogation occurred over a night before he confessed the next morning. *Id.* at 313. Several police officers did the questioning, but they ultimately took Godfrey to a chief detective officer in the morning to whom Godfrey formally confessed. *Id.* That confession "proceeded smoothly and without apparent reluctance on Godfrey's part." *Id.* We noted that if we considered only the last aspect of the confession process in addressing the coercion issue, we would have

deemed the confession voluntary as the state court had when it admitted the confession into evidence. *Id.* at 315. But we rejected the conclusion of the state court and held that the "civil manner" in which the chief detective treated the defendant could not have "cured or made irrelevant the events of the preceding 21 hours." *Id.*

As we held in *Yeager,* and as we reaffirm today, the compartmentalized view of the interrogation process cannot be squared with settled Supreme Court precedent. "[C]oercion may have a persisting invalidating effect upon a confession," even when the confession is apparently made without "reluctance [and] in response to civil questioning in pleasant surroundings." *Id.* (citing *Brown v. Mississippi,* 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936) and *Reck v. Pate,* 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948(1961)). Thus, "[t]he events preceding the formal confession must be considered as well as its immediately attendant circumstances." *Id.* at 313. … Accordingly, Halsey's signature did not extinguish appellees' alleged misconduct during the interrogation.

Our foregoing conclusion leaves us with the question of whether appellees' misconduct could be found to have led Halsey to make the confession. The pertinent facts on this issue, viewed in light most favorable to Halsey, are compelling. Over the course of less than two days, appellees detained Halsey, a man of limited intelligence and little education, who was unaccompanied by a friend or an attorney, for about 30 hours and questioned him almost continuously for about 17 of those hours, of which about nine were highly confrontational, a period measured from the time Pfeiffer took what Halsey called a "forceful" approach continuing to the time that Halsey signed the confession. Appellees persisted in telling Halsey that he was guilty, "hollering and screaming" at him,… despite being aware of Halsey's mental limitations and despite Halsey's repeated protestations of his innocence. Furthermore, Halsey cried and, according to Pfeiffer, went into a trance towards the end of the interrogation. At that point Halsey, who claims that he feared for his life, signed a statement in the appellees' presence even though it included details that only the police and the murderer could have known….. Overall, we are satisfied that Halsey presented enough evidence to withstand the motions for summary judgment on the coercion issue. It is true, as the District Court noted and as appellees repeat in their briefs, that Halsey was not beaten, bribed, or threatened. Furthermore, he was advised of his *Miranda* rights, and, at times, he was given breaks when being questioned. Moreover, given his prior arrests, Halsey had some familiarity in dealing with the police, though his record of repeated arrests suggests that he took away very little from those experiences. In fact, the record does not suggest that he was particularly comfortable in navigating the criminal justice system.

But none of these reasons could justify our affirming the order granting summary judgment. .... There is no magic set of considerations that justifies the granting of summary judgment on a coercion claim, for "a totality of the circumstances analysis does not permit state officials to cherry-pick cases that address individual potentially coercive tactics, isolated one from the other, in order to insulate themselves when they have combined all of those tactics in an effort to overbear an accused's will." *Wilson,* 260 F.3d at 953. When we weigh the factors militating against and favoring a finding that Halsey's

confession was coerced, we are satisfied that rational jurors reasonably could find that Halsey was coerced into signing the confession.

(Combination of assertion the defendant's daughter would suffer without an admission and an implied promise of leniency yield involuntary confession)

In *State v. Ruiz-Piza* (April 2014) the Court of Appeals of Oregon found that the defendant's statements were not voluntarily made. The focus was on two issues: the officers' assertions that the medical care received by defendant's daughter would suffer if he did not confess, and the notion that he was induced to confess by an implied promise of leniency.

In their analysis the court stated:

We begin with the issue of G's medical care; at the outset we state our agreement with the parties that the record cannot reasonably be read to reveal that the officers threatened to withhold medical care from G in the absence of a confession, and we do not perceive that the trial court so concluded. What the officers did do, however, was cultivate and leverage defendant's fear that, unless he admitted to shaking her, G's medical care would suffer…. Having made clear that G had serious medical issues that could be ameliorated by a confession—an assertion that, as a matter of medical fact, is without any support in the record—the officers also appealed to defendant's paternal responsibilities, his religion, stated that defendant was the *only* one who could help G, and stated, in effect, that the way to provide that help was to tell the officers that he had accidently shaken her. Those statements, taken in the circumstances in which they were made, constituted an "inducement through * * * fear" that was specifically calculated to capitalize on what the trial court recognized as defendant's acute vulnerability.

As to the implied promise of leniency: When Hurley stated "we have to have an explanation," a stark choice was put to defendant: either confess to accidentally shaking G and—in addition to securing better medical care—the officers would accept that version of events, or do not confess, and allow the officers to assume that the child had been abused. Whatever abstract legal distinction might exist between accidentally injuring a child while shaking the child and "child abuse" is of no moment; the obvious intent in drawing a distinction between the two alternatives was to induce defendant to confess to less-serious conduct than it would be assumed that he had committed in the absence of a confession. That the officers never explicitly made a promise of leniency or immunity is not dispositive; the effect of their approach was to tell defendant: "the only way to avoid having the police conclude that you are a child abuser is to tell us that you accidentally shook your daughter."

The Appeals court stated, "we do not decide whether either line of police conduct, standing alone, would represent an insurmountable obstacle to the state's effort to show that the statements were made voluntarily. When the inducements discussed above are taken in view of each other and the totality of the underlying circumstances of the

interviews, we conclude that the trial court did not err in concluding that the statements were made involuntarily."

(Interrogator's statements that defendant's ability to "speak plainly," "face-to-face" with his "case agent" would be of limited duration and, critically, would evaporate when "the lawyers [got] involved" should be avoided, but do not create a coercive environment)

In *US v. Shehadeh* (2012) the US District Court, E.D. New York, found that the investigator's statements to the defendant that his ability to "speak plainly," "face-to-face" with his "case agent" would be of limited duration and, critically, would evaporate when "the lawyers [got] involved" should be avoided, but were not coercive. In their decision the court stated the following:

"Essential to review are statements made to Shehadeh regarding his consultation with counsel, especially those of Agent Tinning. Tinning candidly admitted--and his contemporaneous notes confirm--that in the course of explaining the right of a suspect in custody to have an attorney with him during questioning, Tinning told Shehadeh his ability to "speak plainly," "face-to-face" with his "case agent" would be of limited duration and, critically, would evaporate when "the lawyers [got] involved." ... This followed discussion of cooperation and took place during, not after, the advice of rights. Defendant argues that, under the totality of the circumstances, this statement--followed by AUSA Kazemi's "explanation" of the legal process--fundamentally misrepresented his rights and coerced him into waiving them because these statements suggested any opportunity to cooperate was conditioned on doing so before "the lawyers get involved."

Surely, while not crossing the line as defendant protests, Agent Tinning's brief, one-time commentary about the "effects" of asking for a lawyer during post-arrest, custodial interrogation comes as close to the line demarcated by *Anderson* as possible. This is especially true in light of the subsequent appearance of AUSA Kazemi, whose in-custodial speech made clear that Shehadeh's fundamental choice was between cooperation and conviction. Unlike in *Anderson,* however, the Court finds that, under all the circumstances, Tinning's commentary was neither false nor misleading. Specifically, since Agent Tinning's colloquy with Shehadeh was actually true and was not misleading (i.e., he never told Shehadeh that "cooperation" leading to a better result for him was not possible if he asked for a lawyer), it does not support a finding of undue coercion. …. The interrogation process employed, however, leaves much to be desired. It was fraught with constitutional and other legal pitfalls. It is to be avoided. Nonetheless, on the totality of the circumstances, the Court finds the government has proved by a preponderance of the evidence that Shehadeh's waiver was uncoerced, knowing and voluntary.

(*Confession found inadmissible - police violated Miranda and improperly misrepresented evidence to the suspect)*

In *Aleman v. Village of Hanover Park* (2011) the U.S. Court of Appeals, Seventh Circuit, found that the police acted improperly during the interrogation of Aleman.

In their opinion the Court of Appeals stated that, "Aleman indicated a desire for the assistance of counsel twice, and only after responding to further police-initiated custodial interrogation did he agree to be questioned. He said first "I gotta call my guy" (his lawyer) and after speaking to him reported that the lawyer had told him not to speak to the police--yet Micci continued to urge him to sign a Miranda waiver. Aleman invoked his right to counsel the second time when he asked to call his lawyer again. He might have done so a third time, but was prevented when Micci or Villanueva told him to hang up and added, "I ask that you don't use the phone again until we decide what we're gonna do." When a suspect invokes his right to counsel, the police may not recommence questioning unless the suspect's lawyer is present or the suspect initiates the conversation himself.

"There is more that was wrong with the interrogation than a violation of Miranda. Micci induced Aleman's "confession" by lying to him about the medical reports. The lies convinced Aleman that he must have been the cause of Joshua's shaken-baby syndrome because, according to Micci, the doctors had excluded any other possibility. (They had not.) The key statement in Aleman's "confession" was that "if the only way to cause [the injuries] is to shake that baby, then, when I shook that baby, I hurt that baby." The crucial word is "if." By lying about the medical reports, Micci changed "if" to "because" and thereby forced on Aleman a premise that led inexorably to the conclusion that he must have been responsible for Joshua's death; the lie if believed foreclosed any other conclusion.

"In this case a false statement did destroy the information required for a rational choice. Not being a medical expert, Aleman could not contradict what was represented to him as settled medical opinion. He had shaken Joshua, albeit gently; but if medical opinion excluded any other possible cause of the child's death, then, gentle as the shaking was, and innocently intended, it must have been the cause of death. Aleman had no rational basis, given his ignorance of medical science, to deny that he had to have been the cause.

The question of coercion is separate from that of reliability. A coerced confession is inadmissible (and this apart from Miranda) even if amply and convincingly corroborated... But a trick that is as likely to induce a false as a true confession renders a confession inadmissible because of its unreliability even if its voluntariness is conceded... If a question has only two answers-- A and B--and you tell the respondent that the answer is not A, and he has no basis for doubting you, then he is compelled by logic to "confess" that the answer is B. That was the vise the police placed Aleman in. They told him the only possible cause of Joshua's injuries was that he'd been shaken right before he collapsed; not being an expert in shaken-baby syndrome, Aleman could not deny the officers' false representation of medical opinion. And since he was the only person to have shaken Joshua immediately before Joshua's collapse, it was a logical necessity that he had been responsible for the child's death. Q.E.D. A confession so induced is worthless as evidence, and as a premise for an arrest."

(Confession ruled inadmissible when investigators ignored custodial suspect's request to stop)

In *State v. Knyceaulas* (2010) the Court of Appeals of Arizona ruled that the trial court erred in admitting the defendant's confession. Specifically, the defendant contends the detective violated his rights under *Miranda* by continuing to question him after he had requested to end the interview. The following exchange took place during the interrogation:

Mr. Brown: So are-are you taking me to jail now or ... ?

Detective Hange: Am I taking you to jail right this minute? No, I'm not taking you right this minute.

Mr. Brown: Am I under arrest?

Detective Hange: Right this minute, you're here on a physical detention. That's this court order right here, and that court order is to get your DNA, which we're going to do.

Mr. Brown: Okay. Can I do that and then go?

Detective Hange: Well, we'll get to that in a minute. Okay?

Mr. Brown: Because this is not-yeah. Can I do it and then go on?

Detective Hange: You don't want to talk to me?

Mr. Brown: Nah, not no more.

Detective Hange: Why?

Mr. Brown: Because I don't. Because you think you know everything.

Detective Hange: Well, you know I know. You know that.

Mr. Brown: Do I?

Detective Hange: Uh-huh. You know that I know. I'm not fishing here. Kynceaulas, I'm not fishing. I don't fish. I don't believe in fishing.

Mr. Brown: Can we take my DNA and so I[can] go?

Detective Hange: Okay. We'll go ahead and get your DNA.

Mr. Brown: Please.

Detective Hange: That's not a problem.

Mr. Brown: Thank you.

Detective Hange: But you're going to go? I don't think so. I think you're probably going to go to jail.

Mr. Brown: All right.

Detective Hange: All right?

Mr. Brown: Can I make my phone call?

Detective Hange: You'll get to make your phone call in due time. If you decide you want to talk to me, I'm still around. I'm not going anywhere yet.

The Court of Appeals found that "Here, when the detective explicitly asked whether Brown wished to continue talking, Brown answered, "Nah, not no more." Our courts have held equivalent statements to be a clear invocation of a suspect's Fifth Amendment rights…. The trial court therefore erred as a matter of law to the extent it found Brown did not invoke his right to remain silent."

(Police statement that they were not going to pursue any charges against the suspect, after advising him of his Miranda rights, renders the confession involuntary)

In *US v. Lall* (2010) the United States Court of Appeals, Eleventh Circuit, found that the trial court was in error when they allowed the defendant's confession into evidence. The Appeals Court stated that, "In this case, Detective Gaudio gave Lall the *Miranda* warnings on the front lawn of the house. Nevertheless, Gaudio testified that before he entered the bedroom, he told Lall that he was not going to pursue any charges against him. Just as in Hart, this representation contradicted the *Miranda* warnings previously given. Indeed, this advice was far more misleading than that given in Hart. Our holding there compels the conclusion that, as a result of Gaudio's statements, Lall "did not truly understand the nature of his right against self-incrimination or the consequences that would result from waiving it."

Moreover, as in Hart, the totality of the circumstances in this case also bolster Lall's challenge to the propriety of his interrogation. The record shows that during the interview with police, Lall was kept alone in his bedroom, isolated from his family, and told that the purpose of any questioning was to protect Lall's family from future harm. These undisputed facts, taken together with Gaudio's representations, compel the conclusion that Lall did not make a "voluntary, knowing and intelligent waiver of his privilege against self-incrimination and his right to counsel."

(Interrogator's repeated references that he could help the suspect rendered the confession involuntary)

In *Ramirez v. State* (2009) the District Court of Appeal of Florida, First District, the court found that the interrogator's repeated statements that he could help the suspect were improper. In part the District Court stated that "Here, the detective's constant offers of unspecified help were improper. At one point, the detective said to Appellant, "[I]f you want us to help you, you need to help us also." This statement arguably constitutes an offer of a "quid pro quo" bargain within the meaning of relevant case law. Because this statement is not the only one at issue, however, we decline to reach that conclusion definitively. Instead, we have determined that Appellant's statement was induced by improper police conduct based on the totality of the circumstances. In addition to making this questionable statement, the detective strongly implied that he had some specific benefit in mind that he could confer on Appellant. While offering this benefit that he would explain later, the detective made references to immigration issues, the opportunity to "get out of this," and arguably even the death penalty.

Additionally, when Appellant expressed the belief that the detective, as "the law," could do anything he wanted with Appellant, the detective did not clarify his position. The detective's failure to explain the limits of his authority is one major factor that sets this case apart from other cases upholding officers' suggestions that they could help defendants.....

Finally, Appellant's constant requests for the detective to give him more details of how he could help, even in one instance demanding such an explanation before giving an answer, show a preoccupation with the detective's promises and an invited expectation of receiving a benefit in exchange for a statement. Even though Appellant's preoccupation with the promises was readily apparent, the detective never stopped to explain that he had no control over what the prosecutor would choose to do with Appellant's statement.

Under the unique circumstances of this case, the trial court should have excluded the interview from evidence, at least after the point when the detective began to offer "help." Accordingly, we reverse and remand for a new trial to be conducted without the benefit of the involuntary interview statements."

(Confession found involuntary when interrogator misrepresented the charge)

In *McGhee v. State* (2008) the Court of Appeals of Indiana held that the detective's erroneous statement during an interview with defendant that it was not against the law for an uncle to have consensual sex with a niece rendered involuntary defendant's subsequent confession that he had sex with his adult niece.

The court stated that: "McGhee argues that his confession was involuntary because Detective Cole obtained it by using "misrepresentations of fact and promises of leniency." Specifically, he notes that, during the videotaped interview, Detective Cole told McGhee that "it's embarrassing sometimes for an uncle to have sex with his niece,

but it's not against the law if she wanted it." (State's Ex. 7). According to McGhee, his confession was obtained as a result of Detective Cole telling him that his conduct was not criminal, rendering the confession involuntary and inadmissible. We agree."

The court went on to say, "At the very least, Detective Cole's comments constituted an implied promise that McGhee would not be prosecuted if he admitted to having sex with K.O. and it turned out that the sex was consensual. Obviously, that was a promise that Detective Cole, like the officer in Ashby, could not keep. McGhee's confession was brought about by Detective Cole's misstatement of the law and was therefore involuntary and inadmissible."

(Employer found guilty by jury of false imprisonment)

In *Robles, Plaintiff v. Autozone, Inc.,* (2008) Robles obtained a jury verdict in his favor for compensatory damages for false imprisonment. That jury found AutoZone's employee, Octavio Jara (Jara), acting within the course and scope of his employment, had falsely imprisoned Robles in the course of an internal company loss prevention investigation, and it awarded Robles $73,150. However, the trial court granted a nonsuit on the request for punitive damages, and Robles appealed.

Here are the salient facts:

"On July 6, 2000, Robles arrived for work and was told by the store manager ... that he should go to the back room because loss prevention officer Jara and the district manager ... wanted to talk to him. Robles did so and Jara told him there was an issue they needed to talk about, i.e., that the bank had called stating that they received an empty bag with only a deposit slip, and the slip had Robles's signature on it. Jara asked Robles several times if he knew what had happened, and Robles said no. At some point, [the district manager] left the room. Jara then told him, "we know who did it," and accused Robles of stealing the money. Robles denied this for the remaining part of the first portion of the loss prevention interview, which lasted two hours and seven minutes. Jara told Robles they would need a statement, and Robles filled out a form denying that he had taken the money."

After a 10-minute break in the interview, the following events occurred. Jara asked Robles if he knew that Jara was a police officer (a reserve officer for the City of Chula Vista) and Jara told him that he could get any information about anybody. Jara told Robles he had had a former employee, Julio Martinez, arrested by the police for theft. According to Robles's testimony at the first trial, Jara then said, "All I have to do is give a phone call, and the police will be at the front of the store to pick you up, and they'll take you to jail because what you've done is a felony, and you will serve time." Jara said that if Robles left, he would be arrested. Robles was afraid to leave.

According to Robles, Jara then told him that they could keep the matter within the company if Robles confessed and agreed to pay the money back in monthly installments while keeping his job: "Robles then sat down and wrote what Jara dictated to him in the

next page of the statement, confessing to taking the money and signing a promissory note to pay back the money." The interview had lasted over three hours. "Robles was then suspended for a few days, fired, and his last paycheck withheld. He was unable to obtain unemployment insurance, due to being fired, but got a new and better job three or four weeks later. His lost wages amounted to $2,000 or less."

It was soon discovered that the money in the deposit bag, approximately $800 AutoZone cash, (which was the focus of the interrogation) had been found at the bank a few weeks later, without a deposit slip or account number, and the store manager and Jara were told at that time about telephone calls from the bank stating this, but no further action was taken by AutoZone about Robles with regard to this money.

In 2001, Robles filed a complaint for damages for false imprisonment and other theories against AutoZone and some of its employees. At the first jury trial, extensive evidence was presented about the incident and about AutoZone's procedures and policies for loss prevention, including training of loss prevention managers, such as Jara, in the use of the company interviewing manual, entitled "Investigative Interviewing, An Investigator's Guide To Interviewing" (the manual). The manual sets forth methods and interview techniques for loss prevention managers to use in interviewing employees accused of theft.

(See *Asay v. Albertsons, Inc.* for the proper room setting for an employee investigative interview.)

(Important case re the use of deception during an interrogation)

In *State v. Patton* (2003) the court very carefully examines the use of trickery and deceit in the interrogation of suspects, and draws a very clear distinction between verbally misrepresenting evidence and creating a fictitious piece of evidence. In their opinion the court extensively reviews the history of the trickery and deceit issue and what numerous courts have had to say on the issue.

References to suspect's family members

(Court rules that threats to the defendant's ability to maintain contact with his infant daughter were psychologically coercive - the totality of circumstances)

In *Commonwealth v. Monroe* (March 2015) the Supreme Judicial Court of Massachusetts ruled that the investigator's behavior produced a coerced and inadmissible confession. From the court's opinion:

The defendant filed a motion to suppress the statements he made to police officers during a post arrest interview, claiming that even if the waiver of his *Miranda* rights is deemed valid, his statements were nonetheless involuntary.

On appeal, the defendant argues that the motion judge erred in denying his motion to

suppress, claiming that psychological coercion, together with other factors, rendered his statement involuntary and that the admission of his involuntary statement at trial violated his right to due process under the Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. More specifically, he contends that the coercive nature of the detectives' statements regarding the fate of his infant child compels a finding that his statement was involuntary.

At this point in the interrogation, Detective Brissette turned the conversation toward the defendant's daughter, asking him her age and about the family's involvement with the Department of Children and Families (DCF). The defendant responded by stating, "Don't tell me they're going to take my daughter 'cause--don't even tell me 'cause I don't want to hear it. 'Cause my daughter is the most important thing in my life." The detective continued on the subject of the defendant's child, suggesting that the defendant was aware of a scheme by the child's mother to get "money from [w]elfare and stuff," but that the defendant was "playing dumb" during the DCF investigation just as he was doing with the questions about his whereabouts when the victims were attacked.

... At 4:45 p.m., the detective stated the following:
"[T]his is the time to talk to us about what happened, okay? You know what happened. This is your opportunity. You're probably going to end up going away for a long time. You're not going to see that two month old baby for a long, long time, okay? This is the time, maybe this morning you met this girl, maybe it was consensual or whatever but this is the time to talk to us about it and what was going on the last couple of--last week, with those two other girls. This is the time to talk to us about it and tell us about it, okay? Look at me, don't keep looking away from us."

The defendant then dropped his head into his hands and began to cry, eliciting from the detective a command to stop "looking away." The defendant explained that "the only reason why I'm crying 'cause I don't want to live a day without seeing my daughter." This exchange preceded a barrage of references to the defendant's child and girl friend, with the detectives repeatedly telling the defendant to "think of [his] daughter," "think of [his] girl friend," that he would be the reason his girl friend lost custody of their child, and that he would be the reason his child would be raised by strangers. At 4:56 p.m., the detectives, alternating between each of them without any responses from the defendant, stated, "[Y]ou're going to be the reason your girl loses that baby"; " 'Cause you know what, there's a 51A just like there was the last time, [DCF] is already involved with you and with your daughter"; and "At least have that baby grow up with someone they know. The baby might not see you but at least it will be with the mom." Additionally, the detectives provided potential reasons as to why the defendant may have committed the assaults and robberies during this period, stating for example that "things are a little tough right now. You got a three month old that means the world to you and don't know how you're even going to provide for her." The defendant continued to cry, held his head in his hands, was generally unresponsive to the detectives' questions, and stared blankly in front of him.

Within minutes of these repeated references to the possibility that the defendant's girl

friend could lose custody of the child, the defendant made incriminating statements regarding the three incidents. He first acknowledged that there was one dollar in E.C.'s backpack the prior week. The defendant then conceded that he had walked with A.G. earlier that morning but maintained that they did not have any sexual contact and that he did not assault her. Detective Brissette later told the defendant that they had evidence of the defendant's DNA on A.G. from the assault that morning. After more prodding by the detectives, the defendant remarked, "I'm going to tell on behalf of my daughter, because I love my daughter ... I'm going to talk--I'm going to tell you the truth because I love my daughter." The defendant then admitted that A.G. performed oral sex on him and that he ejaculated on her exposed buttocks, but stated that she initiated this contact. He also admitted that he robbed E.C. and L.B. and that he had a knife when he robbed L.B., but that he only pulled out the knife once she tried to fight him.

The police interrogation of the defendant, rife with threats to the defendant's ability to maintain contact with his infant daughter, properly may be characterized as psychologically coercive... Here, as evidenced by the videotaped interview, the detectives threatened the defendant with the loss of contact with his child by repeatedly and falsely claiming that if he did not tell them what happened, the child could be taken away and raised by strangers. Although we have stated that a particular tactic generally will not render a confession involuntary, see Selby, 420 Mass. at 664, 651 N.E.2d 843, the particular conduct at issue here, threats concerning a person's loved one, may impinge on the voluntariness of a defendant's confession.

The chronology is telling. The defendant made his first incriminatory statement at 5:05 P.M. after the litany of threats described above, and more specifically three minutes after the detectives repeated their suggestion that the defendant's child would be protected from an adverse custody determination if he confessed. Before he implicated himself in response to the threats regarding his child, the defendant was not told that the police lacked the power to remove the child from his girl friend's custody or that his confession would have no bearing on whether the child's custody status could be changed. The convergence of the defendant's apparent devotion to his child as reflected in his statements and conduct during the videotaped interview, the defendant's ignorance of the authority of the police to effect a change in his child's custody, and the prominence of the psychologically coercive tactics during the interrogation persuades us that the defendant lost the ability to "make an unconstrained, autonomous decision to confess," Baye, 462 Mass. at 256, 967 N.E.2d 1120, quoting Walton, 10 F.3d at 1030, and thus, his will was overborne. That breaking point occurred at approximately 4:57 p.m., when the defendant reacted to Detective O'Rourke's statement, "At least have that baby grow up with someone they know" by stating, "Please don't take my daughter"; hanging his head; and crying. His inculpatory statements followed.

The defendant's personal characteristics, considered as part of the totality of the circumstances of the videotaped interview, also are relevant to our conclusion that his will was overborne by the police tactics involving his child. During the interrogation, the defendant alerted the police to and demonstrated a disturbed emotional or physical state, a factor relevant to voluntariness... Like the defendant in Magee, the defendant in this

case was in an emotionally disturbed state at the time of his interview. He informed the police of his condition but nonetheless was subjected to the psychological coercion described above. Here, the defendant was generally unresponsive to police questioning until the police made threats regarding the custody of his child. After that occurred, the defendant cried and invoked his love for his child before providing inculpatory statements to the police. As in Magee, although the defendant's emotional and physical condition is not determinative, his condition is a substantial factor in our consideration of whether his will was overborne by the police tactics.

We consider as well the defendant's age and educational background in our analysis of the voluntariness of the defendant's statements... Here, the defendant had recently turned eighteen years of age and was in the process of obtaining his GED at the time of his arrest. He had emigrated from Africa to the United States just six years prior. While these factors alone are insufficient to warrant suppression of the defendant's statements, the defendant's young age and poor educational background support the conclusion that his statements were involuntary.

Taken together, these factors persuasively demonstrate that the defendant's will was overborne and that, as a consequence, statements made thereafter were involuntary. The use of those statements against the defendant at trial was constitutional error.
Other tactics. We comment briefly on the detectives' use of other interrogation techniques which, although not dispositive, contributed to the defendant's loss of his "ability to make an unconstrained, autonomous decision to confess." ... First, "minimization" during interrogation of a crime of which a defendant is accused, combined with other factors, can render a confession involuntary because minimization carries with it an implied promise that the requested confession will result in lenient treatment... Prior to the defendant making any inculpatory statements, the detectives offered the defendant reasons for why he may have committed the alleged robberies, such as needing money to buy food for himself and his infant daughter, and minimized the rape allegation by pointing out that both the defendant and the alleged victim were old enough to engage in consensual sexual activity.

Second, "[t]he use of false information by police during an interrogation is deceptive and is a relevant factor indicating a possibility that the defendant's statements were made involuntarily." Here, Detective Brissette informed the defendant that they had evidence of his DNA on the victim who had allegedly been assaulted that morning. It is evident from the record that the detectives could not have yet known to whom any DNA recovered from that victim belonged. In combination with the psychological coercion, the minimization and false statement support our conclusion that the defendant's inculpatory statements were involuntary.

(Testimony regarding threat of deportation of family members should have been admitted; could cause a coerced confession)

In *US v. Feliz* (July 2015) the US Court of Appeals, First District, reversed the lower court's decision to admit the defendant's incriminating statement. From the Court of

Appeals decision:

"The district court curtailed the record before it when it excluded as hearsay Hortencia's [the defendant's mother] testimony that she heard a police officer threaten Feliz with the deportation of his mother and state custody for his siblings. The court never evaluated the two competing accounts, because it ruled that only one account was before it.

This was plain error. Hearsay is a statement "the declarant does not make while testifying at the current trial or hearing," and "a party offers in evidence to prove the truth of the matter asserted in the statement." ... Feliz did not attempt to introduce testimony of the officers' threats for the truth of the matter asserted. Hortencia testified, for example, that the officer said "your siblings are all going to the Department of Family." Before the magistrate judge, Hortencia testified that an officer said to Feliz, "We are going to deport your mother." She also testified there that the officers told Feliz that if he did not turn himself in, "they were going to deport me and they were going to call the Department of the Family to take the boy and girls." That testimony would not show that Feliz's siblings would truly be sent to the Department of the Family if he did not turn himself into police custody, or that she would have been deported. Rather, the testimony, if credible, would show the fact that the police officer made the threat to Feliz, a fact within Hortencia's personal knowledge.

Given that the improperly excluded testimony was both plausible and significant in this case, the proper course was for the district court to admit the evidence and "give it such weight as his judgment and experience counsel." ... In the written opinion, the district court simply said that there was "no evidence" of coercion and, while "[t]here may have been evidence" of coercion before the magistrate judge, "similar evidence was not reiterated in the hearing before the undersigned."

We vacate the order denying the motion to suppress, vacate the judgment of conviction, and remand for further proceedings consistent with this opinion. Upon remand, the case shall be assigned to a different judge for a new proceeding.

(Confession was coerced when investigators threatened to have Child Protective Services take defendant's child away)

In *U.S. v Guzman* (June 2014) the US District Court, W.D. Texas, ruled that "By implying that he and Hernandez had the ability to determine whether Child Protective Services would take away the custody of her child, Mora improperly coerced Defendant into confessing to importing, knowingly, twenty packages of marijuana. Threatening the custody of a defendant's child is coercive when used to illicit a confession of a defendant. *See* Lynumn v. Illinois, 372 U.S. 528, 534, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963) (holding that threatening to cut off state benefits and custody of her children was coercive). In the instant case, Defendant was separated from her minor child and, after being escorted into an interrogation room, was not informed of what steps would be taken with her child. After denying Hernandez and Mora's allegations throughout her interrogation, Defendant succumbed to their pressure only after Mora made threatening statements about his power

to have Child Protective Services take custody of her child and Hernandez stated that he was leaving the room to determine what steps to take with the minor child. The statements made by Mora, together with Hernandez's actions and the separation of Defendant from her child, constitute coercion and rendered Defendant's confession thereafter involuntary. For these reasons, the Court finds that Defendant's confession was involuntary and that Defendant's oral and written statements, made after Mora and Hernandez's statements and actions concerning the custody of Defendant's child, be suppressed."

(Threat to arrest defendant's mother and aunt rendered incriminating statement inadmissible)

In *US v. Ortiz* (2013) the US District Court, S.D. New York, ruled that the defendant's incriminating statements (while in his apartment where a gun was found) were coerced by threats that the defendant's mother and aunt would be arrested unless he acknowledged owning the gun. In their opinion the court stated that, "The Second Circuit has never squarely addressed whether a threat to arrest a suspect's family member renders that suspect's confession involuntary. Several other circuits, as well as several district courts in this circuit, have considered this question, however, and have all reached a similar conclusion: such a threat does not render a confession involuntary if the police have probable cause to arrest the family member and thus could lawfully carry out the threat.

Here, as a result of Martinez's threat, Defendant's confession fell on the wrong side of that line. Under the rule followed by courts in this circuit and others, Martinez's threat to arrest Montanez [mother] and Defendant's elderly aunt was improper unless the police had probable cause to arrest those individuals and thus could lawfully act on the threat. The government has already conceded that such probable cause was lacking as to Defendant's aunt, so the threat to arrest her clearly was improper....

(Statement to suspect that he "should explain his mistake so that his daughter did not have to grow up without her dad" rendered the confession inadmissible)

In *U.S. v. John* (2012) the US District Court, D. Arizona, found that any incriminating statements that the defendant made after "the agent said Defendant should explain his mistake so that his daughter did not have to grow up without her dad are suppressed as involuntary." The court pointed out in their opinion similar statements that can tender the confession inadmissible, stating the following:

Haynes and Lynumn demonstrate that threats and promises relating to one's children carry special force. Interpreting these cases, the Ninth Circuit has previously concluded that "[t]he relationship between parent and child embodies a primordial and fundamental value of our society."..... When interrogators "deliberately prey upon the maternal [or paternal] instinct and inculcate fear in a [parent] that [he or] she will not see [his or] her child in order to elicit 'cooperation,' they exert the 'improper influence'...

In *State v. Brown* (2008) The Kansas Supreme Court upheld the Court of Appeals

decision to suppress the defendant's confession based on a violation of his constitutional privilege against self-incrimination. The Court of Appeals had found that "in the present case that "[w]hen a parent is essentially compelled to choose between confessing guilt in abusing his or her own child or losing his or her parental rights, the choice is between two fundamental rights under the Constitution."…. In other words, Brown would suffer a substantial penalty, the loss of the fundamental liberty interest in the care, custody, and control of his children if he elected not to incriminate himself, thereby violating the terms of the case plan."

Threats

(*Confession suppressed - made under the influence of fear produced by threats*)

In *State v. Belle* (September 2016) the Court of Appeals of Oregon ruled that the defendant's incriminating statements were made "under the influence of fear produced by threats" and should have been suppressed at trial. From the Court of Appeals opinion:

Defendant was approached by his cousin, Robey, who asked defendant if he wanted to make some money. Specifically, Robey asked defendant for his automated teller machine (ATM) card and personal identification number (PIN). Robey did not tell defendant what she planned to do with his ATM card and PIN, but defendant did know that Robey had "made checks" in the past.

Over the next several days, an unknown person used US Bank ATMs to deposit three checks into defendant's personal checking account. US Bank sought reimbursement for the amounts listed on the checks but all three were returned as forged or counterfeit. Before US Bank learned that the checks were fraudulent, the money had been withdrawn from defendant's account.

[Detective] Fields went to defendant's home to question him about the suspicious activity. Defendant initially denied knowing anything about the fraudulent activity on his account. Fields asked defendant if he was in the National Guard, and defendant responded that he was. Fields then asked defendant if he knew about the military code of conduct, and defendant said that he did. Fields told defendant, "Well, this matter [can] be handled on the state level and not under the military code. And I have not spoken to your commanding officer." Fields continued, "I'm really interested to know who was actually making these checks."

Following those statements, defendant told Fields that his cousin, Robey, had made the checks and that defendant had received about $1,500 for allowing Robey to access his account.

Defendant argues that "his initial statement was the product of a threat and implied promise of leniency," therefore, under *Powell* and ORS 136.425, the trial court erred when it failed to suppress that statement. Defendant contends that Fields made "a threat to contact defendant's commanding officer if he did not cooperate and a promise that he

would not contact defendant's commanding officer if defendant *did* cooperate." (Emphasis in original.)

In arguing to the contrary, the state … argues that Fields' threat was insufficiently compelling because "defendant knew that any admission or confession would likely result in his own state-court prosecution." We recognize that defendant was not promised immunity from state-level prosecution in this case; instead, Fields told defendant that the matter could be handled on the state level, as opposed to under the military code of conduct, and that he had not spoken to defendant's commanding officer…. Because statements promising not to involve third parties or without an explicit promise of leniency or immunity from state prosecution can be sufficiently compelling to require suppression of a defendant's confession, we reject the state's…. argument.

(Threat of being raped in jail contributed to a coerced confession)

In *Little v. US* (November 2015) the District of Columbia Court of Appeals held that defendant's confession following a series of improperly coercive interrogation techniques was involuntary. From the court's opinion:

For nearly two hours of stationhouse questioning, in the face of false reports that several witnesses had identified him, a false claim that his fingerprints were found in the vehicle, and persistent illusory promises of favorable treatment if he confessed, eighteen-year-old Jolonta Little remained steadfast in his denials that he was involved in the carjacking of which he was later convicted in this case. Things began to change, however, when a detective goaded him about the prospect of being sexually assaulted when he arrived at the D.C. Jail if he did not confess and thus give police "an opportunity to help [him] instead of incarcerate [him]." As Mr. Little began to waver, the detectives then proposed the idea of meeting with a lawyer to work out a deal. Under intensifying pressure, and having heard the detective mention a lawyer, Mr. Little inquired, "So where my attorney at?" and stressed that he was "trying to have that meeting set up." There would be no such meeting with his lawyer unless Mr. Little put some "meat ... on the table" and confessed, the officer said: "I got to have a reason for that to happen, and that reason is going to have to be you telling me what happened that day when that lady got robbed." At this point, in the face of a threat of being raped in jail, a confusing statement about when he could see a lawyer, and a statement that conditioned a meeting with a lawyer upon his confessing to the carjacking in this case, Mr. Little's resolve collapsed and he confessed. The firmness of Mr. Little's denials during disquieting tactics and the persistence of those denials as the pressure increased help persuade us that when he finally did speak in the immediate wake of the most coercive tactics mentioned above, his statements were not made "freely, voluntarily, and without compulsion or inducement of any sort." .... On this ground, we hold that Mr. Little's motion to suppress his confession should have been granted, and we reverse Mr. Little's convictions and remand for a new trial.

(Threatening deportation was coercive)

In *People v. Ramadon* (2013) the Supreme Court of Colorado upheld the lower court's decision to suppress the defendant's statements that were made after the investigator

threatened to deport him to Iraq if he did not tell the truth. In their opinion the Supreme Court stated that, "After viewing the videotape of the interrogation, we uphold the trial court's suppression order starting at minute fifty-four, instead of minute forty-two, when the interrogating officer told Ramadon that, if he did not tell the truth, he would likely be deported to Iraq. The record supports the trial court's conclusion that coercive police conduct during the custodial interrogation starting at the fifty-four minute mark played a significant role in inducing Ramadon' s inculpatory statements.

(The statement to the suspect that "It would be worse for you" if you did not talk to law enforcement was coercive)

In *US v. Ramirez* (2014) the US District Court, S.D. Florida found that the investigator's statement to the defendant that "It would be worse" for him if he did not speak to law enforcement was coercive.

"In the defendant's case, the court emphasized that the detective told the defendant that a disadvantage of having a lawyer present was that the lawyer would instruct the defendant not to answer questions, yet, the court explained, "[t]he reason for requiring a lawyer during custodial interrogation is to protect a suspect's privilege against self incrimination."…. . In addition, the court exhibited particular concern that the detective's statement that "honesty wouldn't hurt [the defendant]" "contradicted the *Miranda* warning that 'anything he said could be used against him in court.' [ ] The phrase 'honesty will not hurt you' is simply not compatible with the phrase 'anything you say can be used against you in court.' The former suggested to [the defendant] that an incriminating statement would not have detrimental consequences while the latter suggested (correctly) that an incriminating statement would be presented at his trial as evidence of his guilt."

(Telling a suspect he could be charged with the more serious crime of lying to the police can nullify the confession)

In *State v. Valero* (2012) the Court of Appeals of Idaho confirmed the lower courts finding that the defendant's confession should be suppressed because "the deceptive tactics used by the detective, under the totality of the circumstances, rendered the confession involuntary." From the Appeals Court decision:

"Deceptive police practices do not necessarily create coercion which would render a suspect's subsequent confession involuntary and excludable..... Confessions derived during the course of interrogations have been upheld as voluntary, notwithstanding misrepresentations of facts by the police, such as telling a defendant that his fingerprints were found on physical evidence or at the scene.... Courts have uniformly accepted the police tactic of "telling a suspect they have found some incriminating evidence to elicit statements from a suspect on the view that an innocent person would not be induced to confess by such police deception."..... However, that acceptance wanes when the police misrepresent the law.

The detective misrepresented the law regarding the polygraph. Both before and after the

polygraph the detective told Valero that the polygraph results would be admitted into court...

After stating that he could testify one hundred percent to Valero's guilt, the detective returned to his themes. The detective again minimized the seriousness of the accusations, stating that they were "not the end of the world." Then, the detective stated: "What is getting you to the end of the world and getting you in a bad spot now is the crime of lying to the police." At that point, Valero was faced with the possibility of being punished for two crimes: (1) one based on the girl's allegations; and (2) the other purported crime of lying to the police and, according to the detective, the more serious of the two crimes. Aside from the possibility of being punished for two crimes, Valero was placed in the position of being able to get out of the purportedly greater crime of lying by confessing to the purportedly lesser crime of inappropriate touching. The district court properly found that this false choice resulted in Valero's will being overborne.

While we do not hold that downplaying the seriousness of the accusations, by itself, resulted in Valero's will being overborne, it is a factor in the totality of the circumstances. Most importantly, in this case, the detective utilized downplaying of the seriousness of the victim's accusations to juxtapose that alleged crime against a threat of being charged with a more serious crime of lying to the police, which the officer could prove "one hundred percent" because the polygraph established that Valero was lying. Thus, Valero was faced with a Hobson's choice.
.
... Most critically, the detective's representation that Valero could be charged with a more serious crime of lying to police if he did not confess was inherently coercive. It is precisely the type of coercive tactic that could induce an innocent person to confess."

(Court finds that interrogator conduct "overbore" defendant's will and rules that the confession is inadmissible)

In *US v. Sanchez* (2009) the United States District Court, D. Nebraska, ruled that "Because the officers overbore Sanchez's will, Sanchez's confession should be found involuntary, and therefore, inadmissible."

The court describes the interrogator's conduct as follows:

"In determining whether the officers' conduct overbore Sanchez's will, the court will examine the officers' conduct and Ms. Huffman's conduct. As an initial matter, the officers' interrogation of Sanchez could have taken place at Sanchez's home, but the officers chose to conduct the interrogation at the police station. The facts of this case indicate the officers were angry and intimidating, they got close to Sanchez's face, and they were yelling at and badgering Sanchez. Officers told Sanchez he was "going to jail," and threatened him with charges of attempted murder and assault with a deadly weapon. Additionally, the officers' suggestion of possible retaliation by the victim's brother, who was known to be dangerous, may reasonably be considered a threat to a person in Sanchez's position. Such a threat of possible violent retaliation may be considered

particularly coercive in light of the fact Officer Rave knew Sanchez had younger sisters. Finally, allowing Sanchez to see a photograph of the victim's injuries may have been a significant factor in overbearing the will of Sanchez, given his level of immaturity, low tolerance for resisting others' influence, and seeing his mother emotionally upset after viewing the graphic photograph of Rodriguez' injuries."

(Confession found inadmissible due to threats and promises from the investigators)

In *State v. Pies* (2009) the Iowa Court of Appeals reversed the trial court finding that the defendant's confession was admissible and ruled that the confession was actually the result of the "not-so-subtle threat of a long burglary sentence and by the promise of a potential lesser penalty upon confession." In reviewing the matter the Court of Appeals stated the following:

"During questioning, an "officer can tell a suspect that it is better to tell the truth without crossing the line between admissible and inadmissible statements from the defendant."…. However, the line between admissibility and exclusion is crossed "if the officer also tells the suspect what advantage is to be gained or is likely from making a confession. Ordinarily the officer's statements then become promises or assurances, rendering the suspect's statements involuntary."

With these principles in mind, we detail portions of the interrogation:

Officer R: OK. Now, now we are going to shift gears. And I am going to tell you right now I have got enough right now to arrest you and take you to jail for burglary of that hardware store. I am offering you an option here to come clean and lessen the charge and work with us on this thing.... At this point, if you choose not to cooperate, we will take you, I will charge with the full boat of the crime and you will suffer the consequences.

Officer R: We are offering you a break here. To come clean.

Officer S: Let's take care of this problem and lessen the charge or take the full boat of this.

Officer R: Matt, you work with us-the county attorney-we will indicate ... in our report to him, that you ... were very cooperative. Do you want to fight this thing and work against us, then you are going to get charged and it is going to be very serious. Do you want me to read you what the penalty is on that?

Pies: Burglary?

Officer R: Long time jail. Probably up to ten years....

Pies: Oh jees....

Officer R: ... Why are you shaking your head?

Pies: I just feel like I am being backed against the wall here I, mean. Whether I did or didn't do it. You are telling me that you got my garbage.

Officer R: You know you did it. You are the only one that is going to try to help yourself. If you don't want to help yourself ... that's fine. You say the word, we will cease the conversation. I'll cuff you and take you over and book you in. If you want to help yourself you are going to talk to ... try to lower this penalty down a little bit. ...

Officer R: ... The thing is now we know you did it, you know you did it, help yourself on this thing without burying yourself. Because believe you me, a theft charge versus a burglary charge maybe, maybe looks just a little bit better than burglary.

Officer S: Do you have any of the cash left?

Pies: Are you going to put this deal in writing?

Officer R: What deal?

Pies: Understand that you are going to drop the charge.

Officer R: Matt.

Pies: If I pled guilty.

Officer R: Matt. I can not put anything in writing. It is up to the county attorney. But what I can do is indicate in the report that you ... helped with this thing. And that you were honest. If you don't want to be honest, then that is when it is going to get serious. Mike and I will do everything we can to put in a good word for you to lessen your penalty on this thing, but you got to help us out.

Officer S: We can make a recommendation that the charges be lessened. We told you already that we have enough to charge with your burglary. We are giving you the opportunity to help yourself.

Under the evidentiary test articulated in Mullin, utilized in Quintero, and reaffirmed in McCoy, we conclude the trial court erred in ruling the officers did not make improper promises. Pies's inculpatory statements were improperly induced by the not-so-subtle threat of a long burglary sentence and by the promise of a potential lesser penalty upon confession. Thus, the inculpatory statements were not voluntarily given and "should not have been admitted in evidence because of [the statements'] lack of reliability."

(Confession inadmissible due to promises and threats)

In *People v. Fuentes* (2006) the Court of Appeal, Second District, California found the defendant's confession to be inadmissible because improper promises and threats were

made during the interview, both express and implied, which rendered the confession involuntary as the product of coercive police activity. From the Appeal Court's decision: "In making this argument, defendant focuses on exhortations that even good people can do bad things while intoxicated and that defendant's not being in his "right state of mind" when the incident happened would "help" him. In addition, defendant was told that not confronting the situation would be "worse" for him, if defendant lied the case would go "very, very bad" for him, and if defendant kept quiet he could be charged "for something more serious, very ugly." Conversely, if a person tells the truth "it goes much better for them" and "the charges are lowered - a little." Finally, at least one and one-half hours after the interview started, defendant was given the alternative of spending either "the rest of [his] life" or "five or six years" in jail. He then confessed. In addressing the issue of voluntariness, the trial court concluded that under the totality of the circumstances the "latitude" taken by the police in questioning defendant was permissible. Based on our independent review of this legal issue, we reach the opposite conclusion (and therefore do not need to analyze the separate issue of defendant's Miranda waiver)."

Promises

The confession of Brendan Dassey ("Making a Murderer") ruled to be involuntary: "repeated false promises"

In *Dassey v. Dittmann* (August 2016) the US District Court, E.D. Wisconsin, ruled that Brendan Dassey's confession was involuntary. Brendan Dassey's confession to involvement in the murder of Teresa Halbach was depicted in the Netflix series "Making a Murderer". The District Court ruled that the confession was the result of promises of leniency.

The District Court stated that, "the state courts unreasonably found that the investigators never made Dassey any promises during the March 1, 2006 interrogation. The investigators repeatedly claimed to already know what happened on October 31 and assured Dassey that he had nothing to worry about. These repeated false promises, when considered in conjunction with all relevant factors, most especially Dassey's age, intellectual deficits, and the absence of a supportive adult, rendered Dassey's confession involuntary under the Fifth and Fourteenth Amendments."

From the District Court's opinion:

The court must look to all relevant facts to determine whether Dassey's March 1 confession was voluntary. The interview occurred mid-day rather than in the early morning hours, or at a time when Dassey might expect to be asleep… The questioning was not particularly prolonged. Although Dassey was in the interview room from about 11:00 a.m. until 4:00 p.m., the relevant questioning spanned less than three hours… Dassey was left alone for less than two hours, the longest single stretch being about 50 minutes. He was offered food and beverages. Although the interview occurred in a police station, it was in a "soft interview room," with carpeting and upholstered furniture as opposed to a room with an uncarpeted floor, a hard table, and chairs. Wiegert advised

Dassey of his rights under Miranda, including the right to not answer questions, to stop the questioning, and to have an attorney appointed for him and present during any questioning.

Dassey exhibited no signs of agitation or distress throughout the interview (he sobbed only after being told he was under arrest). The investigators maintained calm tones, never using aggressive or confrontational tactics. If these were the only relevant facts, they would tend to support a finding that the March 1 confession was voluntary. But when assessed against all of the circumstances of Dassey's interrogation, these facts are overshadowed by far more consequential facts.

For starters, Dassey was a juvenile – only 16 years old – at the time of his confession.

Also significant is the fact that investigators questioned Dassey without the presence of a arent or other adult looking out for his interests. It is true that neither federal law nor the United States Constitution requires that the police even inform a juvenile's parents that the juvenile is being questioned or honor a juvenile's request that a parent or other adult (other than a lawyer) be present during questioning… However, because "[i]t is easier to overbear the will of a juvenile than of a parent or attorney, ... in marginal cases–when it appears the officer or agent has attempted to take advantage of the suspect's youth or mental shortcomings–lack of parental or legal advice could tip the balance against admission."

Not only did Dassey not have the benefit of an adult present to look out for his interests, the investigators exploited the absence of such an adult by repeatedly suggesting that they were looking out for his interests: "I wanna assure you that Mark and I both are in your corner, we're on your side ..." and "... I'm your friend right now, but I ... gotta believe in you and if I don't believe in you, I can't go to bat for you."

Moreover, Dassey's borderline to below average intellectual ability likely made him more susceptible to coercive pressures than a peer of higher intellect… Although he attended regular education classes, Dassey received special education support services.

Ten years earlier, his IQ was assessed at an overall score of 74.

Crucial in the voluntariness analysis is what the investigators told Dassey at the beginning of the interrogation. Fassbender assured Dassey, "from what I'm seeing ... I'm thinking you're all right. OK, you don't have to worry about things." In isolation, such a statement would not be a problem. Based on what the investigators actually knew at that time, they very possibly believed Dassey to be merely a witness.

However, less than two minutes later, Wiegert assured Dassey, "We pretty much know everything[.] [T]hat's why we're talking to you again today." … The combination of these statements, that the investigators already "pretty much know everything" and that Dassey did not "have to worry about things," is an entirely different matter. The investigators were not merely telling Dassey, "Based upon what you have told us so far,

we don't think you have anything to worry about." Rather, what they told Dassey was, "We already know what happened and you don't have anything to worry about." The investigators' assertions that they already knew what happened and assurances that Dassey did not have anything to worry about were not confined to an isolated instance at the beginning but rather persisted throughout the interrogation.

Dassey's conduct during the interrogation and his reaction to being told he was under arrest clearly indicate that he really did believe that, if he told the investigators what they professed to already know, he would not be arrested for what he said.

The investigators' statements were not merely ambiguous promises to Dassey that cooperating would lead to a better deal or that the investigators would "stand behind" him or "go to bat" for him, … Rather, the investigators' collective statements throughout the interrogation clearly led Dassey to believe that he would not be punished for telling them the incriminating details they professed to already know. While at one point Wiegert did rotely say, "We can't make any promises..." this single, isolated statement was drowned out by the host of assurances that they already knew what happened and that Dassey had nothing to worry about.

Thus, the state courts' finding that there were no "promises of leniency" was "against the clear and convincing weight of the evidence…."

The Supreme Court has long recognized that a false promise is a powerful force in overcoming a person's free will…. Consequently, "[a] false promise of lenience is 'an example of forbidden [interrogation] tactics, for it would impede the suspect in making an informed choice as to whether he was better off confessing or clamming up.'"

More than merely assuring Dassey that he would not be punished if he admitted participating in the offenses, the investigators suggested to Dassey that he would be punished if he did not tell "the truth." Especially when the investigators' promises, assurances, and threats of negative consequences are assessed in conjunction with Dassey's age, intellectual deficits, lack of experience in dealing with the police, the absence of a parent, and other relevant personal characteristics, the free will of a reasonable person in Dassey's position would have been overborne. Once considered in this proper light, the conclusion that Dassey's statement was involuntary under the totality of the circumstances is not one about which "fairminded jurists could disagree."

That said, the court does not ascribe any ill motive to the investigators. Rather than an intentional and concerted effort to trick Dassey into confessing, what occurred here may have been the product of the investigators failing to appreciate how combining statements that they already "knew everything that happened" with assurances that Dassey was "OK" and had nothing to worry about collectively resulted in constitutionally impermissible promises.

(*Promises of leniency and threats of the death penalty are coercive*)

In *Bussey v. State* (November 2015) the District Court of Florida, Second District, over ruled the lower court and found that the investigator made promises of leniency and threats of the death penalty, making the defendant's incriminating statements involuntary.

On January 5, 2012, a grand jury indicted Bussey for the first-degree premeditated murder. Prior to trial, Bussey filed a motion to suppress statements he made to two Pinellas County Sheriff's Office detectives during an interrogation in Lowndes County, Georgia, on January 2, 2012.

The detectives told Bussey that it was "[o]ne of two options," that he "either walked in that store to kill a man or [he] walked in there to do a robbery and something accidentally ... went bad." Bussey repeatedly denied that he ever visited the store or committed the robbery, and he insisted that he was being honest with them. The detectives told him that he could get the "needle because of that damn—that stupid way of thinking." Bussey continued to deny his involvement, and the detectives continued to tell him that he had two options. One detective said "[y]ou killed a guy in cold blood," and the other detective said "[y]ou made a mistake."

The detectives told him that he was not a cold-blooded killer and that it was a mistake. But they warned that if he continued to deny his involvement, they were going to end the interview and charge him with "first-degree murder" and "seek the death penalty." … Bussey asked, "[I]f it's a mistake robbery, what is my time?" One detective that said he was not going to talk about time but that he would tell the state attorney if Bussey accepted responsibility. But the detective did promise that if Bussey continued to deny being in the store, the detective would be "seeking the death penalty." But the detectives reiterated that they could try to help him out if it was a mistake. Bussey asked three more times if they were going to charge him with "mistake of robbery." The detective said, "Darius, I'm gonna charge you with a robbery. Okay? But I need you to tell me what happened. I need you to be honest with me." It was at that point that Bussey said "I will" and then "I ain't even know the gun went off, to be honest." He then answered questions about the offense, explaining that he had ridden a bike to the store, that he had been wearing the clothes in the video but ditched them in a dumpster, that he threw the gun in a drain sewer, and that the gun went off accidentally. At the end of the interview, Bussey stated twice that "I just don't wanna get charged with no murder." He stated, "I'll be good with robbery, but I can't get charged ... with no murder." One detective said, "It's not up to us," and the second detective said, "You can at least live now."

And while the detectives accurately explained to Bussey that he could face the death penalty for the charge of premeditated murder, they repeatedly misled Bussey regarding what charges and penalties he could face if the victim's death was the result of what they referred to as an "accident" or "mistake," i.e., a robbery resulting in a death.…The detectives misled Bussey into believing that if he confessed to the victim's death being an accident, he would be charged with robbery, not murder, and he would not face the death penalty…. And even after he admitted to the robbery, Bussey was still under the

impression that he would not be charged with murder, as indicated by his comments at the end of the interview.

Based on the totality of the circumstances, we conclude that Bussey's statements were the result of coercion.

(Promises to the defendant he would not face criminal charges if sexually touching a seven-year-old child was a mistake or accident was coercive)

In *State v. Reynolds* (April 2016) the Supreme Court of Vermont upheld the lower court's ruling that it was coercive for an investigator to make promises to the defendant that if he would admit to a mistake or accidental sexual touching of a seven-year-old child he would not face criminal charges.

In late December 2013, a police detective contacted defendant and asked if he would come to the station to discuss a neighborhood complaint. Defendant agreed to help if the detective would come to his house instead. The detective arrived in plainclothes with no visible weapon. He was accompanied by a caseworker from the Department for Children and Families.

After about four minutes, the detective disclosed the general reason for his questions. He told defendant that Z.Z. had "talked about some inappropriateness that went on." Defendant was audibly taken aback. Defendant agreed with the detective that Z.Z. was not the type of child who would make things up or try to get someone in trouble. When defendant continued to indicate no understanding of where the conversation was headed, the detective stated that Z.Z. had "talked about touching each other's privates."

After half an hour of talking to the detective, defendant admitted to inappropriately touching Z.Z. Defendant told the detective that "It just happened.... Like you said." He then answered yes or no to the detective's targeted follow-up questions. The court found that defendant offered almost no details of his own…. According to defendant, he confessed because he believed it was the only way to end the interrogation, and he believed the detective was promising him treatment, not jail, as long as he said that the touching was a mistake.

Most importantly, the court found that the detective made a series of promises that if defendant would admit to a mistaken or accidental touch, he would not face criminal sanctions, and defendant testified that this played a significant role in his confession.

We agree with the trial court that the totality of the circumstances here shows that "coercive governmental conduct played a significant role in inducing" defendant's confession…. Our conclusion is based on the detective's inappropriate promises of leniency, coupled with the detective's misrepresentation of his authority.

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(Confession found inadmissible due to promise of no jail and help finding shelter for defendant and her children to live)

In *Sharp v. Rohling* (July 2015) the US Court of Appeals, Tenth Circuit, found that the state trial court erred in admitting the defendant's incriminating statements that she made after being advised that she would not go to jail - that she was just a witness. In this case a homeless advocate, David Owen, was killed. His body was found in the vicinity of a homeless camp. Four people, including Kimberly Sharp, were arrested for his murder. From the court's opinion:

"According to Sharp, she also headed into the woods to see what was going on. There she saw Owen on his knees and Hollingsworth with "an axe that he was going to [use to] kill him like that." Sharp told Hollingsworth, "[N]o, don't do that, don't do that. I can't be an accessory to this shit, you know. I can't do that. I got two kids...." She said Cornell then brought Hollingsworth a rope which was used to tie up Owen. Baker stuffed a rag in Owen's mouth, and the two men continued to beat him. Sharp told Wheeles [the investigator] that Cornell then burned all of Owen's possessions, including his pictures, notebooks, shoes, and socks. Hollingsworth and Baker then dragged Owen into the woods, and Sharp never saw Owen again.

After additional discussion during which Sharp continued to deny any participation, Wheeles specifically asked if she helped burn Owen's possessions. She denied helping burn or having Owen's phone or bag at any point. Sharp eventually admitted that she helped burn. When Sharp then asked if she was going to jail, Wheeles responded, "No, no, no, no, no, no, no, no, [no, no]. You are a witness to this thing as long as you do not do something dumb and jam yourself." He further explained that if she had been scared she should tell him and, "Just don't tell me no if I ask you something." Sharp then detailed her role in burning Owen's phones and notebooks.

.... Approximately 1 hour later Wheeles escorted Sharp to the camp where she re-enacted the events surrounding Owen's kidnapping and murder. During the re-enactment, Sharp told Wheeles that when Hollingsworth was standing over Owen with an axe, she had said to him, "No, don't kill him." Wheeles requested clarification, "Did you say 'No, don't kill him,' or did you say, 'No, don't kill him here?' " Sharp responded, "Don't kill him here." (Emphasis added.) Sharp also admitted that Hollingsworth had then asked her to bring him some rope, and she told Cornell to go get it. She further admitted that it was her idea to burn Owen's things so there would not be any evidence to tie her to the events. "I said we have to burn it 'cause I don't need the evidence. I don't want to be tied to this." Following the re-enactment, Wheeles brought Sharp back to the station. He asked her a few more questions and then left her alone in the interview room with her children. Approximately 1 hour after returning to the station, Wheeles was notified that the district attorney's office had decided to charge Sharp. When Wheeles told her that she was going to be placed under arrest, she became angry and upset. Sharp accused Wheeles of lying to her and said that he had tricked her, telling him: "This is bullshit."

Ms. Sharp seeks relief under S 2254, arguing the state supreme court erred in considering

the coercive effect of Detective Wheeles's promises during his interview with her. She argues Detective Wheeles induced her confession by promising leniency and assistance in finding shelter for her and her children.

Ms. Sharp's decision to continue providing details does not seem "to have been the result of calculation [instead of] coercion." Roman-Zarate, 115 F.3d at 783. Detective Wheeles's promise she would not go to jail induced her confessional statements because he made clear there would be no cost of disclosure. He gave Ms. Sharp a get-out-of-jail-free card, and she obliged by giving him more incriminating details. Ms. Sharp therefore did not simply "balance[ ] personal considerations with the possible cost of disclosure," id., when making her subsequent confessional statements. Instead, his promise "[wa]s of the sort that may indeed critically impair a defendant's capacity for self-determination." ... And despite Detective Wheeles's assurance at the beginning of the interview--that he was "not going to lie to [Ms. Sharp] in this investigation"--his promise that she would not go to jail was false or misleading.....

In isolation, Detective Wheeles's comments about helping Ms. Sharp and her children might not appear coercive. He did not explicitly suggest that Ms. Sharp confess in exchange for his assistance with shelter. But he did mollify her concerns about finding shelter by saying "[w]e'll work out some place for you to go," .... , a promise inconsistent with a suggestion of arrest. And his willingness to cut short the interview to retrieve her children from the presence of a registered sex offender added weight to his "no jail" promise of leniency, which he had made only a few minutes earlier.

Ms. Sharp's surprised and angry reaction when Detective Wheeles arrested her at the end of the interview indicated her incriminating statements were not the product of free will because they were given on the false premise she would not go to jail. She accused him of lying and trickery and thought her cooperation would make her a witness, not a defendant.

Having carefully reviewed the interview video and considered the totality of circumstances, we conclude Ms. Sharp's will was overborne once Detective Wheeles promised her she would not go to jail after she admitted to participating in the crime. Once that promise was made, Ms. Sharp's subsequent incriminating statements were involuntary because she had been told she would not go to jail for her involvement. The trial court therefore erroneously admitted those statements at trial in violation of the Fifth and Fourteenth Amendments.

(Statements inadmissible because the investigator advised defendant he would protect him from going to jail)

In *State v. Chulpayev* (March 2015) the Supreme Court of Georgia upheld the lower court's ruling to suppress the defendant's statements because the investigator repeatedly indicated that he would protect the defendant from going to jail. From the court's opinion:

"... Chulpayev testified at the suppression hearing that Agent Jackson repeatedly

indicated that he would protect Chulpayev from going to jail, and from a murder charge in particular, and the trial court credited that testimony.... Specifically, before the July 2012 interview, the FBI agent told Chulpayev that he would "keep the murder warrant off" if Chulpayev talked to him. The other law enforcement officers involved in the interview testified that Chulpayev was treated as a confidential informant in the murder case, and the recording of the interview ends with Agent Jackson telling Chulpayev that one of the things the agent cared most about was "keep [ing] [Chulpayev] out of jail." Similarly, before the October 2012 interview, Agent Jackson told Chulpayev, "I'm the lead on the case, and as much as you do for me, ... I will make sure nothing happens to you.... I got you. Just come and do what I'm asking you to do"--and what the agent was asking Chulpayev to do was agree to be interviewed by the SSPD detectives. Agent Jackson's representations that he was the leader of the murder investigation and that Chulpayev would not be in any trouble if he spoke to the SSPD officers were supported by Detective Williams during the interview. Chulpayev testified that, after these promises by the then-lead investigator on the case, he gave the July and October 2012 interviews so that Agent Jackson could protect him.

Accordingly, the record supports the conclusion that Chulpayev's statements during the first two interviews were induced by promises related to the potential criminal charges he faced, and the trial court did not err in suppressing those statements."

(The importance of accurate translations by the interpreter - erroneously suggesting a lesser punishment if defendant confessed)

In *State v. Fernandez-Torres* (October 2014) the Court of Appeals of Kansas upheld the lower court's decision to suppress the incriminating statements made by the defendant. From the Court of Appeals' opinion:

"In September 2010, the Douglas County District Attorney charged Fernandez with aggravated indecent liberties with a child for the lewd touching of A.L.G., who was 7 years old at the time.

During the investigation of the offense, Fernandez accompanied Lawrence police officer Anthony Brixius to the law enforcement center to be questioned about his interaction with A.L.G.

At the suppression hearing, Brixius testified that he and Fernandez talked in English on the ride to the law enforcement center. Brixius speaks very little Spanish. Another police officer accompanied them. No one spoke in Spanish during the brief trip. Once at the law enforcement center, Fernandez was placed in an interrogation room. Brixius testified that he had concerns about Fernandez' fluency in English and sought out a Spanish-speaking translator to participate in the interrogation. Brixius pressed Oscar Marino, a bilingual probation officer, into service. Marino was born in Venezuela and grew up speaking Spanish; he came to the United States in his teens about 30 years ago and has become fluent in English. Marino has no training in real-time translation and has never been certified as a Spanish-English translator. At the suppression hearing, Marino testified that

he has translated for police officers conducting interviews or interrogations "[a] handful" of times. The interrogation was videotaped.

"In weighing Fernandez' age, intellect, and background, the district court relied, in part, on the clinical assessment of Dr. Barnett. Dr. Barnett's expert opinion that Fernandez functioned intellectually in the "low average" range and likely had some form of learning disability was unrebutted. Dr. Barnett also testified Fernandez had difficulty readily understanding and responding to questions posed to him. Again, that clinical observation went unchallenged in the sense the State offered no countering expert. The intellectual limitations Dr. Barnett suggested at least square with Fernandez' abbreviated education and his partial literacy, especially in English. The district court found Fernandez' intellect played a part in rendering his statements involuntary.

The district court was particularly troubled by the last two enumerated factors: the fairness of the interrogation and Fernandez' fluency in English. We share that concern. In this case, the two factors are closely related, so we discuss them together.

Fluency in English typically comes into play when a suspect is literate in some other language but is interrogated in English... Illustrating the seamlessness of the generically labeled factors, fluency would also be implicated if a suspect knew only English but his or her mental incapacity substantially impaired his or her ability to communicate. That situation might also bear on mental condition and, possibly, intellect. This case presents a variant because Brixius sought out a translator, so the interrogation could be conducted in Spanish--Fernandez' primary language, although Fernandez understands some spoken English.

To be plain about it, Marino lacked the bilingual capacity and the training to function effectively as a translator in an extended interrogation about a sex crime against a child. The two experts agreed that Marino mistranslated both questions and answers and sometimes substantially paraphrased what was being said. The district court's expressed concern about whether Brixius and Fernandez were fully communicating in an effective way finds sufficient support in the record evidence.

The district court was particularly troubled by Marino's use of "negociar" in conveying Brixius' assertion that "we can deal with" the situation if Fernandez had touched A.L.G. inappropriately for just a second. Both experts considered the translation to be misleading and suggestive of an accommodation in which Brixius could handle or negotiate any offense if Fernandez admitted to briefly touching A.L.G.'s pubic area or vagina. As translated for Fernandez, the statement might be construed as a promise of lenient treatment or an outright deal, thereby affecting the truthfulness of any inculpatory admissions on the theory a suspect might falsely confess if he or she understood no charges or only minor charges would result.

The emphasis Marino imparted with his use of "negociar" may not have been what Brixius specifically wanted or intended. But the deviation was one of degree given Brixius' interrogation technique that combined false representations about supposedly

incriminating evidence with suggestions that inaccurately tended to minimize the legal consequences of some unlawful behavior. The result of those techniques over the course of the interrogation combined with communications issues resulting from subpar translation and Fernandez' limited intellectual capacity caused the district court to find the resulting statements to be involuntary and, thus, constitutionally suspect. Fernandez' limited fluency in English ties into the fairness of the interrogation. So we turn to that factor.

In the face of Fernandez' denials that he inappropriately touched A.L.G. and his limited admission that he might have accidently brushed her pubic area in trying to get her back into bed, Brixius falsely stated skin cell evidence conclusively proved otherwise. There was no such evidence. Brixius, however, insisted the phantom scientific evidence meant Fernandez intentionally touched A.L.G.'s vagina. Brixius then repeatedly challenged Fernandez to offer some explanation for that conduct. Brixius suggested Fernandez wasn't a bad person and merely had a momentary lapse in judgment, perhaps because he was upset or had drunk too much or for some other reason, in contrast to being a degenerate regularly preying on children for sexual gratification. Brixius then told Fernandez if he had touched A.L.G. for a second, they could "deal with that"--the representation that Marino translated to "negociar." Later in the interrogation, Brixius again told Fernandez that it was "okay" because he didn't keep on touching A.L.G. Those representations falsely minimized the legal consequences of the action--brief, intentional physical contact with A.L.G.'s genitals actually would legally support a charge of aggravated indecent liberties with a child and a life sentence upon conviction.

Brixius' interrogation approach effectively informed Fernandez both that the police had irrefutable scientific evidence that he had touched A.L.G.'s vagina and that if he had done so only for a second his actions were "okay" and could be dealt with. The underlying message to Fernandez was this: We have overwhelming evidence against you, but if you tell us you did it just briefly, nothing much will happen to you. Brixius maneuvered Fernandez into a situation in which yielding to the suggestion would seem to carry a material benefit, though quite the reverse was true. An unwary or pliable subject--Fernandez, based on the district court's findings, fit that bill--could be induced to accede to the suggested version of events because it looked to be convenient, compliant, and advantageous. In that situation, a suspect may no longer be especially concerned about falsity of the statement. The interrogation strategy lures the subject in, snares him or her with representations about the strength of the evidence (that may or may not have any basis in fact), and then offers what appears to be a way out through admissions deliberately and incorrectly cast as significantly less legally and morally blameworthy than alternative explanations of the evidence.

In this case, looking at the whole of the circumstances, we conclude, as did the district court, that the inculpatory statements Fernandez made to Brixius were sufficiently tainted by the interrogation process and Fernandez' vulnerability to be something less than freely given."

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(Repeated implied promises of leniency nullify confession admissibility)

In *State v. Talayumptewa* (October 2014) the Court of Appeals of New Mexico upheld the lower court's decision to suppress the defendant's incriminating statements "on the basis that they were the product of coercive police conduct in the form or promises of leniency." From the Appeals court decision:

"Defendant responded to the officers' questions by saying that he could not remember what happened because he was intoxicated when the alleged incidents occurred. In response, the officers repeatedly told Defendant they would be meeting with the district attorney, that his claims not to remember were legally invalid, and that they had the ability to influence the district attorney with respect to the level of charges Defendant faced. Among other similar statements, Officer Pena told Defendant:

You're giving us nothing and that's what we're gonna [sic] go to the D.A.s with ... is that he gave us nothing ... he tried to use the old ... I don't remember because I was intoxicated defense.... And that's what we're gonna tell the D.A He came in and he gave us a convenient excuse.... Oh I was drunk.... Oh I don't remember.... It coulda [sic] happened, but I don't know if it did ... or anything like that.... So if you do remember what happened, just come clean with us.... We're trying to help you here.... Okay, but we can only help you so much.... Okay, I can't go to the D.A.s and be like hey let's ... you know let's cut this guy a break or ... or let's ... you know let's do this or ... let's uh ... you know let's think about it second [sic] if you won't tell us what happened cuz [sic] I can't go to the D.A. with that.... Okay, I can't.... The D.A. ain't gonna [sic] buy that either.

The officers also began to inform Defendant that he was facing multiple felony charges and that they could help him, but only if he remembered. Officer Pena told Defendant:

Okay.... I tried to help you here, I tried to give you a life line, I tried to help, I tried to give you that life preserver for you to help yourself, you don't wanna [sic] take it that's fine.... I'll ... we ... Investigator Ashley will go forward to the ... to the D.A.s with what we have based off what her ... what she's saying 'cuz [sic] you don't want to recant anything she's saying by just saying I was intoxicated, I don't remember ... that's fine, if that's ... that's the road you wanna [sic] go down ... that's fine, okay ... when the warrant comes and when we're putting you in jail ... for multiple felonies okay ... don't say oh wait a minute, I wanna [sic] talk now, because that's gonna [sic] be gone, once you get cuffed and put in jail.

In the specific exchange cited by the district court, the officers also discussed the range of prison terms for different degrees of felonies in response to Defendant's question about how much jail time he was facing. The following discussion then occurred:
Defendant: Is there a way I can like.... The only way I can help myself is to remember, right?

Officer Pena: That would be a big help.

Defendant: And then if I remember and that is what happened I'm still looking at those right?

Officer Pena: No[t] necessarily, uh ... it's still ... we still have to ... it's not like we sit here and we're like okay, we're gonna [sic] charge him for this okay ... we need to get everything done ... we still got some interviews to do and stuff like that, we're gonna [sic] do ... we're gonna [sic] interview everybody then we take our whole case and we give it to the D.A.s and the D.A.s is the one who say ... this and that ... okay?

Officer Ashley: [S]eriousness of the crime is way up here, we can help eventually bring it back down to maybe almost down to nothing ...

Officer Pena: That also depends on ... us being able to go to the D.A.s ... being able to say to the judge you know, he was very ... sorry it was an accident, it was [a] stupid mistake that he did while he was intoxicated ... he came in he was honest about it, he was up front about it ... he did remember finally, he came back in and said hey this is what I remembered.

These statements and the others like them constitute implied promises of leniency because their import was that Defendant would be arrested on serious felony charges if he continued to claim a lack of memory, but that if he made certain admissions, officers would intercede with the district attorney on his behalf, and that they had the ability to have charges reduced or not brought at all.

... The transcript contains numerous statements by the officers throughout the interview, the effect of which was to say that if Defendant gave a statement they would act on his behalf and had the ability to get the charges reduced. This was more than a mere offer to bring Defendant's cooperation to the attention of the district attorney, which courts have found acceptable.

We next turn to the overall question of voluntariness.....

Again, our review of the transcript of the interview supports the district court's ruling. As the district court found, there were a multitude of implied promises of leniency that started at the outset of the interview and continued throughout, constituting coercive police overreaching. We also find it significant that prior to making both the oral and written statements at issue, Defendant indicated that he was acting in an effort to avoid prison... Before writing the apology letter at the request of the officers, Defendant said: "I'll do anything to avoid jail cuz [sic] I don't wanna [sic] to miss out on my daughter[']s life." Also, while making statements purporting to remember the events of the evening, Defendant repeatedly said that his motivation was to avoid jail: "I'm trying to remember because I really don't want to go to jail or anything else.... I'm trying to remember because I wanna [sic] be able to just put this behind me and just move on." "I'm trying to remember but it's ... like I will do anything it takes to avoid jail time." "I'm just trying to remember so I don't ... I just ... you know, I don't wanna [sic] to go to jail."

The State points to the fact that Defendant came voluntarily to the police station, was informed that he was free to leave, and did not appear sleepy, nervous, or intoxicated to the officers. The State also notes that the officers reminded Defendant that they personally would not be making the charging decision. However, while these factors may weigh in favor of voluntariness to some extent, based on the totality of the circumstances, we agree with the district court that they are insufficient to outweigh the coercive effect of the numerous implied promises of leniency made to Defendant by the officers throughout the interview.

(Promise of concurrent sentences)

In *US v. Sharp* (2013) the US District Court, W.D. Kentucky, ruled that the defendant's confession should be suppressed because it was the result of a promise that all sentences would run concurrently, and the statement if she did not confess the sentences would run consecutively.

Specifically the court stated, "Defendant contends that the police promised in both the interrogation concerning the Hayes Oil robbery and the Kangaroo Express robbery that she would be sentenced concurrently with the robbery of Fifth Third Bank. Based on the transcript of the interrogation on June 29, 2012, the Court finds substantial corroboration in the record that the police promised just prior to Ms. Sharp's confession in each instance that she would be sentenced concurrently with the Fifth Third robbery. As to the interrogation concerning Hayes Oil, Detective Book informed Defendant that it did not matter how many crimes that she confessed to at that point because the Government was "not going to run sentences after sentences after sentences" on her.... Detective Book reiterated this point before informing her that the police had a video of her committing the Hayes Oil robbery. The interrogation concerning Kangaroo Express followed almost the exact same pattern. In fact, Detective Herndon not only explained the difference between consecutive and concurrent sentencing but also specifically stated, "As a general rule, it doesn't matter how many crimes you've committed, they run the sentences concurrently." Id. at 34. Detective Herndon then continued to explain that if she did not confess at that time and the police found more evidence to charge her with the robbery of Kangaroo Express, then "by the time that catches up you may have to run your case consecutively as opposed to concurrently." Id. at 35. Again, the conversation turned to a brief discussion about the existence of a video, and then Ms. Sharp confessed to robbing the Kangaroo Express.

(Statement's such as "people who were honest with the police would be helped differently than those who lied about their guilt" led to an inadmissible confession)

In *Kohland v. State* (2013) the Court of Appeals of Iowa ruled in favor of the defendant's claim that his counsel was ineffective because he failed to move to suppress his confession. In their analysis the court considered the statements that the investigator made to the defendant during the interrogation, and in their discussion of the issue of an admissible confession, stated the following:

"In the present matter, Cpl. Reid offered help and indicated people who confessed were helped differently than those who withheld the truth. Cpl. Reid repeatedly instructed Kohland he would be free to leave at the end of the interview regardless of what he said and truthfulness would allow Kohland to fix any mistake. More disturbing, however, was when Cpl. Reid stated a confession would mean the case would proceed differently than if it continued as a criminal investigation. The obvious implication from this statement is Kohland's cooperation would prevent the case from being investigated as a criminal matter.

"…… We find these statements are the equivalent of a promise for better treatment, as found in *Hodges.* The same can be said of Cpl. Reid's assurance that Kohland would be set free following the interview…. Cpl. Reid's statement that the case would be treated differently than a criminal investigation is impermissible and amounts to an assurance that no criminal charges would follow… These statements go far beyond simply informing the prosecuting authorities of the defendant's cooperation and amount to an *identifiable benefit being promised."*

(Improper interrogator behavior – promise not to charge with murder)

In *State v. Garcia* (2013) the Supreme Court of Kansas reversed the defendant's conviction, finding that the interrogator's behavior led to a coerced confession. The Supreme Court stated that, "Garcia contends that the district court erred in finding that the totality of the circumstances established that his confession to participating in the robbery was freely and voluntarily given. He emphasizes two circumstances that gainsay voluntariness: (1) The interrogating officers withheld requested medical treatment and pain medication for Garcia's gunshot wound until the interrogation was completed; and (2) the State used promises of leniency to induce the confession. We agree with Garcia; the manner in which his ultimate confession to robbery was obtained was unconstitutionally infirm.

"We turn now to Garcia's specific complaint that the officers denied him medical treatment for the purpose of inducing a confession. The district court considered Garcia's gunshot wound and accompanying pain only as it related to his ability to lucidly communicate with the law enforcement officers. In that regard, the district court was willing to accept the fact that Garcia was in pain, so long as the pain was not so acute as to affect his ability to know what he was doing or saying. But a *knowing* confession is not a *voluntary* confession if it is coerced, *i.e.,* if it is not the product of free will. The inquiry, then, is whether the officers' withholding of medical treatment influenced Garcia's decision to confess to the robbery. If law enforcement officers make an accused endure pain, even less than debilitating pain, until the accused gives a statement that the officers will accept, the voluntariness of that confession is, at best, suspect. The record indicates that was the circumstance here.

"We discern that certain things are patently obvious from the words and actions of the law enforcement officers conducting Garcia's interrogation. First, the officers knew that Garcia had been shot in the foot with a firearm; that he probably still had the bullet inside

his body; that he had not received professional medical treatment for the wound; and that he was experiencing pain from the injury at the time of the interrogation. Next, Garcia was not going to be provided any medical attention or pain relieving medication until the officers had completed their questioning and took him to the hospital to retrieve the bullet for evidence. Further, the officers appeared unlikely to complete their questioning until Garcia gave them the statement that they believed to be true, which was that Garcia participated in the robbery.

"The foregoing exchange did not stop short of promising a benefit to Garcia in return for his confession to robbery. The promised benefit was clearly stated: "They're not going to book you for murder." That was the same carrot that the officers had been unsuccessfully dangling in front of Garcia for hours.

"The law enforcement officers' coercive tactics and promises of leniency, in the context of the circumstances of the entire interrogation, convince us that the confession here was not a product of the accused's free will, *i.e.,* was not voluntary. Accordingly, we find that the district court erred in refusing to suppress the defendant's confession."

(Improper offer of leniency nullifies a confession)

In *State v. Wiley* (2013) the Supreme Court of Maine found that the detective made an improper offer of leniency to the defendant and that his improper offer of a short jail sentence and some probation, as an alternative to lengthy prison sentence, was the primary motivating cause of the defendant's confession, thus rendering the confession involuntary.

In describing the detective's behavior, the court stated the following: "Detective Bosco's representation as to how certain it was that Wiley's cooperation would secure him a short jail sentence and probation was equivocal at times, with Detective Bosco stating at one point, "I can't *promise* you anything," but then, moments later stating that he could "guarantee" that the judge would be more lenient. Nonetheless, it is inescapable that the overall effect of Detective Bosco's representations—which he alternately described as an "offer," "option," "opportunity," and chance to "write[ ] your own punishment"—was to establish that if Wiley confessed to the crimes he would get a short county jail sentence with probation, and thereby avoid state prison. Wiley was told, "[t]he only reason you're getting this opportunity is because people spoke very highly of you," and that "[t]his offer's going to expire if ... you're not going to do the right thing." The conclusion that this concrete representation was, in effect, an improper offer of leniency is inescapable."

(Improper promise of leniency- treatment in lieu of jail)

In *State v. Howard* (2012) the Iowa Supreme Court found that "the detective's questioning crossed the line into an improper promise of leniency under our long-standing precedents, rendering Howard's subsequent confession inadmissible."

In their opinion the Iowa Supreme Court stated that, "It is true, as the court of appeals' majority noted, Detective Hull never overtly told Howard he would receive a lighter sentence if he confessed. He never said an inpatient treatment program would be the only consequence. He stated no quid pro quo out loud. But, his line of questioning was misleading by omission. As the court of appeals' well-reasoned dissent aptly observed, "Officer Hull's statements strategically planted in Howard's mind the idea that he would receive treatment, and nothing more, if he confessed."... Detective Hull's repeated references to getting help combined with his overt suggestions that after such treatment Howard could rejoin Jessica and A.E. conveyed the false impression that if Howard admitted to sexually abusing A.E. he merely would be sent to a treatment facility similar to that used to treat drug and alcohol addiction in lieu of further punishment. Significantly, Detective Hull did not counter this false impression with any disclaimer that he could make no promises or that charges would be up to the county attorney. We hold his interrogation crossed the line into an impermissible promise of leniency, rendering the confession that followed inadmissible."

(Impermissible promise of leniency)

In *State v. Polk* (2012) the Supreme Court of Iowa concluded that "the district court erred in denying Polk's motion to suppress his confession..... Polk's confession followed an impermissible promise of leniency..." From the Supreme Court's opinion:

"After three minutes of questioning, Polk said, "I ain't got nothing to say. Can I go back to my pod?" Monroe immediately baited Polk by saying he could go back if Polk "didn't want to know what happens from here on out." Polk took the bait, asking, "What happens?" and remained in the interview room. Monroe then began to insinuate that cooperation could affect punishment. Monroe told Polk that "what happens from here can be influenced by what we talk about." Monroe elaborated, "Let me just lay it out for you like this okay, it has been my experience working cases like this, that if somebody cooperates with us, on down the road the county attorney is more likely to work with them." For the next several minutes, Monroe reinforced the message that Polk would benefit by cooperating. For example, Monroe stated county attorneys "are much more likely to work with an individual that is cooperating with police than somebody who sits here and says I didn't do it."

….. After Monroe and Polk agreed to resume the interview, Monroe played on the fact Polk had children:

I'm telling you, you need to start thinking about what you are going to do for yourself because I know you got a couple of kids out there and I'd hate to see the kids miss their daddy for a long time because you didn't want to talk about what's going on.

Monroe continued: "Man if you don't want to do this for you, do this for your kids. They need their dad around. [35-second pause] Just don't forget you got kids that are depending on you. They need their pops around." The court of appeals observed, "It is clear from this statement that the officer meant to communicate that if Polk confessed, he would

spend less time away from his children." We agree. The strategy worked--Polk promptly confessed to taking a firearm to the scene with the intent to shoot Henley and firing shots at Henley there.

Monroe's interrogation strategy goes beyond the permissible tactics approved in Whitsel. Monroe did not simply offer to inform the county attorney of Polk's cooperation. Instead, he suggested the county attorney is more likely to work with him if he cooperates and implicitly threatened Polk that silence will keep him from his children for "a long time." Monroe's statements are similar to the officer's statement in Hodges that "there was a much better chance of ... receiving a lesser offense" if the defendant confessed…. In each case, the officer suggested the defendant's confessions would likely reduce the punishment.

We conclude Monroe crossed the line by combining statements that county attorneys "are much more likely to work with an individual that is cooperating" with suggestions Polk would not see his kids "for a long time" unless he confessed. Other courts have cried foul when interrogators imply a confession will reduce the suspect's time away from his or her children.

(Improper interrogator statements - promises and threats)

In *Commonwealth v. Baye* (2012) the Supreme Court of Massachusetts found that the defendant's incriminating statements should have been suppressed as a result of the statements made to him by the investigators. From their opinion:
"Here, before making any inculpatory statements, the defendant unambiguously expressed his desire to speak to a lawyer.... Understanding that the defendant would consult an attorney if he thought that the troopers would "accuse or charge [him]," the troopers told him that they would not do so. Knowing also that they had warned the defendant at the outset, consistent with Miranda, that anything he said to them could be used against him, the troopers undermined their prior admonition by agreeing that his statements would not be used as the basis of an accusation or a charge.

..... For this reason, assurances that a suspect's statements will not be used to prosecute him will often be "sufficiently coercive to render the suspect's subsequent admissions involuntary" even when the suspect shows no outward signs of fear, distress or mental incapacity.....

The troopers' reaction to the defendant's invocation of his Fifth Amendment rights is of particular concern here because the defendant's request occurred after he had been read his Miranda rights. We have "encouraged police to give Miranda warnings prior to the point at which an encounter becomes custodial," ..... and we do not decide in this case whether the provision of such warnings binds interrogators to honor scrupulously a suspect's invocation of his or her Miranda rights outside the context of a custodial interrogation. However, where the police provide precustodial warnings but then ignore the defendant's attempts to avail himself of those rights, the "coercive effect of continued interrogation [is] greatly increased because the suspect [could] believe that the police

'promises' to provide the suspect's constitutional rights were untrustworthy, and that the police would continue to" ignore subsequent invocations, rendering such invocations futile."

(The difference between "limited assurances" and promises of leniency)

In *US v. Pacheco* (2011) the US District Court, D. Utah, drew a distinction between "limited assurances" and promises of leniency. In their opinion they stated that "Under Supreme Court and Tenth Circuit precedent, a promise of leniency is relevant to determining whether a confession was involuntary...." The Supreme Court has recognized that when individuals are "in custody, alone and unrepresented by counsel," they are "sensitive to inducement" by promises of leniency. Not all promises, however, are coercive. Courts have held that an officer may make a promise to talk with a prosecutor and recommend leniency. An officer may even speculate that such "cooperation will have a positive effect." Because such statements are mere "limited assurances," they are permissible. Statements, however, that go beyond limited assurances can "critically impair a defendant's capacity for self-determination."

In this case, the investigator "made repeated improper use of the word "I" during the interrogation. He said I can charge you with one count or I can charge you with ten; I am the first point in judging in the federal system; I am going to indict you; I already have a U.S. attorney on board; and I can charge the January 17th robbery under the Hobbs Act. Besides these statements, Detective Wendelboth conveyed to Pacheco that he was leaving it up to him to decide whether to confess so he could avoid a life sentence and get out to see his children grow up. The import of these statements is that Pacheco would have reasonably understood that Detective Wendelboth had the authority to make a deal, that he would decide what counts to charge based on the level of Pacheco's cooperation, and that if Pacheco confessed he would not receive a life sentence.

Although Detective Wendelboth did briefly mention that he would go to the AUSA, his comment was insufficient to clarify that he had no authority to make a deal with Pacheco and that he only would be making a recommendation to the AUSA. The court therefore concludes Detective Wendelboth's statements were not mere "limited assurances," but promises of leniency that could result in a coerced confession."

(Confession made to company investigators ruled inadmissible because it was the result of a promise not to prosecute)

In *State v. Powell*, (2011) the Court of Appeals of Oregon upheld a lower court's decision the suppress a confession from an employee because the "express and implied promises of immunity from criminal prosecution given to the defendant by the Fed Ex investigators render[ ] his statements to them involuntar[y]." In this case the employee was told the following by the company investigators:

"It's apparent that you took this stuff, so now we're at a crossroads, okay? * * * We're at a point where either we handle it in-house here, in FedEx, or we can turn everything we

have over to the [police department], and then they handle it from there. Now if you choose that route, there's nothing you can do. They'll be going to get search warrants for your house, for your mother's house. They'll go through all of your stuff. It's just gonna be a big mess, okay? * * *

"At this point, our base concern here at FedEx is we want to know, we need to make a customer happy. And if we can make the customer happy, then they don't come back on [defendant], okay? And I don't think you're a bad guy, okay? If I had thought you were a bad guy I would've taken all this stuff and we would've given it to the [police department] and said, 'You gotta jack him up, we're done with him,' okay? I don't feel that way. You've got a lot of stuff going on in your life right now, and I know it. People do boneheaded things, okay? But where we go now is what's going to decide your future. * * * Nobody but who's in this room needs to know."

(Police cannot promise drug treatment in lieu of incarceration)

In *State v. Jenkins* (2011) the Court of Appeals of Ohio, Second District, upheld the trial court's decision to suppress the defendant's incriminating statements because they were the result of a promise of treatment in lieu of prison. "Jenkins described his initial interview with Yount as follows: "He told me that he had the authority to get me treatment as long as I helped him. He was a man of his word. He said if I was a man of my word, he would be a man of his word. He would get me treatment as long as I was truthful and honest with him. That was the only way it was going to happen." Jenkins stated that Yount told him that he had the authority, independent of the prosecutor, to arrange treatment in lieu of conviction.

" 'The line to be drawn between permissible police conduct and conduct deemed to induce or tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police. * * *

" 'When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he night reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or in court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. The offer or promise of such benefit need not be expressed, but may be implied from equivocal language nor otherwise made clear.' "

On February 10th, Jenkins made Yount aware of his drug addiction, and Yount discussed intervention in lieu of conviction with Jenkins, and he further indicated that the police department has "influence on things that happen throughout the trial." On February 11th, Yount testified that he recommended treatment for Jenkins to the judge. Jenkins was fearful about going into withdrawal. While Yount did not guarantee treatment in

exchange for Jenkins' confession, he implied by his conduct and words that such a benefit was a possibility. In considering the nature of the benefit to be derived from Jenkins' confession, namely treatment for a severe drug addiction, we conclude, as did the trial court, that the benefit did not naturally flow from a truthful course of conduct on the part of Yount. Intervention in lieu of conviction was not available as a matter of law, and Yount's false representations undermined Jenkins' capacity for self-determination and impaired his decision to provide incriminating statements. Having considered the totality of the circumstances, the State's sole assignment of error is overruled."

(Court finds confession inadmissible due to interrogator threats and promises)

In *U.S. v. Ellington* (2011) the U.S. District Court, S.D. Texas, Houston Division, stating that "In this case, the coercive conduct of the law enforcement officials that participated in planning and executing Ellington's interrogation is the critical factor that leads the Court to conclude that Ellington's statement was involuntary. Indeed, the Court is deeply troubled by the course of official conduct that ultimately caused Ellington to waive his rights and make an incriminating statement. The agents employed threats of significantly greater punishment for Ellington and his wife and made illusory promises of leniency if Ellington "cooperated." They then made Ellington's sole opportunity to cooperate contingent upon his willingness to waive his right to counsel and incriminate himself. When considered together, as they were intended to be, these pressures were plainly coercive and, ultimately, caused Ellington to make a statement that was not the product of his free and rational choice.

In sum, both the agents and AUSA Rodriguez told Ellington that he was being presented with his sole opportunity to cooperate. If he chose not to give a statement during the interrogation, the charges against him and his wife would be "stacked." Indeed, the agents and AUSA Rodriguez threatened Ellington with the prospect of extreme consequences if he refused to provide an incriminating statement, while at the same time made an illusory promise that, if he gave an incriminating statement and was able to provide substantial assistance, he could avoid the maximum consequences, avoid going to jail that day, continue receiving a pay check for some period of time, and keep his wife out of prison. "In many ways, both types of statements are simply different sides of the same coin: 'waive your rights and receive more favorable treatment' versus 'exercise your rights and receive less favorable treatment.' " ….. Viewed either way, the agents formulated an extraordinarily frightening threat coupled with an attractive inducement, making it "apparent that the prosecutor and police went to extraordinary lengths to extract from [Ellington] a confession by psychological means……

(Court rejects confession obtained after suspect was promised by the interrogator that he would testify for the suspect)

In *State v. Bordeaux* (2010) the North Carolina Court of Appeals upheld the lower court's opinion to rule the defendant's confession inadmissible because it was the result of a promise of leniency.

"The trial court found that during the interview, officers indicated to Defendant that they would testify on his behalf and explain that he only made a mistake. Thereafter, Detective Odham explained that "the Judge will look at that and say 'Well damn, you know, we don't want to ruin this kid's life,' or whatever the Judge will say. I don't know what the Judge will say ...." While Detective Odham attempted to retreat from his initial statement by light of the proposed testimony, other statements made throughout the course of the interview helped to arouse in Defendant the hope of a more lenient sentence. Several statements made by Detective Odham suggested that Defendant might still have the opportunity to attend community college and that his future was dependant upon cooperating during the interview. The trial court's findings indicate that the detectives promised that they would speak on Defendant's behalf and a benefit would result. When viewed in their totality, the Detectives' statements during the course of the interview aroused in Defendant "an 'emotion of hope' " of lighter, more lenient sentence."

The Court of Appeals also pointed out that "In this case, the detectives' suggestion that Defendant was a suspect in a murder investigation accompanied by promises of relief made Defendant's statement involuntary. The officers were fully aware that Defendant did not participate in the murder. The intended effect of the detectives' query about the murder was to cause Defendant to be "worried and off-balance." When coupled with the promises of relief, the deception used by detectives rendered Defendant's confession inadmissible at trial."

Promise of reduction in number of counts coercive)

In *US v. Beaver* (2008) "... the main thrust of Defendant's argument is that he was induced to confess by the interrogating agents' promises of leniency." The court concluded that "The Defendant clearly formulated the reasonable belief that the agents were promising him a reduction in the number of counts charged and a lighter sentence if he confessed to fondling the girls. Of particular importance is the Defendant's insistence that Agent Frank's shake his hand. It is clear that Defendant thought a deal had been struck and wanted this handshake to memorialize the deal, a deal that he described as being the agents' agreement to drop all but two counts contained within the indictment. As a result of these circumstances, the Court is convinced the Defendant believed he had been promised lenience." Click here for the complete opinion.

(Interrogator's promise not to charge defendant with a "fictional" murder if he told the truth resulted in a coerced confession)

In *Chambers v. State* (2007) the Fourth District Court of Appeal Florida found that the trial judge erred in not suppressing the defendant's confession. The Court of Appeal stated:

Chambers challenges law enforcement's suggestion that he could face murder charges unless he told the truth as an impermissible promise not to prosecute in exchange for the truth. Two decisions cited by Chambers and rendered by this Court support his

contention.

First, in *Edwards v. State*, 793 So.2d 1044 (Fla. 4th DCA 2001), this Court held a confession involuntary where it ensued from an investigator's threat to hit a suspect with every charge he could if the suspect did not tell the truth, and wrote:

Certainly, a threat to charge a suspect with more, and more serious, crimes unless he or she confesses is coercive. Further, it is essentially a promise not to prosecute to the fullest extent allowed by law if that person confesses. Hence, the investigators' threats amounted to an exertion of improper and undue influence, rendering the affected portion of Edwards' statement involuntary.

Likewise, in *Samuel v. State*, 898 So.2d 233 (Fla. 4th DCA 2005), this court held a confession involuntary where it ensued from an officer's threat to charge the suspect with fifteen robberies, where there was evidence of at most nine and probable cause for only one, if he did not tell the truth, writing that "Fowler's promise not to prosecute the other fictional crimes" was coercive and rendered the confession involuntary.

Based on Edwards and Samuel, we reach the inescapable conclusion that Chambers' confession which almost immediately ensued from what was essentially a promise not to charge him with a "fictional" murder if he told the truth rendered his recorded statement and confession unconstitutional as coerced and involuntary.

Court decisions re appropriate/permissible investigator statements

In general

(*"… the Court must express its strong concern that the search and interrogation methods used in this case barely fall within the borders of what is legally acceptable"*)

In *US v. Bhatt* (February 2016) the US District Court, N.D. Georgia, expressed concern about the investigators interrogation tactics, stating that they "barely fall within the borders of what is legally acceptable." From the District Court's opinion:

Twelve to thirteen agents armed in tactical gear arrived at Defendant Bhatt's doorstep at the crack of dawn, with some agents displaying their weapons, to conduct an investigatory search and related interrogations. Defendant and his family members were asleep when the law enforcement team arrived at their doorstep and began loudly knocking on the door… They clearly were implementing a "shock and awe" strategy to obtain the maximum information feasible in connection with an investigatory search.

The Defendant and his father were handcuffed at the onset of the search for ten to fifteen minutes while their wives stood by outside and the house was cleared…. Both Defendant and his father were solely wearing boxers, because they had just been woken from sleep. Within 27 minutes of the agents knocking on the door, they proceeded to interrogate Defendant and his father separately, without providing them an opportunity to clothe. The

interview of Defendant took place on the house porch and lasted all told almost three hours, including two short breaks. The entire search and interrogation process lasted almost four hours. The agents never told Mr. Bhatt that he was free to leave the home and choose not to be interviewed. They never told him they could accompany him to his bedroom so he could properly clothe himself. The agents tag teamed Bhatt's interrogation by adding the lead investigator, Mr. Ashley, to the two-person interrogation team for the last segment of the interrogation that lasted approximately 50 minutes…. Further, he advised Bhatt that if he failed to cooperate, that Ashley would tell the U.S. Attorney of his lack of cooperation and that this would impact the decision to prosecute and how to handle the case.

The focus of the voluntariness inquiry is on whether the defendant was coerced by the government into making the statement: "The relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception."

Among the factors the Court should consider are the defendant's intelligence, the length of his detention, the nature of the interrogation, the use of any physical force against him, or the use of any promises or inducements by police…

When the Court evaluates these factors, including Defendant's professional background, his age and the circumstances of the search and interrogation, it ultimately reaches the same conclusion made by the Magistrate Judge. However, the Court remains more concerned about the collective impact of the variety of tactics used in this case to place coercive psychological pressure on Bhatt. These include: (1) the "shock and awe" intrusive dawn wake-up arrival delivered by a troop of twelve to thirteen armed law enforcement officers; (2) the lead agents' (who included a female agent) obvious intentional undermining of Defendant's sense of independence and orientation, by virtue of their proceeding to interview Bhatt for hours on end after while in his boxers, just after he had been abruptly woken by their team; (3) the agents' failure to make clear that Defendant was free to leave and not submit to an interview; (4) Agent Ashley's extended and somewhat strained representations regarding the benefits of cooperation and the risks of prosecution as well as his capacity to assist Defendant in communicating with the judge on the case via a letter; and (5) the length of the interrogation that was conducted for hours immediately following the Defendant's being woken and placed in handcuffs initially.

While the Court finds Agent Ashley went overboard in his statements, he did not deliver these in a coercive manner. Nor was Bhatt's interview as a whole conducted in an overtly threatening manner by the agents. The Court therefore concurs with the Magistrate Judge's finding that the Defendant's statement here was given on a voluntary basis in view of applicable law, but it views the agents' conduct of the interview as part of a pattern of pushing the limits. The Court remains deeply disturbed by the coercive power dynamics created by the officers' lengthy interview of the Defendant while he vulnerably stood in his boxers for hours after the shock of being woken by a large team of armed

officers. These tactics, tolerated in *Peck* but expanded still further here, will not likely be approved by this judge if stretched any further.

(*Confession voluntariness: an excellent example from an FBI interrogation*)

In *US v. Adcox* (May 2016) the US District Court, W.D. Louisiana upheld the admissibility of the defendant's incriminating statements, rejecting the claim that the investigators employed material misrepresentations, trickery and deceit. From the District Court's opinion:

At 7:00 a.m. on the morning of March 27, 2014, two FBI special agents, Maurice J. Hattier, Jr., and Billy J. Chesser, knocked on the front door of Billy Joe Adcox, Jr.'s ("Adcox") home in Vienna, Louisiana. Upon opening the door, the agents advised Adcox that they were seeking his cooperation in an ongoing criminal investigation being conducted by a federal grand jury in Baton Rouge, Louisiana. Adcox invited the agents in and they all sat down around the dining room table. The agents questioned Adcox for the next one hour and forty-five minutes about his knowledge of, and involvement in certain stock market trades of the publically traded company, Shaw Group, Inc ("Shaw") in July 2012, around the same time that Shaw was in merger talks with another company.

According to Agent Hattier, Adcox eventually admitted that his good friend, Jesse Roberts, advised him to buy stock in Shaw based on insider information that Roberts had received from Roberts' brother-in-law and Shaw employee, Scott Zerinque. Adcox then forwarded the tip to at least one other person. Adcox admitted to the agents that he netted approximated $40,000 from his trading activity in Shaw stock and options.
On March 4, 2015, a federal grand jury returned a two count indictment against Adcox for securities fraud (insider trading), and conspiracy to commit same…… Adcox, via counsel, filed the instant motion to suppress any incriminating statements made by him during his interview on the grounds that the agents obtained his statements involuntarily through material misrepresentations, trickery, and deception.

The court finds that Agent Hattier did not *directly or explicitly* promise leniency or immunity to Adcox, in exchange for Adcox's truthfulness or cooperation. Furthermore, Hattier truthfully disclosed to Adcox that he was not the focus of the investigation – *at that time.* Rather, the agents were trolling for bigger fish, namely Roberts and Zeringue. Hattier hoped to obtain Adcox's cooperation in the government's case against these other individuals. At the hearing, however, Hattier candidly admitted that by providing useful information against Roberts and Zerinque, et al, Adcox necessarily would have to incriminate himself. Furthermore, by incriminating himself, Adcox would be providing prosecutors with leverage in their efforts to preserve his cooperation going forward. Needless to say, Hattier did not disclose these additional details to Adcox before commencing the interview.

On the other hand, Hattier advised Adcox that it was his choice whether to answer questions or not. Furthermore, if he *did* elect to answer questions, it was important for him to respond honestly. Adcox opted to answer the agents' questions, but, on more than

occasion, denied any third-party influences or knowledge in his decision to purchase Shaw stock/options. If this was untrue, as his later statements suggest, Adcox potentially made a false statement to an FBI agent in violation of 18 U.S.C. § 1001(a)(2).

In an effort to prompt Adcox's cooperation, Agent Hattier advised Adcox that the agents did not feel that he had been completely truthful up to that point. They told him that they were aware that Adcox had spoken to other individuals about his Shaw trades and that he had traded in Shaw because he had received material, non-public information about Shaw from these other individuals. In other words, the agents advised Adcox that they believed that he potentially had committed a crime. Although the agents may have exaggerated the extent of their knowledge, they already possessed phone and trade records which suggested that a possible crime had been committed.

The agents assured Adcox that, his transgressions notwithstanding, the FBI remained *more* interested in his honesty, together with his cooperation against the other subjects. Because of the agents' repeated assurances that the focus of the investigation was on others, and the agents' attempts to enlist Adcox's cooperation in those efforts, Adcox undoubtedly hoped for leniency in exchange for his disclosures. However, he could not, in good faith, expect more than that. The agents offered no guarantees or explicit promises. In fact, on the several occasions during the interview that Adcox sought to clarify his status, Agent Hattier advised him that prosecution decisions remained the province of the U.S. Attorney; the FBI could only provide input into those decisions. Moreover, the FD-302, which the agents undoubtedly provided to the prosecutors, documented the nature and extent of Adcox's cooperation. In other words, Agent Hattier upheld his end of any implied bargain. Furthermore, according to Agent Hattier, Adcox ultimately decided not to cooperate with the prosecution, thereby negating the basis for any claim for leniency.

In addition, by all appearances, Adcox was intelligent and educated, with the requisite knowledge to execute his own on-line stock and option trades. The agents never raised their voices, or exerted any emotional or physical pressure for Adcox to respond to questions. In fact, they advised Adcox that it was his choice whether to answer their questions or not. Even Ms. Adcox characterized the encounter as an “interview,” rather than an “interrogation.” Adcox's statements were not the product of coercive police conduct.

Upon consideration of the totality of the circumstances, the undersigned finds that the government has demonstrated by a preponderance of the evidence the voluntariness of defendant's incriminating statement(s).

(Confession voluntariness: ambiguous invocation of right to remain silent and rejection of claim of coercive police tactics; rejection of exhaustion claims)

In *State v. Perdomo-Paz* (October 2015) [Missouri Court of Appeals, Western District] the defendant contended on appeal that he invoked his right to remain silent by referencing, in isolation, his statement that he did "not for real, man, no,**but...**" want to

answer questions about a homicide. He argues that this statement required Detective Ray to immediately cease her interrogation. But our Missouri Supreme Court has stated that it does "not read *Miranda* searching for out-of-context sentences that support a preferred outcome." ... "Instead, courts must look to the full context of a particular statement in order to determine whether a suspect invoked his rights or not."

From the courts opinion: "At the beginning of the interrogation, Detective Allen read Perdomo-Paz his *Miranda* rights. Perdomo-Paz signed a *Miranda* waiver and began talking to Detectives Ray and Allen. Detective Ray asked basic informational questions. She then told Perdomo-Paz that she and Detective Allen were conducting a homicide investigation:

Det. Ray: Well, the reason we are talking to you, we're, uh, conducting an investigation, it's a homicide investigation. Okay, so, I just want to ask you a few questions about that. You cool with that?
Perdomo-Paz: What is, I mean [unintelligible], I mean, I don't know that ... [several seconds of silence]
Det. Ray: You fine with that, just talking about a homicide. Is that, is that....
Perdomo-Paz: I mean not, not for real, man, no, but....
Det. Ray: Why not?
Perdomo-Paz: I mean because when Kansas tried to talk to me about a homicide, you know, ... sometimes I couldn't even sleep ... that I know who killed somebody, [parts unintelligible]
Det. Ray: Okay, well, these are going to be easy questions, okay? Is that, is that fine? You okay with answering some easy questions? [several seconds of silence when Perdomo-Paz paused and then nodded his head affirmatively]
Detective Ray then began questioning him. Throughout the interrogation, Perdomo-Paz's story remained consistent: he went to a party on Noland Road in Independence at 9:30; "Carlos" drove him home; he was home by 1:00 a.m.; he stayed home the rest of the evening and did not go to any other parties that night.
Perdomo-Paz's response, "not for real, man, no, but ..." to Detective Ray's question whether he was "fine" with talking about a homicide was not a clear and unequivocal assertion of the right to remain silent. As we have stated under a similar fact pattern: [A suspect's] use of the conjunction "but" is an equivocation, which suggests that he was experiencing an internal conflict: while he did not want to talk about what had happened, other factors compelled him to do so."

The court went on to state: "Considering the totality of the circumstances, Perdomo-Paz's statement was not coerced. First, Perdomo-Paz was advised of his *Miranda* rights and signed a waiver, indicating that he understood them. Second, Perdomo-Paz claims that his statement was coerced because when he asked for water because his throat was dry and when he asked for a bathroom break, the detectives did not *immediately* give him water or allow him to use the restroom. However, shortly thereafter, the detectives gave him water and a bathroom break when he asked a second time. Third, the length of Perdomo-Paz's interrogation-three hours *with a break* -was not coercive. Missouri courts have held that *continuous* questioning for four hours is not coercive.... Fourth, while

Perdomo-Paz told the detectives during the interrogation that he was tired and at times laid his head on his folded arms on the table, he did not demonstrate that he was so tired that he was unable to resist the questioning. A statement is not involuntary due to a defendant's tiredness when the interrogation is conducted at a reasonable time and the length of the interrogation is reasonable.... Additionally, the video recorded interrogation (which has been viewed by this Court) contradicts Perdomo-Paz's claims of exhaustion by showing he was sufficiently alert and energetic to actively participate in exchanges with the detectives. Fifth, Perdomo-Paz claims that Detective Ray made sporadic statements to him that were "aggressive and demeaning." The Missouri Supreme Court has held that tactics such as "yelling, 'getting in his face,' and misleading" a suspect about whether his accomplice was making a statement implicating him were not impermissibly coercive where the detectives did not touch the defendant or threaten him with any physical harm.... We conclude that none of the factors identified by Perdomo-Paz establish that he was deprived of his free choice to admit, deny, or refuse to answer the detectives' questions or that his will was overborne when he made the statement.'

(Court rejects defednant's claims that her confession was coerced: that she was threatened with harsher punishment if she did not confess; the length of the interrogation was coercive; she was advised that her refusal to confess could result in false accusations against her daughter; and, the officers were, at times, "insulting and used profanity," suggested that her "medication 'affected her intellect,' " and that she was " 'not a true friend of [the victim].)

In *State v. Cloutier* (January 2015) the Supreme Court of New Hampshire carefully examined the issue of confession voluntariness. The defendant claimed that her confession should have been suppressed because she was threatened with harsher punishment if she did not confess; the length of the interrogation was coercive; she was advised that her refusal to confess could result in false accusations against her daughter; and, the officers were, at times, "insulting and used profanity," suggested that her "medication 'affected her intellect,' " and that she was " 'not a true friend of [the victim].' The Supreme Court upheld the admissibility of her incriminating statements.
From the court's opinion:

"... the defendant argues that Plourde's statement, "[I]f we leave here today, ... [w]e'll handle it like we handle ... like somebody who's done this many times," constituted " 'a threat of harsher punishment should [she] remain silent,' " and asserts that the remaining circumstances of the interview "did not mitigate the effect of this threat." She contends that Plourde's threat, in combination with certain other circumstances, "foreclosed any rational conclusion that her confession was voluntary beyond a reasonable doubt."
... As to the first factor, the defendant contends that the nature of Plourde's statement constituted a threat of harsher punishment should she not confess.

... to the extent Plourde's single statement constituted a threat, it was not a threat "to inform the prosecutor or the judge of" the defendant's refusal to cooperate. ... Nor did his statement convey "an unmistakable message that [the defendant] would be punished" if she remained silent and failed to admit her involvement in the crime.... Indeed, it is

unclear what Plourde meant by this single statement. Nonetheless, even were we to assume that Plourde's statement constituted some sort of threat, our review of the video recording discloses no indication that this statement overbore the defendant's will or had any impact upon her conduct during the interview so as to render her confession involuntary.

Our review of the record reveals no other factor that undermines the trial court's finding of voluntariness. Although the defendant was at the police station for nearly six hours, an interview of this length, in and of itself, does not render a statement involuntary. See Belonga, 163 N.H. at 356, 42 A.3d 764 (holding that six *17 and one-half hour interview did not render confession involuntary). What is of paramount importance is what occurred during the interview.... Here, there was no evidence that the defendant "needed or was deprived of food, medical attention, or sleep."

Further, as the trial court found, the defendant's demeanor on the videotape is consistent with finding her statements voluntary. The trial court found that she "look[ed] relaxed" and "appeared lucid and self-possessed." She answered the officers' questions and made statements "in a normal conversational way," and did not appear "intimidated." Although at the end of the interview, the defendant began to "tear up and sob[ ]," this alone is not dispositive. As the trial court concluded, "the tears and the emotional disturbance" demonstrated "remorse," "not the sign of a person ... whose will has been broken." Absent overreaching, deception or coercion by the police, a defendant's emotional response to an interview does not render her confession involuntary.

The defendant also claims that the officers suggested that her refusal to confess could result in false accusations against her daughter. Under some circumstances a confession may be rendered involuntary because the police unreasonably exploit a person's compassion for a loved one.... For example, courts have held that a confession may be involuntary when police make threats to arrest a suspect's family members.... Here, however, the officers did not make such a threat. Rather, they merely questioned whether the defendant's daughter was involved after the defendant agreed that video surveillance would show her and her daughter "over there." Thus, this is not a case in which the police impermissibly used a defendant's compassion for a loved one to "extract a statement."

Finally, the defendant claims that the officers were, at times, "insulting and used profanity," suggested that her "medication 'affected her intellect,' " and that she was " 'not a true friend of [the victim].' " (Brackets omitted.) Although the officers were "not entirely friendly and sedate," .... the interview consisted mainly of questioning in a reasonable tone. To the extent the officers raised the defendant's use of medication, they did so as a possible reason for why they thought she may have taken the safe. Under the circumstances of the interview, the defendant could not have expected that her conversation with the officers would occur without any confrontation or intimation that she might be connected to the crime or questioning as to why she might be connected to the crime.

In this case, the evidence supports the trial court's conclusion that the defendant's

statements were the product of a free and unconstrained choice..... Accordingly, we affirm the trial court's finding that the defendant's statements were voluntary.

(Aggressive behavior does not lead to a coerced confession)

In the case, *In the Interest of P.G. v. State* (January 2015) the Court of Appeals of Utah did not find the investigator's aggressive behavior during the interrogation to be coercive. From the court's opinion:

"Second, the detective's persistence during P.G.'s interrogation does not undermine the juvenile court's finding that "[w]hile the detective's manner was rather aggressive at times it did not rise to the level of being coercive." For example, during P.G.'s interrogation, the detective repeatedly told P.G. that he already knew that P.G. sexually assaulted M.G., he refused to accept P.G.'s denials, and he shouted once at P.G. to "stop lying." However, "a police officer's exhortations to tell the truth or assertions that a suspect is lying do not automatically render a resulting confession involuntary." ... the contrary, "we think it eminently reasonable that police officers challenge criminal suspects' questionable explanations in their pursuit of the truth." ... Here, the detective was not merely posturing. He had substantial evidence prior to the interrogation that P.G. sexually abused M.G. M.G. had already told a school counselor, another school employee, and another detective about P.G.'s abuse. P.G.'s younger brother also told the other detective that P.G. had informed their mother about the abuse. Thus, although the interviewing detective was persistent and his interrogation techniques were sometimes aggressive, these facts do not serve to render P.G.'s confession involuntary.

Third, although neither P.G.'s parents nor his attorney were present during his interrogation, these facts are not determinative. See *State v. Dutchie*, 969 P.2d 422, 429 (Utah 1998). Cf. Utah R. Juv. P. 26(e) ("A minor 14 years of age and older is presumed capable of intelligently comprehending and waiving the minor's right to counsel ... whether [or not] the minor's parent, guardian or custodian is present."). P.G. did not request to speak to his parents or an attorney prior to or during the interrogation. Instead, after the detective read P.G. his *Miranda* rights at the beginning of the interrogation, P.G. affirmatively stated that he understood his rights and agreed to speak to the detective. Accordingly, the absence of P.G.'s parents or an attorney during his interrogation does not undermine the juvenile court's finding that his confession was voluntary."

(*Investigator's statement that it was time for the defendant to "come to Jesus" was not a coercive statement*)

In *Singleton v State* (November 2015) the Court of Appeals of Mississippi found that the investigators comment to the defendant that it was time to "come to Jesus" did not constitute a coercive statement. From the court decision:

"Singleton asserts that his confession resulted from pressure and intimidation from the investigators. Singleton testified that Investigators Ellis and Huddleston "play[ed] good cop and bad cop," which led to a feeling of intimidation. Singleton primarily contends,

however, Investigator Ellis coerced Singleton into confessing when he made the remark that it was time for Singleton to "come to Jesus."

Singleton, a preacher for approximately fifty-four years, argues that Investigator Ellis took advantage of his religious beliefs by using Jesus to elicit a confession. The United States Supreme Court has held "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."

The *Connelly* Court further held "the Fifth Amendment privilege [against self-incrimination] is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.' In fact, the Supreme Court has found that the use of religious references does not automatically render a confession involuntary.

In this instance, Investigator Ellis told Singleton that it was "time to come to Jesus" after the investigators played the tape-recorded conversation between Singleton and Daniel, and Singleton continued to deny his involvement with Daniel. Investigator Ellis testified his use of the phrase was merely to get Singleton to tell the truth in light of the incriminating evidence.

The Mississippi Supreme Court held that "[a] mere exhortation to tell the truth is not an improper inducement that will result in an inadmissible confession." While Singleton stated he found the remark offensive, Investigator Ellis testified he did not use any threatening or intimidating language or tone that would constitute coercion. This inducement to tell the truth without more does not rise to the level of coercion. Thus, the religious reference did not render Singleton's statement involuntary."

(Social Security Fraud)

In *US v. Harper* (September 2014) the US District Court, W.D. Kentucky, upheld the defendant's incriminating statements that she had given to agents from the Social Security Administration Office of Inspector General office. From their opinion the court stated the following:
Defendant, Janet Harper, is charged in Count 1 of the Indictment with knowingly receiving and retaining stolen property of the Social Security Administration consisting of $82,468.02 in supplemental security income benefits. In Count 2 of the Indictment, Defendant is charged with knowingly executing a scheme and artifice to defraud the Medicaid Program by falsely representing her living situation and marital status. On July 8, 2014, Defendant filed a motion to suppress "any and all statements, admissions and confessions allegedly given by the defendant, whether oral, written or otherwise recorded, which the government proposes to use as evidence against her" based on allegations that that they were involuntary and taken against Defendant's Fifth and Sixth Amendment rights.

At the evidentiary hearing, Agent Baker, Agent Krieger, and Defendant testified that after

the Defendant entered the interview room, the Agent informed her of her rights. Specifically, Agents Baker and Krieger testified that Agent Baker read the non-custodial rights form to the defendant that provided in part as follows: "You have the right to remain silent and make no statement at all. Any statement you do make may be used as evidence against you in criminal proceedings. You are not in custody. You are free to leave and terminate this interview at any time." (United States' Exhibit 2.) Defendant signed the signature line on the form and printed her name below the signature line. Defendant acknowledged signing the form and being informed of her rights. In as much as Defendant argued in her initial motion to suppress that her statements should be suppressed as a result of a violation of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1965), the motion is denied.

First, the Court finds that Agent Baker and Agent Krieger did not trick Defendant into signing the statement admitting that she made false statements regarding her living arrangement in her applications for supplemental social security benefits. After considering the testimony of the Agents, Janet Harper, and Ronald Harper, the Court credits the testimony of the Agents regarding the events of the interview. The Court finds that during the interview, Agent Baker informed Defendant he had reason to believe that statements given by her to the Social Security Administration over an 11 year period were false. Defendant admitted that those statements were false, and she voluntarily initialed the statements to acknowledge their falsity. At the request of the Defendant, Agent Baker wrote out the Defendant's statement based on things she communicated during the interview, read the entire statement aloud to the Defendant, and gave the Defendant the opportunity to correct the statement. The Defendant indicated the content of the statement was correct and signed it.

Second, the Court finds that the Defendant's mental condition, medication, lack of medication, or feelings of sadness and nervousness did not render the statement made by Defendant nor the signing of the statement in question involuntary. The Agents testified that Defendant's demeanor during the interview was calm and even-keel; she did not appear to be upset. She talked in a normal tone. Agent Baker testified that she did not appear to have any physical impairment, did not appear to be under the influence of any drugs or alcohol, and did not have any difficulty answering the questions. During the interview, Agent Baker questioned Defendant if she was under the influence of any drugs or alcohol, and she indicated that she was not. Further, the Agents testified that Defendant's behavior did not indicate that she had anything wrong with her mental state that would impair her ability to participate in the interview. The Court credits the Agents' testimony on this issue finding that Defendant was calm, alert, and responsive at the time of the interview."

(Bible in the interrogation room is not coercive)

In *Mauldin v. Cain* (August 2014) the US District Court, E.D. Louisiana upheld the lower court’s decision not to suppress the defendant’s incriminating statements and to reject the suggestion that the presence of a Bible in the interrogation room was coercive. In their opinion the court stated that, “Contrary to Mauldin's argument, defense counsel

raised the issue of the Bible in the chair next to Mauldin during the police interview. The record reflects that both the prosecutor and defense counsel questioned the officers about the Bible, described as a "little Gideon Bible" that was on the chair next to Mauldin and which could be seen in parts of the video. Sergeant Troy Tervalon testified that he placed the "small version" of the Bible in the chair before the interrogation started. He stated that he put it there so that Mauldin's "conscience would kick in, to tell the truth." He indicated that he said nothing to Mauldin about the Bible and placed it there before Mauldin was brought into the room. It was just a technique he used.

The record demonstrates that Mauldin's counsel did take issue with the presence of the Bible during the interview and included the argument to bolster the alleged coercive circumstances forming the basis of the motion to suppress the confession. Mauldin's suggestion otherwise is without factual support.

In addition, there is no law to suggest that the mere presence of the Bible would have been sufficient for counsel to establish coercion of the confession. *See* Williams v. Norris, 576 F.3d 850, 868–69 (8th Cir.2009) (references from the Bible and appeals to God are not alone coercive); *Williams v. Jacquez,* No. 05–0058, 2011 WL 703616, at *24 n. 19 (E.D.Cal. Feb. 19, 2011) (officers indicating during interview that the Bible instructs that a person tell the truth), *order adopting aff'd,* 472 F. App'x 851 (9th Cir .), *cert. denied,* — – U.S. —–, 132 S.Ct. 378 (2012). Thus, counsel was under no professional obligation to re-urge that point by separate motion to suppress when the argument was already rejected by the Trial Court. *See* Smith v. Puckett, 907 F.2d 581, 585 n. 6 (5th Cir.1990) ("Counsel is not deficient for, and prejudice does not issue from, failure to raise a legally meritless claim."); *see also,* Koch v. Puckett, 907 F.2d 524, 530 (5th Cir .1990) (concluding that "counsel is not required to make futile motions or objections."); *see also,* Wood v. Quarterman, 503 F.3d 408, 413 (5th Cir.2007) (" '[f]ailure to raise meritless objections is not ineffective lawyering; it is the very opposite.' ") (quoting Clark v. Collins, 19 F.3d 959, 966 (5th Cir.1994)).

Relief on this claim was properly denied by the state courts and the denial was not contrary to *Strickland.* Mauldin is not entitled to relief on this point."

(Investigators operated at the "outer bounds of permissible conduct")

In *U.S. v Thomas* (May 2014) the US District Court, N.D. Illinois, upheld the admissibility of the defendant's confession, but cautioned the investigators that they were operating at the outer bounds of permissible conduct. From the court's opinion:

"Defendant argues that the use of his statement at trial would violate his Fifth Amendment right against self-incrimination because he was impaired by his pain medication and therefore lacked the capacity to make a voluntary confession.

Defendant argues that the agents' coercion began with their failure to identify themselves and the purpose of their visit. He also claims that the agents coerced him because they misrepresented the intended length of the interview and interviewed him knowing that he was impaired by his medication. The Court, aided by the factors listed above, comes to a

different conclusion. Defendant is an adult and possesses a sufficient educational and intelligence level to run his own business. The interview was less than two hours in length. Defendant testified that Special Agent Dahlgren grew aggravated during the interview when Defendant contradicted him, but Defendant remained undeterred in clarifying his statements to the agents. In addition, Defendant alleges no use of physical punishment. As discussed above, Defendant was not admonished of his constitutional rights because he was not in custody. Using the multi-factor test laid out by the Seventh Circuit, the Court cannot find any evidence of coercion by the agents.

Although Defendant has not proven any constitutional violation was committed by the agents, the Court is troubled by the agents' investigative tactics. Special Agent Colin testified that she was aware that Defendant was represented by Sam Adam, Jr. Even if Defendant stated during the interview that Adam was not representing Defendant "at that time," Special Agent Colin read the correspondence sent by Adam to the CTA declaring that he was representing Defendant in any investigation pertaining to Thomas Painting and Decorating. The agents took advantage of Defendant's lack of legal prowess in order to run an end-run around his Fifth Amendment rights. While Defendant's assertions regarding his mental state are not compelling enough to invalidate the voluntariness of his confession, the Court notes that this entire dilemma could have been avoided if the agents had simply contacted Defendant's attorney prior to conducting the interview. Unfortunately, the Court cannot locate, and Defendant has not provided, any case law to suggest that the agents' tactics warrant a suppression of his statement. Indeed, a government agent's deceitful conduct does not render a confession inadmissible absent threats or promises by the agent…. The Court recognizes that government agents must zealously pursue alleged criminal wrongdoing. Nonetheless, the Court warns HUD and DOL that, in this instance, their agents operated at the outer bounds of permissible conduct under the Fifth Amendment."

(Statement the defendant would be taken home if he was honest did not require exclusion of the statement)

In *Sparrow v. State* (2013) the Court of Appeals of Georgia, found that telling the suspect that he would be taken home after the questioning if he was honest with the investigators did not make the confession involuntary. The court stated the following:

"On appeal, Sparrow argues that the trial court erred by admitting his confession because it was not voluntary. He points to Mann's promises of secrecy and that he would take Sparrow home after the interview if Sparrow was honest with him. But based on our review of the videotape, it is clear that Mann did not promise anything with respect to prosecution for the burglary. Mann had told Sparrow that he still needed to speak with the victim of the crime to determine what would happen next, thus, Mann's promise was merely that he would take him home after questioning and not that Sparrow would be free from future charges. A promise to take the suspect home after questioning--not relating to ultimate charges or sentences for the suspected crime--is merely a collateral benefit that does not require automatic exclusion of the confession... Further, ... a promise of secrecy shall not require exclusion of the statement, so Mann's promise not to tell

Sparrow's sister or his parole officer about the drug use does not render Sparrow's statement involuntary. Based on the totality of the circumstances, the record supports the trial court's determination that Sparrow's statements were not subject to exclusion...

(Detective's statements during the interrogation telling defendant that he thought she was lying were admissible)

In *Johnson v. Commonwealth* (2013) the Supreme Court of Kentucky upheld the lower court's decision to allow the jury to hear audio tapes of the defendant's interrogation in which they heard the investigator say he thought the defendant was lying.

From the court's opinion: "The recordings contained instances of a detective telling the Appellant that he thought she was lying... Appellant initially objects to the playing of the tapes because they contain repeated instances where the interrogating detective expressed his opinions about whether the Appellant was telling the truth about the circumstances of the victim's death. Specifically, he stated on tape that Appellant "put [the bruise] there" and "punched him in the back." As the interview progressed, Detective Allen appeared to express more frustration, yelling "I'm so sick ... of your bullcrap, bullcrap, bullcrap! You keep sitting there saying [that the police are] lying! When twelve jurors are sitting there, we'll see who's lying!"

…..Appellant pleaded with Detective Allen that she was telling the truth, to which Detective Allen responded "I'm not buying into that. I'm wasting my time ... two days interviewing you ... we've got enough for an arrest ... tell [your story] to twelve jurors.".

The issue with playing these audiotaped interrogations in their entirety, specifically the portions of them that contain statements made by a law enforcement official that suggest, if not explicitly state, that the officer believes that the defendant is lying, is very similar to a witness characterizing the testimony of another witness as "lying." It has long been the law of this Commonwealth that a "witness's opinion about the truth of the testimony of another witness is not permitted.... That determination is within the exclusive province of the jury..... Technically speaking, however, when an officer makes statements during an interview accusing a person of lying, neither the officer nor the person is a witness at that time. The question, then, is whether the principle in *Moss* extends outside the courtroom so as to make it unduly prejudicial to allow a jury to hear the portions of an interrogation of a criminal defendant wherein an officer accuses the defendant of lying.

This Court addressed this precise issue in *Lanham v. Commonwealth,* 171 S.W.3d 14 (Ky.2005), and held that such statements are admissible. In so holding, the Court decided that Moss did not extend to recordings of police interrogations and stated:

We agree that such recorded statements by the police during an interrogation are a legitimate, even ordinary, interrogation technique, especially when a suspect's story shifts and changes. We also agree that retaining such comments in the version of the interrogation recording played for the jury is necessary to provide a context for the answers given by the suspect.'

("the very outer limit as to what tactics law enforcement may employ when performing a custodial interrogation")

In *Martin v. State* (2013) the Supreme Court of Florida addressed the defendant's claim that this confession was coerced by the detectives who he claimed "relied upon the following six coercive tactics to induce his confession: The police (1) threatened him with the spectre of death row; (2) deluded him as to what he could expect for himself and from a jury if he confessed; (3) deceived him as to the amount of time he had to cooperate with law enforcement; (4) promised their favorable testimony and use of their influence during his trial if he cooperated; (5) promised to arrange a visit for him with his girlfriend if he cooperated; and (6) exploited his religious beliefs by relying on a version of the "Christian burial" interrogation technique."

The Supreme Court ruled that "When considering the facts, relevant standard of review, and totality of the circumstances, we do not agree with Martin that the detectives coerced his confession. Nevertheless, some of the techniques the detectives employed walked the line that separates permissible from impermissible interview tactics, and we, as a result, note that this case presents the very outer limit as to what tactics law enforcement may employ when performing a custodial interrogation."

The Supreme Court concluded, "The interviewing detectives engaged in a variety of tactics to elicit information from Martin. Given the specific factual circumstances addressed in this case, however, we do not agree with Martin's contention that the interviewing detectives coerced his confession, thus rendering it inadmissible. Law enforcement must be afforded some leeway in how they conduct interrogations to ensure public safety and to further… their objective of locating a missing person who might still be alive. The interview here cannot be characterized as so coercive as to render Martin's confession involuntary. Although some of the tactics and techniques used by the detectives may have been less than ideal, West and Wolcott did not directly threaten, deceive, or delude Martin into confessing. Therefore, we affirm the trial court's denial of Martin's motion to suppress."

(Claim that the implication of a lighter sentence resulted in a coerced confession rejected)

In *Van Jackson v. State* (2012) the decision by the Texas Court of Appeals, Austin, points out the value of investigators video recording the interrogation. In their decision the court stated that , "Jackson argues that the video proves that he was "fatigued, hungry, injured[,] and left isolated in a small room for some time" and that the detective induced his confession by suggesting that he might receive a lighter sentence if he was honest and apologized for robbing Rivas. However, the detective never made a positive promise to Jackson that he would receive a benefit by confessing. Rather, he told Jackson that juries want to hear defendants say they are sorry and that prosecutors want to know if defendants are cooperative, truthful, and apologetic. These general statements were not enough to render Jackson's statements involuntary.....

..... Although Jackson was arguably tired during the interrogation, the video shows that he was alert, coherent, and could answer the detective's questions. The detective's questioning lasted less than twenty minutes, and at no time was the detective threatening or overbearing.... Therefore, we conclude that Jackson's confession was voluntary, and the trial court did not err in denying Jackson's motion to suppress the confession. Jackson's second point of error is overruled.

(Statements to the defendant that his denials were "bullshit" and that he was "kind of screwed" and that he was "fucked" were not threats)

In *Moore v. Scribner* (2011) U.S. District Court, C.D. California rejected the defendant's claim that his confession was coerced by threats and lying about the evidence. From the court's opinion:

"Petitioner cites the following "threats" by Carr. During the first interview, Carr told Petitioner that his denials were "bullshit." ... Carr told Petitioner: "You're in deep trouble if you continue to feed me a line of bullshit." ... Carr also told Petitioner that because the police has physical evidence contradicting Petitioner's story, he was "kind of screwed." ... During the second interview, Carr told Petitioner he could "prove" Petitioner was at the scene of the crime... Carr added: "I don't believe you shot the man. What I do know is you're fucked unless you can come up with a reason and explain to me what happened."

None of Petitioner's allegations rises to the level of a threat indicating Petitioner's confession was coerced. Carr's statements that Petitioner was in "deep trouble," was "kind of screwed," and was "fucked" were designed to induce Petitioner to tell the truth. Carr did not threaten Petitioner with any specific consequence if Petitioner failed to confess.

Petitioner argues that Carr's misrepresentations about the evidence constituted coercion. ... During the first interview, Carr told Petitioner there was "physical evidence" that placed Petitioner at the crime scene... When Petitioner asked what evidence, Carr did not respond... During the second interview, Carr said the police had lifted fingerprints from Bennett's apartment door and a glass table inside the apartment, and the fingerprints matched Petitioner's.... After Carr continued to push for a reasonable explanation, Petitioner finally stated that "[i]t was a robbery."

Standing alone, Carr's misrepresentations would be insufficient to render Petitioner's confession involuntary. Petitioner also argues Carr made promises of leniency. Petitioner argues Carr told Petitioner that unless Petitioner gave a "reasonable explanation" for what occurred, he would be "fucked," whereas if he gave a reasonable explanation, he would be "set ... free." ... Petitioner's contention distorts the record. While Carr repeatedly asked for a "reasonable explanation"..., there is no evidence Carr promised leniency. Telling Petitioner that he's "screwed" or he's "fucked" if he does not cooperate... does not amount to a promise of leniency. Telling Petitioner that his "cooperation is gonna go a heck of a long way" is not a promise of leniency.

(Interrogator's "empathetic and caring demeanor" was not coercive)

In *People v. Powell* (2012) Court of Appeal, First District, Division 3, California, the court upheld the admissibility of the defendant's confession, finding that "There was no improper coercion here. It is no exaggeration to say that Sergeant Alexander came across more like a mentor than a police officer during the interview. He spoke about family, character, overcoming problems, accepting responsibility for wrongdoing, and becoming a better man. He urged Powell to "walk the righteous path," to "do the right thing," to "tak[e] control of your life." He touched Powell gently on the leg and shoulder and said he was a good person who never intended for someone to die. "[O]n that day you made a bad decision. But ... your decision was not as bad as the outcome. You're not a killer." He told Powell that he cared about him and his mother, and that he believed Powell was "put on this earth to excel and succeed in life. And, unfortunately, you're not, you are making decisions that aren't good up 'til this point. This could be a turning point." He urged Powell to help himself and "do what's best for you right now." He invited Powell to think about a future life, family and career "when this is all said and done...."

"But, at no point during the interview did either officer expressly or impliedly promise Powell that he might not be charged with, prosecuted for, or convicted of the murder if he cooperated. They did not suggest that Powell could influence the decisions of the court or district attorney, but simply suggested that his truthfulness would be beneficial in an unspecified way. Indeed, Sergeant Alexander said he did not know what kind of charges would be brought and that those decisions were made by other people. Under the circumstances, the officer's suggestion that it would be better for Powell to tell the truth and promptings to consider his future did not amount to a promise of leniency. ..

(Statements such as, "these things happen, it is ok"; "we don't believe you had any intentions of doing it" and "a tragic accident occurred" do not offer a promise of leniency)

In *US v. Hunter* (2012) the US District Court, E.D. Virginia, upheld the lower court's decision to admit the defendant's confessions. "The facts and circumstances in this case establish that Hunter's statements were "voluntary" for constitutional purposes. Though still in her early twenties, the defendant was not a juvenile at the time of C.P.'s injuries or her interrogation. There is no evidence in the record that Hunter lacks education or has low intelligence. Neither Agent David nor Investigator Hampton harmed or threatened to harm Hunter if she did not answer their questions.

... "Of all the facts pertaining to the voluntariness of Hunter's statements, the most concerning are Agent David's intentional efforts to minimize the seriousness of the defendant's criminal exposure, which certainly had the potential to cause Hunter to discount her own assessment of her jeopardy, as evidenced in her initial description of events. The defendant also claims that by making such statements as such as "these things happen, it is okay", "no one is going to fault you for it", "we don't believe you had any intentions of doing it", and "a tragic accident occurred" [Doc. No. 33], Agent David made an "implied promise" that if Hunter were to admit to shaking C.P., she (Hunter) would

suffer no punishment. Likewise, the defendant argues that Agent David impermissibly induced her statements by suggesting that she (Hunter) needed to provide accurate details of how C.P. was injured in order to maximize the chances of C.P.'s recovery. Based on these and other statements, the defendant claims that overall, her will was "overborne" by Agent David's tactics and that her "capacity for self-determination was critical impaired," particularly when Agent David allegedly conditioned Hunter's ability to see her husband on her willingness to confess.

... "In this Circuit, only certain types of promises, when not kept, will render a resulting confession involuntary…. These promises are limited to explicit statements by the questioning official that he will do, or not do, a specific act, in exchange for the confession... Moreover, the cases that have suppressed statements on the basis of an implied promise involve promises that were compelling in terms of the consequences that would befall the defendant or those associated with the defendant.

,,, "Agent David's statements were not so much promises as they were opinions concerning the criminality of Hunter's conduct and how it would be viewed by others. While Agent David's repeated assurances that she understood how Hunter must have felt and that she (Agent David) believed the incident was an accident were no doubt persuasive and inducing, nothing in those statements constitutes a quid pro quo promise to Hunter in exchange for a confession. Based on all the facts and circumstances, the Court finds that that Agent David did not make a promise to Hunter that vitiates her confession.

(The statement that questioning could go the "easy way" or the "hard way" does not constitute a threat when the statement is viewed in context.)

In *People v. Frith* (2012) the Court of Appeal, Second District, California upheld the admissibility of the defendant's confession, even though the defendant was told that the questioning could go the "easy way" or the "hard way" which he claimed was an implication of physical force. From the Court of Appeals decision:

Our review of the record reveals no substantial indicia of deception, undue pressure, or coercion by the detectives.... First, defendant's argument that Detective Durden's statement that questioning could go the "easy way" or the "hard way" implied the use of physical force takes the statement out of context. Directly after stating they could do it the easy way or the hard way, the detective explained, "The easy way is, that you [are] up front and honest. The hard way is, you want to play the game. Okay. If you want to play the game I have her story." Detective Durden went on to state there were always three sides to a story--his, hers, and the truth. Taken in context, it is clear the detective was exhorting defendant to tell the truth and even went so far as to indicate that he did not give defendant's story less weight than Breanna's. There was no threat, express or implied, in the detective's statements. A confession is not involuntary, where, as here, "[the detective] did not cross the line from proper exhortations to tell the truth into impermissible threats of punishment or promises of leniency."

Defendant next argues that when Detective Durden suggested he was "shucking and jiving," defendant believed the detective was accusing him of lying and felt intimidated by the detective's tone and body language. Even aggressive accusations of lying do not amount to coercive threats absent threats of punishment or promises of leniency.... In Joe R., the court held that a minor's confession was voluntary even though the police accused him of lying "loudly, emphatically, and with terse language (e.g., 'bullshit')...." ... Defendant does not claim to have suffered any language stronger than "bullshit," and as a 43-year-old man and a TSA officer, he was far less likely to have felt coerced by the implication that the officers believed he was lying than the 17-year-old boy in Joe R. Any implication by the detectives that defendant was lying does not invalidate his confession.

(Court rejects claim investigators made "misleading and manipulative comments" that coerced the confession)

In *People v. Flores* (2012) the Court of Appeals, 4th District, CA rejected the defendant's claim that the "Detective Rondou's comments during his interview "were calculated to make [him] believe he would be legally benefitted by explaining his role in the crime to them." …. To support his argument, Flores cites the following comments from the interview:

"This is your opportunity to tell the truth ... 'cause if you were with somebody and they did something stupid that you didn't know about, that's on them. Let them deal with that but don't make this about you by lying about it because you're only, not only trying to help yourself, you're trying to help the other person...?"

"If you sit in here and lie about it, if you know that somebody did something wrong like that and you lie about it for them, that's helping them after the fact. That could cause you problems down the road."

"[W]hatever you say in here is what you have to live with down the road. We've had a lot of guys that we talk to them like this and then, you know, things go the way that they go and then they sit there and they, they look at us and say, man, I wish I would have told you when I had the chance. You know, all of a sudden now they're sitting in court."

"This isn't new and I've had countless times, most of the guys tell me, but the guys that didn't, countless times when they've looked over at me in court, [ ]cause we're sitting with them at the table, damn man, I wish I had told you that day, and I look back and say, I told you to tell us that day. [P] ... [P] We gave you every chance and now look at you.... [W]e know you got caught up in some stuff that you weren't planning on doing.... As men, we put it on the table, we deal with it.... It's not the end of the world but you [sic] sitting in here lying. All that does is make us think you had a bigger deal in this, whether you were the one that planned this out or you had a bigger role than what you really did...."

"This is your chance to tell your side of the story. If you want to go with what other people told us it's not going to be good for you."

Flores cites these statements as some of the "misleading and manipulative comments" made to him. He argues "[o]ver and over [the] police extolled the benefits of telling them the truth, and stated that it was his last chance, his one and only chance to reap the benefits of telling the truth."

The officers' statements were permissible exhortations to tell the truth. It was not objectionable to emphasize the dangers of lying to the officers, which if later discovered, would damage Flores's credibility. As the Attorney General notes, the officers did not tell Flores he would receive any legal benefit if he told the truth and admitted his involvement. Statements suggesting a defendant has one chance to cooperate with the police and tell his version of the facts generally are permitted. (See *United States v. Gamez* (9th Cir.2002) 301 F.3d 1138, 1144 [officer's "comment that it would 'behoove' [defendant] to disclose what he knew about [the victim's] murder and that this was his 'last chance' to come forward does not amount to coercion"].)

(The police can lie to a suspect by telling him that they are not recording the interrogation when they actually are)

In *Evans v. Phelps* (2012) the U.S. District Court, D. Delaware, upheld the court's decision to admit the suspect's confession even though the police had lied to the suspect when they denied that they were recording the interrogation. From the District Court's opinion:
"In his second sub-argument, Petitioner contends that his due process rights were violated by the admission of the confession, because Lieutenant Jamison's untruthful remark that the interrogation was not being videotaped amounted to police coercion and rendered Petitioner's confession involuntary.

Petitioner presented both sub-arguments to the Delaware Supreme Court on direct appeal. The Delaware Supreme Court denied Petitioner relief, holding that:

[I]t is clear from the videotape of [Petitioner] with Lieutenant Jamison that [Petitioner] was advised of his Miranda rights, and that [Petitioner] waived those rights knowingly, intelligently and voluntarily. Moreover, we agree with the Superior Court that [Petitioner's] inquiry of Lieutenant Jamison mid-interview as to whether the interrogation was being videotaped was not, as [Petitioner] argues, an invocation of his Miranda rights.

Here, Petitioner asked Lieutenant Jamison "Is this being recorded?" (D.I. 49, *Evans v. State*, No. 471, 2007, Appellant's App. # 1 at 27) Lieutenant Jamison responded, "No. I will get you to write whatever you confess to." Id. Nothing in this exchange indicates an unambiguous request on Petitioner's part for counsel or an unambiguous invocation of his right to remain silent. Therefore, the Court concludes that the Delaware Supreme Court's denial of Petitioner's first sub-argument was based on a reasonable determination of facts, and was neither contrary to, nor an unreasonable application of, clearly established Federal law.

(It was not a promise of leniency when the suspect was told he would "only be a witness if he had merely been present but had not been a shooter.")

In *Thlang v. Jacquez* (2012) the U.S. District Court, E.D. California, upheld the Appeal's Court's decision to reject the defendant's claim that "his statements after Detective Seraypheap urged him to be a witness rather than a suspect were involuntary and inadmissible because this was an implied promise of benefit or leniency which induced him to admit he was present at the shooting. In his view, the witness/suspect dichotomy was a false representation that admitting he was present "would result in his being a mere witness and not a suspect and his release from custody."

"As the trial court noted, defendant was strong-willed and was sophisticated about the nature of police interrogation tactics in a serious case. Detective Seraypheap had earlier told him that regardless of whether he did the shooting or not, "I'll tell you this right now, you can't get off the hook. You have to answer to it." After making the witness/suspect remark and before the incriminating admission, the detective told defendant that denying he was present "hurt[s] your case more." This, too, implies that there will be a case against defendant regardless of an admission of presence.

(Court finds use of a videotape as a prop during an interrogation acceptable)

In *People v. Lewis* (2012) the Supreme Court, Appellate Division, Fourth Dept., New York upheld the admissibility of the defendant's incriminating statements. On appeal the "Defendant further contends that one of his statements to the police was involuntary inasmuch as it was obtained as a result of police deception, i.e., the use of a videotape as a prop, and as a result of the conduct of the police in attempting to capitalize on the potential criminal liability of defendant's girlfriend. We reject that contention. "Deceptive police stratagems in securing a statement 'need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession' .... Under the circumstances of this case, the fact that the police used a videotape as a prop does not warrant suppression."

(Interrogating a suspect after continued denials not coercive)

In *Murga v. State* (2012) the Court of Appeals of Texas upheld the admissibility of the defendants confession, even though the defendant claimed his statements were coerced. In examining the circumstances surrounding the interrogation, the court reported that, "Both detectives testified they did not coerce or harass appellant into making a statement against his will and that appellant freely and voluntarily spoke to them; at no time did appellant ask to terminate the interview or state that he wanted an attorney. Appellant was offered necessities such as food, water, and bathroom breaks. The record reflects that appellant never complained that any lack of sleep or anything else rendered him unable to continue with the interview. Lopez testified the method of interrogation the detectives used was not to accept appellant's denials and to continue the interview until appellant told the truth. Appellant was accused several times of lying when he denied committing

the crime, and he was encouraged to tell the truth even when he was crying. There were long periods of time when appellant was in the interview room alone.....

Viewing appellant's confession under the totality of the circumstances, we conclude the trial court's findings and conclusions that appellant's confession was voluntarily made and thus admissible are supported by the record. Appellant was informed of his *Miranda* rights, and he stated more than once that he understood his rights. Although the detectives continued to encourage appellant to tell the truth after he denied involvement in the offense, they did not threaten or coerce appellant during the approximately five hours they actually interviewed him."

(Telling defendant length of punishment and misrepresenting evidence not coercive)

In *People v. Riley* (2012) the Court of Appeal, Fourth District, Division 1, California upheld the admissibility of the defendant's confession even though the interrogator stated the possible punishment she was facing and misrepresented the evidence against the defendant. In their opinion the court points out the following:

"Riley contends she was coerced into confessing by Vasilis's promises of leniency in exchange for cooperation. Riley claims Vasilis's statement that they were discussing "something that could ... give you a, a sentence if you get to like youth authority till you're twenty-five or for life" was a promise to treat her as a juvenile if she confessed, or as an adult if she refused.

We acknowledge the weight of opinion condemning promises of leniency.... However, we reject Riley's assertion that Vasilis's comment amounted to such a promise. There is no indication in the record that Vasilis implied Riley would receive a juvenile sentence instead of a life term for cooperating, and Riley's assertion to the contrary is a mischaracterization. Vasilis stated the possible sentences Riley might face for murder, including incarceration in the youth authority until the age of 25 or life imprisonment, but did not suggest her confession would be a factor in determining the outcome in her case. … he simply outlined the maximum sentences possible for her crime depending on her age, a distinction he made no claim of control over. A bare mention of consequences, absent some promise or threat, cannot overbear a defendant's will.... The evidence thus shows Vasilis's statements, however characterized, did not have a coercive effect upon Riley. Rather, Riley's internal guilt led to her confession.

Riley next claims her statements were involuntarily because Vasilis lied to her about the existence of surveillance video. We disagree. While "police deception is a factor to be taken into consideration" when determining whether a confession is voluntary, deception alone will not invalidate a confession..... Our courts have allowed numerous instances of police mendacity, including those "far more intimidating and deceptive" than those employed here..... Generally, deceptive interrogation techniques only cross the line when they are of a type "reasonably likely to procure an untrue statement." ... Put another way, deception only mandates reversible error when it overbears the will of the suspect to the extent that confession becomes preferable even to the truth. .

(Promise to keep the suspect's name out of the media will not invalidate the confession)

In *State v. Alaniz* (2011) the Court of Appeals of Texas (Corpus Christie) ruled that the trial court abused its discretion when it found that an improper promise induced Alaniz to confess. During the interrogation the investigator stated to the suspect "we were going to do our very best to keep her out of the media."

The Court of Appeals stated that, "... the record supports a finding that Detective Lerma was explaining the policy of the police department to Alaniz, i.e., explaining how the department handled victims of alleged sexual assault... The trial court was unreasonable in isolating Detective Lerma's one statement made while articulating department policy and in concluding that because the one statement focused on Alaniz's concerns about the victim, it was a promise on the part of the detective that rendered Alaniz's confession invalid.

Furthermore, even assuming that Detective Lerma's statement was a promise, we agree with the State that there is no evidence that the promise induced Alaniz to confess or depended upon his confession. The court of criminal appeals has held that an " 'if-then' relationship [is] required to establish [such] a promise." …. "[T]here must be some indication that the police "induce[d] appellant to confess by implicitly or explicitly suggesting a 'deal, bargain, agreement, exchange, or contingency.' " ….. In other words, it is a promise made in exchange for a confession that is prohibited, not some free-standing promise untied to the decision to confess.

("Incessant questioning or demands to tell the truth" do not render a confession inadmissible)

In *Bolton v. McEwen* (2011), the U.S. District Court, N.D. California, upheld the trial court's decision to admit the defendant's incriminating statements. I their opinion the District Court outlined the following:

Bolton maintains that his statement to police should have been excluded as involuntary because the interrogation was lengthy, coercive, and included "incessant" demands to admit he killed Barfield. When an interrogation is recorded, as it was here, the facts surrounding the giving of the statement are undisputed, and we independently review the determination of the trial court on the ultimate issue of voluntariness.

" '.....Questioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect.... Yet in carrying out their interrogations the police must avoid threats of punishment for the suspect's failure to admit or confess particular facts and must avoid false promises of leniency as a reward for admission or confession...."

Bolton first argues that the officers' "incessant" demands that he admit his involvement and their statements that they "knew" he did it rendered his confession involuntary and

unreliable. Bolton's argument appears to be that he was coerced into confessing because the detectives were not being truthful about "knowing" that he killed Michelle. Police deception during interrogation, however, is not necessarily impermissible….. "Police trickery that occurs in the process of a criminal interrogation does not, by itself, render a confession involuntary and violate the state or federal due process clause. [Citation.] Why? Because subterfuge is not necessarily coercive in nature.... And unless the police engage in conduct which coerces a suspect into confessing, no finding of involuntariness can be made.

Next, Bolton maintains that the detectives' "incessant" questioning during the "lengthy" interrogation rendered his confession involuntary. Our review of the videotape of Bolton's interrogation reveals otherwise. The interrogation lasted for only two hours, hardly "lengthy." The detectives, though insistent at times, never threatened Bolton or even raised their voices. Bolton did not appear confused or exceptionally fatigued. Much of the detectives' questioning involved background information and the sequence of events on the evening of the killing. The detectives pointed out inconsistencies between his and J.'s statements, and questioned him about his improbable claim that "some dudes" attacked his wife, yet he failed to try to help her or call police.

(Telling a suspect "that if he cooperated and told the truth, he would get more points off his ultimate sentence under the federal Sentencing Guidelines" was not a promise of leniency that would nullify the confession)

In *US v Delaney* (2011) the U.S. District Court of Appeals, Sixth Circuit found that such a statement did not render a confession inadmissible. In their discussion as to what constitutes an acceptable promise, the court stated the following:

"The first prong of the Mahan test asks whether the agents' statements were objectively coercive. A promise of leniency in exchange for cooperation may be a relevant factor in determining whether a confession was involuntary….. Nevertheless, such statements usually are permissible…. In general, such promises are coercive only "if they are broken or illusory."

We have found that "promises to inform a prosecutor of cooperation do not, ipso facto, render a confession coerced."…… Similarly, promises "to recommend leniency" or "speculation that cooperation will have a positive effect" do not make subsequent statements involuntary.

Here, the agents explained to Delaney that if he cooperated and told the truth, he would get more points off his ultimate sentence under the federal Sentencing Guidelines. They also explained that his chances of going home that day were greater if he cooperated. Certainly, the agents made these statements with the intent to compel Delaney to testify, but they were not false. The agents did not inform Delaney that he did not have to accept responsibility at that time to receive the sentence reduction, but the absence of this information does not render the statements illusory. Without more, these statements were permissible promises of possible leniency.

(Telling the suspect he could help himself by telling the truth was not coercive)

In *Renteria v. Curry* (2011) the US District Court, E.D. California, upheld the trial court's admission of the defendant's incriminating statements. From the District Court's opinion:

At the hearing on the motions, the prosecutor played, and the court reporter transcribed, a tape recording of that interview. Representative of the statements he characterizes as improper promises of leniency are a detective's comments that he could help himself by telling the truth and being "totally forthright" because it would "really look bad to the jury if the evidence doesn't match what you're telling us," that "it's going to go a lot better for you" if he were to cooperate, and that "[w]e can't help you unless you're honest." Representative of the statements he characterizes as improper threats of the death penalty are a detective's comments that "you need to help yourself right now because if you don't you're probably going down forever and you'll probably never see daylight again," that "the death penalty's not totally out of the question," and that "you're looking at a possible death sentence here." The record of the end of the interview shows that as a detective asked him to be "honest with us and tell us the truth" [Petitioner] interrupted him and said, "I want to talk to a lawyer." The detective replied, "I can't help you," and asked no other questions.

The court reject the defendant's claim that his confession was coerced by threats and promises, saying that "although Petitioner argues that the questioning was coercive, Petitioner presents no evidence that coercion led to Petitioner's statements or that Petitioner's will was overborne."

(References to religion during an interrogation do not result in a coerced confession)

In *Reeves v. State* (2011) the District Court of Appeal, Florida, Fourth District found that "we agree with the trial court's reasoning that the detectives' use of religion to encourage the defendant to tell the truth did not make the defendant's statements coerced. The trial court's parenthetical descriptions of Walker, Smithers, and McNamee are accurate. In each of those cases, the supreme court and this court considered various religious references in the context of the totality of the circumstances and found that the confessions in those cases were voluntarily given and not coerced. Similarly in this case, the detectives merely played off the defendant's initial religious expressions of "God as my witness" and "The Lord's more powerful than anybody on this earth" to encourage him to tell the truth. "Encouraging or requesting a person to tell the truth does not result in an involuntary confession."

(Reference to "God forgiving the suspect" did not render the confession involuntary)

In *Harden v. State* (2011) the Supreme Court of Mississippi upheld the lower court's decision to find the defendant's confession voluntary. In their opinion the Supreme Court relates the following:

“In the audiotaped confession, Harden repeatedly denied that anything had happened with L.Q., before he finally confessed. Detective Zacharias told Harden that he was aware Harden was under a lot of pressure; Harden cried and stated that he might as well be dead. Detective Zacharias told Harden that as humans “we all make mistakes,” have “weaknesses” and “at some point we all as men [must be] willing to step up to the plate and accept responsibility.” The following exchange occurred:

Q: Do you believe in God?

A: Yeah, I believe in God.

Q: Okay, do you believe God forgives all?

A: Yeah, He forgives all.

Q: He does forgive all, doesn't He? No matter what your sins are, he forgives you doesn't He? But do you not also have to accept responsibility, as hard as it is for you right now? As a man, you need to step forward and accept forgiveness. But that forgiveness is not given easily. You have to meet half-way don't you? Right? And the only way is for you to accept responsibility, for you to admit your weakness ...

The trial court found that Harden's statement was voluntary. The trial court noted Detective Zacharias's testimony that Harden had been emotional, that he had understood what was being asked, and that he had understood his rights. The trial court held that the statements regarding religion did not amount to coercion. The court found that there was nothing to indicate Harden did not understand what was going on, that he had a particular susceptibility to religious matters, or that he was overcome due to a lack of mental capacity.”

(Court upholds confession after suspect told he has two choices – cooperate and we will talk to the DA; don’t cooperate and we will not talk to the DA)

In *US v. Siler* (2011), the U.S. District Court, E.D. Tennessee, agrees with the magistrate’s decision when she found that during the interrogation of the defendant Investigator Ogle presented the defendant with two choices, either (1) cooperate, be charged with two burglaries, and the investigator would speak with the DA and the probation officer about the defendant's cooperation, or (2) not cooperate, potentially be charged with a “bunch of charges,” and the investigator would not speak with the DA and the probation officer. The magistrate judge also found that one of the investigator's statements, taken in isolation, could constitute a promise of leniency, coupled with a threat of imprisonment. However, when the magistrate judge viewed that statement in the context of the entire interview and the whole of the investigator's conduct, the magistrate judge determined that it was not objectively coercive because the investigator repeatedly told the defendant he could not promise him anything except that he would go to the DA.

The defendant, on the other hand, asserts that he was presented with the following choices, either: (1) cooperate, not be charged with the burglary charges or a gun charge, and the investigator would speak with the DA and the probation officer about the defendant's cooperation, or (2) not cooperate, be charged with the burglary charges and a gun charge, and the investigator would not speak with the DA and the probation officer. The defendant also asserts that he made the inculpatory statements only after the investigator assured him he would not be charged.

In sum, the Court agrees with Magistrate Judge Shirley that the investigator promised the defendant that if he cooperated, the investigator would speak with the DA and the probation officer and, contingent upon the decisions of the DA and the probation officer, the defendant could receive drug rehabilitation and probation. The Court agrees with Magistrate Judge Shirley that, when the context of both interviews are considered, along with the whole of the investigator's conduct, Investigator Ogle did not threaten the defendant with immediate imprisonment versus promises of leniency dependent on the defendant's cooperation. Accordingly, because the investigator's promises of leniency were not illusory, did not threaten immediate imprisonment, and because the investigator did not promise the defendant that no charges would be brought against him if he cooperated, the Court agrees with the magistrate judge that the investigator's statements and/or promises of leniency regarding the burglary charges, drug rehabilitation, and probation were not objectively coercive."

(Telling a suspect that he is lying is not coercive)

In *Revis v. State* (2011) the Court of Criminal Appeals of Alabama upheld the admissibility of the defendant's confession, even though the defendant had claimed that his statements were the result of coercive techniques, including the fact that the police told him he was lying to them during the interrogation.

In addressing this issue the Appeals Court points out several cases that rejected the suggestion that telling a suspect he is lying is a coercive tactic:

"Moreover, any statements that the investigators made indicating that Revis was lying or accusing him of lying did not cross the boundaries of impropriety by becoming threats. See *United States v.. Artis*, [No. 5:10-cr-15-01, September 16, 2010] ___ F.Supp.2d ___, ___ (D.Vt.2010)("[T]he only evidence that weighs in favor of a finding of involuntariness is the fact that three law enforcement officers questioned Mr. Artis, confronting him with evidence of his guilt and accusing him of lying after telling him that lying to them would be a crime. This evidence supports a conclusion that the law enforcement officers were confrontational, but it does not support a conclusion that they were coercive. See *Parsad[v. Greiner*], 337 F.3d[175] at 185 [(2d Cir.2003)] ('all custodial interrogations inherently involve pressure, and officers routinely confront suspects with incriminating evidence.')." See also *State v. Owen*, 202 Wis.2d 620, 642, 551 N.W.2d 50, 59 (1996)(the court found that Owen's claim that his statement was involuntary because of improper police tactics such as "good cop/bad cop" and confrontational questioning was without merit and stated, "The adoption of roles by the

investigators and [the investigator's] accusation that Owen was lying and that he was responsible for [the victim's] death are not improper police procedures. Further, the fact that the investigator raised his voice and invaded Owen's space by getting close to him does not establish actual coercion."). See also *Estrada v. State*, 313 S.w.3d 274 (Tex.Crim.App.2010)(statement by Estrada, a youth pastor, to police in which he admitted impregnating and murdering a member of his youth group was not coerced and involuntary despite the use of the following interrogation techniques: accusing him of impregnating and murdering the victim, falsely telling his girlfriend that he had admitted to their allegations and then allowing the girlfriend to meet with him, telling him he was the central figure in the investigation, and accusing him of lying)."

(Court rules that exhorting the defendant to be truthful so that "his sins would be forgiven" was not coercive)

In *State v. Phillips* (2010) the Missouri Court of Appeals, Southern District, upheld the admissibility of a confession after a four and one half hour interrogation, stating, in part, that "Missouri courts have found confessions to be voluntary which resulted from interrogations that lasted as long as or longer than Defendant's. See *State v. Smith*, 735 S.W.2d 65, 68 (Mo.App.1987) (holding defendant's confession to be voluntary when it came after six and a half hours in custody with intermittent interrogation); *State v. Simpson*, 606 S.W.2d 514, 517 (Mo.App.1980) (holding that continuous questioning for four hours is not coercive)."
In this case, the defendant, objected to "Detective Hope's exhortation that he be honest so that God would forgive him of his sins. While the cynic may question the sincerity of the Detective's spiritual advice, these remarks clearly did not represent promises of worldly benefit, nor did they suggest that by confessing Defendant would be able to escape punishment or incur a lesser one.... An appeal to a suspect's religious beliefs does not render his confession involuntary unless other circumstances indicate that his will was overborne, and Defendant in this case has put forth no such evidence."

("[T]here is nothing inherently wrong with efforts to create a favorable climate for confession.")

In *US v. Sanchez* (2010) the US Court of Appeals, Eighth Circuit, overruled the trial court's decision to grant the defendant's motion to suppress incriminating statements. The trial court had found that "the officers were angry and intimidating toward Sanchez, got close to Sanchez's face, yelled and badgered Sanchez, told Sanchez that he was "going to jail," and threatened Sanchez with charges of attempted murder and assault with a deadly weapon…. Additionally, the magistrate judge concluded that the officers' "threat of possible violent retaliation" by the victim's brother-who had a reputation for violence-was "particularly coercive in light of the fact Officer Rave knew Sanchez had younger sisters." …. Also, he found that the officers' showing Sanchez a picture of the victim's injuries "may have been a significant factor in overbearing the will of Sanchez, given his level of immaturity, low tolerance for resisting others' influence, and seeing his mother emotionally upset after viewing the graphic photograph of [the victim's] injuries."

The Court of Appeals reversed, finding that "Obviously, interrogation of a suspect will involve some pressure because its purpose is to elicit a confession. In order to obtain the desired result, interrogators use a laundry list of tactics. Numerous cases have held that questioning tactics such as a raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne. Astello, 241 F.3d at 967 (internal quotations and citations omitted). "[T]here is nothing inherently wrong with efforts to create a favorable climate for confession." *United States v. Santos-Garcia*, 313 F.3d 1073, 1079 (8th Cir.2002) (internal quotations and citation omitted)."

(Suggesting defendant would receive counseling and lenient treatment if he admitted to the sex offenses did not invalidate the confession)

In *State v. Douglas*, (2009) the Court of Appeals of Ohio, Tenth District, upheld the admissibility of the defendant's confession. In this case the "Appellant argues that Phillips rendered his confession involuntary by suggesting that he would receive counseling and lenient treatment if he admitted to the sex offenses. Assurances that a defendant's cooperation will be considered or that a confession will be helpful do not invalidate a confession, however."

"Appellant argues that his low intelligence and learning disability rendered his confession involuntary. The record does not establish that appellant's mental condition led to an involuntary confession. Although the psychologist who evaluated appellant recognized that appellant has difficulty with complex information and that his "passive, compliant style" may prevent him from seeking needed assistance, he also concluded that appellant has the "capability to understand concepts and principles" and "make a decision that is likely to be in his best interest." (Defense Exhibit A.) Furthermore, the psychologist concluded that appellant is neither mentally ill nor mentally disabled.

"In addition, the totality of the circumstances establishes that appellant's will was not overborne and his capacity for self-determination was not critically impaired when he spoke with Phillips. ..... Appellant's videotaped confession shows that he comprehended Phillips' questions and was able to express his thoughts and recall his actions in a rational manner. Lastly, appellant was not new to the police interview process; Phillips had previously interviewed appellant on a different matter."

(Court rejects claim that officers created an environment that caused defendant's will to be overborne)

In *State v. Goodwin*, the South Carolina Court of Appeals upheld the defendant's confession as voluntary. Goodwin maintained that the trial court abused its discretion by admitting his statements into evidence when the officers created an environment that caused his will to be overborne.

Here, Goodwin maintains his will was overborne by the culmination of police tactics used during his interrogation. Specifically, he cites the officers' lying about evidence,

threatening inappropriate and unjustifiable police action against his family members, strongly suggesting they could influence the State's decision to seek the death penalty, and numerous emotional appeals relating to his family.

When considering the Withrow factors to determine the voluntariness of Goodwin's statement, we find the trial court properly admitted Goodwin's statements. Goodwin evidenced his knowledge of the judicial system in the audio taped interview when he initiated a conversation about his probable sentence. The initial interrogation lasted seventy minutes, and Goodwin was offered food, drink, and the opportunity to use the facilities. Moreover, the first four statements were at the police station, in an interview room and in the officers' offices. The fifth interview was at the jail, and the sixth was during an excursion from jail. Furthermore, the questioning was at the most a continuous seventy minutes, and while there were six individual statements, all occurred within a three-day period.

(Telling the suspect that the prosecutor will be advised of their cooperation does not constitute a promise of leniency)

In *People v. Carrington*, (2009) the Supreme Court of California upheld the confession that the defendant killed three people and examined each interrogation to assess the defendant's claims that she confessed due to promises of leniency.

In their opinion the Supreme court stated that the "Defendant also contends that Detective Lindsay's assurances that the police merely were attempting to understand defendant's motivation in committing the crimes impermissibly coerced her to confess. To the contrary, Detective Lindsay's suggestions that the Gleason homicide might have been an accident, a self-defensive reaction, or the product of fear, were not coercive; they merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime. This tactic is permissible."

They also stated that "The statements made by the officers did not imply that by cooperating and relating what actually happened, defendant might not be charged with, prosecuted for, or convicted of the murder of Esparza. The interviewing officers did not suggest they could influence the decisions of the district attorney, but simply informed defendant that full cooperation might be beneficial in an unspecified way. Indeed, defendant understood that punishment decisions were not within the control of the police officers. As noted above, she said it "just depends on the judge and DA and how are they going to prosecute it." Under these circumstances, Detective Sherman's statement that he would inform the district attorney that defendant fully cooperated with the police investigation did not constitute a promise of leniency and should not be viewed as a motivating factor in defendant's decision to confess."

("You're digging a hole you're not gonna be able to get out of." "This is the one percent of the time, I tell you, if you keep quiet they're gonna hammer you." Discussion of what constitutes a threat)

In *State v. Evans* (2009) the Supreme Court of New Mexico examined the defendant's claim that his September 18, 2005 statement to police, admitting culpability in the victim's death, should have been suppressed because the police used coercive tactics which rendered his statement involuntary. Specifically he claimed that the following statements made by the interrogator were coercive:

"You're digging a hole you're not gonna be able to get out of." "This is the one percent of the time, I tell you, if you keep quiet they're gonna hammer you."

"[I]f you leave it like it is, you're through...."

Defendant's interrogator made this statement after Defendant denied involvement in the killing:

"Just because you don't wanna be a rat, you're gonna be treated as a monster in court and you're never gonna get out of prison."

The Supreme Court then discussed what constitutes a threat:

"The critical difference in the case law between impermissibly coercive threats and threats which do not cross the line is in how credible and immediate the accused perceives the threat to be. Threats which the accused may perceive as real have been held to be impermissibly coercive. (holding that where defendant-inmate had a below-average IQ and had already received "rough treatment" by other inmates and was a convicted child murderer, a promise to protect him from further physical violence if he confessed amounted to a "credible threat" of physical violence). On the other hand, threats that merely highlight potential real consequences, or are "adjurations to tell the truth," are not characterized as impermissibly coercive. (holding that police threat to the defendant that the court would "hang [your] ass" if the defendant did not confess, a comment which was disputed by the State, did not render confession involuntary). It is not per se coercive for police to truthfully inform an accused about the potential consequences of his alleged actions.

Three of the four statements at issue here could be taken as threats: (1) "they're gonna hammer you"; (2) "you're through"; and (3) "you're gonna be treated like a monster in court and you're never gonna get out of prison." All of these statements lie between the two poles described above-the statements are more than adjurations to tell the truth, but less than credible threats of violence. "You're never gonna get out of prison" can reasonably be taken to refer to a potential life sentence-well within reality for a first-degree murder conviction, which is at issue in this case. "You're gonna be treated like a monster in court" appears to be a reference to the way those in court might perceive Defendant. The comment may be a stretch or an exaggeration, but it is not out of the realm of a real possibility. Agent Ness never specified what he meant by "you're through," or who he was referring to as "they" in "they're gonna hammer you." Both statements, taken in isolation, could be taken as a threat of physical violence. However, taken in context with the entire interrogation, where Agent Ness repeatedly

communicated to Defendant that he was not interested in vengeance, and certainly not in physical vengeance, the statements-vague though they are-cannot credibly be taken to threaten Defendant with physical violence.

Our case law makes clear that deception is not coercive per se. ("[D]eception, in itself, is not a basis for ruling, as a matter of law, that a confession should be suppressed."). The degree of deception is but one factor to consider in deciding whether a confession was given contrary to the accused's free will. Considering the deception as one factor in our analysis, we must also consider Defendant's probable reaction to those statements. At the time of the confession, Defendant was a 30-year-old man who, in the district court's words, was "in full control of his faculties," and who had prior exposure to the criminal justice system. Agent Ness made veiled and somewhat ambiguous threats to Defendant, but unlike the "mentally dull" teenage defendant in *Payne v. Arkansas*, or an illiterate defendant with mental retardation, as in Culombe. Defendant had an adult capacity to sort exaggerated tough talk from real threats. There is certainly a point at which police threats, promises, or deception, would cross the line into coercion, but that line has not been crossed here."

(Court rejects claim of threatening statements)

In *State v. Neal* (2009) the Court of Appeals of Arizona upheld the trial court's decision to admit the defendant's confession. The defendant claimed that he confessed as a result of threatening statements made to him during the interrogation. The court found that:

"Here, the statements made by police to which Defendant's counsel objected included, "Before you go down the path of not being able to set things straight and us going to the prosecutor and saying hey, [']he wants to beat around the bush and all this craziness,['] then you are looking at other things," "When this story comes out, ultimately, who will you be insulting is the person who [,] who reviewing the case-who is the prosecutor" and "If Jarvis didn't tell us everything, then that is something we are going to have to report." Tempe Police Department Detective Trent L. (Detective L.) testified that such statements were designed to communicate that "[t] he prosecutor was going to indeed review the case, and that the evidence as it sat" did not include Defendant's version "as to what happened inside the store that evening." Defendant testified he believed that if he did not confess, "the punishment was going to be harsher." The trial court and this court reviewed a recording of the interrogation and concluded that "there was no conduct on the part of the police that served to overcome the defendant's will or there were no promises, no threats, no coercions, no force."

(Defendant claims confession was coerced because interrogator was sympathetic, understanding and tired to justify his criminal act – court upholds confession)

In *State v. Parker*, the Court of Appeals of South Carolina stated that "Few criminals feel impelled to confess to the police purely of their own accord without any questioning at all.... Thus, it can almost always be said that the interrogation caused the confession.... It is generally recognized that the police may use some psychological tactics in eliciting a

statement from a suspect.... These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary."

"Excessive friendliness on the part of an interrogator can be deceptive. In some instances, in combination with other tactics, it might create an atmosphere in which a suspect forgets that his questioner is in an adversarial role, and thereby prompt admissions that the suspect would ordinarily only make to a friend, not to the police." Miller v. Fenton, 796 F.2d at 604 (3d Cir.1986), cert. denied, 479 U.S. 989, 107 S.Ct. 585, 93 L.Ed.2d 587 (1986). "Nevertheless, the 'good guy' approach is recognized as a permissible interrogation tactic." Id. (holding confession admissible despite interrogating officer's "supportive, encouraging manner ... aimed at winning [appellant's] trust and making him feel comfortable about confessing."). See also Beckwith v. United States, 425 U.S. 341, 343, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976) (interrogator had sympathetic attitude but confession voluntary); Frazier v. Cupp, 394 U.S. 731, 737-38, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (confession voluntary when petitioner began confessing after the officer "sympathetically suggested that the victim had started a fight.")."

(No quid pro quo bargain)

In *Harris v. State* (2008) "Harris claims that his admissions were obtained through police trickery, and the detectives "delude[d]" him by minimizing the dangers of admitting to the assault and robbery and threatening to prosecute for first-degree premeditated murder on the basis of statements allegedly made by other defendants." The Court of Appeals found that "the detectives did not make promises or threats that coerced Harris into confessing. Rather, they made general statements, such as, that a witness had identified Harris and that Harris faced significant jail time. They did not offer a quid pro quo bargain for a confession. See Philmore v. State, 820 So.2d 919, 928 (Fla.2002) (finding that statements suggesting leniency in interview are objectionable only if they amount to express quid pro quo deal). Nor did the detectives indicate that murder resulting from a robbery is any less serious than intentional murder. They only inquired as to whether the boy had planned a robbery, as opposed to having grabbed the victim off the bike to intentionally beat him to death."

(Court rejects claim that lies, threats and promises coerced a confession)

In *US v. Freeman* (2008) the Defendant claimed that his will was overborne by a number of factors, including the interrogators' use of the following lies, threats, and promises. "Over the course of the interview, SA Bogle suggested to the accused that everyone makes mistakes and the best thing to do is admit it and get it behind you. He promised the accused that if he cooperated, they could tell his commander about it and it might help. On the other hand, he told the accused, if you don't tell the truth, the case will go downtown and with a civilian victim you could get five years in jail. When the accused denied being out that night, SA Bogle lied to him and told him a witness saw him out. He also told the accused that his fingerprints were found at the scene." The Court found that

"Viewing all the facts taken together, we agree with the Court of Criminal Appeals that they were not "so inherently coercive as to overcome the appellant's will to resist."

(Statements that he had some "serious problems" and needed to do the right thing and help himself out by talking to them, and that he was facing "serious time," fall within the permissible bounds of psychological persuasion)

In *US v. Zavala* (2008) the court stated that, although it is possible to find involuntariness based on psychological coercion, "it is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect." The question to be answered when such tactics are used is whether they 'were so manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess.' However, an investigator may "play on the suspect's sympathies or explain that honesty might be the best policy for a criminal who hopes for leniency from the state."

The statements that the interrogator made that he had some "serious problems" and needed to do the right thing and help himself out by talking to them, and that he was facing "serious time," (Tr. 5/12/08 13, 20),-fall within the permissible bounds of psychological persuasion. These statements, informing petitioner of the possible repercussions of conviction, were not "so manipulative and coercive that they deprived [petitioner] of his ability to make an unconstrained, autonomous decision to confess." The Court concluded that the defendant was properly Mirandized and was not coerced into giving a confession in violation of his Fifth Amendment rights.

False imprisonment – why it is important for the investigator not to block the employee's access to the interview room door

Asay v. Albertsons, Inc. (2007) http://www.reid.com/pdfs/200708_legalupdates.pdf

(Continued exhortations to tell the truth and references to religious beliefs do not render a confession inadmissible)

In *State v. Blank* (2007) the Supreme Court of Louisiana relied on the videotape of the interrogation to uphold the admissibility of a confession the defendant claimed was coerced as a result of the interrogators references to the defendant's deceased mother, appeals to his emotions and religious beliefs, as well as repeated exhortations to tell the truth. The court stated the following:

While defendant's factual allegations are accurate, he does not show that any of the state's conduct coerced his admissions or rendered the confession involuntary. Our review of the videotapes and the verbatim transcript does not show the officers exercising any type of coercion which would at all indicate that this confession was involuntary. To the contrary, the vast majority of the interview was extremely benign on the part of the officers and Blank was treated very well throughout. In response to defendant's specific examples of coercive conduct, it is evident from the record that defendant did not request

food during the interview, during which, notably, none of the interrogators stopped to eat a meal. Despite intermittent statements expressing fatigue and or physical discomfort, defendant never requested to terminate the interview. Moreover, for the most part, officers accommodated defendant when possible, providing him drinks, allowing him to use the restroom and heating the interrogation room. While at first the officers denied defendant's request to smoke, after he smoked a cigarette while he was alone in the bathroom, they continued to let him smoke, and he was allowed to smoke before he confessed to any crimes.

As to the references to defendant's deceased mother, appeals to a defendant's emotions and/or religious beliefs typically do not render an ensuing confession involuntary. Defendant also claims that the officers' relentless exhortations that he tell the truth in conjunction with false suggestions indicating that they possessed forensic evidence of his guilt, illegally coerced the confession. Defendant claims that during the interrogation, officers used the word "truth" no less than 30 times, including several communications in which they urged that he answer their questions truthfully. Courts have routinely held that a mild exhortation to tell the truth, or a remark that if the defendant cooperates the officer will "do what he can" or "things will go easier," will not negate the voluntary nature of a confession.

In this situation, defendant fails to show the existence of coercion rendering the statement involuntary.

(Offer to work with police in exchange for favorable recommendation to prosecutor upheld)

In *State v. Moore* (2007) the Washington Court of Appeals ruled that:
"Here, the trial court found that the offer to Moore (to work with the police in exchange for a favorable recommendation to the prosecutor) was made post- Miranda, but not necessarily before or after the confession (which was also post- Miranda). A mere promise of leniency, without more, is not enough to invalidate a confession. State v. Riley, 19 Wn. App 289, 297-98, 576 P.2d 1311 (1978). At best, all that was promised here was a recommendation of leniency, which was offered in exchange for informant work, not for the confession. Because no evidence of coercion for a confession is in the record, the findings of fact support the conclusion that the offer did not invalidate Moore's confession.

(US District Courts upholds admissibility of incriminating statements even though subterfuge was used as to the purpose of the interview)

In *US v Rosen* (2007) the US District Court, E.D. Virginia found that the incriminating statements made by the defendants were admissible even though the investigators misrepresented the reason for the interview and even indicated at one point that the interviews did not relate to a criminal investigation. In their decision the court stated, "No Supreme Court or Fourth Circuit decision has ever suppressed a defendant's statements on the sole ground that false statements by law enforcement officers to the

defendant rendered the statement involuntary. At most, courts consider police deception or trickery as one factor to consider in a totality of circumstances assessment of voluntariness."

(What constitutes a promise of leniency?)

In *U.S. v Kasey* (2007) the US District Court D. Arizona examined the issue of what statements constitute a promise of leniency that would render a confession inadmissible. They found that such statements as:

"You can help yourself out by telling the truth."

"[T]his is probably going to be a 50-year-to-life-type count. You know you need to mitigate, try to help yourself out...."

"And they'll give the benefit for standing up. Because that's the way the Federal system works for cooperation with the Government. That's the way it works. You get the benefits for doing that. It shows a truthfulness. Whether the truth hurts, you get a benefit for the truth, and the truth can hurt. It's not fun talking about this kind of stuff."

"You just need to make a decision if you want to do something like that to explain to the world why this went down. But it's up to you. I mean, this is to help you. It's not going to help me, I don't need the help."

"They're young like you are. They are trying to do whatever they can to rectify a bad situation and make it in their best interest, and I would do the same thing".

"There's just a huge amount of evidence and when we work with the Apache Detectives and us, that's the kind of cases we put together. And they're very thorough, very solid. So you're young, you need to do something that's going to help you out."

The court stated, "A promise only vitiates consent if it is "sufficiently compelling to overbear the suspect's will in light of all attendant circumstances."… Reciting possible penalties or sentences does not render a statement involuntary.

Here, the agents told Defendant that she could help herself by telling her version of the events. There is nothing in the interview transcript to indicate that the agents said or did anything to overbear Defendant's will. Merely stating that Defendant should "help herself by telling her story" is not sufficiently compelling to overbearing her will by offers of leniency. Furthermore, Defendant states that she confessed to prevent others, who had nothing to do with the murders, from being charged. At no point in the interview did Defendant indicate that she confessed because the agents promised leniency or that her confession was in exchange for a lighter sentence. Nor do the agents state that they are offering Defendant a lesser sentence in exchange for her confession. Finally, the agents' recital of possible prison sentences does not render Defendant's statement involuntary."

(California Supreme Court upholds the use of deception)

In *People v. Smith* (2007) the interrogating officers administered to the defendant a "Neutron Proton Negligence Intelligence Test" that pruportedly showed that the defendant had recently fired a gun. On appeal the defendant claimed that this was a coercive tactic. In the California Supreme Court's opinion they stated, "Police deception "does not necessarily invalidate an incriminating statement." (People v. Maury (2003) 30 Cal.4th 342, 411, 133 Cal.Rptr.2d 561, 68 P.3d 1.) Courts have repeatedly found proper interrogation tactics far more intimidating and deceptive than those employed in this case. (See, e.g., Frazier v. Cupp (1969) 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 [officer falsely told the suspect his accomplice had been captured and confessed]; People v. Jones (1998) 17 Cal.4th 279, 299, 70 Cal.Rptr.2d 793, 949 P.2d 890 [officer implied he could prove more than he actually could]; People v. Thompson (1990) 50 Cal.3d 134, 167, 266 Cal.Rptr. 309, 785 P.2d 857 [officers repeatedly lied, insisting they had evidence linking the suspect to a homicide]; In re Walker (1974) 10 Cal.3d 764, 777, 112 Cal.Rptr. 177, 518 P.2d 1129 [wounded suspect told he might die before he reached the hospital, so he should talk while he still had the chance]; People v. Watkins (1970) 6 Cal.App.3d 119, 124-125, 85 Cal.Rptr. 621 [officer told suspect his fingerprints had been found on the getaway car, although no prints had been obtained]; and Amaya-Ruiz v. Stewart (9th Cir.1997) 121 F.3d 486, 495 [suspect falsely told he had been identified by an eyewitness].) Indeed, at least one Court of Appeal has approved of the particular practice used in this case. (People v. Parrison (1992) 137 Cal.App.3d 529, 537, 187 Cal.Rptr. 123 [police falsely told suspect a gun residue test produced a positive result].)

After examining the circumstances surrounding the "Neutron Proton Negligence Intelligence Test," it does not appear that the tactic was so coercive that it tended to produce a statement that was involuntary or unreliable.

(Court outlines acceptable interrogator behavior)

In reaching their decision to deny the motion to suppress the defendant's confession in the case *US v Jourdain* (2007) the court outlines acceptable interrogator behavior. In their decision they state, "As our Court of Appeals has recognized:

To state the obvious, “interrogation of a suspect will involve some pressure because its purpose is to elicit a confession.” [United States v. Astello, 241 F.3d 965, 967 (8th Cir.2001), cert. denied, 533 U.S. 962 (2001)]. “[T]he fact that the tactics produced the intended result * * * does not make a confession involuntary.” Id. at 968. In other words, ‘there is nothing inherently wrong with efforts to create a favorable climate for confession.” United States v. LeBrun, 306 F.3d 545, 555 (8th Cir.2002)(internal citations omitted. “ ‘[Q]uestioning tactics such as a raised voice, deception, or a sympathetic attitude will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne.’ “ Astello, 241 F.3d at 967 (quoting Jenner v. Smith, 982 F.2d 329, 334 (8th Cir.1993)). Nor will a promise of leniency, an “expressed disbelief in the statements of a suspect * * *, or lie[s] to the

accused about the evidence against him" necessarily render a confession involuntary. Wilson v. Lawrence County, 260 F.3d 946, 953 (8th Cir.2001) (internal citations omitted). Rather, the coercive conduct must be "such that the defendant's will was overborne and his capacity for self determination critically impaired." Astello, 241 F.3d at 967 (internal citations omitted).

As was true with Kelly's statements in Graves' vehicle, we find no responsible basis upon which to conclude that the Defendant's will was overborne by the questioning techniques that were employed by Peterson, or because of any of Kelly's individual characteristics."

Accident scenario (self-defense)

(*Court rules confession voluntary even though defendant was told that if the baby's death was the result of a 100% accident he would probably go free*)

In *Hayes v. Plumley* (September 2016) the US District Court, S.D. West Virginia upheld the admission of the defendant's incriminating statement that he caused the death of an eighteen-month-old child and rejected his claim that the confession was the result of coercion. From the District Court's opinion:

Petitioner claims that his limited admission to his role in R.M.'s death was coerced by law enforcement. Detectives coaxed the statement at issue from him during a two and one-half hour interview held on October 4, 2010, the day following R.M.'s death. The interview took place in the kitchen of the South Charleston Police Station, where Petitioner agreed to be interviewed, acknowledged his understanding that he was not under arrest and free to leave at any time, and executed a waiver of his *Miranda* rights.

Given their view of the evidence, the detectives presented Petitioner's predicament in terms of two options: he could either continue to feign ignorance and, from his silence, be treated as a remorseless killer, or otherwise confess to an accident resulting from a brief fit of rage or lapse in judgment and receive mercy. As the interview proceeded, Petitioner became obviously intrigued by the idea that confession to an accidental injury could result in a less severe sentence. He asked the detectives if he would be "put away" if R.M.'s injuries were accidentally inflicted. It is the detectives' subsequent attempts to distinguish between an accidental, as opposed to a deliberately inflicted, injury which Petitioner claims amounted to coercion. He finds the following two portions of dialogue particularly objectionable:

Q: ... If it's an accident, we would deal with it. Accidents happen all the time.
A: And you'd still put me in jail.
Q: That's not true. If an accident happened, an accident happened. Accidents happen all the time. I investigate lots of accidents.
A: And do those people still do time?
Q. No. There's a difference between an accident and something with malice…. Later on, Petitioner again pressed the detectives to tell him the "best case scenario" if he admitted knowledge of the circumstances surrounding R.M.'s death:

A: I'm saying what is a judge going to do to me?
Q: I ... I will tell you if we go in there and you tell him that this baby was a hundred percent fine ... when you put her in the car seat[,] [a]nd you showed up ten minutes later with this much damage ... they're gonna' say you' re just a fat liar and ...
Q: I'm saying that it's an accident.
A: ... If it's a hundred percent an accident, it'll be a completely different story.
Q: That's what I want to know.
A: If it was a hundred percent an accident, you would probably be free to leave once it's dealt with. You might get charged with lying to us at the beginning of this because you ... you had no ... you shouldn't have done that.

Reviewing this transcript, the magistrate judge concluded that while the interviewing detectives "certainly emphasized the positive aspects of Hayes providing a statement describing R.M.'s death as accidental ... the detectives never unambiguously promised that Hayes would receive a lesser sentence or would not be criminally charged for R.M.'s death."

A detective's truthful statements about a suspect's predicament "are not the type of 'coercion' that threatens to render a statement involuntary."…. The detectives arrived at the interview armed with evidence clearly pointing to Petitioner's culpability. Met with his incredible claim of ignorance, the detectives did not coerce his admission to an accidental event by merely pointing out the harsher reception he would face if he continued to deny the obvious. As the Supreme Court has recognized, "very few people give incriminating statements in the absence of official action of some kind." …. Moreover, drawing Petitioner's attention to the potential legal consequences of his actions was not patently coercive. "[T]elling the defendant in a noncoercive manner of the realistically expected penalties and encouraging him to tell the truth is no more than affording him the chance to make an informed decision with respect to his cooperation with the government."

Furthermore, the Court simply does not accept Petitioner's assertion that he believed the detectives to be promising immediate release in exchange for an inculpatory statement. The detectives told Petitioner that regardless of the content of any confession, he would be processed, presented before a magistrate, and then left to "work it out with the prosecutor." They acknowledged that his admission to any involvement in the child's death might result in him being "put away," but that the "putting away part [would] be a lot worse for somebody who shows no remorse."… Petitioner's own statements during the interview prove that he was acutely aware of the risks before him and belie his current assertion that he inculpated himself with the belief that he would not be criminally charged. Immediately following their discussion of the difference between accidental and malicious acts, Petitioner remarked, "[y]ou're going to take me and process me any way it goes." … The detective agreed, admitting that Petitioner's imminent arrest was "[m]ore than likely." … Again, Petitioner acknowledged his understanding, stating, "[w]hen I leave here today, it's going to be in handcuffs." … He even asked before offering the critical statement which one of the detectives would take him "downtown" for booking.

Furthermore, even if the detectives' statements highlighting the benefits of confessing to an accidental incident constituted implied promises of leniency, the surrounding circumstances do not indicate that Petitioner's "will [was] overborne or his capacity for self-determination critically impaired." … Petitioner maintained an awareness throughout the interview that the evidence inexorably pointed to him as the one who caused R.M.'s injuries and appeared to be weighing the benefits of implicating himself in an accidental, as opposed to a purposeful, event. And for the detectives' best efforts, Petitioner never offered an account of the alleged accident that comported with the medical evidence….

In light of the countervailing contextual factors, the Court does not believe that the detectives' suggestion that Petitioner would not serve prison time if R.M.'s injuries were purely accidental overcame his capacity for self-determination. Therefore, the Court **FINDS** that Petitioner has not met his burden to demonstrate that his limited—and subsequently discredited—admission to injuring R.M. was involuntary.

(*Suggesting to the defendant that the stabbing death was self-defense does not render the confession involuntary*)

In *Fundaro v Curtin* (January 2015) the US District Court, E.D. Michigan, denied the defendant's claim that his confession should have been found to be involuntary because the police suggested that the stabbing was self-defense. From the court's opinion:

"Petitioner's sole claim is that the statements he made to police after his arrest were involuntary and should have been suppressed because the interrogating officers misrepresented the consequences of admitting to the homicide. He claims that the officers told him that his conduct constituted self defense and therefore he did not have anything to worry about by cooperating. The trial court held an evidentiary hearing on the claim in which the officers in question and Petitioner testified. After the hearing, the trial court issued an opinion finding that Petitioner's confession was voluntary and a product of his own free will. The Michigan Court of Appeals upheld this decision. Respondent argues that the state court adjudication of Petitioner's claim reasonably applied the established Supreme Court standard, and therefore habeas relief is not warranted.

The test for the voluntariness of a statement to the police is whether the confession [is] the product of an essentially free and unconstrained choice by its maker[.] If it is, if [the suspect] has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

Here, the evidence presented at the pretrial hearing indicted that Petitioner was informed of and waived his *Miranda* rights. Petitioner did not contest that he told the officers that he was willing to talk to them after he was read his rights, and he did not claim that he invoked his right to cut-off questioning during the interview. Petitioner was familiar with the criminal justice system and police questioning, having been involved with investigations from 2007-2009.

The officers participating in the interview denied that they made any threats or promises to Petitioner in exchange for his cooperation. Petitioner appeared to the officers to be coherent, understood what was happening, and answered questions logically. During the initial interview by Sergeants Troy and Wittebort, which lasted from 7:45 p.m. until 9:00 p.m., Petitioner denied any involvement at all in the death of the victim. The officers suggested that perhaps the victim attacked him because a hammer was found near his harm.

Mistretta told Petitioner that he did know anything about the facts of the homicide. He explained that he was telling Petitioner that he should cooperate because if he didn't, then the officers would not hear his side of the story and consider that Petitioner may have acted in self-defense. Petitioner then claimed that the shop owner came at him with a hammer so he stabbed him in self-defense.

The record supports that state court's decision that Petitioner's statement to the police was voluntary. "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns." So while it is true that a promise of leniency can render a confession coerced depending on the totality of the circumstances, ... here there was no promise of leniency made to Petitioner. The officers merely informed defendant that if what he did was self-defense then it was in his best interests to say so. While Petitioner testified that he understood the officers to be saying that he did nothing wrong, their testimony shows that they made no such representation. Rather, the statements were conditional: *if* Petitioner acted in self-defense, *then* he should explain his side of the story. The statements did not inform him that he in fact acted in self-defense. In light of this, Petitioner's choice to give his version of events was reasonably construed by the state courts to be the product of an essentially free and unconstrained choice by Petitioner. *Schneckloth*, supra. The police did not promise Petitioner that his story would exonerate him, only that the interview was his opportunity to share it. The state court decision that Petitioner's statement was voluntary therefore did not constitute an unreasonable application of the established Supreme Court standard.

(Georgia Supreme Court rejects the idea that a suggestion that the shooting was an accident constitutes a hope of leniency)

In *Smith v. State* (June 2014) the Supreme Court of Georgia held that statements by the police detectives during a custodial interrogation to the effect that shooting the victim was an accident in response to the victim lunging at the defendant did not constitute a slightest hope of benefit that could render defendant's confession inadmissible. From their opinion the Supreme Court stated the following:

“At the time appellant made a statement to police, he was under arrest for the Perez robbery and suspected of the two other crimes. He was given his *Miranda* rights before the interrogation commenced and he waived those rights. Within the first twenty minutes of the interrogation, appellant admitted that he shot Justin Patel at the BP station. During the discussion of the BP incident, the police told appellant that there was a surveillance

tape showing that the victim lunged at appellant before appellant shot him. The police made statements to appellant to the effect that the shooting was an "accident" in response to the victim lunging at appellant and appellant eventually made inculpatory statements…. Appellant contends the trial court erred in admitting the videotaped confession into evidence because he contends it was induced by the slightest hope of benefit "as the hope of lighter punishment was clearly implied by the [detective's] excusable accident theory," in violation of the former OCGA § 24–3–50. We disagree. "A hope of benefit generally arises from 'promises related to reduced criminal punishment—a shorter sentence, lesser charges, or no charges at all.' [Cit.]" … At no point did detectives tell appellant that he would not be charged with murder, that he would be charged with a crime less than murder, or that he would receive lesser punishment if he confessed. In fact, appellant understood that he would be incarcerated for his actions because he twice asked about obtaining a bond and made statements to the effect that he knew he was going to jail. Under these circumstances, there was no violation of OCGA § 24–3–50."

(Investigator's statement that felony murder would receive a lesser sentence than premeditated murder did not render confession involuntary)

In *State v. Turner* (May 2014) the Nebraska Supreme Court held that misinformation by police officers during the defendant's interview that felony murder would receive a lesser sentence than premeditated murder did not overcome defendant's will so as to render his confession involuntary based on purported promises of leniency. From the court's opinion:

"Turner argues that his confession was involuntary because it was induced by an implied promise that he would receive a lesser sentence if he confessed that the shooting was accidental. As evidence of this implied promise, he points to Ficenec's statements that it made "a big difference" how and why the shooting occurred and to Krause's statement that the possible penalty could be 1 to 10 years' imprisonment if the shooting was accidental. He claims that these statements constituted an implied promise of leniency which overcame his will and caused him to confess. He further argues that the officers' statements were deceptive because first degree murder encompasses felony murder—which does not require a showing of malice, intent, or premeditation.

Turner is correct in his assertion that the officers deceived him during the course of the interview at the parole office. Ficenec's statements as to there being "a big difference" how and why the shooting occurred, and specifically Krause's statement that Turner could get 1 to 10 years' imprisonment if the shooting was accidental, incorrectly indicated that felony murder would receive a lesser sentence than premeditated murder…

… We have previously noted that a deceptive statement regarding possible sentences is only one of several factors to be considered. In *State v. Thomas,* we determined that the defendant's confession was voluntary and not caused by misinformation regarding possible sentences due to the presence of three factors. These factors included that (1) the officers returned to previous themes between the discussion of possible penalties and the

defendant's confession, (2) the defendant indicated a knowledge that he could receive life imprisonment for the crime both before and after his confession, and (3) the confession occurred after an officer indicated that he did not know what sentence would be imposed.

... As in *Thomas,* Turner's confession did not follow the discussion in which the officers misrepresented that a lesser sentence would be imposed for felony murder. Rather, his confession was immediately preceded by the officers' return to the prior theme of Turner not being a bad, evil person; Krause's exhortation to "do the right thing"; and the colloquy regarding Turner's belief in God and the fate of his soul. Thus, the dialog immediately preceding Turner's confession supports the conclusion that his confession was primarily motivated by remorse and a desire to do the right thing—not to receive a lesser sentence.

As to the second factor we identified in *Thomas,* Turner indicated both before and after his confession that he was aware he could receive a sentence of life imprisonment. Before Turner confessed at the parole office, he stated, "Man, I'm going to get life for this shit." And after he confessed and was transferred to the police department, Turner stated to Coleman, "I'm about to get like, life." Thus, this factor indicates that Turner did not believe his confession precluded him from receiving life imprisonment.

Finally, like the defendant in *Thomas,* Turner confessed after officers stated that they did not know what sentence would be imposed. In response to Turner's statement, "I'm going to get a hundred years," Ficenec replied, "I can't tell you what the potential penalty could be. I mean I'm not going to bullshit you. Could you potentially get life? Is that a possibility? I mean, I'm not a judge, I'm not a prosecutor." And during the colloquy immediately preceding Turner's confession, Krause stated, "I don't know, okay?" in response to Turner's assertion that he "might be in jail for a long-ass time." Thus, although they incorrectly indicated that felony murder would receive a lesser sentence, the officers made no representations as to what sentence Turner would receive if convicted. This factor supports the conclusion that Turner's confession was not motivated by a belief that he would receive a particular sentence.

(Accident versus intentional act was a "red herring" but not coercive)

In *Walker v. Davis* (January 2014) the US District Court, E.D. California, upheld the lower courts finding that the defendant's confession was not coerced by the investigators.

"Petitioner argues that the criminal justice system naivete of her client, when juxtaposed with the skill and persistence the interrogators utilized in questioning over a three day period, made for a due process violation, i.e., an involuntary number of damaging admissions.

Defendant's argument centers on representations from the detectives during the interviews on October 23 and 24. On October 23, Detective Tyndale informed defendant that she failed the polygraph examination, and he was having a hard time with whether she intentionally caused the child's death. He told her that people would forgive a

mistake, but if someone made a mistake and was not honest about it, "people aren't as forgiving." He also said: "I don't think you're someone who would intentionally kill a child.... [P] ... [P] But if there was something that happened that was an accident, ... [P] ... [P] that's what you need to tell me. 'Cause otherwise the detective[']s gonna think you did do something on purpose."

Later, Detective Tyndale told defendant he would like to design a polygraph test she could pass, and he would have to explain to Detective Jason why she did not pass the polygraph. Detective Tyndale repeatedly asked defendant if the child's death was an accident, and continued: "When you tell me what it was, that's how I'm gonna design the polygraph test.... [P] ... [P] Because if it's an accident, that's what people understand. Especially when you're sorry for it. When you don't tell the truth, people don't believe you're sorry."

Detective Tyndale continued this line of questioning, assuring defendant he believed the killing was accidental, and telling her: "if you tell me the truth, I promise you're gonna pass the test. If it was an accident, I can show that. But you gotta be honest with me about it." He repeatedly promised defendant that if she told the truth, he would develop a test she could pass. He also told defendant, "You know, what kind of person would kill a small child on purpose? Are you that kind of person?"

Detective Tyndale then told defendant he knew she was "worried" and "scared" as some day "12 people sitting in a jury" would be looking at her, wondering whether she did it on purpose or it was an accident. He reiterated that it would be important for him to "walk out of here and be able to go up to Detective Jason and say, she's telling me the truth? She did it, but she didn't do it on purpose. It was an accident." As the interview wound down, he told defendant she took on more children than she could handle, and "I can help you show that it was an accident." By the end of the interview, defendant admitted she accidentally killed the child.

The Court of Appeal opinion, accurate as it is, nevertheless does not reflect the persistency of the questioning. The first two days of the interviews by Detective Jason were plodding, polite and persistent. Petitioner was asked again and again to describe the circumstances which led to the infant's death. The tireless questioning led to petitioner being caught in inconsistencies/absurdities, e.g., she administered CPR at the time when she found the infant dead in the middle of the night, and later, after she "panicked," several hours later, when she repeated CPR on a known lifeless body in the process of a conversation with a 911 dispatcher. After a polygraph was administered on October 23, Detective Tyndale attempted to force the issue. This interview on October 23, and that of detective Jason on October 24, 2007, was of a more aggressive character, although at all times, the interrogation was civil. In the latter interviews, if the police detectives told petitioner she was not telling the truth regarding the causation of the death once, they told her 100 times. The detectives were not going to accept any answer by petitioner that she did not take the actions which led to the death. Similarly, the numerous statements to petitioner stressing the different possible outcomes depending on whether "it was an accident" or "purposeful," was a red herring in that Cal.Penal Code 273ab only required

purposeful actions of petitioner in causing injury, which resulted in death. The prosecution would not have to prove that petitioner intended the death of the infant by her actions. And, the police knew at the time that the injuries to the infant were incompatible with an accident. Many times petitioner was coaxed to be honest, and that the truth would make her feel better. She was in fact told on occasion that she was being honest, but the questioning continued with the clear indication that she was not. She was also confronted numerous times with the alleged falsity of her polygraph exam, often coupled with the "accident-purposeful" dichotomy, i.e., people would understand if the death was an accident.

Moreover, petitioner's unsupported-in-degree by the record, "naivete" assertion is not the same as the "critical" factor of Doody's juvenile status, although the undersigned recognizes that Doody was almost an adult at the time of his interrogation. Many persons who are interrogated by the police are being questioned for the first time; these persons may not have developed a skill set of "admission avoidance." But something more than unfamiliarity with police techniques is necessary before persistent questioning will be found to have overborne the will of the person being questioned. It appears to the undersigned that petitioner believed she could talk her way out of her problems; many people make that mistake as the interrogators are politely weaving the web ever tighter on the person questioned. Good interrogation technique should not be confused with undue pressure. As recounted above, petitioner was permitted to go home after the first and second day of questioning to recover and reflect on the day's interrogation.

In sum, the Court of Appeals' determination that petitioner's confession was not involuntary cannot be termed unreasonable as that term is defined in AEDPA.

(Interrogator's reference to mitigating circumstances, including the fact that the shooting may have been an "accident" or from a "fit of rage" "fall far short of being promises of lenient treatment in exchange for cooperation")

In *People v. Carrillo-Garcia* (2012) the Court of Appeal, Third District, California rejected the defendant's claim that his confession was coerced by the police through implied promises of leniency and implied threats "that his failure to cooperate would work against him." The trial court found the statements were voluntary and denied the motion to suppress. From their opinion the Court of Appeal stated:

"Defendant, who maintains he was particularly susceptible to influence because he was only 18 years old and naive about the criminal justice system, contends the police coerced his confession with repeated promises of leniency. Not so. As aptly pointed out by the Attorney General, two Supreme Court cases with remarkably similar interrogations found the confessions were voluntary.

In *People v. Holloway* (2004) 33 Cal.4th 96, the interrogator suggested that the killings might have been accidental or resulted from a fit of rage and that these circumstances could " 'make[ ] a lot of difference.' " ... Similarly, the sergeant here also suggested to defendant that mitigating circumstances could "make[ ] a difference." Thus, he reinforced

the message that defendant might not have intended to kill, but that his emotions got out of control. Here, as in Holloway, the interrogator's suggestions "fall far short of being promises of lenient treatment in exchange for cooperation. The detectives did not represent that they, the prosecutor or the court would grant defendant any particular benefit if he told them how the killings happened." ... Rather, the interrogators' admonitions did no more than tell defendant the benefit that might " ' "flow[ ] naturally from a truthful and honest course of conduct" ' [citation]...." .

The interrogator in *People v. Carrington* (2009) 47 Cal.4th 145 (Carrington) employed the same techniques. He too tried to convince his suspect that it would behoove her to explain any mitigating circumstances and suggested, " 'What if she scared you? She confronted you. Or maybe there was someone else with you.' " ... Like the sergeant, the interrogator in Carrington encouraged the suspect to tell the truth and take the weight off her shoulders... And he promised that if the suspect cooperated during the interview, the officers " 'would try to explain this whole thing with, with Los Altos P.D. as [best] we can.' "

None of these exhortations crossed the impermissible line and rendered the police conduct coercive. The officer's statement that "he would help defendant in explaining 'this whole thing' to the Los Altos police did not constitute a promise of leniency...." ... Nor did the assurances that the police were attempting to understand the defendant's motivation coerce her to confess; rather "they merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime."

The sergeant used the very same interrogation techniques in trying to persuade defendant to tell the truth. Neither his repeated references to the district attorney, his attempts to get a better understanding of defendant's motives and to extract mitigating circumstances, nor his encouragement to defendant to lighten his load constituted coercion, even when considering defendant's age and lack of experience with the criminal justice system. Although defendant, to his credit, had no criminal record and was a very young adult, there is nothing in the record to suggest he was particularly vulnerable, did not understand English, or was mentally or emotionally compromised. Given the utter lack of coercive police interrogation and no evidence defendant's statements were not voluntary, we conclude the trial court properly admitted the statements he made during his interrogation."

("If for some reason you went in [the restaurant] to do a robbery and somehow the gun went off [accident]" was not a statement that suggested leniency)

In *Commonwealth v. Johnson* (2012) the Supreme Judicial Court of Massachusetts upheld the admissibility of the defendant's confession. On appeal, the defendant had argued that his statements were not made voluntarily, claiming that at the time of the interview, he was young, inexperienced, terrified, and likely intoxicated, and that, during the interview, Detective Black lied about forensic evidence implicating him and falsely suggested that confessing would be advantageous. From the court's opinion:

"Similarly, there is scant justification for the defendant's current contention that he was "terrified," such that his statements were not made voluntarily. To be sure, Black noted that the defendant briefly put his head in his hands and, at times, seemed "nervous" and "scared." On the other hand, the defendant also appeared lucid, coherent, and articulate throughout the questioning, and Black told him, in a nonaggressive manner, "I'm not trying to scare you and I hope you understand that. I'm trying to explain to you how serious this is." The defendant's emotional state is wholly consistent with the situation in which he found himself and the gravity of the charges he faced; it did not render him so emotionally unstable or irrational that he could not act voluntarily, nor was it the product of any alleged police coercion.

Relatedly, Black also never improperly implied that confessing would benefit the defendant. Specifically, Black told the defendant: "This is kind of a bad situation"; "If for some reason you went in [the restaurant] to do a robbery and somehow the gun went off, I don't know how, today is the day to tell me that"; and "I want to give you the opportunity today to get out in front of this." These statements fall within the general rule that "[a]n officer may suggest broadly that it would be 'better' for a suspect to tell the truth, ... or may state in general terms that cooperation has been considered favorably by the courts in the past."

(Rationalizing a defendant's actions (self-defense/accident) in such a way that he "might hope that he would not be charged with murder" did not render the confession inadmissible)

In *State v. Fundaro* (2012) the Court of Appeals of Michigan upheld the trial court's denial of Fundaro's motion to suppress his statements. "Fundaro explained that the officers kept telling him that it sounded like it was an accident or self-defense and that it would be better for him if he would just tell them what happened. He stated that he would never have admitted to committing the crime had he known that he would be facing life in prison.

At the hearing, Wittebort testified that he and Troy tried to get Fundaro to tell them about the stabbing by throwing out "theories" or "scenarios" that might help Fundaro rationalize what happened:

It's just another, it's another theory.... I mean, the bottom line is we're trying to get to the bottom of what happened. So, throw a bunch of scenarios ... and see which ... appeals to him. So, I mean, it's just another rationalization that was tossed at Mr. Fundaro.

Although they suggested theories and scenarios under which Fundaro might not be guilty of murder, Wittebort testified that he never promised Fundaro leniency and that he did not hear anyone else promise him leniency. And Fundaro testified that the officers talked about leniency, but did not specifically promise him anything. Indeed, he acknowledged that Troy told him that he could not promise him anything. Fundaro suggests that he only confessed because the officers convinced him that he would not be charged with murder, but the officers used these types of themes from the very beginning of the interview and

Fundaro had no trouble denying involvement throughout the majority of the questioning. Moreover, during the interview, and despite all the allegedly misleading statements, Fundaro repeatedly indicated that he understood that he would likely go to prison; he even told Mistretta: " 'I killed a guy and I went in there to rob the joint. I'm still going to go to prison?' "

.... Although the officers might have helped him rationalize his actions in such a way that he might hope that he would not be charged with murder, the evidence does not demonstrate that these tactics so affected Fundaro that his will was overborne or his capacity for self-determination was critically impaired."

(Court rules that accident scenario is not coercive)

In *People v. Batiste* (2011), the Court of Appeal, 1st District, Div. 3, California, the defendant claimed that his confession was coerced because it was the product of deception or implied promises of leniency by the officers. From the court's opinion:

"Batiste argued in the trial court that the officers made an implied promise of leniency when they suggested he might have acted in self-defense. That argument lacked merit. Here, as in *People v.. Carrington* (2009) 47 Cal.4th 145, 171, "suggestions that the ... homicide might have been an accident, a self-defensive reaction, or the product of fear, were not coercive; they merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime. This tactic is permissible. [Citation.] Moreover, any benefit to defendant that reasonably could be inferred from the substance of [the officer's] remarks was ' " 'merely that which flows naturally from a truthful and honest course of conduct,' " ' because the particular circumstances of a homicide can reduce the degree of culpability, and thus minimize the gravity of the homicide or constitute mitigating factors in the ultimate decision as to the appropriate penalty. [Citation]."

(Suggesting the homicide was an accident or self-defense was not coercive)

In *People v. Carrington*, (July 2009) the Supreme Court of California upheld the confession that the defendant killed three people and examined each interrogation to assess the defendant's claims that she confessed due to promises of leniency.

In their opinion the Supreme court stated that the "Defendant also contends that Detective Lindsay's assurances that the police merely were attempting to understand defendant's motivation in committing the crimes impermissibly coerced her to confess. To the contrary, Detective Lindsay's suggestions that the Gleason homicide might have been an accident, a self-defensive reaction, or the product of fear, were not coercive; they merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime. This tactic is permissible."

They also stated that "The statements made by the officers did not imply that by cooperating and relating what actually happened, defendant might not be charged with,

prosecuted for, or convicted of the murder of Esparza. The interviewing officers did not suggest they could influence the decisions of the district attorney, but simply informed defendant that full cooperation might be beneficial in an unspecified way. Indeed, defendant understood that punishment decisions were not within the control of the police officers. As noted above, she said it "just depends on the judge and DA and how are they going to prosecute it." Under these circumstances, Detective Sherman's statement that he would inform the district attorney that defendant fully cooperated with the police investigation did not constitute a promise of leniency and should not be viewed as a motivating factor in defendant's decision to confess."

(Court rejects Dr. Leo testimony that suggesting accident increases the risk of a false confession)

In *People v. Wroten* (2007) Dr. Richard Leo testified that the interrogators suggested to the defendant "that the offense was accidental, thereby minimizing the suspect's perception of the consequences of an admission and implying that an accidental killing might result in leniency. This technique can increase the risk of a false confession." The court rejected this position and the jury convicted the defendant of first degree murder. In their review of the case the Court of Appeal, 2nd District, Division 2, California stated "There were also no promises of leniency made to appellant. The statements he points to as making such promises are at worst ambiguous and, in any event, did not pervade the interrogation. Detective Lait's statement that they were giving appellant a "million dollar opportunity" to explain whether the shooting was intentional or accidental contains no promise of benefit. While the detective stated that knowing whether the murder was intentional or accidental might make a difference in "how we proceed," he did not say it would benefit appellant or that it would make a difference as to whether they would proceed. Furthermore, after Detective Lait made those statements, appellant continued to deny involvement in the Mosley shooting....Those statements did not overbear his will to resist and proximately cause him to confess. Detective Garrido's statement that they wanted to get appellant "cleared up" was little more than encouragement to tell the truth."

(Court upholds admissibility of confession in which detectives focused on difference between accidental and intentional killing)

In *Bramley v. State* (2006) the Indiana Court of Appeals upheld the admissibility of the defendant's confession. In their opinion the court stated:

"The voluntariness of a statement is determined by examining the totality of the circumstances surrounding the interrogation…. Relevant factors include the length, location, and continuity of the interrogation, and the maturity, education, physical condition, and mental health of the defendant. Id. In making its determination, the trial court weighs the evidence to ensure that a confession was not obtained "through inducement, violence, threats or other improper influences so as to overcome the free will of the accused." …. A confession is inadmissible if it is obtained by promises of mitigation or immunity, but vague and indefinite statements by the police that it would be in a defendant's best interest if he cooperated do not render a subsequent confession

inadmissible…. Where a promise of leniency stems from a defendant's specific request for leniency as a precondition for making a statement, the voluntariness of the statement is not induced by misconduct.

Bramley directs us to three statements that the detectives made that he contends amount to promises of leniency and threats and render his confession involuntary. First, Bramley directs us to an analogy Detective Jowitt used while transporting him to the Hamilton Count Jail. Detective Jowitt told Bramley that there were three suspects and only one apple and that "[o]ne person generally gets to eat the whole apple." … Detective Jowitt testified at trial that the apple in the analogy represented a plea deal a defendant could get if he cooperated with the police before the other suspects did.

Bramley next directs us a statement Detective Jowitt made during the interrogation:

And you don't want other people giving accounts of Michael Shane Bramley because you don't know what they're saying and you don't know ⋯ like I said you don't know the spin that they're putting on it. The spin can be real important. Ok? 'Cause that can be the difference between Michael Shane Bramley is ⋯ a cold hearted ruthless, dangerous, psychopathic, you know yada, yada, yada, or just hey, something happened up there and it didn't really go down like it was supposed to and there was ⋯ a problem or there was a mistake or there was an accident or it didn't happen quite the way it maybe appeared just by looking at the surface facts of it, okay?

Finally, Bramley highlights statements that the detectives made that he claims implied that he would receive a lesser sentence if he testified that Moody's death was an accident. Typical examples of the detectives' statements are: "I sure wouldn't want to be put in the situation where someone else is putting stuff down on me that wasn't quite the way it happened," id. at 363, and "[the difference between intentional murder and an accident] is just different. Worse thing in the world [is intentional murder]," id . at 377. The detectives focused on the differences between an accidental and an intentional killing and emphasized the benefits that a suspect could reap if he tells his side of the story because the other suspects cannot adversely fill in the "gray parts" of the crime:

Here, there were two other suspects in Moody's murder and Detective Jowitt tried to explain to Bramley, by using the apple analogy and the "grey parts" comment, that the other two suspects could wrongly implicate Bramley if he did not tell the truth about his role in the crime. While Bramley may have lost the prisoner's dilemma game, Detective Jowitt's comments do not rise to the level of specific promises of leniency or threats that have previously been held to render a confession involuntary.

Deception

(*Using deception during the interrogation of a defendant classified as mentally retarded is not coercive*)

In *Turner v. Coleman* (July 2016) the US District Court, W.D. Pennsylvania upheld the trial court's decision to deny the defendant's claim that his incriminating statements should have been excluded because the investigator lied to him during the course of the interrogation which allegedly caused the defendant's will to be overborne, and that the trial court failed to take into consideration the fact of his mental retardation in reaching their conclusion. From the District Court's opinion:

The trial court conducted a hearing on the suppression motion and made credibility determinations: "[t]he Court accepts as credible the testimony of Trooper Lipniskis and rejects as not credible the testimony of Defendant Turner…. .

The trial court then went on to address the issue of whether Trooper Lipniskis' tactics of misleading Petitioner amounted to police coercion of Petitioner's statements/confession… The trial court noted that "[o]nce an individual has been told of his or her Miranda rights, any statement elicited from him or her during a continuing interrogation is inadmissible in evidence against him or her, unless the totality of the circumstances surrounding the interrogation indicates that the accused in fact knowingly and voluntarily decided to forgo his or her Miranda rights." ... The trial court then went on to note that [f]actors that affect the validity of the waiver of Miranda rights include: (1) the duration and methods of interrogation; (2) the conditions of detention; (3) the manifest attitude of the police toward the accused; (4) the accused's physical and psychological state; and (5) any conditions which may serve to drain one's powers of resistance to suggestion and undermine one's self determination.

Considering all of the foregoing factors, the trial court then went on to find that Petitioner's statements were not the product of coercion.

The Court finds that Trooper Lipniskis' use of a misleading statement during the questioning of Defendant was not so manipulative or coercive that it deprived the Defendant of the ability to make a free and unconstrained decision to confess. Therefore, the Court finds that Trooper Lipniskis' misleading statement to Defendant that doctors informed Trooper, while he was out of the interview room and Defendant was writing his first statement, that the victim's injuries were not consistent with the Defendant's version of what happened does not rise to the level of compulsion or coercion and thus are not within Miranda's concerns.

Petitioner fails to show that the trial court's reasoning was contrary to or an unreasonable application of United States Supreme Court precedent on Fifth Amendment Miranda rights or voluntary confessions/statements. Indeed, we find the foregoing to not be contrary to or an unreasonable application of United States Supreme Court precedent. Frazier v. Cupp, 394 U.S. 731, 739 (1969) ("The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the 'totality of the circumstances,' and on the facts of this case we can find no error in the admission of petitioner's confession.").

To the extent that Petitioner argues that Trooper Lipniskis' use of deception was per se a violation of Miranda or a per se cause of his statements to be coerced, Petitioner is simply wrong on the law…. ("The Supreme Court has noted a distinction between police trickery as a means of coercion and police trickery as mere strategic deception; '[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda's* concerns.'…. In other words, a law-enforcement agent may use some psychological tactics or even actively mislead a defendant in order to obtain a confession, provided that a rational decision remains possible.").

To the extent that Petitioner argues that the trial court erred as a matter of fact in finding that Trooper Lipniskis' use of deception did not cause Petitioner's statements to be coerced, Petitioner fails to rebut the factual determinations of the trial court by pointing to any evidence other than perhaps the fact of his mental retardation. Petitioner seemingly argues that the trial court failed to take into consideration the fact of his mental retardation.

The trial court was aware of Petitioner's potential mental retardation as early as October 8, 2009 and, and certainly, no later than November 3, 2009, when the trial court had available to it an expert report by Dr. R. William Tallichet, Psy.D. who opined that Petitioner was mentally retarded within the meaning of Atkins…. The trial court did not issue its decision on Petitioner's suppression motion until November 6, 2009.

Hence, the evidence of record affirmatively rebuts Petitioner's seeming contention that there was no evidence of Petitioner's retardation before the trial court when it made the decision on Petitioner's suppression motion. Nor can we accept Petitioner's suggestion that merely because Petitioner's mental retardation was not specifically mentioned in the trial court's November 6, 2009 opinion denying Petitioner's suppression motion, that the trial court did not consider such in its decision. The trial court specifically invoked the totality of the circumstances test, and specified that coming within the totality of the circumstances test is a consideration of "(4) the accused's physical and psychological state; and (5) any conditions which may serve to drain one's powers of resistance to suggestion and undermine one's self determination." Presumably, the fact of Petitioner's mental retardation falls within these categories.

(*Manipulative tactics - lying about evidence; lying about the victim being a federal informant; lying about his friends naming him as the shooter - did not render the confession inadmissible*)

In *Valle v Butler* (June 2016) the US District Court, N.D. Illinois, upheld the lower court's ruling that the "aggressive and manipulative" tactics used by the investigators did not cause an involuntary confession. From the District Court's opinion:

Shortly after 10:00 p.m., detectives Jeffrey Parish and Robert Wallace of the Aurora Police Department and Agent Larissa Camacho of the Federal Bureau of Investigation resumed interrogating Valle. During this interrogation, Camacho told Valle numerous lies

to induce a confession. She showed him a compact disc in a plastic case and told him it contained a recording, made by a federal informant wearing a wire at the Latin Kings party Valle had attended the night of Lozano's death, on which Valle bragged about the shooting. Camacho also said that Lozano was a federal informant himself, which, she repeatedly explained, meant that Valle would be prosecuted for a more serious federal crime unless he could convince the police he did not know he had targeted an FBI informant. All of this was untrue. Lozano had not been a federal informant, and the authorities had no recording of Valle.

Camacho told Valle that she already knew everything that had happened because his friends had already turned on him and she had listened to the allegedly incriminating recording. This, too, was untrue. Valle told the officers that the recording must have captured him telling ‘a little bullshit lie...just trying...to be cool.‘ Parish told Valle that this was one of his last chances to say that he had made a mistake, that nobody was going to believe him, and that he was ‘fucked.‘ Parish and Camacho explained that Valle had two choices. One option was to ‘sit here and lie‘ by continuing to maintain his innocence and await trial, at which time Camacho and her informants would testify, the recording on the compact disc would be played for the jury, and Valle would be ‘fucked‘ because no jury would ever believe his story. His other option, the officers said, was to ‘tell the truth‘ and admit that he ‘made a mistake.‘

Valle moved to suppress the statements he made during his interrogation based on the claim that they were involuntarily given. He claimed that he had been deprived sufficient food, water, and sleep, and that his high susceptibility to deceptive police tactics due to his personal intellectual limitations led him to be coerced into falsely confessing. The trial court denied Valle's motion. As the appellate court later summarized:

It found that the officers did not falsely suggest sympathy. It recognized that the tone of the interviews sometimes became accusatorial and that the officers ‘slid their chairs into defendant's space‘ and shook a finger at defendant. It noted that Camacho had engaged in deception. The court accepted the validity of the *Miranda* warnings. It found that defendant had been articulate and responsive in his answers throughout the interrogation.

The court concluded that Valle's confession was not given involuntarily.

(*Lying about DNA evidence is not coerciv*)

In *Demarest v. Secretary, Dept of Corrections* (March 2016) the US District Court, M.D. Florida, upheld the lower court’s ruling that lying about DNA evidence is not coercive. From the court’s opinion:

Demarest claims that the state trial court erred in denying his motion to suppress his confession, resulting in a violation of his constitutional rights. In his motion to suppress, Demarest asserted …. that police lied about the presence of DNA evidence to intimidate him into confessing. From the court’s opinion:

….. However, misstating the evidence, without more, is not the type of coercive police activity that results in an involuntary confession. *See* *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (an officer's false statement that suspect's companion confessed was insufficient to render the suspect's statement involuntary). Accordingly, misrepresentations of fact "are not enough to render a suspect's ensuing confession involuntary." *United States v. Lall*, 607 F.3d 1277, 1285-86 (11th Cir. 2010). "Misleading a suspect about the existence or strength of evidence against him does not by itself make a statement involuntary." *United States v. Farley*, 607 F.3d 1294, 1328 (11th Cir. 2010). Rather, "courts have held statements involuntary because of police trickery only when other aggravating circumstances were also present." *Id*. (citing *United States v. Castaneda-Castaneda*, 729 F.2d 1360, 1363 (11th Cir. 1984)). Thus, "statements have been held involuntary where the deception took the form of a coercive threat, or where the deception goes directly to the nature of the suspect's rights and the consequences of waiving them." *Id.* (citations omitted).

Furthermore, there is no evidence to indicate that any threats were made against Demarest, that anything was promised to him, or that the officers pressured him into making either written or oral statements. Nor does the record support a finding that the officers' misstatements regarding DNA evidence were accompanied by, or amounted to, a coercive threat or other aggravating circumstance that deceived Demarest about the nature of his rights or induced his confession.

Accordingly, the totality of the circumstances under which Demarest confessed reflects that his confession was voluntary and was not coerced by police misinformation about the existence of DNA.

(Intrinsic falsehoods do not create a coerced confession)

In *Marquez v. State* (December 2015) the Supreme Court of Nevada found that the investigators did not coerce the defendant's incriminating statements and that intrinsic falsehoods do not cause a coerced confession. From the court's opinion:

The totality of the circumstances shows that the police did not coerce Marquez during the interrogation. First, the record shows that Marquez was 46 years old at the time of the interrogation, so the police did not take advantage of his youth. Second, nothing in the record reflects that Marquezs education or intellect is below normal, so the police did not take advantage of his lack of education or intelligence. Third, Marquez received *Miranda* warnings, he indicated that he understood the warnings, he did not invoke his right to remain silent or request an attorney, and he spoke to the detective. Thus, the police did not overbear Marquez by failing to advise him of his rights. Fourth, Marquez was not detained prior to the interrogation. Therefore, the police did not overcome Marquez's will through a lengthy detention. Fifth, the interrogation lasted only about an hour before Marquez confessed, so this was not a prolonged interrogation. Also, the detective only questioned Marquez on one occasion, so the questioning was not repeated. Lastly, the record does not indicate, and Marquez does not argue, that police mistreated him. Therefore, the police did not use physical coercion to overcome Marquez's will and

secure a confession.

Coercion through police deception

This court has held that trial courts should also consider police deception in evaluating the voluntariness of a confession... Police deception does not automatically render a confession involuntary. Police subterfuge is permissible if "the methods used are not of a type reasonably likely to procure an untrue statement." ... This court has distinguished between intrinsic falsehoods and extrinsic falsehoods.... Intrinsic falsehoods imply the existence of implicating evidence and are more likely to secure a truthful confession from a defendant.... Extrinsic falsehoods involve issues that are collateral to the crime and are more likely to overbear a defendant's will and secure a false confession or "a confession regardless of guilt." (concluding that a confession was coerced when police threated a defendant that "state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate" '). Deceptions that are likely to produce a false confession are not permissible and render a confession involuntary.

Marquez alleges that the detective impermissibly deceived him in order to secure a confession when the detective said that their conversation was confidential. If the detective had promised Marquez that their conversation would remain confidential, such deception would constitute an external falsehood and require suppression of his statement.... The deception would be an external falsehood because such a promise is collateral to the crime and could motivate a suspect to confess regardless of guilt. Here, the detective said that he was not telling everyone about the sexual assault allegations. His statement is ambiguous and we cannot conclude that it rises to a guarantee of confidentiality. Moreover, the detective provided *Miranda* warnings at the beginning of the interview and the detective also informed Marquez that anything he said could be used against him in a court of law. As such, Marquez could not expect immunity or confidentiality after confessing. Therefore, the police did not use an external falsehood to coerce Marquez's confession and the trial court did not err when it denied Marquez's motion to suppress his statements to police.

(Lying about evidence - saying a witness placed the defendant in the victim's car - was not coercive)

In *State v. Bates* (June 2015) the Missouri Court of Appeals, Eastern District upheld the lower court's decision that the defendant's confession was not coerced. From the court's opinion:

On appeal, Appellant asserts his videotaped statements should have been suppressed as unknowingly, unintelligently, and involuntarily made in that he was incapable of understanding his *Miranda* rights. Appellant contends his confession was the product of a coercive interrogation because the detectives took unfair advantage of his age, illiteracy, and learning disability to obtain the statements. Appellant maintains the detectives' act of lying to him about their evidence in the case and telling Appellant he was a cold-blooded killer who should get the gas chamber were coercive police tactics. We disagree.

Contrary to Appellant's assertion, there is no evidence of any coercive police activity or that Appellant did not understand his rights. Appellant was 18 years old when he was detained and interviewed for Victim's murder, making him an adult, not a juvenile. Appellant relies heavily on the fact that he told detectives he was illiterate during the interview for support yet provides no explanation as to how this affected Appellant's ability to understand his rights... Here, the detectives orally advised Appellant of his *Miranda* rights three times and Appellant indicated he understood those rights. Although Appellant told the detectives he had a learning disability and left school after the tenth grade, Appellant also told the detectives that his learning disability had no effect on him. Det. Ray testified there was nothing apparent about Appellant that led him to believe Appellant was suffering from any physical condition or any kind of impairment that prevented Appellant from understanding what was happening.

Furthermore, the fact that the detectives provided Appellant with false information regarding the investigation does not invalidate Appellant's confession. Statements obtained by subterfuge "are admissible unless the deception offends societal notions of fairness or is likely to produce an untrustworthy confession."... Det. Ray's act of falsely telling Appellant that the police had eyewitnesses placing Appellant in Victim's car when he was killed does not offend societal notions of fairness and was unlikely to produce an untrustworthy confession.

Viewing the evidence in the light most favorable to the trial court's decision, we find, under the totality of the circumstances, that Appellant's statements to police were made knowingly, intelligently, and voluntarily.

(Is it coercive to tell a subject that it was important for him to tell the investigators how the child was injured so he could get proper treatment when the investigators knew that the victim was brain dead and would not recover?)

In the case *State v. Rodriquez-Moreno* (September 2015) the Court of Appeals of Oregon upheld the lower court's decision not to suppress the defendant's incriminating statement.

From the Court of Appeals decision: "A third interview began about 3:00 a.m., this time conducted by Matrisciano. The trial court found that the detective began by asking if defendant recalled the *Miranda* warnings. When Matrisciano began repeating them, defendant interrupted to say that he understood the warnings and would speak to the detective. The third interview lasted for one hour and fifteen minutes.

Matrisciano insisted that "there was something else that had happened." At some point, Matrisciano told defendant "that it was important that [he] know what happened so that the doctors could be able to treat [S]." The trial court found that Matrisciano's statement was untrue and that the detective knew the child was brain dead and would not recover.

Defendant broke eye contact and sat quietly. He told Matrisciano that he was scared that Onofre-Nava would leave him. Matrisciano asked how many times defendant had shaken

S. Defendant admitted that he shook S one time after she had gotten into his food and started crying. At Matrisciano's request, he demonstrated how he shook S forcefully by the arms. Matrisciano noticed that defendant demonstrated that he had shaken the imaginary S three times and that he demonstrated her head moving all the way backward and forward each time. Defendant admitted that he was angry and that, on a scale of one to ten, from low to high, he had been "a seven." After shaking S, defendant said, he laid S down forcefully on the couch. Defendant agreed to make a tape-recorded statement, and he repeated what he had just told Matrisciano. At the end of the third interview, defendant was arrested and told that S would likely die from her injuries.

Defendant moved to suppress all his statements made after Matrisciano "falsely told him that they needed information from him * * * in order to be able to assist the doctors in saving [S's] life ." Defendant argued that the statement contributed to coercive circumstances in violation of defendant's rights under Article I, section 12, and under the Fifth and Fourteenth Amendments.

The trial court denied the motion, determining, among other things, that "defendant was never given any promises or threatened in any way"; "[t]here was no evidence that defendant suffered from any mental impairment at any time"; "defendant was never denied any request he made to use the restroom or for water"; the conversations with officers "were civil and polite"; Matrisciano's misstatement did not render defendant's statements involuntary; and, under the totality of the circumstances, the state had met its burden to prove that defendant's statements "were freely and voluntarily given."

In this case, the record supports the trial court's findings that "defendant was never given any promises or threatened in any way." Although defendant remained at length in the hospital, his stay was voluntary. As the trial court found, "defendant was never denied any request he made to use the restroom or for water," and the conversations with officers "were civil and polite." Defendant was reminded of his rights, and he chose to continue speaking with the investigating detectives. He understood that he was the primary suspect in causing S's injuries. His will was not overborne, and his capacity for self-determination was not critically impaired. His candid statements were not the result of any threats or promises. We conclude that the trial court did not err in determining that, in the totality of these circumstances, defendant's statements were voluntary.

(Lying to a suspect and "playing on his emotions" does not render the confession inadmissible)

In *State v. Pellikan* (April 2015) the Court of Appeals of Ohio, Fifth District, upheld the lower court's decision to admit the incriminating statements by the defendant that he sexually touched his eight-year-old cousin (KM) in the vaginal area. The defendant claimed that his statements were coerced and should have been suppressed. From the Court of Appeals opinion:

"In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal

experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." As noted by the Ohio Supreme Court in *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588 at paragraph 93:
Nevertheless, "the use of an inherently coercive tactic by police is a prerequisite to a finding of involuntariness..... Consequently, unless a coercive tactic was used, we need not assess the totality of the circumstances.

Appellant does not allege that he was subjected to physical abuse, threats, or deprivation of food, medical treatment or sleep. Nor does he allege that he was yelled at during the two interviews. Rather, appellant alleges that his confession was involuntary because Detective Grizzard lied to him and played on his emotions.

Appellant, who was nineteen years old at the time, was interviewed two separate times. The first interview was for 45 minutes and the second was for 25 minutes. Both were recorded.... Appellant, in support of his argument that his confession was coerced, notes that at the suppression hearing, Detective Grizzard admitted that he told appellant that KM loved him and that his family was on his side, forgave him and wanted to help him. Detective Grizzard further admitted that he told appellant that the investigation showed that he did it and could get a second chance if he admitted that he had touched KM. Appellant also argues that, at the suppression hearing, the Detective admitting to playing on his emotions and love for the victim by asking him if he would "do anything" to prevent her from having to go through the process. Detective Grizzard, at the hearing, admitted that he told appellant that KM said that she was "willing to get over it" when, in fact, she had not... Detective Grizzard also admitted that he "played hard on this let's save [KM] ."

At the suppression hearing, Detective Grizzard was questioned about the second interview. He testified that he brought appellant in for a second interview because he did not believe that appellant had told him everything that had happened. When asked, he admitted telling appellant that he thought that appellant was scared and frightened the day before and that things had gone too fast. Appellant argues that at the second interview, the Detective continued playing on his emotions and love for the victim. He also notes that after appellant said that he was done talking, Detective Grizzard told appellant that he was not. At the suppression hearing, on redirect, Detective Grizzard testified that when he said no to appellant, he was not telling appellant that he was not free to leave and that, in fact, appellant left a few minutes later. Detective Grizzard clarified that after appellant said that he was done talking because he believed that they had all of the information they needed, he told appellant that he was not because they needed more information. Appellant then continued talking to Detective Grizzard.

We find that the record does not demonstrate that appellant's statements to Detective Grizzard were coerced and involuntarily made. While appellant argues that he was a 19 year old who had not been read his rights or interrogated before, he had been informed of his *Miranda* rights, he had indicated that he comprehended those rights, and he had expressly waived those rights. The two interviews were not lengthy or intense and no

deprivation or threats occurred. At the end of the first interview, appellant went home and then agreed to come back the next day. At the beginning of the second interview, appellant told Detective Grizzard that he felt better after admitting what he had done was wrong. He had asked Detective Grizzard to pick him up for the second interview and then left after such interview.

Considering the totality of the circumstances surrounding appellant's statements to Detective Grizzard, we find that appellant's statements were voluntary and not coerced."

(Employing deceptive practices to elicit a confession are not coercive)

In *US v Hunter* (February 2015) the US District Court, N.D. Georgia, upheld the lower court's decision not to suppress the defendant's incriminating statements. From the court's opinion:

Hunter argues that the statements he made to the agents on May 16, 2013, were involuntary, and are therefore inadmissible, because: (1) he "believed that the agents came to his residence ... to help Anna, [ ] who was in danger," but he "did not understand that the agents were looking for child pornography,; (2) he did "not believe he had any choice" to make a statement "because of his prior experience with law enforcement," [; and (3) the agents never advised him that he had a right to counsel or that his statements could be used against him. Whether a statement was voluntarily given must be examined in light of the totality of the circumstances.... "This totality of the circumstances test directs the Court ultimately to determine whether a defendant's statement was the product of 'an essentially free and unconstrained choice.' ... "Among the factors the Court must consider are the defendant's intelligence, the length of his detention, the nature of the interrogation, the use of any physical force against him, or the use of any promises or inducements by police." *Id*. (citations omitted).

The focus of the voluntariness inquiry is whether the defendant was coerced by the government into making the statement, so "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." ... Thus, "[t]hose cases where courts have found confessions to be involuntary 'have contained a substantial element of coercive police conduct.' "Sufficiently coercive conduct normally involves subjecting the accused to an exhaustingly long interrogation, the application of physical force or the threat to do so, or the making of a promise that induces a confession."
Another "factor to consider among the totality of the circumstances in determining voluntariness' " is whether the police employ deceptive tactics to elicit a confession. However, " '[c]ourts have been reluctant to deem trickery by the police a basis for excluding a confession on the ground that the tricks made the confession coerced and thus involuntary.' Rather, courts have held that "trickery or deceit is only prohibited to the extent it deprives the suspect of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." Thus, "[t]he kinds of deception that are generally deemed to trigger suppression are lies about a defendant's legal rights (i.e ., 'you must answer our questions'), false promises (i.e., 'whatever you

say will be just between us'), or threats (i.e., 'if you don't talk, you won't see your family for a very long time') ."

Additionally, the law in the Eleventh Circuit "is clear, that the police's use of a trick alone will not render a confession involuntary," unless there are "other aggravating circumstances" beyond the mere use of deceptive tactics, ... Indeed, "[c]onfessions are not generally rendered inadmissible merely because they are obtained by fraud, deception, or trickery practiced upon the accused, provided the means employed are not calculated to procure an untrue statement and the confession is otherwise freely and voluntarily made."

Under the totality of the circumstances in this case, the Court concludes that Hunter's statements to the agents on May 16, 2013, were made voluntarily.

(Confession voluntariness – lying about the evidence)

In *Jefferson v. State* (July 2014) the Supreme Court of Nevada upheld the lower court's decision to admit the defendant's confession. In this case the defendant argued that " the district court erred in denying his motion to suppress the statements he made to law enforcement. He argues that his confession was involuntary because he was subjected to repeated and prolonged questioning, as well as deceptive interrogation techniques. From the court's opinion:

"We conclude that substantial evidence supports the district court's conclusion that Jefferson's confession was voluntary. Jefferson, an adult, does not claim that he misunderstood what was happening; he responded cogently to the detectives' questions; his interrogation began with an explanation of his *Miranda* rights; it took place at a reasonable time (9:00 p.m.) and lasted only 45 minutes; and, while one of his hands was handcuffed to a bar, he was free to leave any time for water or to use the restroom.

Additionally, Jefferson's argument that his confession was rendered involuntary by the detectives' deceptive interrogation techniques is unavailing. Jefferson argues that the detectives misrepresented DNA evidence by exaggerating what DNA evidence could reveal to them and the time frame in which they would learn the information. However, "an officer's lie about the strength of the evidence against the defendant is, in itself, insufficient to make the confession involuntary." … The question is whether the tactics " 'interject[ed] the type of extrinsic considerations that would overcome [Jefferson's] will by distorting an otherwise rational choice of whether to confess or remain silent.' … In this case, such tactics would not likely overcome Jefferson's will because, if Jefferson was truly innocent, he would not be concerned that DNA evidence would implicate him. Rather, he would know that it would exonerate him. Thus, nothing about the detectives' tactics appears coercive or likely to produce a false confession.

Jefferson's arguments that the detectives impermissibly implied that the prosecutor would be informed that he refused to cooperate, and threatened to take away his children are equally unavailing. The detectives indicated that if the DNA showed something different

than what Jefferson had told them, then the DA would be aware of the discrepancy, which would likely be bad for Jefferson. But that is not the equivalent of a threat to inform the DA that Jefferson was not cooperating. Likewise, the detectives told Jefferson that, given the allegations against him, he might not be able to be around his children for a while. However, this statement was only made in response to Jefferson's own questions regarding his children. This was not a coercive tactic to get Jefferson to confess, but merely a true statement of the current situation."

("the law permits the police to pressure and cajole, conceal material facts, and actively mislead")

In *US v. Graham* (June 2014) the US District Court, N.D. Georgia, upheld the admissibility of the defendant's incriminating statements, and carefully examined the issue of police deception during an interrogation. The District Court stated the following in their opinion:

"The focus of the voluntariness inquiry is whether the defendant was coerced by the government into making the statement, so "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." … Thus, "[t]hose cases where courts have found confessions to be involuntary 'have contained a substantial element of coercive police conduct.'… "Sufficiently coercive conduct normally involves subjecting the accused to an exhaustingly long interrogation, the application of physical force or the threat to do so, or the making of a promise that induces a confession."

… Whether the police employ deceptive tactics to elicit a confession is "one factor to consider among the totality of the circumstances in determining voluntariness." … However, "[c]ourts have been reluctant to deem trickery by the police a basis for excluding a confession on the ground that the tricks made the confession coerced and thus involuntary." … Rather, courts have held that "trickery or deceit is only prohibited to the extent it deprives the suspect of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." … Thus, "[t]he kinds of deception that are generally deemed to trigger suppression are lies about a defendant's legal rights (*i.e .,* 'you must answer our questions'), false promises (*i.e.,* 'whatever you say will be just between us'), or threats (*i.e.,* 'if you don't talk, you won't see your family for a very long time') ."

… Although Graham asserts that the agents' use of deception in this case "[wa]s itself aggravated and standing alone is sufficient basis to hold that [his] statements ... were the product of coercion," [Doc. 41 at 23], the law in the Eleventh Circuit "is clear, that the police's use of a trick alone will not render a confession involuntary," unless there are *"other* aggravating circumstances" beyond the mere use of deceptive tactics, … Indeed, "[c]onfessions are not generally rendered inadmissible merely because they are obtained by fraud, deception, or trickery practiced upon the accused, provided the means employed are not calculated to procure an untrue statement and the confession is otherwise freely and voluntarily made."

Graham cites to a number of cases in which statements elicited from a defendant in response to police deception were found involuntary,…. but these cases all involve significant aggravating circumstances not present here, *see, e.g., Lynnum,* 372 U.S. at 534 (mother's confession held involuntary where "made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate' "); *Spano,* 360 U.S. at 321–22 (finding confession involuntary where defendant was foreign-born, had only one-half year of high school education and a history of emotional instability, and was subjected to prolonged late-night questioning that included repeated denials by police of the request to consult with attorney and the threat that if he remained silent his friend on the police force would lose his job); *Irons,* 646 F.Supp.2d at 971–72 (confession involuntary where police sought to "exploit [defendant's] friendship" with a female officer, in whom he also had a romantic interest, by falsely telling him that the officer had been arrested and that he "should confess in order to protect her from prosecution"); *but see United States v. Charlton,* 565 F.2d 86, 89 (6th Cir.1977) (confession voluntary notwithstanding police threats to arrest son absent cooperation)…. Indeed, the cases cited by Graham illustrate nothing short of "extreme forms of deception or chicanery," *United States v. Jacques,* 744 F.3d 804, 812 (1st Cir.2014) (citations and internal marks omitted), which are far removed from the ruse used here. Moreover, the defendants in those cases were given the impression by police that they could avert some impending harm that would otherwise befall their family or friends, if only they would "cooperate" with the investigation. In this way, they were essentially confronted with the dilemma of either cooperating with the police or else allowing their loved ones to suffer as a result of their own recalcitrance, which "not only impaired [the defendants'] free choice, but also cast doubt upon the reliability of the resulting confession," *Holland,* 963 F.2d at 1051. Here, in contrast, there is not the slightest hint that the agents rendered Graham's confession unreliable by confronting him with a similar ultimatum that directly implicated any close personal or familial relations. And if Graham was actually deceived by the ruse and agreed to speak with the agents in order to help them find the missing girl, as he appears to allege, *see* [Doc. 41 at 5, 24–25], this would not make his statements less reliable, since it would have been counter-productive for him to provide the agents with false information that would only impede their efforts to locate her.

In brief, "the effect of psychological pressure or deception on the voluntariness of a statement depends on the particular circumstances in each case,"… and the circumstances in this case simply do not show that the agents' misrepresentation about a missing girl, unaccompanied by any aggravating factors, rose to the level of "coercive police activity,"… that so overpowered Graham's will or "critically impaired" his "capacity for self-determination," as to render his statements involuntary, ... Indeed, "[f]ar from making the police a fiduciary of the suspect, the law permits the police to pressure and cajole, conceal material facts, and actively mislead—all up to limits not exceeded here[.]"… Accordingly, the ruse employed by Agents Harris and Westhall "did not amount to coercion in violation of [Graham's] Fifth Amendment rights," … and the totality of the evidence in this case demonstrates that Graham's statements at the interview of May 31, 2012, were made voluntarily.

(Interrogator deception that "crosses the line")

In *People v. Aveni* (2012) Supreme Court, Appellate Division, Second Department, New York the court stated that "This case presents us with an opportunity to decide under what circumstances the police, while interrogating a suspect, exceed permissible deception, such that a suspect's statements to the police must be suppressed because they were unconstitutionally coerced.

"Here, the defendant argues that his statements should be suppressed because the detectives improperly deceived him when they explicitly lied to him by telling him that Camillo was alive and that the physicians treating her needed to know what drugs she had taken or else she could die, and implicitly threatened him with a homicide charge by stating, "[I]f you lie to me and don't tell me the truth now ... it could be a problem."

"In this case, the detectives coerced the defendant's confession by deceiving him into believing that Camillo was alive and implicitly threatening him with a homicide charge if he remained silent. The detectives used the threat of a homicide charge to elicit an incriminating statement by essentially telling the defendant that the consequences of remaining silent would lead to Camillo's death, which "could be a problem" for him. Faced with this Hobson's choice, the defendant had no acceptable alternative but to talk to the police. By lying to him and threatening him, the detectives eviscerated any sense the defendant may have had that he could safely exercise his privilege against self-incrimination and put the People to their proof. Either he would tell them what he knew or he would face the probability of life imprisonment if Camillo died. In light of the detectives' implicit threat of a homicide charge if the defendant remained silent, we cannot conclude that the defendant voluntarily waived his Fifth Amendment privilege against self-incrimination.

(Lying about DNA evidence did not make the confession inadmissible)

In *State v. Smith* (February 2014) the Court of Appeals of Nebraska found that lying to a suspect about DNA evidence did not render the confession inadmissible. From the court's opinion:

"Smith asserts that he repeatedly denied the accusations until the detective "told him the police had his DNA evidence on [E.H.'s] clothes," and this made "Smith believe that the police had scientific proof that he [was] guilty of the charges." Smith claims that the detective's tactics were employed to elicit an incriminating statement and that "[a]lthough providing false information to a suspect has been deemed normal police protocol, taken in the totality of the circumstances it was a direct violation of ... Smith's constitutional rights."

It is fundamental that a statement must be suppressed if it is obtained by offensive police practices.... However, mere deception will not render a statement involuntary or unreliable; the test for determining the admissibility of a statement obtained by police deception is whether that deception produced a false or untrustworthy confession or

statement. Id. If a benefit is offered in exchange for testimony, and the offer is definite, then a confession is involuntary and must be suppressed...

Nothing in this record indicates that Smith's statements made to Kavars or the letter written to E.H. were false or untrustworthy, nor is there any evidence that Kavars made any inappropriate offers to Smith in exchange for a statement. Kavars testified that the OPD has a protocol for conducting suspect interviews, which protocol includes providing false information to a suspect as a means of eliciting statements. Kavars explained that in this case, he had clothing that belonged to E.H. but that it did not have any DNA from Smith, contrary to what he suggested to Smith during the interview. Upon cross-examination, Kavars acknowledged that he obtained clothing from E.H. "[t]o lead the suspect to believe I had evidence I didn't have," and he agreed that the clothing was "basically used as a prop." Kavars confirmed that during his interview with Smith, he pulled those clothes out of an envelope and told Smith his DNA was on the clothing, and told him that on more than one occasion. He agreed it was a lie, but was a tactic he used. Kavars also "led [Smith] to believe that everything that happened with the victim at that residence was okay with her when she told me in the interview it wasn't."

On redirect, however, he confirmed that this was an acceptable method of interviewing and that further, he did not force Smith "in any way to admit that he had rubbed his penis on [E.H.'s] body." He further confirmed that he did not "force him in any way to admit that he had, in fact, pulled his pants down and touched the victim."

Kavars' testimony is supported by the recordings of the interview.....

The tactics used by the police in this case, while deceptive, cannot be characterized as such coercion that it caused Smith's "will to be easily overborne." .

(Lying about evidence such as minimizing the victim's injury, and telling the defendant gun shot residue and eyewitnesses showed that he was the shooter, would not cause an innocent person to confess)

In *People v. Boner* (2012) the Court of Appeal, Third District, California upheld the admissibility of the defendant's confession. The court heavily relied upon the DVD of the interrogation to assess the defendant's claim that his statements were involuntary because the police the lied to him about the victim's physical condition. From their opinion the court stated that:

"[T]elling a suspect falsehoods regarding the status of the case against him is widely accepted." ... "Where the deception is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted." .....

The detectives said the gunshot residue test and eyewitness statements showed defendant was the shooter, and both Antwaine and Moody had told the detectives everything. Although apparently these statements were not true, we do not find that any of these statements, nor all of them together, would tend to cause an innocent person to confess.

Defendant contends that minimizing the victim's injury, as well as the statements that defendant "can help [himself] out" and "can dig ... so big of a hole that we can't help you out," amounted to an improper offer of lenity if defendant confessed. We are not persuaded by this argument.

Here, the detectives did not state or imply that if defendant admitted he shot the victim he would get lenient treatment because the victim had not been badly hurt. Instead, they employed a technique of minimizing the consequences of defendant's actions. We do not see that such conduct is likely to make an innocent person falsely confess.

In this case defendant knew he had shot someone during an armed robbery, and knew he was being questioned about that incident. The fact he was told the victim only needed a band-aid was not the sort of deception that would tend to cause an innocent person to admit to the shooting."

(Incriminating statements admissible even though police deceived defendant about what offenses they were investigating)

In *US v. Whitfield* (2012) the U.S. Court of Appeals, Fourth Circuit upheld the lower court's decision not to suppress incriminating statements even though the investigating police "deceived him [defendant] about the offenses they were investigating." From the Appeals Court opinion:

"Whitfield's chief complaint is that the police officers deceived him about the offenses they were investigating, particularly those involving the forced accompaniment and death of Mrs. Parnell. Nevertheless, Whitfield concedes that the officers "had no duty to advise [him] of the identity of the specific offense under investigation" or "inform [him] of every potential theory of liability related to [his] conduct."... Although Detectives Sampson and Sumner led Whitfield to believe that their only interest at the start of the interview was the Belmont home break-ins, Whitfield obviously knew that his interactions with Mrs. Parnell were the result of his breaking and entering of her home. Whitfield persists, however, that he could not have rationally assessed the consequence of confessing to the break-ins because Sergeant Reynolds had indicated that Mrs. Parnell was alive and had "ID'd" Whitfield.... Because of Reynolds' misrepresentations, Whitfield contends that he mistakenly believed that he was being investigated for only a minor crime.

As the Supreme Court has explained, "[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns." *Illinois v. Perkins,* 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990).

As a result, the totality of the circumstances support the district court's denial of suppression.

(Telling the suspect that the victim had accused him of a more serious crime is not a coercive tactic - even though the victim had not made such an assertion)

In *People v. Jaeger* (2012) the Supreme Court, Appellate Division, Third Dept., New York, the court found that they were not "persuaded by defendant's contention that his statements were the product of coercive and deceptive interrogation practices by the police. "Police may generally engage in deception while investigating a crime, with suppression required only where 'the deception was so fundamentally unfair as to deny due process or [where] a promise or threat was made that could induce a false confession' ".....On more than one occasion during the interview, Stack suggested to defendant that victim A accused him of having intercourse with her despite the victim neither stating nor implying that any intercourse had occurred. However, as the tactic employed by Stack was not accompanied by any threats or promises that might induce a false confession and was not fundamentally unfair, the deception did not render defendant's confessions involuntary."

(Lying about evidence (number of witnesses that identified suspect) did not render confession inadmissible)

In *Arrue v. Hedgpeth* (2010) the US District Court, C.D. California upheld the lower court's decision to admit the defendant's incriminating statements. In this case the defendant claimed that the "police used coercive tactics that overcame his will, leading to his confession. Petitioner argues that the police lied to him when they told him that he had been identified as one of the perpetrators and when they offered him leniency by telling him that if he confessed, he would avoid a special circumstances murder conviction and would help his family. Petitioner says the officers also threatened him by telling him he was "fucked" because he faced a special circumstances conviction, which meant that he would be in prison for life if he did not confess. The California Court of Appeal denied Petitioner's claim, finding that the totality of the circumstances showed that the confession was voluntary."

The District Court further stated that, "...the state court found that, although police did use language such as "fucked" to describe Petitioner's situation, they did so only in describing the facts in colorful language, and that police made no threats or promises which might have overborne Petitioner's will.....The only circumstance the court found could have suggested an involuntary confession was the fact that police lied to Petitioner about being identified as the shooter by his three confederates. But, the record shows that police did not entirely invent this statement; at trial, both attorneys agreed that one person had identified Petitioner as the shooter, but that it was untrue that three people had identified him. In any event, the state court found that police deception about whether Petitioner had been identified as the shooter did not render the confession involuntary.

(Lying to a suspect about the extent of inculpatory evidence against him does not render a confession inadmissible, and telling a suspect that his cooperation would be to his benefit is not coercive)

In *State v. Perez* (October 2010) the Court of Appeals of Wisconsin upheld the admissibility of the defendant's incriminating statements even though the police lied to him about the extent of the inculpatory evidence, and even though the interrogator told the defendant that his cooperation would be to his benefit.

On the issue of misrepresenting evidence the court pointed out that, "Of the numerous varieties of police trickery, however, a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary. Such misrepresentations, of course, may cause a suspect to confess, but causation alone does not constitute coercion; if it did, all confessions following interrogations would be involuntary because "it can almost always be said that the interrogation caused the confession." Thus, the issue is not causation, but the degree of improper coercion.... Inflating evidence of [the defendant's] guilt interfered little, if at all, with his "free and deliberate choice" of whether to confess, for it did not lead him to consider anything beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime. In other words, the deception did not interject the type of extrinsic considerations that would overcome [the defendant's] will by distorting an otherwise rational choice of whether to confess or remain silent."

The court further stated, "DuBois did not promise Perez leniency in exchange for his confession. "An officer telling a defendant that his cooperation would be to his benefit is not coercive conduct, at least so long as leniency is not promised. Similarly, coercive conduct does not occur when ... an officer, without promising leniency, tells a defendant that if he or she does not cooperate the prosecutor will look upon the case differently."

(Court upholds confession in which investigators lied about the strength of their evidence during interrogation)

In *Mata v. Martel*, 2009, the United States District Court, N.D. California, upheld the confession which was the result of an interrogation in which the investigators " used two ruses". The investigator "told Mata that his saliva provided a DNA match with sperm found on the victim's underwear and that the victim's sister, Julissa, had seen Mata having sex with the victim. The detectives also made suggestions about what they thought happened. They encouraged Mata to tell the truth, told him that he wouldn't want to look like a liar if he went to court, called him a liar at certain points, and accused him of calling the victim a liar. .....They also told Mata that they didn't believe him, and that they believed he had raped the victim."

Furthermore, "Detective David Gonzalez suggested how he thought the sexual assault occurred: "Here's what I think happened, okay, I think that she's probably a very promiscuous girl ... I think that she was very attracted to you and liked you ... she started saying that, you know, she liked you ... and maybe wanted to do things with you ... you didn't intend, you know, you didn't intend to have sex with her ... but it just happened."

(Falsely telling suspect he has been identified as the shooter is not coercive)

In *People v. Rubio* (2009) the Appellate Court of Illinois Second District upheld the admissibility of a confession the defendant claimed was the result of coercive police deception. From the Appellate Court opinion:

"In urging that his confession was involuntary, defendant emphasizes that the detectives misled him as to the strength of the evidence against him by insinuating that the shooting had been filmed and that several witnesses had identified him as the person who shot the victim or escaped the scene after the shooting. However, defendant correctly concedes that "police trickery, standing alone, does not invalidate a confession as a matter of law." *Frazier v. Cupp*, ("The fact that the police misrepresented [the evidence] is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible"); ("A misrepresentation which prompts inculpatory statements is only one factor to be considered in determining the voluntariness of the resulting statements"). In Frazier, Kashney, and Martin, police or the prosecution falsely exaggerated the evidence against the defendants, and the defendants thereafter confessed their guilt. See Frazier, (defendant falsely told that his accomplice had confessed); Kashney, (prosecutor falsely told defendant that his fingerprints were found at the crime scene); (defendant falsely told that an accomplice had identified him as " 'the triggerman' "). The courts held the confessions to have been voluntary and admissible.

Defendant recognizes the above line of precedent and instead relies on another case, *People v. Bowman*, to support his argument that the police deception here rendered his confession involuntary. In Bowman, police enlisted the defendant's cell block mate to convince the defendant, who was "intensely fearful" of being returned to a particular correctional center in which he had spent four years, "that if [the defendant] [confessed], [he] would avoid a transfer to [the correctional center] and stay in the county jail long enough for [the cell block mate] to be released from jail, to return, and to assist in [the defendant's] escape." Bowman. The appellate court affirmed the trial court's judgment that the defendant's confession was involuntary; it concluded that police used deceptive interrogation tactics, calculated to take advantage of the defendant's intense fear of returning to the correctional center, as a means to overcome the defendant's free will.

We see a wide chasm between Frazier, Kashney, and Martin on one hand and Bowman on the other. In Frazier, Kashney, and Martin, the deception related to the ability to prove the defendants' involvement in the crimes; in Bowman, the police used deception to offer the defendant a provocation to confess extrinsic to the interrogation process. In an appeal of a habeas corpus proceeding in an Illinois case, the Seventh Circuit aptly described the difference between these two types of deception:

"Of the numerous varieties of police trickery * * *, a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary. [Citations.] Such misrepresentations, of course, may cause a suspect to confess, but causation alone does not constitute coercion; if it did, all confessions following interrogations would be involuntary because 'it can almost always be said that the interrogation caused the

confession.' [Citation.] Thus, the issue is not causation, but the degree of improper coercion * * *. Inflating evidence of [the defendant's] guilt interfered little, if at all with his 'free and deliberate choice' of whether to confess [citation], for it did not lead him to consider anything beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime. In other words, the deception did not interject the type of extrinsic considerations that would overcome [the defendant's] will by distorting an otherwise rational choice of whether to confess or remain silent."

We agree with the Seventh Circuit and conclude that the police deception here had little, if any, undue coercive effect."

(A fake polygraph test did not render involuntary the defendant's incriminating statement; a listing of other misrepresentations)

In *People v. Mays* (May 2009) the Court of Appeal, Third District, California found that "mock polygraph test administered to defendant after he requested a lie detector test during detective's questioning, and fake test results, did not render involuntary defendant's incriminating statement, after he received the fake test results.." From the court's decision:

Police deception during a custodial interrogation may but does not necessarily invalidate incriminating statements. A psychological ploy is prohibited only when, in light of all the circumstances, it is so coercive that it tends to result in a statement that is both involuntary and unreliable. [undercover law enforcement officer posing as fellow inmate was not required to give Miranda warnings to suspect.

As summarized in *People v. Chutan*: "Police trickery that occurs in the process of a criminal interrogation does not, by itself, render a confession involuntary and violate the state or federal due process clause. Why? Because subterfuge is not necessarily coercive in nature. And unless the police engage in conduct which coerces a suspect into confessing, no finding of involuntariness can be made.

"So long as a police officer's misrepresentations or omissions are not of a kind likely to produce a false confession, confessions prompted by deception are admissible in evidence. [Citations.] Police officers are thus at liberty to utilize deceptive stratagems to trick a guilty person into confessing. The cases from California and federal courts validating such tactics are legion. [officer falsely told the suspect his accomplice had been captured and confessed]; [officer implied he could prove more than he actually could]; [officers repeatedly lied, insisting they had evidence linking the suspect to a homicide]; [wounded suspect told he might die before he reached the hospital, so he should talk while he still had the chance]; [police falsely told suspect a gun residue test produced a positive result]; [officer told suspect his fingerprints had been found on the getaway car, although no prints had been obtained]; and [suspect falsely told he had been identified by an eyewitness]. [defendant's confession to child molestation was not

rendered involuntary by officer's failure to reveal he was conducting a criminal investigation and not just asking questions regarding placement of the children.

People v. Smith, held it was not impermissibly coercive for a police officer to tell the defendant that a "Neutron Negligence Intelligence Test" (a sham) indicated he had recently fired a gun. Additionally, the sham did not elicit a full confession, but only incriminating statements.

People v. Farnam, held the defendant's confession to robbery and assault of hotel occupants was voluntary, despite the police having falsely informed the defendant that his fingerprints were found on the victim's wallet. In California, it has been held that if a defendant takes a lie detector test willingly, " 'neither the fact it was given nor the fact that the defendant was told by the test giver it revealed in his opinion that defendant was not telling the truth, inherently demonstrates coercion. [Citation.]' "

Courts in other states have held defendants' confessions/admissions voluntary where the police told the defendant he or she failed a polygraph test, when no real test was performed, or a real test was given but did not show deception by the defendant, or the police misled the defendant as to the accuracy of the test or its admissibility in court. [confession voluntary despite police (apparent) deception in informing the defendant that he failed a polygraph examination]; [confession voluntary where defendant was hooked up to a polygraph, but it was not turned on]; [affirmed conviction based on confession obtained after the police (perhaps) untruthfully told the 17-year-old defendant that he failed a computer voice stress analyzer, when in fact the test did not so indicate, or did so unreliably]; [police misrepresentations to defendant concerning performance on polygraph test did not invalidate confession].)

Here, we disagree with defendant's view that the police engaged in shocking and outrageous misconduct. The request for a polygraph examination was initiated by defendant, not by the police. The deception was a mock polygraph. A polygraph is designed to elicit the truth, and the police already had information from other sources that defendant was the shooter (including Schallenberg's identification of defendant as the gray-clad person in the AM/PM photo, and eyewitness statements that the gray-clad person was the shooter). The use of the mock polygraph was not likely to produce a false confession. Although defendant testified he believed polygraphs are 100 percent accurate, that belief was not induced by the police. Moreover, we know the trickery was not particularly coercive because, even after the police showed defendant the fake test results, defendant continued to deny involvement in the crime. He merely admitted being present at the scene wearing a gray sweatshirt. It was other evidence, other than defendant's statements, which gave his admission its weight, i.e., the AM/PM surveillance photo of a gray-clad male, Schallenberg's identification of defendant as the gray-clad male in the photo, and the testimony of eyewitnesses that the gray-clad male was the shooter. (Although the prosecutor used defendant's admissions in closing argument to the jury, he used them as corroboration for the other evidence.)

(Can an interrogator tell a suspect "this is just between you and me" when, in fact, the interrogation is being recorded and the recording will be used against the suspect?)

In *Lee v. State* (2009) the Court of Special Appeals of Maryland upheld a trial court's decision to admit the confession of a defendant who had been led to believe by the interrogator that their conversation was "just between you and me" when it was actually being recorded. From the court's decision:

"Appellant's first contention is that the circuit court erred in denying his motion to suppress the statement that he gave to the police following his arrest. This contention is based on an exchange between appellant and Detective Schrott, which occurred after appellant had waived his Miranda rights, and after some discussion of the events of the evening. This exchange was as follows:
[APPELLANT:] Yeah, this is being recorded [somewhere aint it?]

[DETECTIVE:] This is between you and me, bud. Only me and you are here, all right? All right?

Although the suppression court initially expressed "some concern" that the statement vitiated the Miranda waiver, it ultimately denied appellant's motion to suppress, stating: The statement he makes is, this is being recorded, ain't it? The Detective does not directly answer that question by saying yes or no, but he certainly leaves the Defendant to believe that the conversation is just between the two of them, which was not true. But I do not think that the, it changed the Defendant's willingness to answer the questions in any way. Or violated his rights. So the Motion to Suppress the Defendant's statement is denied."

The Court of Special Appeals found that "Here, unlike the cases cited, supra, there was no express promise that the defendant's statements would remain confidential or that the statements were "off-the-record." Detective Schrott merely responded to appellant's query regarding whether the interrogation was being recorded by stating: "This is between you and me, bud. Only me and you are here, all right? All right?" As the State notes, this statement did not reflect any agreement of confidentiality. Rather, it was an equivocal response that was designed, not to establish a confidential relationship, but to deflect appellant's suggestion that he was aware that the interrogation was being recorded. We view Detective Schrott's response as sidestepping appellant's question regarding whether the interrogation was being recorded.

Even if the response is viewed as an affirmative misstatement that the interrogation was not being recorded, however, such a response would not violate Miranda. "There is no requirement that a defendant who has properly been given Miranda warnings must also be told he ... may be tape-recorded or video-recorded or both." *State v. Vandever*, 714 A.2d 326, 328 (N.J.Super.Ct.App.Div.1998), cert. denied, 834 A.2d 405 (2003). Police deception regarding whether an interrogation is being recorded, does not contradict the Miranda warning that anything the suspect says can be used against the suspect. A police officer's false statement that an interrogation is not being recorded, when in fact it is

being recorded, does not render a confession inadmissible. *State v. Wilson*, 755 S.W.2d 707 (Mo.Ct.App.1988). "

(Interrogators misrepresentation of hair and fiber evidence is insufficient to make the otherwise voluntary confession inadmissible)

In *State v. Hardy* (2009) the Court of Criminal Appeals of Tennessee, at Nashville upheld the admissibility of the defendant's confession. In their opinion they state: "Next, the appellant challenges the admission of his statement on the grounds that officers were deceptive when they told him they could place him in Vanessa Claude's van during the month of the crime by dating hair and fiber evidence. In *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420 (1969), police obtained a full confession from Frazier after they misrepresented to him that his co-defendant confessed. Viewing the totality of the circumstances, the Supreme Court upheld the admission of Frazier's statement, concluding that the misrepresentation was insufficient to make the otherwise voluntary confession inadmissible. We likewise agree with the trial court's assessment in the present case. Under the totality of the circumstances, Detective Downing's misrepresentation about being able to date the appellant's prints in the van was not sufficient to overbear the appellant's will so as to render his confession involuntary.

Finally, the appellant argues that his confession is involuntary because officers impliedly gave him false legal advice when they told him that he would benefit from giving a statement if Lillard had him "snaked up" in something. The trial court found that "the police officers did not give false legal advice" to the appellant during the interrogation. We agree with the trial court that the officers' comments did not amount to false legal advice. Further, we note that such vague statements encouraging cooperation are not sufficient to overbear an accused's will so as to render a statement involuntary."

(Police misrepresent eyewitness and fingerprint evidence against suspect - court upholds confession)

In *Weaver v. State* (2008) the police falsely told the defendant during his interrogation that 1) witnesses saw him commit the crime, (2) his fingerprints were found, and (3) a videotape showed his involvement in the crime. "Finally, appellant argues that one of the officers made false promises. After inquiring as to appellant's age, the officer told appellant he had his whole life ahead of him, even though the officer knew appellant was charged with capital murder. Additionally, when discussing appellant's drug use, the officer stated, "You know what if this just happened when you, you know you might had been doing something you didn't realize what you were doing, that's fine! There's nothing wrong with that...." Appellant appears to contend that, by making this statement, the officer was falsely promising that appellant would not face legal consequences if he committed the crime while under the influence of an illegal substance"

"In viewing the totality of appellant's interrogation, we determine that the trial court did not err in concluding that appellant's confession was voluntary. Appellant's inquiries as to what charges were being brought against him did go unanswered, but, as the trial court

found, the officers specifically told appellant that they were investigating a capital murder. Officers' misrepresentations that witnesses, fingerprints, and video linked appellant to the crime merely related to his connection to the crime and were not the type of deception that likely causes an involuntary confession. Similarly, any promises made that appellant "had his whole life ahead of him" or relating to appellant's drug use during the crime were not of such an influential nature that would cause appellant to speak."

(Lying about results of a black light test not coercive)

In *Brown v. State* (2008) the court found that "During the interrogation, Detective Zacharias lied by telling Thomas that the police had conducted a black light test of the house where Thomas was living. Detective Zacharias lied further by telling Thomas that this test uncovered traces of Thomas's semen throughout the house. After these misrepresentations, both detectives testified that Thomas recanted his previous denial and admitted to fondling Jill between twelve to fifteen times. Looking at the totality of the circumstances, we cannot say that the trial court's ruling that Thomas's confession was voluntary, despite Detective Zacharias's misrepresentation, is against the overwhelming weight of the evidence."

(Court upholds confession in which police lied about satellite imagery implicating suspect)

In *People v Minniti* (2007) the Illinois Appellate Court upheld a confession that resulted from an interrogation in which the police misrepresented the evidence against the suspect. "The defendant contends that his statements were involuntary because they were the result of police trickery. The trial court found that there were three instances of police deception. The police lied to the defendant when they told him that there was (1) satellite imagery showing someone go from the defendant's home to the victim's home on the night of the murder and (2) DNA evidence, matching him, found inside the victim. The police also misled the defendant's father when they told him they wanted to do a routine follow-up interview of the defendant but did not inform him that they had DNA evidence from the victim's bathroom indicating that the defendant had been present inside the victim's home. While we do not condone Officer Gardner's tactics, the trickery here does not render the defendant's confession involuntary.

Minimization

(*Minimizing the seriousness of the crime is not coercive*)

In *State v. Fouts* (March 2016) the Court of Appeals of Ohio upheld the trial court's finding that the defendant's confession was voluntary; rejecting his claim that the interrogator's effort to minimize the seriousness of his actions was coercive.

A jury convicted Douglas W. Fouts of gross sexual imposition and attempted unlawful sexual conduct with a minor; the trial court sentenced him to prison and Fouts filed this appeal, arguing in part, that his statements were involuntary because the police engaged in deceptive practices by minimizing the seriousness of his actions.

The record of the suppression hearing shows that Fouts was a 40–year–old man with no apparent mental deficiency who had worked in the real estate business and had previous criminal experience arising from a grand larceny charge. He voluntarily drove himself to the police station and was questioned for approximately 30 minutes. During the interview the officer told Fouts she did not believe he had raped the minor. The officer testified that she never told Fouts that if he confessed there would be no charges. Fouts neither alleges, nor do we find, any evidence that the police officer made statements constituting direct or indirect promises of leniency, or that she made representations concerning sentencing or probation. Likewise, there is nothing in the record that suggests the officer made any misrepresentations of the law.

Fouts's argument is that the officer minimized his offense by telling him she did not believe he committed rape. We find nothing deceptive about this statement; the officer testified that the minor's factual allegations did not include rape. The other possible statements in the record that arguably minimized Fouts's offense were the officer's statement that she believed he "made a mistake" and "mistakes can be fixed", and her characterization of what might have happened the night before as "iffy." However, we find nothing about those vague and indefinite statements that would render his confession involuntary.

(Court finds that interrogators are permitted to use minimization techniques)

In *State v. Belonga* (2012) the Supreme Court of New Hampshire upheld the admissibility of the defendant's incriminating statements, finding that police can use minimization techniques. In this case the defendant claimed that the interrogator's "minimization of the possible causes of Rylea's [her child] injuries affected the voluntariness of her statements." The court pointed out in their opinion the following:

"At the suppression hearing, Maher testified that he used an interrogation technique that involves "minimizing the actions [of defendants to suggest] that they are less culpable for their actions, whether it be due to a chemical dependence or being under the influence of alcohol or drugs or being [under] the stress of a single parent." Therefore, this interrogation technique does not entail the use of outright falsehoods, but rather the use of subtle subterfuge. Given that police are permitted to mislead a suspect, they are likewise permitted to use minimization techniques." .

(The value of videotaping an interrogation – minimization)

In *Commonwealth v. Chaperon* (2010) the Appeals Court of Massachusetts upheld the admission of the defendant's confession after reviewing the videotape of the interrogation. In their decision the court stated that, "The defendant claims that, after administering *Miranda* warnings, the detectives undermined them by promising him that they would not place him under arrest if he admitted to criminal conduct. This claim is unfounded. The detectives told the defendant (truthfully, as it turns out) that whatever he might say during the encounter, he would not be arrested that day. At the outset of the

interview (which is neither included in the transcript supplied by the defendant nor mentioned in either party's brief), Detective Eason stated, "You're not being arrested tonight, but I still have to read you your [*Miranda*] rights" (emphasis added). Later statements were to the same effect-that whatever the defendant might say he would not be arrested on the spot. The detectives did not state or imply that, regardless of the warnings he received, his confession would insulate him from arrest. *Cf. Commonwealth v. Shine*, 398 Mass. 641, 650-651 (1986).

While the detectives engaged in a form of "minimization" (repeatedly stating that people will forgive a person who made a mistake, but will not forgive a liar), and also told the defendant that he should get therapy, these features of the interrogation do not preclude a finding that the defendant's statements were voluntary; rather, they are to be considered as part of the totality of circumstances.

Viewed in that way, we agree with the motion judge that the manner in which the defendant was questioned did not render the defendant's statements involuntary. Significantly, throughout the interrogation, the defendant remained composed and did not seek to terminate the interview; he carefully calibrated his answers, offering explanations (both plausible and implausible) to deflect suspicion; and, despite eventually admitting that he had touched or rubbed the victim's vagina on a number of occasions, he steadfastly denied that he ever penetrated her with his fingers as she alleged.

Regarding the technique of minimizing the moral seriousness of the offense the Supreme Court of Canada stated the following:

- "There is nothing problematic or objectionable about police, when questioning suspects, in downplaying or minimizing the moral culpability of their alleged criminal activity. I find there was nothing improper in these and other similar transcript examples where [the detective] minimized [the accused's] moral responsibility." *R v. Oickle* (2000) http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1801/index.do

<u>Suggestion of reduced charges</u>

(*Statements indicating that juries were more likely to be lenient if presented with a full confession were not coercive*)

In *State v. Cox* (August 2016) the Supreme Court of Minnesota held that defendant's confession was not rendered involuntary when police promised they would look into his brother's death in exchange for statement; that law enforcement officers' statements suggesting full confession would be viewed favorably by prosecutor were not coercive; and that officers' statements indicating that juries in county were more likely to be lenient if presented with full confession were not coercive. From the Supreme Court's opinion:

Cox argues the district court committed reversible error by denying his motion to suppress his confession. Specifically, Cox alleges that (1) police promised that in exchange for his statement they would look into his brother's death; (2) police assured

him they could influence the county attorney; and (3) police told him that a “small town Scott County jury” would be more lenient if presented with a full confession.

About 1 hour and 20 minutes into the interview, Cox raised the possibility of making a deal with the officers: if they promised to look into his brother's death, he would tell the officers what happened.

The transcript of the statement demonstrates that Cox's will was not overborne. Indeed, Cox initiated the negotiation that led to Agent Wold's agreement and Cox's inculpatory statement….

We next consider Cox's argument that the statements of Agent Wold and Detective Horner suggesting a full confession would be viewed favorably by a prosecutor were coercive. A suggestion by the police that they can influence prosecutors in favor of a defendant is improper….

Cox points to several statements investigators made during his interview before he confessed as evidence of coercion. For example, police officers stated:
• I wanna know that information so that we can go and tell our bosses that tonight Anthony was very truthful....
• It looks so much better that when the attorneys when they pull all of our reports together and they review your statement or review the recording of this interview tonight and they go wow here is a young man who at least said what he did he's sorry for what he did and he didn't mean it for it to go down that way and he was cooperative and filled in all of the other pieces all I can tell you Anthony is that people that do that (Inaudible) better I think everybody involved in the whole system just go wow....

We conclude that the police statements Cox challenges were not improper in the context in which they were given. The officers stated that a full confession would be impressive and that defendants who make a full confession generally do better in the criminal justice system. But the officers did not promise that if Cox confessed, they would attempt to obtain favorable treatment for him from the prosecutors. Consequently, the police statements in this case are significantly different than the statements we have deemed improper in the past.

Cox further argues his confession was rendered involuntary by the police officers' statements that Scott County juries have a “small town” outlook and are more likely to look favorably on a full confession. He suggests the officers “played on the societal fear of urban crime committed by young black men and how that [is] perceived in small towns.” These statements were all made to pressure Cox into implicating Kurr, which ultimately proved fruitless. We conclude that the police statements were not unduly coercive. The statement of how a jury may view certain evidence is simply a prediction. In sum, we conclude that the totality of the circumstances do not support Cox's argument that his confession to police was involuntary.

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(*Suggesting to the defendant that he might get a better deal if he was "first to the table" and that he should consider the impact it would have on his son if he was in prison were not coercive statements*)

In *US v. Woodley* (May 2016) the US District Court, E.D. Michigan, upheld the lower court's decision that statements suggesting to the defendant that he might get a better deal if he was "first to the table" and he should consider the impact it would have on his son if he was in prison were not coercive. From the court's opinion:

Woodley argues that his alleged confession was involuntary because the officers used coercive tactics during the interrogation….The video makes clear that the officers did not coerce Woodley through any threatened or physical force. Nor did they verbally abuse him in any way. And the officers provided Woodley with relatively comfortable surroundings. Woodley's claim is thus based on the content of the Officers' statements, not the manner in which they were made. In particular, the officers suggested that Woodley might get a better deal if he was "first to the table," explained that carjacking carried a long prison sentence, urged Woodley to consider the impact on his son if he were to go to prison, and suggested they could link him to other carjackings if he did not cooperate.

Regarding the officers' statements implying that Woodley would get a better deal if he was "first to the table," the Sixth Circuit has noted that "[a] promise of leniency in exchange for cooperation may be a relevant factor in determining whether a confession was involuntary," but "such statements usually are permissible." … Here, the officers merely suggested to Woodley that if he cooperated, he might be able to obtain a lower sentence if convicted. These statements were not false or illusory…. And all the officers did here was speculate. They said, "usually the first man to the table gets the best deal" (Video at 22:13), and, "First to the table, we could work with that," (*Id.* at 22:47). These speculative statements did not render Woodley's subsequent confession involuntary.

Nor was it coercive for the officers to suggest to Woodley that he would face a long prison term if convicted. "A truthful and non-coercive statement of the possible penalties which an accused faces may be given to the accused without overbearing one's free will....as long as the statement results from an informed and intelligent appraisal of the risks involved rather than a coercive atmosphere, the statement may be considered to have been voluntarily made." … Informing Woodley of the potential sentence he was facing was not objectively coercive.

And telling Woodley that he would not have much contact with his son if he were to receive such a prison sentence was not objectively coercive either. Though the officers told Woodley that he would not see his son and that if he were to be imprisoned, someone else might end up raising his son, they did not threaten any legal or economic consequences to Woodley's son.

Over the course of nearly four hours, the officers painted a realistic picture of Woodley's situation and the process that was about to unfold. They did not make any illusory promises, nor did they make any unfounded threats to either Woodley or his son. While these statements may have upset Woodley, they did not rise to the level of coercive police activity.

(Investigator's statement that felony murder would receive a lesser sentence than premeditated murder did not render confession involuntary)

In *State v. Turner* (May 2014) the Nebraska Supreme Court held that misinformation by police officers during the defendant's interview that felony murder would receive a lesser sentence than premeditated murder did not overcome defendant's will so as to render his confession involuntary based on purported promises of leniency. From the court's opinion:

"Turner argues that his confession was involuntary because it was induced by an implied promise that he would receive a lesser sentence if he confessed that the shooting was accidental. As evidence of this implied promise, he points to Ficenec's statements that it made "a big difference" how and why the shooting occurred and to Krause's statement that the possible penalty could be 1 to 10 years' imprisonment if the shooting was accidental. He claims that these statements constituted an implied promise of leniency which overcame his will and caused him to confess. He further argues that the officers' statements were deceptive because first degree murder encompasses felony murder--which does not require a showing of malice, intent, or premeditation.

Turner is correct in his assertion that the officers deceived him during the course of the interview at the parole office. Ficenec's statements as to there being "a big difference" how and why the shooting occurred, and specifically Krause's statement that Turner could get 1 to 10 years' imprisonment if the shooting was accidental, incorrectly indicated that felony murder would receive a lesser sentence than premeditated murder...

... We have previously noted that a deceptive statement regarding possible sentences is only one of several factors to be considered. In *State v. Thomas*, we determined that the defendant's confession was voluntary and not caused by misinformation regarding possible sentences due to the presence of three factors. These factors included that (1) the officers returned to previous themes between the discussion of possible penalties and the defendant's confession, (2) the defendant indicated a knowledge that he could receive life imprisonment for the crime both before and after his confession, and (3) the confession occurred after an officer indicated that he did not know what sentence would be imposed.

... As in Thomas, Turner's confession did not follow the discussion in which the officers misrepresented that a lesser sentence would be imposed for felony murder. Rather, his confession was immediately preceded by the officers' return to the prior theme of Turner not being a bad, evil person; Krause's exhortation to "do the right thing"; and the colloquy regarding Turner's belief in God and the fate of his soul. Thus, the dialog immediately preceding Turner's confession supports the conclusion that his confession was primarily

motivated by remorse and a desire to do the right thing--not to receive a lesser sentence.

As to the second factor we identified in Thomas, Turner indicated both before and after his confession that he was aware he could receive a sentence of life imprisonment. Before Turner confessed at the parole office, he stated, "Man, I'm going to get life for this shit." And after he confessed and was transferred to the police department, Turner stated to Coleman, "I'm about to get like, life." Thus, this factor indicates that Turner did not believe his confession precluded him from receiving life imprisonment.

Finally, like the defendant in Thomas, Turner confessed after officers stated that they did not know what sentence would be imposed. In response to Turner's statement, "I'm going to get a hundred years," Ficenec replied, "I can't tell you what the potential penalty could be. I mean I'm not going to bullshit you. Could you potentially get life? Is that a possibility? I mean, I'm not a judge, I'm not a prosecutor." And during the colloquy immediately preceding Turner's confession, Krause stated, "I don't know, okay?" in response to Turner's assertion that he "might be in jail for a long-ass time." Thus, although they incorrectly indicated that felony murder would receive a lesser sentence, the officers made no representations as to what sentence Turner would receive if convicted. This factor supports the conclusion that Turner's confession was not motivated by a belief that he would receive a particular sentence.

(Statement to the effect that the defendant had a "chance to reduce the potential charges or sentencing" if he showed remorse and confessed did not render the confession inadmissible)

In *US v. Takai* (2013) the US District Court, D. Utah, the court found that statements to the effect that the defendant had a "chance to reduce the potential charges or sentencing" if he showed remorse and confessed did not render the confession inadmissible. In their opinion the court stated that, "Defendant's allegations of coercive tactics in the second interview revolve mainly around Agent Quirk and Detective Coats' various statements promising that they would speak to prosecutors to recommend leniency if he ... would come clean and show remorse. The transcript of the interview reveals numerous such statements.

In the interview, Agent Quirk and Detective Coats repeatedly made statements to the effect that there was a "chance to reduce the potential charges or sentencing" if he showed remorse and confessed... The basis of such statements was that the investigators would recommend leniency to the prosecutors. And both Detective Coats and Agent Quirk repeatedly clarified that they did not have the authority to make promises, control the charges, the sentencing, or even whether the case would be filed in state or federal court, though they did encourage Defendant by saying that cooperation might help... This court held in.... that in an interrogation, officers may "speculate that such cooperation will have a positive effect" as long as they do not "go beyond limited assurances." .... The court finds that Agent Quirk and Detective Coats' statements, though to some extent "promises" (but not of leniency; rather, promises to speak to the prosecutors to recommend leniency), were carefully hedged to avoid going "beyond limited assurances."

...Thus, the court finds there was no police misconduct in this interview that would justify looking further into specific characteristics of Defendant that could affect the voluntariness of his confessions where coercive police conduct has been found.

(What constitutes a promise of leniency?)

In *Ozuna v. Texas* (2011) the Court of Appeals of Texas, Austin, found that "For a promise to render a confession invalid, it must be positive, made or sanctioned by someone in authority, and of such an influential nature that it would cause a defendant to speak untruthfully….General offers to help a defendant are not likely to induce an accused to make an untruthful statement, and therefore will not invalidate a confession. Similarly, general statements made to a suspect that a confession may sometimes result in leniency do not render a confession involuntary." .

(If you do not tell the truth, "Life has ended" does not constitute a threat)

In *People v. Cardenas* (May 2011) the Sixth District Court of Appeal, California, says that it does not constitute a threat. In their opinion the court stated that, "The sergeant's testimony indicated that the remark was neither a threat of harsher punishment if defendant Plancarte did not confess to robbery nor a promise of greater leniency if he did. Rather, the gist of the remark appears to be that, absent the "truth," life as defendant Plancarte knew it would end, which would seem to imply that the police already had a convincing case against defendant Plancarte unless the "true" facts put things in a different light. Exaggeration of the strength of the evidence against a defendant during interrogation does not necessarily render a confession involuntary… Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise does not ... make a subsequent confession involuntary.

(The detective's statement that "[i]f you admit to things, you make mistakes, you made a bad choice; but if you deny this, in my book, you are a criminal," was merely moral urging…not a promise of leniency)

In *Garcia v. State* (2011) the District Court of Appeal of Florida found that "The detective's statement that "[i]f you admit to things, you make mistakes, you made a bad choice; but if you deny this, in my book, you are a criminal," was merely moral urging." They stated that, "The constitution does not bar the use ... of any statements that could be construed as a threat or promise, but only those which constitute outrageous behavior and which in fact induce a confession." There must also be a causal nexus between the improper conduct or questioning and the confession. A confession is not involuntary if officers do nothing more than "encourage or request that person to tell the truth."

"We do not reach the question of whether the detective's promise was "outrageous," because the detective's statements do not constitute or suggest a promise of leniency. The detective's statement that "[i]f you admit to things, you make mistakes, you made a bad

choice; but if you deny this, in my book, you are a criminal," was merely moral urging. "Encourag[ing] or request[ing][a] person to tell the truth" does not result in an involuntary confession."

(The statements, "I have no intention of putting you in jail tonight" and "If you have a problem, we can help you.... I promise you, I will do everything I can to help you." were not promises of leniency.)

In *State v. Leeson* (2011) the Court of Appeals of New Mexico upheld the lower courts decision to admit the defendants confessions. On appeal the defendant had argued that his confession was involuntary because it was elicited by false or implied promises and threats. In examining this issue the court made the following observations:

"The court quoted Detective Kohler as having stated, "[r]ight now, no matter what happens, no matter what you tell me, and I swear to this, I have no intentions of putting you in jail tonight." The express promise did not concern long term leniency, only the avoidance of jail that night and provided no incentive or disincentive to make admissions. The district court noted that the detective kept this promise, even though Defendant made certain admissions.

"The district court also concluded that Defendant could have inferred an implied promise to get help for him if he was cooperative. At the hearing on his motion, Defendant pointed to the following statements Detective Kohler made in the first interview as implied promises. "If you have a problem, we can help you.... I promise you, I will do everything I can to help you.... That might be something we can help you with." We addressed similar statements regarding possible treatment in State v. Lobato, 2006–NMCA–051, ¶ 1, 139 N.M. 431, 134 P.3d 122, where the defendant was charged with criminal sexual penetration of a minor. We agreed that the statements in that case gave the impression that the defendant would get treatment if he confessed, but we did not find any promise that the defendant would get treatment instead of prison time or would get a lesser sentence of imprisonment….We concluded that the defendant's confession was not rendered involuntary by the officer's discussion of possible treatment. We reach the same conclusion here."

(The statement "…you might be charged with one thing you know there's plea agreements and things they can work out a deal" is not a promise of leniency)

In *Sims v. State* (2011) the Court of Appeals of Indiana upheld the lower court's opinion that this statement was not a promise of leniency. The full statement that was at issue was the following:

"But ... don't be silly and lie about this I mean because even though you might be charged with one thing you know there's plea agreements and things they can work out a deal with you but don't throw away your entire life because that jury is going to be pi* *ed and that judge is gonna [be] pi* *ed if you go in lying in Court. They're gonna say [he] shows no remorse, he doesn't feel bad about what happened and whether you cry or not I

mean that's not ... that's not what remorse is about. But doing the right thing here and telling the truth what happened that's ... that's what you need to do."

The court found that, "Here, however, Detective Mayhew neither promised Sims his punishment would be mitigated nor misstated the law. Rather, the detective merely told Sims that it was in his best interest to be honest and tell the real story, and that plea agreements and deals were available. The Indiana Supreme Court has consistently held that vague and indefinite statements by the police about it being in the best interest of the defendant for him to tell the real story or cooperate with the police, such as the one in this case, are not sufficient inducements to render a subsequent confession inadmissible."

(Telling the suspect the nature of the charge - capital murder - and that he can help himself by telling the truth does not render the confession inadmissible)

In *Smith v. State* (2010) the Court of Criminal Appeals of Texas upheld the admissibility of the defendants' confession even though he was told by the interrogator that "I'll get you the death penalty or you can tell me the truth and help yourself."

The Appeals Court found that, "Rogge's statements, which the appellant deems a threat, "offensive to due process, and [sic] draws a line the police may never cross, not even with a suspect who has been warned and has expressed a willingness to speak to them," do not affirmatively promise that the appellant would not get the death penalty if he confessed. At best, the comments convey the understanding that the appellant would most likely get the death penalty if he were found to be lying; if he told the truth, he would have a chance at a life sentence. When the appellant stated that he was trying to cooperate with Detective Rogge because it was "probably" the only thing that would save him from the death penalty, his statement did not inherently mean that he was being offered a deal with the police for a life sentence. In fact, when the appellant testified at the suppression hearing, he did not even say that Rogge had promised him anything or that he felt coerced to make his statement."

(The statement "we are here to listen and then to help you out," is not an implied promise of leniency)

In *People v. Vance* (2010) the Court of Appeal, First District, California upheld the trial court's opinion that the statement "we are here to listen and then to help you out," was not an implied promise of leniency. The Appeals Court stated that, "While defendant reads an implied promise of leniency into Officer Kelly's statement that "we are here to listen and then to help you out," and Officer Norton's statement that "the court ... wants to know what the real story is and you're the only one that can provide that," our review of the videotape reveals that the only benefits promised by the officers was the peace of mind defendant and others would have after he did the right thing and gave his side of the story. That is not coercion.

The court's decision went on to point out that "Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a

threat or a promise, does not ... make a subsequent confession involuntary"; *People v. Jimenez* (1978) 21 Cal.3d 595, 611-612, 147 Cal.Rptr. 172, 580 P.2d 672 [" '[when] the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made"]; *People v. Andersen* (1980) 101 Cal.App.3d 563, 578, 161 Cal.Rptr. 707.) The brief and bland references upon which defendant has seized do not push this case over the forbidden line of promised threats or vowed leniency (see *People v. Ray* (1996) 13 Cal.4th 313, 340, 52 Cal.Rptr.2d 296, 914 P.2d 846), certainly not within the context of an interview that lasted more than three hours."

("We are here to help you, we are the only ones who can help you." Is not a promise of leniency)

In *Redd v. State* (2009) the Court of Appeals of Texas, Houston, upheld the trial courts decision to admit the defendant's statements into evidence. On appeal the defendant claimed that his "will was overborne by false promises and threats" - specifically claiming that the investigators told him that "(1) he would not get life in prison if he cooperated; (2) they were there to help him; and (3) they were the only ones who could help him."

The Appeals court ruled that the "Appellant does not specify the exact promises made by Elizondo and Dew that he assails. General statements by an officer that he is there to help defendant and is the only one who can help defendant do not indicate the "if-then" relationship required to establish a promise."

Also, the court wrote that "Specifically, appellant argues that he was induced to confess by the following statement made by Elizondo: "I guarantee that you're not going to do life [in prison] like he is. Or who ever"..... Elizondo's "guarantee" was part of a larger statement in which Elizondo attempted to persuade appellant to tell his "side of the story" before Isler was detained and blamed everything on appellant."

(Statements like "try to get something going"; I want to help you put your "best foot forward" do not constitute promises of leniency. Statements like "being the guy that's not being completely honest" and being the "odd-man out" and "left out in the cold," do not imply a threat or dire consequences.)

In *People v. Atencio* (2010), the Court of Appeal, Third District, California found that the trial court properly admitted the defendant's confession, stating that, "Having examined the interviews, we discern no implied threats or promises of leniency. As defendant points out, detectives told him they were "trying to get something going" for him and trying to "help" him to put his "best foot forward" by providing a statement that honestly explained "why all this bad shit happened" and showed "some remorse" for Rapp's death. However, this cannot be construed as an implied promise of leniency. In the context of the interview, the detectives were doing nothing more than exhorting defendant to tell the truth and permissibly offering to help him explain his side of the story to the district attorney. (See People v. Ramos, supra, 121 Cal.App.4th at p. 1204 ["no improper promise

of leniency" where the detective "promised only to present evidence of [defendant's] cooperation to the district attorney"].) The detectives "did not suggest they could influence the decisions of the district attorney," but simply informed defendant that providing an honest account of events might be beneficial in an unspecified way. (People v. Carrington, supra, 47 Cal.4th at p. 174.) Indeed, immediately before he confessed to the murder plot, the detectives specifically told him the district attorney would be responsible for charging him and there probably was not a lot of "movement," "if any," as far as which crimes would be charged against him. Consequently, offering to help him explain his side of the story to the district attorney cannot be construed as an implied promise of leniency.

"Defendant also faults the detectives for warning him against "being the guy that's not being completely honest" and being the "odd-man out" and "left out in the cold," and for telling him the only way he could help himself was to tell them what happened. According to defendant, these statements constituted a threat that he was in a hopeless situation and would suffer dire consequences unless he confessed. He also complains the statements were repeated after he was told Krauter and Medina had confessed to the murder plot. Thus, he suggests, "the threat that [he] would be 'left out in the cold' if he did not confess to the murder plan like the others ha[d] done was meant to imply that all of the other participants who freely admitted participation in the murder plot would be receiving a more favorable outcome, and that he would be denied a similar benefit because of his refusal to admit the plan to commit murder."

"On the contrary, far from threatening defendant, the detectives were simply explaining the natural consequences that would flow from his lying to them, should his coconspirators suffer a crisis of conscience and confess. We have no doubt that, when those words of the detectives were repeated after they informed defendant that Krauter and Medina had confessed, the words carried greater weight in defendant's mind and likely led to the confession that followed immediately. But the fact that a strategy was effective does not make it unconstitutional. "No constitutional principle forbids the suggestion by authorities that it is worse for a defendant to lie in light of overwhelming incriminating evidence." (People v. Carrington, supra, 47 Cal.4th at p. 174.) This is all that the detectives did in this case. They did not, as defendant claims, imply that Krauter and Medina would receive a more favorable outcome because they confessed, or that defendant would be denied a favorable outcome unless he also confessed."

(Court rejects the claim that a coercive environment was created when the investigators mentioned the gravity of the offense and the possibility of a lengthy prison sentence and then told the suspect that if he cooperated he might benefit)

In *US v. Dominguez-Gabriel* (2010) the United States District Court, S.D. New York, upheld the trial court's decision to admit the defendant's incriminating statements even though he claimed that the agents created a coercive environment when they mentioned the gravity of the offense and the possibility of a lengthy prison sentence and then told him that if he cooperated he might benefit.

From the court's opinion:

"Finally, the Defendant complains that the agents created a coercive environment when they mentioned the gravity of the offense and the possibility of a lengthy prison sentence and then told him that if he cooperated he might benefit. But the Second Circuit has made clear that simply stating that cooperation may help a defendant facing a lengthy sentence is not enough to render a statement subsequently made involuntary. United States v. Gaines, 295 F.3d 293, 299 (2d Cir.2002); United States v. Ruggles, 70 F.3d 262, 265 (2d Cir.1995) ("Certainly, statements to the effect that it would be to a suspect's benefit to cooperate are not improperly coercive."). And when the agents told the Defendant that he had been arrested on a serious offense for which he might face a lengthy jail sentence, they were simply informing him of the facts of his situation. See United States v. Tutino, 883 F.2d 1125, 1138 (2d Cir.1989) (holding that once a suspect "had been advised of his rights, the agents were free to discuss with him the evidence against him and the reasons why he should cooperate"); Green v. Scully, 850 F.2d 894, 903-04 (2d Cir.1988) (holding that police officials' references to the electric chair, while improper, did not render a confession involuntary); United States v. Pomares, 499 F.2d 1220, 1222 (2d Cir.1974) (holding that "[i]t was quite proper in the course of such discussion to mention the situation which Pomares faced," including informing the defendant he faced heavy penalties for drug smuggling).

Even taken together, none of these circumstances rise to the level of coercion or suggest that the Defendant's "will was overborne."

(The interrogator's implication of leniency in exchange for cooperation is not coercive)

In *Lewis v. Commonwealth* (2009) the Court of Appeals of Virginia, Richmond the court upheld the admission of the defendant's confession. Specifically, they stated that "according to Lewis' argument, he was coerced to confess because Detective Byrd implied that Lewis would benefit by cooperating, he implied that cooperating would help Lewis see his child, he implied that Lewis' continued cooperation could earn leniency in sentencing, and he told Lewis that a videotape showed "everything."

Detective Byrd implied on several occasions that cooperating might help him obtain some leniency in the future. We held in Washington that the officer's implication of leniency in exchange for cooperation is not coercive. 43 Va.App. at 304, 597 S.E.2d at 262 (The officer's statement was not an actual promise of leniency, and the officer never claimed to have the power to affect the decision of the Commonwealth's Attorney's office.). Here, Detective Byrd never guaranteed Lewis that, by cooperating, he would receive any benefit. The detective did not make any promises to Lewis, and he never indicated that he had authority to dispense leniency in prosecution, sentencing, or visitation rights while in prison. Therefore, according to Washington, Detective Byrd's implication that cooperation might help Lewis in the future is not coercive. Moreover, Detective Byrd's implications that cooperating would help Lewis see his child and gain leniency in sentencing is similarly not coercive."

(Telling the suspect that if he tells the truth it could be in his benefit to do so and exaggerating the strength of the evidence against him does not render a confession involuntary)

In *People v. Garcia* (2009) the Court of Appeal, Second District, Division 2, California the court upholds the admissibility of the defendant's confession. In this case the court found that "The record negates appellant's contention that the officers made an implied promise of leniency in charging or punishing appellant. During the interview, one of the officers explained to appellant that he could be tried as a juvenile or as an adult, but added: " I can't make you any promises and I wouldn't do that but we need to know the truth and we need to know what you were thinking in your heart." (Italics added.) When appellant asked the officers what would happen to him, the officers told him: "You're going to be charged with the murder." They went on to tell him that although they would present his case to the juvenile system, someone other than the officers would make a decision whether he would be tried as an adult. In our view, there was no express or implied promise of leniency.

The officers certainly urged appellant to tell the truth and represented to appellant that it could be in his benefit to do so. These exhortations, however, were within the permissible bounds of telling appellant that it would be in his advantage to be truthful because the officers did not attach a promise of leniency with the exhortations. (Jimenez, supra, 21 Cal.3d at p. 611 ["mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary"]; *People v. Hill* (1967) 66 Cal.2d 536, 549["[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity"]; In re Anthony J., supra, 107 Cal.App.3d at p. 969 [15 year old defendant's confession held voluntary where officers told defendant that if he told the truth, the officers would tell the court that defendant was cooperative and would play the taped confession to the court " 'to show how cooperative the minor had been' "].)

It is true, as appellant points out, that the officers in this case exaggerated the nature of the eyewitness testimony against appellant. During the interrogation, the officers told appellant that witnesses had identified appellant as walking up to the victim, shooting the victim, running toward a van driven by his brother and leaving in that van. In fact, the two eyewitnesses for the prosecution testified only that the person they saw running after the gunshots shared the same physical build as appellant. "Numerous California decisions confirm that deception does not necessarily invalidate a confession." (*People v. Thompson* (1990) 50 Cal.3d 134, 167.) Courts have upheld the admission of a confession where the officer's " 'deception was not of a type reasonably likely to procure an untrue statement.' [Citations.]" (Ibid., citing In re Walker (1974) 10 Cal.3d 764 [upholding confession where officers deceptively told defendant that he would die before he reached the hospital]; *People v. Watkins* (1970) 6 Cal.App.3d 119 [upholding confession where officers deceptively told defendant that his fingerprints were found on the getaway car].)

In our view, the deceptions employed by the officers in this case were not of the type reasonably likely to procure an untrue statement from appellant."

("I'm going to help you to get out of here, I'm going to help you with the detective...." was not a promise of leniency)

In *Briones v. State* (2008) the Appellant claimed he confessed because the interrogator promised to help him, and that he (appellant) thought the interrogator would help him go free. The interrogator did make the following statements to the defendant: ""I'm going to help you to get out of here, I'm going to help you with the detective.... [W]ith the truth, everything will come out right.... [A]t one point in your life, you need to trust someone.... I'm giving you my word as a man.... You need to speak with me and tell me everything, and we'll solve all of this." A short time thereafter, Colunga added: "I will call the detective, call her here. You and I will talk to her and we'll explain to her why.... You have a disease.... But we need to help you." The Court of Appeals found that "These generalized statements of help and comment on the power of truth, however, do not constitute the kind of "if-then ... deal, bargain, agreement, exchange, or contingency" that is of such a nature to cause a suspect to speak untruthfully."

References to suspect's family members

(*Police statements that the defendant's nephew would be released if the defendant "did the right thing" [confessed] and that the police "should have brought your sister down too" were not coercive*)

In *Commonwealth v. Winstead* (September 2015) the Circuit Court of Virginia, Fourth Judicial Circuit, found that statements suggesting the release of the defendant's nephew if he "did the right thing" and confessed, as well as a statement that the police "should have brought your sister down" to the police station were not coercive. From the court's opinion:

Defendant argues that his written confession must be excluded because he did not give it freely and voluntarily. Specifically, Defendant asserts that the interrogating officers coerced Defendant into signing the confession by (1) forcing Defendant to observe his nephew confined in a holding cell, (2) implying that they would release the nephew if Defendant confessed, and (3) commenting about Defendant's sister that they "should have brought her in" to the station. Defendant claims that, as a result of this conduct, his will was overborne and he felt coerced into signing the confession.

Virginia law recognizes that "a confession may be involuntary and hence inadmissible when induced by threats to prosecute members of the confessor's family."… However, "a confession is not *per se* invalid merely because the confessor implicates himself in an effort to secure the best possible disposition of a charge pending against a relative or friend ... it must also be shown that the ... relative was improperly detained or threatened as the means whereby the confession was involuntarily extracted." … As with other arguments as to voluntariness, the inquiry is "whether the defendant's will was overborne

at the time he confessed." … If the defendant's "will was overborne," his or her resulting confession is inadmissible.

In the case at bar, Defendant claims that officers coerced him into confessing by (1) detaining his nephew Jerrell, (2) having Defendant observe Jerrell confined in a holding cell, (3) telling Defendant "if you do the right thing, Jerrell will get to go home," (4) stating to Defendant "you'd be surprised how many people let their family members get arrested," and (5) remarking that the police "should've brought your sister down, too." Defendant argues that these statements constitute implied threats to prosecute Defendant's family members if he did not confess, thereby rendering his subsequent written confession involuntary.

Because both *Hammer* and *Hill* involved threats made by officers to investigate or prosecute an arrestee's family member, these decisions govern the Court's analysis. These cases stand for the general proposition that a confession is not rendered involuntary by an officer's statement implying that the police would investigate or prosecute a member of the defendant's family if that threat could be lawfully carried out and is not accompanied by baseless threats or other deprivations that could overcome the defendant's will.

On balance, in view of the circumstances of Defendant's detention and questioning, Defendant's individual characteristics, and the fact that the police could have carried out their alleged threats, the Court holds that Defendant's confession was not involuntary.

(*Court rejects defendant's claim that he confessed because his family members were threatened with arrest*)

In *Ortega v. Sherman* (March 2016) the US District Court, C.D. California upheld the lower courts rejection of the defendant's claims that he confessed due to police "threats, promises of leniency, and deception." From the District Court's opinion:

Los Angeles County Superior Court jury found Petitioner guilty of first degree special circumstances murder. The jury also found that Petitioner personally discharged a firearm. Thereafter, Petitioner was sentenced to life without the possibility of parole, plus a consecutive 25-year-to-life term for the firearm enhancement.

… Petitioner maintains that the investigating detectives employed three impermissibly coercive tactics that caused him to incriminate himself: threats, promises of leniency, and deception. First, Petitioner contends that the detectives used threats against his family to persuade him to provide incriminating statements about the shooting. In particular, he complains that the detectives effectively told Petitioner that his brother would face murder charges unless Petitioner admitted that he fired two shots at the victim. Petitioner also complains that the detectives threatened to arrest his mother unless he was forthcoming about the shooting and his motives for targeting the victim.

Second, Petitioner maintains that the detectives effectively promised him leniency if he was forthcoming about the shooting. In particular, Petitioner notes that the detectives

stated that Petitioner would appear to be a cold-blooded killer unless he explained why he had shot the victim. According to Petitioner, this statement amounted to a promise that he could avoid being charged with premeditated murder if he explained his motivation for targeting the victim. Simultaneously, Petitioner construes the statement as a threat that he would, in fact, be charged with premeditated murder if he did not explain why he had targeted and shot the victim.

Finally, Petitioner alleges that the detectives coerced him to confess by falsely stating that they knew Petitioner's father and, thereafter, using Petitioner's patently obvious feelings towards his father in order to persuade Petitioner to admit why he had shot the victim. This tactic was impermissibly coercive, according to Petitioner, because he was uniquely vulnerable to it, and the detectives used his vulnerability in an effort to gain his confidence. Petitioner notes that the tactic was highly successful, as the record shows that he cited the purported fact that one of the detectives knew his father as the reason why he ultimately elected to be truthful about the shooting.

The California Court of Appeal rejected Petitioner's coercion claim. In doing so, the court of appeal applied the proper legal standard for analyzing federal law challenges to purportedly coerced confessions.

Here, the court of appeal reasonably concluded that Petitioner's custodial statements were voluntary. Each of Petitioner's allegations of coercion is addressed in turn below.

1. Threats to Family Members

Threats involving an accused's family members can render a resulting confession involuntary…..

Nevertheless, there is no clearly established federal law for the proposition that threats or promises relating to one's family warrant special attention…. Rather, on habeas review, such threats "may be considered as part of the totality of the circumstances" in determining whether the suspect's will was overborne.

Here, the detectives' purported threats to arrest Petitioner's brother and mother did not render any aspect of Petitioner's confession coerced. Like the police in *Hufstetler*, who had reason to believe that the defendant's girlfriend participated in the robbery, the detectives here had good reason to believe that Petitioner's brother was involved in the murder. Indeed, the detectives laid out the evidence that they had amassed against Petitioner and his brother. Moreover, Petitioner's account of the shooting – that he fired only one shot – left only the possibility that his brother fired the second shot. As such, the detectives could not have committed any misconduct by accurately noting the predicament of Petitioner's brother.

2. Promises of Leniency

Inducements generally serve to invalidate a confession…. Not all promises by police, however, impact the voluntariness of a resulting confession. Rather, the "promise must be sufficiently compelling to overbear the suspect's will in light of all attendant circumstances."… Thus, in *Guerrero*, the Ninth Circuit held that an officer's promise both to inform the prosecutor about a suspect's cooperation and to recommend leniency was insufficient to render the suspect's resulting confession involuntary.

Here, a review of the record shows that the detectives made no promises of leniency to Petitioner. Although the detectives repeatedly referred to Petitioner as a cold-blooded killer, those references were not made in the context of a promise for leniency. Rather, they were made in an effort to persuade Petitioner to explain his motive for shooting the victim, rather than insisting that he had no reason for doing so. In particular, the detective indicated that, if Petitioner's explanation were accepted – that is, if there were no motive for the shooting – then Petitioner was essentially claiming to be a cold-blooded killer. Construing that statement as a promise of leniency strains credulity. Regardless, no reasonable person would interpret the detective's statements, when considered in the context that they were made, either as promises of leniency or threats of enhanced charges. Thus, they do not amount to coercion.

3. Deceiving Petitioner about Knowing His Father

Police deception alone will not render a confession involuntary…. Thus, police generally can lie to a suspect about, for example, the extent of the evidence against the suspect or feign friendship with the suspect without fear of rendering the resulting confession involuntary.

Here, the detectives' references to Petitioner's father are no exception to this general rule. At most, the detectives misled Petitioner as to whether they knew Petitioner's father and whether they believed that his father was an honest man. Although these statements were false, they constitute the type of trickery that courts have repeatedly found to be permissible. Moreover, Petitioner has alleged no facts that would support a conclusion that his will was overborne simply by the fact that the detectives knew his father or that they believed his father to be an honest man. Regardless, the detectives invoked Petitioner's father in an effort to appeal to Petitioner's sense of honesty; consequently, there is no reason to believe that the references to Petitioner's father resulted in, or were likely to result in, a false confession.

In short, the detectives made no statements that rendered Petitioner's confession involuntary. Consequently, the court of appeal's rejection of Petitioner's challenge to the admissibility of his pre-trial statements was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court. Petitioner, therefore, is not entitled to habeas relief with respect to this claim.

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(Reference to the possible prosecution of his son did not render the confession inadmissible)

In *US v. Goldtooth* (June 2015) the US District Court, D. Arizona, rejected the defendant's claim that the interrogating officers preyed on his family emotions and thereby coerced him to confess. From the court's opinion:

Defendant and his son were arrested on August 11, 2011, in connection with the robbery for which they were originally stopped. Defendant was interviewed two days later, on August 13, 2011, regarding the murder of Virgil Teller. He was interviewed by FBI Special Agent Matt Shelley and Navajo Criminal Investigator Mike Henderson.

During the interview Agent Shelley recounted information he had obtained, including information concerning disputes within a gang to which Defendant and Virgil Teller belonged. He also mentioned Defendant's son, saying: "I know Gage got some cuts on his hand the same night."... The officer then said: "I mean, anything you can do to enlighten me, get yourself out of a mess--you know what I mean? Because it's not looking too good ... right now."

At this point in the conversation, Defendant asked "[w]here's my son?" ... Agent Shelley responded that Gage was in custody in the same facility, but that Shelley had not yet spoken to him. Agent Shelley then said: "Seem like a guy that looks after your son, right? I mean, I know you guys bang together a little bit." ... A few moments later, the agent said: "But, it seems to me that, you know--seems to me you're kind of protective of your son."... Defendant responded: "Yeah, pretty much." ... Agent Shelley then said: "I'll be quite frank with you, you know, things are kind of looking at him like not so good. And I know he--you don't--you've been in. You don't want him to go in I'm sure. Am I right?"... Defendant said "Yeah."

Agent Shelley stated that a collection of evidence had occurred at Teller's house, including the collection of blood. He noted that not all of the blood was Teller's. He said: "I need to know about it. You know, if it's self-defense or whatever, or if, you know, it just started out as a melee, and just got out of hand, whatever, I just need to know." ... The officer said: "You're in a tough spot. Am I right?"

Defendant asked for a drink of water, and the officers provided it to him. Defendant then said: "My son didn't have nothing to do with it." ... Defendant proceeded to explain that he, his son, and Tsosie went to Teller's house to ask Teller about an altercation that occurred the day before with other gang members. Defendant said he was not going with any ill intent. He said Teller's door was partially open, and when Gage pushed it completely open, Teller swung a machete at Gage, hitting him in the hand and cutting it severely. Defendant noted that he was already intoxicated when he saw Teller "trying to hurt my son[.]"... "I just got out of hand, you know." ... Defendant proceeded to explain that he lost control and stabbed Teller with the knife. After providing the additional detail, Defendant said: "Like I said, my son didn't have nothing to do with it, you know."

Defendant argues that the interrogating officers preyed on his family emotions and thereby coerced him to confess. Defendant relies on three cases.

In *Lynumn v. Illinois*, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963), the Supreme Court reversed a defendant's conviction on the ground that her confession was coerced. The Supreme Court provided this explanation: It is thus abundantly clear that the [defendant's] oral confession was made only after the police had told her that state financial aid for her infant children would be cut off and her children taken from her if she did not "cooperate." These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly "set her up." There was no friend or adviser to whom she might turn. She had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.

In *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963), the Supreme Court reversed the defendant's conviction because his written confession was coerced. The defendant was held for approximately 16 hours while being denied any opportunity to call his wife or attorney. Interrogating officers told the defendant that he would continue to be held with no ability to contact his family or lawyer until he confessed in writing. The Supreme Court explained: The [defendant] at first resisted making a written statement and gave in only after consistent denials of his requests to call his wife, and the conditioning of such outside contact on his accession to police demands. Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family, Haynes understandably chose to make and sign the damning written statement[.]

In *United States v. Tingle*, 658 F.2d 1332 (9th Cir.1981), the Ninth Circuit reversed the defendant's conviction because her confession was coerced. The Defendant was held in the back of a police car and questioned by two officers for an hour... . The Ninth Circuit provided this explanation: In this case, the threat was not as explicit nor as extreme, but the coercive purpose and effect are indistinguishable from that in Lynumn. Agent Sibley recited a virtual litany of maximum penalties for the crime of which Tingle was suspected, totaling 40 years imprisonment. He expressly stated, in a manner that could only be interpreted in light of the lengthy sentences he had described, that Tingle would not see her two-year-old son "for a while." Referring specifically to her child, Sibley warned her that she had "a lot at stake." Sibley also told Tingle that it would be in her best interests to cooperate and that her cooperation would be communicated to the prosecutor. He also told her that if she failed to cooperate he would inform the prosecutor that she was stubborn or hard-headed.

The interrogations in *Lynumn, Haynes, and Tingle* each included an appeal to family sentiments in an otherwise coercive environment. They do not mean every reference to a suspect's family during interrogation renders a subsequent confession involuntary. As the Ninth Circuit has explained, "in extreme cases, appealing to a defendant's moral obligation to his or her family as leverage to coerce is unconstitutional."... The Ninth Circuit further explained that references to family members could, in appropriate

circumstances, be considered a permissible interrogation technique: "Detective Cardwell simply reminded Ortiz of his obligation to his family to tell the truth and that his children were counting on him to do the right thing. These permissible psychological appeals to his conscience, although possibly making him emotional during the interview, do not demonstrate that his will was overborn."

After considering the totality of the circumstances in this case, the Court concludes that Defendant's will was not overborn by the interrogation techniques of the officers. The Court bases this conclusion both on Defendant's characteristics and the details of the interview.

Defendant was 39 years old at the time of the interview. He had a GED degree, was articulate, and had substantial experience in the criminal justice system, including many previous misdemeanor convictions and at least one prior felony conviction. The interview transcript and tape suggest that Defendant fully understood the nature of the interview and the questions that were asked.... Defendant listened to and read the *Miranda* warnings, consented to be interviewed, and signed a waiver of rights form. Questioning by the two officers was not loud, oppressive, or overbearing; it was conversational and friendly.

The discussion of Defendant's son was not an irrelevant appeal to family emotions. His son, Gage, had been arrested with Defendant, in a vehicle where the apparent murder weapon was carried, and had a severe cut on his hand. Defendant admitted that he "banged" with his son, an apparent reference to gang activity, and was drinking and intoxicated with him on the night in question. Discussion of Gage's possible involvement in the murder was thus a relevant and logical line of inquiry, as were questions about Tsosie's possible involvement.

The officers did not threaten Defendant. They did not make promises of leniency toward Gage. They did imply that Gage was a suspect in the murder--a true statement given the facts from the night of the traffic stop--and did appeal to Defendant's interest in protecting his son. But the Court views this line of questioning, in light of all the surrounding facts, as akin to the family-related questions in Ortiz, which the Ninth Circuit found to be a "permissible psychological appeals to [Defendant's] conscience." ... Indeed, a discussion of Gage's involvement was a more relevant and natural topic of inquiry than the mention of family in Ortiz.

Although it is true that the discussion of Defendant's son appears to have been a turning point in the interrogation, this fact is consistent with a desire on Defendant's part to take responsibility for a crime Defendant committed. Defendant not only made clear that his son was not involved in the stabbing, but also that Tsosie was not involved. This suggests that Defendant's confession was an acceptance of his responsibility for the murder, not simply a capitulation to coercive family-related questions. A review of the entire interrogation leaves the Court firmly convinced that Defendant's will not was overborn. This case is distinguishable from the circumstances in Lynumn where officers specifically threatened that financial aid would be cut off to the suspect's children and she

would not see them again unless she cooperated. The suspect was questioned while encircled in her apartment by three police officers and a twice-convicted felon who had set up the purported drug buy, and she was inexperienced in the criminal law and had no reason to disbelieve the threats.

This case is also distinguishable from Haynes, where officers specifically held the defendant incommunicado and told him that he would be permitted to contact his family and lawyer only after he confessed. As the Supreme Court noted, the tactics of secret and incommunicado interrogation were "devices adapted and used to extort confessions from suspects."

This case is also distinguishable from Tingle. The officers in Tingle recited maximum penalties for the crimes being faced by the suspect, totaling 40 years, and then told her she would not see her two-year-old child "for a while." They suggested it would be in her best interests to cooperate and that her cooperation would be communicated to the prosecutor. The interrogation occurred while the suspect was sitting in a police car with two officers. The environment was sufficiently pressurized to cause the suspect to begin sobbing and shaking.

Comparable coercion and pressure were not brought to bear on Defendant in this case. The interview was calm, Defendant was experienced in the criminal justice system, he knowingly waived his rights, no threats were made, and the discussion of his son was a relevant and logical outgrowth of his son's involvement on the night in question. By more than a preponderance of the evidence, the Court finds that Defendant's confession was voluntary.

(*The propriety of utilizing a suspect's family member during an interrogation*)

In *US v. Hufstetler* (March 2015) the US Court of Appeals, First District, examined the issue whether the officers' references to the defendant's girlfriend during the interrogation were inappropriate and, if so, whether such statements overpowered his will. From the court's opinion:

"As he sees it, his interrogators immediately sensed his concern for Craig and then repeatedly referenced her incarceration in order to force his hand. It was only after the officers successfully convinced Hufstetler that Craig's freedom hinged on his willingness to talk, he says, that he finally confessed. He thus insists that the officers infringed upon his constitutional rights.

Over time, there have been several developments in the law applicable to addressing the propriety of utilizing a suspect's family member during an interrogation, as Hufstetler alleges occurred here. Admittedly, the applicability of the decision in any one case to another can be difficult given the fact-intensive nature of the totality-of-the-circumstances inquiry. As a body though, the cases do provide guideposts to aid us in determining whether police conduct in this context crosses the line. We thus begin by laying out a mosaic of cases on this topic before plotting Hufstetler's plea in that panoply

of law.

One cluster of cases implies that the use of a family member uniquely tugs at a suspect's emotions and thus can have an undue impact. Particularly notable here are two Supreme Court decisions. The first, Lynumn, involved officers informing a defendant that her failure to cooperate would result in her losing financial aid for, and custody of, her children.... The Court noted that the defendant had no reason to question the officers' capacity to carry out those threats.... Accordingly, the court deemed the tactics improper and ordered the confession suppressed.

A few months later in *Haynes v. Washington*, 373 U.S. 503 (1963), the Court reiterated this point. There, interviewing officers repeatedly told a suspect that he would be unable to call or see his wife until he wrote out a confession.... Those threats occurred over a number of days and the defendant "gave in only after consistent denials of his requests to call his wife, and the conditioning of such outside contact upon his accession to police demands." .... The Court deemed this improper and, when weighed against the defendant's susceptibility to coercive tactics, found the confession to be involuntary.

Hufstetler points us to a number of cases from the Ninth Circuit which he believes best capture the import of those Supreme Court opinions. The first is *United States v. Tingle*, 658 F.2d 1332 (9th Cir.1981). In that case, the Ninth Circuit evaluated an interrogation in which the suspect was told that she had "a lot at stake" with respect to her child.... The court used the occasion to broadly state that it is impermissible to "deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit cooperation."

In 2011, that court restated this proposition in *Brown v. Horell*, 644 F.3d 969 (9th Cir.2011)--a case that Hufstetler largely clings to here. The Ninth Circuit reviewed an interrogation during which an officer noted that the suspect's ability to see or be with his child was entirely contingent on his cooperation with the police.... They "expressly conditioned [the suspect's] ability to be with his child on his compliance with her questioning." Id. Although the petitioner's ultimate claims were denied under relevant habeas standards, the court still classified such threats as coercive....

At a minimum, these cases illustrate that we must be on alert when an officer utilizes a family member as a tool during an interrogation. Nonetheless, cases from this circuit provide examples of situations where the discussion of a family member was deemed acceptable. The parties emphasize two.

The first is *United States v. Jackson*, 918 F.2d 236 (1st Cir.1990). There, a defendant was arrested for gun and drug offenses but only admitted to possessing the drugs. In an effort to entice the suspect to talk, the investigating officer informed him that his sister was under arrest for the gun violation, and thus his confession could assist her..... On appeal, Jackson argued that the use of the sister in that way was unduly coercive, but we concluded that the statement was neither a direct threat nor promise. .... Moreover, we found that "there [was] no evidence that an especially close relationship existed between

Jackson and his sister, or that Jackson was unusually susceptible to psychological coercion on that account or any other." ... Accordingly, we affirmed the district court's decision that the confession was voluntary.

Recently, we reached a similar result in *United States v. Jacques*, 744 F.3d 804 (1st Cir.2014). In that case, interrogating officers remarked "on the failing health of Jacques's elderly father, suggesting that continued resistance might deprive Jacques of crucial years with his family."... . In response to an involuntariness challenge, we stated that "statements that a defendant's refusal to cooperate may lead to an extended separation from his or her loved ones may contribute to a finding that the defendant's confession was coerced ... [h]owever, the mere fact that a defendant is placed under some psychological pressure by agents does not necessarily render a confession involuntary."... We ultimately concluded that the subsequent confession was voluntary because there was only a single reference to the family member, the suspect's demeanor during the interrogation did not manifest any notable psychological or emotional anxiety, and there was no evidence that he was particularly susceptible to coercion.

Thus, while Lynumn and its progeny counsel us to be particularly cognizant of the risk of coercion when reviewing interrogations where officers invoke references to a family member, our cases also emphasize that discussion of a family member, on its own, is not per se coercive. Instead, we must closely examine the specific manner in which the officer discussed the relative and weigh such references against the defendant's susceptibility to coercion.

When evaluating the propriety of police tactics we consider "the totality of the circumstances," which may include the "length and nature of the questioning," the existence of any explicit or implicit threats, and any deprivation of a suspect's essential needs. ... A promise or threat need not be explicit, but can also result from "[s]ubtle psychological coercion ." ...

Hufstetler accuses the officers of making improper threats or promises. To flesh out this argument, he cites portions of the transcript which, in his view, show the officers conditioning Craig's release on his willingness to confess. Most notably, he quotes: "I certainly don't want to see those kids be without their mother;" "[T]here's obviously different outcomes for [Craig], depending on what it is in the details;" and, "[Y]ou can save her a buck by saying that you didn't tell her what you were gonna go do, but you're not doing that." He thus believes that the officers deliberately preyed on his emotions to force a confession from him.

After carefully reviewing the transcript and listening to the interrogation, we can discern no improper threat or promise. At the outset, we note that the officers had probable cause to hold Craig. In such a circumstance where the referenced relative is both a family member and a co-suspect, probable cause for holding that individual helps to place the officers' statements in context. Without more, an officer's truthful description of the family member's predicament is permissible since it merely constitutes an attempt to both accurately depict the situation to the suspect and to elicit more information about the

family member's culpability.

(Court rejects the suggestion that a loss of visitation rights was coercive)

In *Holland v. Rivard* (March 2014) the US District Court, E.D. Michigan, upheld the lower court's decision to admit the defendant's incriminating statements. From the court's opinion:

The Michigan Court of Appeals rejected the petitioner's claim that a promise induced his confession and found it to be made voluntarily:

The existence of a promise is just one of the circumstances to consider in examining whether, under the totality of the circumstances, the statement was made voluntarily.... Raupp testified that defendant first introduced the topic of speaking with his family, although defendant claims that Raupp brought it up. We find no basis to upset the trial court's determination that Raupp's testimony was more credible on this issue.... Considering that Raupp had no knowledge of defendant's other crimes before defendant told him, Raupp had no reason to promise defendant anything in order to obtain a confession. In fact, Raupp was unaware that there was even a possibility of obtaining a confession or confessions. In addition, Raupp did not have the authority to grant defendant's request to see his family. To the extent that there was any promise, it was merely Raupp's promise to pass along defendant's request to see family to Raupp's supervisors. Accordingly, the record does not support a finding that defendant was induced or coerced into making the incriminating statements, and the trial court did not err in holding that defendant's incriminating statements were not improperly induced by a promise.

The Supreme Court has held that a combination of threats and promises may be sufficient to overbear an interviewee's will and constitute impermissible coercion.... The circumstances in *Lynumn* are distinguishable from those presented in this case. In *Lynumn*, the defendant was interrogated in her apartment while surrounded by three police officers and a police informant. The officers threatened that if she did not cooperate, state financial aid for her infant children would be cut off and the children would be taken from her. In this case, the petitioner was not facing threats to the physical and financial well-being of his minor children, or, for that matter, of his mother and fiancee. His desire to prepare his loved ones for his planned confession does not render the confession involuntary or the police conduct coercive. Individuals confess for a host of reasons. Law enforcement officers are not required to attempt to parse out or identify an individual's motivations for testifying.... Here, there is no indication that the petitioner was threatened in any way. Access to loved ones may certainly be reasonably restricted during incarceration. There is no indication that police threatened the petitioner with any loss of visitation unrelated to the fact of his imprisonment.

(Invocation of defendant's children as a method to get a confession ruled not coercive)

In *State v. Arriaga-Luna* (2013) the Supreme Court of Utah reversed the lower court's

decision that the defendant's confession was coerced because of the interrogating officers' "invocation of Mr. Arriaga-Luna's children as a method to get a confession." From their opinion the Supreme Court stated the following:

"As the U.S. Supreme Court has long held, "certain interrogation techniques, either in isolation or as applied to the unique character of a particular suspect, are so offensive to a civilized system of justice that they must be condemned," and confessions resulting from them are inadmissible.... Threats or promises render a confession involuntary if, in light of the totality of the circumstances, they overcome a defendant's free will.

In *Lynumn v. Illinois* ... and *United States v. Tingle*... the defendants' confessions were held to have been coerced because the interrogating officers made threats regarding the defendants' children. The police officers in Lynumn encircled a single mother and told her that she would not see her children again unless she admitted to being a drug dealer.... The officers also told Lynumn that her children's government assistance would be withdrawn unless she confessed.... The U.S. Supreme Court held that the threats regarding Lynumn's children, viewed in light of her lack of experience with criminal law and lack of counsel, overcame her free will and produced an involuntary confession....

In *Tingle*, the Ninth Circuit held more broadly that "[w]hen law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit 'cooperation,' they exert ... 'improper influence' "... police interrogated a young mother who was suspected of bank robbery and told her that she "would not see [her] child for a while if she went to prison."

Although we recognize that the intense loyalty and emotion present in most parent-child relationships does provide an opportunity for coercion, we do not adopt any per se rule regarding the effect of references to a defendant's children on the voluntariness of a confession. The ultimate test in any case involving the voluntariness of a confession is whether the defendant's will has been overcome under the totality of the circumstances.

The detectives appealed to Mr. Arriaga-Luna's love for his daughters in three primary ways. First, during the initial interview Detective Arenaz told Mr. Arriaga-Luna, "You're not gonna see [your children]. You're ... you're gonna be locked in prison the rest of your life." We have held that officers may not threaten a harsher punishment if a defendant does not confess or promise a lighter punishment if the defendant does confess.... Here, Detective Arenaz made the statements while attempting to coax Mr. Arriaga-Luna to implicate his brother or say that the killing was accidental--not while persuading him to confess to murder. Furthermore, these statements were not improper threats because Mr. Arriaga-Luna in fact faced prison time if found guilty of murder, and separation from one's children is a natural consequence of being in prison. Detective Arenaz did not suggest that Mr. Arriaga-Luna would be able to see his children only if he confessed.

Mr. Arriaga-Luna argues that Detective Arenaz's statement was a veiled, indirect threat that he must cooperate in order to see his children. We recognize that implicit threats can constitute psychological coercion and overcome a defendant's free will. However, here,

the context of the detective's statement clarifies that the statements were not implicit threats but rather factual communications that if Mr. Arriaga-Luna implicated his brother and his brother was found to be the sole murderer, Mr. Arriaga-Luna would not "be locked in prison for the rest of [his] life." Similarly, if the killing were entirely accidental, Mr. Arriaga-Luna would likely be set free. We also note that Mr. Arriaga-Luna did not confess during this interview, which suggests that the officer's statements did not overcome his free will....

In the second interrogation two days later, Detective Hamideh employed the false-friend technique. Among other things, Detective Hamideh told Mr. Arriaga-Luna, "But yes, I can bring resources there so that [your daughters] can be educated and break the cycle here."

When defendants are concerned for the safety and welfare of their families, law enforcement can inform defendants of public and charitable resources. However, officers should limit themselves to factual statements and not imply that aid for defendants' families is contingent on a confession. Here, Detective Hamideh strayed close to the line by making a personal offer to help Mr. Arriaga-Luna when he said "I can bring resources." However, it is clear from the full transcript that the officer made the statement about resources in response to Mr. Arriaga-Luna's inquiry about what would happen to his daughters, and not in exchange for a confession.

Detective Hamideh also urged Mr. Arriaga-Luna to "give [your daughters] hope that yes, I did what I did.... And I am going to take the time, until--until that point.... And after that point--'Girls. We are going to be together.' But free." Detective Hamideh also told Mr. Arriaga-Luna, "I think that their daddy--their daddy can say, 'Yes. I did make a mistake. But I have my dignity because I told the truth.' " Thus, the detective urged him to confess to earn the respect of his daughters.

Such appeals to a defendant's sense of morality and responsibility are usually non-coercive..... The totality of the circumstances show that Mr. Arriaga-Luna's free will was not overborne. Accordingly, the trial court erred in granting Mr. Arriaga-Luna's motion to suppress his confession. We reverse and remand for further proceedings consistent with this opinion.

(The interrogator's statement to the defendant that he would get help for the defendant so that he could retain custody of his children does not represent a promise that would nullify the confession – detailed discussion of acceptable investigator statements and approaches)

In the case of *State v. Farnsworth* (2007) the Supreme Court of Minnesota overruled the District Court that found that such a statement would render the confession inadmissible. The Supreme Court stated:

Farnsworth argues that Schmitz's promise to get Farnsworth help so that Farnsworth could retain custody of his children was so coercive that even an innocent person would

falsely admit to having sexually abused his children. Farnsworth emphasizes that shortly after Schmitz promised him "help," he admitted that all of B.P.'s accusations were true without knowing what the accusations were, and he argues that his willingness to do so illustrates the coercive nature of the interview. The state argues that Schmitz's comments were not so inherently coercive that an innocent person would confess to the crime of child sex abuse. The state further contends that Schmitz's statements were well within the parameters of acceptable officer behavior established by this court...

The district court concluded that while many of the relevant factors outlined in Jungbauer suggested that the confession was voluntary, Schmitz's statement that he was trying to get Farnsworth "the best help [he could] so you can have your kids still" was so inherently coercive that it would cause an innocent person to confess, and that the confession was involuntary. After reviewing the relevant factors, we conclude that Farnsworth's statement was voluntary and the district court erred in ordering suppression...

We next conclude that the nature of the interrogation was not so coercive as to render the confession involuntary. It is true that Schmitz did offer Farnsworth help. But we have recognized that "the police must also be allowed to encourage suspects to talk." State v. Merrill, 274 N.W.2d 99, 108 (Minn.1978). Moreover, we have acknowledged that the use of an empathic approach when interviewing the suspect does not alone make a confession involuntary. Pilcher, 472 N.W.2d at 333. In the context of the interview, many of Schmitz's statements to Farnsworth, such as "Honesty is the best thing. * * * I thought * * * I'll bring him in Monday and listen to his story and try to get you some help because that's what you need," and "we are gonna talk about what happened, why it happened, where it happened, when it happened and then we are gonna get you some help," can be construed as efforts to encourage conversation. We do not believe that Schmitz's statements, together with the other circumstances surrounding the interview, were so coercive, manipulative, or overpowering as to deprive Farnsworth of his ability to make an unconstrained and wholly autonomous decision to speak. Schmitz's statements contained no explicit or implied promises. Rather, Schmitz's statement implied that people who commit child sex abuse need and should receive help. The nature of the questioning does not suggest that Farnsworth was led to believe that Schmitz occupied something other than an adversarial role as a questioner. In fact, Farnsworth's own statements, indicating that he was going to jail and going to lose custody of his children, illustrate Farnsworth's understanding of Schmitz's role in the interview. See Pilcher, 472 N.W.2d at 333-34 (concluding that the use of a sympathetic approach does not alone render a confession involuntary where the defendant exhibited a wariness of police tactics).

We have held that offers of help do not make a statement involuntary as long as the police have not implied that a confession may be given in lieu of criminal prosecution. See State v. Thaggard, 527 N.W.2d 804, 812 (Minn.1995); State v. Slowinski, 450 N.W.2d 107, 111-12 (Minn.1990). In Slowinski, we concluded that, even though the arresting officers had improperly suggested that they had influence with the county attorney to argue for psychiatric help, the defendant's confession was voluntary because the officers did not promise the defendant that he would receive psychiatric help instead

of being sent to prison. 450 N.W.2d at 112. Similarly, in Thaggard, we upheld the voluntariness of a confession because even though the defendant thought he might receive drug treatment, he understood the Miranda warnings and knew that what he said could be used against him, and the defendant was never told, nor did the officer imply, that he would not be prosecuted if he gave a statement. 527 N.W.2d at 811-12. In contrast, in State v. Biron, we concluded that the confession was involuntary where the defendant was expressly told that if he *375 cooperated the police would have his case brought before juvenile court, but that if he did not, they would not consider seeking juvenile court proceedings. 266 Minn. 272, 277-78, 282, 123 N.W.2d 392, 396, 399 (1963).

We conclude that in this case Schmitz's actions were more similar to those of the officers in Slowinski and Thaggard than Biron. Schmitz's statements contained no explicit or implied promises that Farnsworth would not be prosecuted if he confessed, and Schmitz in no way indicated that he had special influence with the district court. Moreover, nothing in Schmitz's statement that he was trying to get Farnsworth "the best help [he could] so you can have your kids still" indicated that if Farnsworth did not confess he would certainly lose custody of his children, whereas if he did confess, he would be able to retain custody. In fact, none of Schmitz's statements amounted to "persuasive arguments calculated to induce a confession." Biron, 266 Minn. at 282, 123 N.W.2d at 399. Rather, Schmitz's general offers of help seemed to be efforts to encourage Schmitz to talk-a tactic that we found permissible in Merrill.

(A statement to the defendant that his children would be removed from the house unless he cooperated with the investigation did not render the confession inadmissible)

In *Stanton v. Commonwealth* (2011) the Supreme Court of Kentucky found that such a statement in the particular circumstances was not problematic. The court stated the following:

"In sum, the Fourteenth Amendment prohibits interrogation tactics calculated to overbear a suspect's will and to produce confessions involuntary in the sense that the suspect's capacity to choose has been distorted and critically impaired. The United States Supreme Court has held that threats to deprive a parent of his or her child unless the parent "cooperates" with investigators can run afoul of that prohibition. Here, however, unlike the cases in which a parent suspect has been threatened with an ultimate and speculative loss of a child and has been given to understand that "cooperation" will avert that loss, Stanton was merely informed that as matters stood the sexual abuse allegations against him would require those involved in the investigation to seek a court order separating his children from further contact with him, pending the investigation. This warning was not a speculative threat of ultimate loss of Stanton's children, but an accurate statement of what was apt to happen next in such cases, and as such it did not amount to overreaching by the state agents involved and did not pressure Stanton to such an extent as to impair his capacity to choose. Simply put, his admissions were not coerced by improper conduct."

(Court rejects defendant's claim that his confession should have been suppressed because he confessed in exchange for a promise of a family visit)

In *State v. Maciel* (2010) the Court of Appeals of Arizona affirmed the trial court's decision to admit the defendant's confession, even though he claimed that he confessed in return for a promise of a family visit. In making their decision the court stated that, "We find *State v. McVay*, 127 Ariz. 18, 617 P.2d 1134 (1980), dispositive of defendant's arguments.

In McVay, our supreme court found two factors that undermined the defendant's argument in that case that his confession was coerced by the investigating officers' promise of his removal from an isolation cell. 127 Ariz. at 20, 617 P.2d at 1136. First, the court held that, when an alleged promise is couched in terms of a "mere possibility or an opinion," it cannot be deemed a sufficient "promise" so as to render a confession involuntary. Second, the court concluded that when the defendant initiates the "deal" or "promise" that was solicited in exchange for the confession, that "promise" cannot be viewed as interfering with the defendant's "exercise of a free volition in giving the confession." Id. at 20-21, 617 P.2d at 1136-37. Those factors apply to undermine defendant's arguments in the present case as well.

Here, the evidence shows that defendant initiated the "deal" when he, unprompted, informed M.B. that he wanted to confess to a murder in exchange for a family visit. Defendant did not dispute that he initiated the deal in his motion to suppress. Having chosen to initiate a deal, "freely and voluntarily," defendant cannot now maintain that in accepting the deal he was the victim of coercive influences."

(A statement to the defendant that "if his girlfriend was charged, and if she stayed in jail, there was a possibility that social services could take her children away" was not coercive)

In *State v. Brock* (2010) the Court of Appeals of Wisconsin upheld the admission of the defendant's confession, even though he was told that "if his girlfriend was charged, and if she stayed in jail, there was a possibility that social services could take her children away." In their opinion the Appeals Court stated that:

"Brock argues that Lynumn v. Illinois, 372 U.S. 528 (1963), requires suppression of his statement. Lynumn held that threats that a mother's children would be taken away from her unless she "cooperated" "must be deemed not voluntary, but coerced." Id., 372 U.S. at 534. Lynumn is inapposite because in that case the defendant was threatened with the loss of her children if she did not confess. Id., 372 U.S at 530-534, 544. Here, however, Panasiuk told Brock that if his girlfriend was charged, and if she stayed in jail, there was a possibility that social services could take her children away. Under established law, absent a showing that such a scenario was impossible or feigned, the explanation of what could happen to a third person does not make the defendant's confession coerced."

("If you don't tell the truth you will go to jail and lose your family" – not a threat)

In *People v. Montes* (2009) the California Court of Appeal, Second District, upheld the trial court's decision to admit the defendant's confession. On appeal the defendant claimed that his confession was coerced as a result of police threats and promises.

"Throughout the interview, the detectives encouraged Montes to tell the truth. Otherwise, they warned him he could face a significant prison sentence and lose his family. Among other things, they told him:

"Your wife will meet somebody else, somebody else will be at Christmas with your daughters, there will be someone buying them gifts calling them Mija, and sitting on their lap and being there for her Quincenera, and taking the rest of it, they'll be calling him daddy, and you'll be in Pelican Bay, which is about eight-nine hours drive north."

"But here's the deal. Here's what happens on my job now. Tomorrow I go down to see the District Attorney and I tell the District Attorney, okay, I picked up Jorge last night, uh I would say Jorge is a hard head, didn't want to talk to me, which if [sic] your right I agree. Jorge doesn't want to talk to me, um, so do what you got to do. And what they're going to do is they'll research the case and what, what that scenario I just went down with you. I'll say, well I talked to Jorge, I don't think Jorge is the shooter, I already told you I don't think you're the shooter, okay? I think out of the people in that car you were the least culpable of anybody.... I think Jorge got suckered into something and he's kind of fucked. But I talked to Jorge, we explained everything, he told me exactly what happened, we need to work with Jorge. Now, I can't make any promises. No promises. I'll get you a promise. Actually right now I'll get on the stand and say I don't think you're the shooter. That's what I'm going to do.... But what I want to do is I want you to tell me what happened out there, of why you were there. I'd much rather have you come to court and say, okay, I was there, I drove the car, blah, blah, blah, blah, blah, but I didn't do this shit because I didn't know this shit was going to happen. I think you got suckered into this.... Now, what happened is, there are different kind of charges here. You can go to jail for attempt (sic) murder, (unintelligible) gun, which is a big charge, they can basically charge you with an ADW, they can make you an accessory, um they can do this, I can't do this ... or the D.A. can say you know what? I'd rather have Jorge as a witness, make him a witness. Okay? And, and use you there. But that's a deal that they would have to work out between you and your attorney. That's between them, I can't do that. I can only feed them the information on what to do here."

The Court of Appeal found that "Indeed, our review of the record shows that neither the detectives nor the polygraph examiner made any promises of leniency. To the contrary, Detective Smith repeatedly told Montes that he could not make any promises and that it was up to the district attorney to decide whether to make Montes a witness or to prosecute him. The only promise the detectives made was to pass any information they gleaned from Montes to the district attorney. The record also fails to show any threats by the detectives that the district attorney would learn of his refusal to cooperate which

would result in some further harm to his case. We find no error in the trial court's decision to allow the jury to hear Montes' admissions."

(Court rejects claim that threat to prosecute the defendant's sister coerced the confession)

In *Hill v. Virginia* (2008) the defendant claimed that he confessed because the interrogator threatened to prosecute his sister for possession of the cocaine unless he claimed ownership. The Court of Appeals upheld the trial court's decision that the confession was voluntary. The Appeals court stated, in part, "Here, appellant's sister was already validly arrested pursuant to probable cause. The question is whether a promise to forgo a valid prosecution against a lawfully charged party is coercive. We find that appellant's desire to extricate his sister from a valid arrest does not in itself render his confession involuntary."

(Statement that the defendant needed to consider whether she wanted the chance to be with her son someday was not coercive)

In *Gomez v. State* (2008) the "Appellant contends that Muniz [the interrogator] made comments regarding appellant's son that were meant to induce appellant to confess. Specifically, appellant contends that Muniz stated that it would be better for appellant to cooperate, that appellant needed to consider whether she wanted the chance to be with her son someday, and that she needed to take advantage of the opportunity that the police were giving her to tell the truth." At one point Muniz said "And all of that, what happened, unfortunately already happened ... I'm just telling you what it is ... and that you accept responsibility, and if you really love your child, the way you love him ... and maybe you want a future with your son ... here is the opportunity." The Court of Appeals concluded that "Muniz did not induce or attempt to induce appellant into providing a confession in exchange for any promised benefit." Click here for the complete opinion.
(Statement by interrogating officers that Child Protective Services would have to remove defendant's son from her house unless they could determine exactly what happened to her infant daughter was not coercive)

In *People v. Sanabria* (2008) the Supreme Court, Appellate Division, Second Department, New York found that the statement by interrogating officers that Child Protective Services would have to remove defendant's son from her house unless they could determine exactly what happened to her infant daughter was not untrue or so fundamentally unfair as to deny defendant due process or raise danger that she would falsely confess, and thus did not render defendant's confession involuntary, where defendant was in custody for grievously abusing her daughter, and Child Protective Services already had obtained from Family Court order of protection directing defendant to stay away from her home and her children.

(Police may make truthful statements that impact a child or loved one without rendering a defendant's statement involuntary)

In *US v. Gorman* (2008) "Gorman claims that he would not have made any statements if police had not threatened to take his child into state custody and he did not voluntarily waive his *Miranda* rights. He asserts that police threatened to contact the Oklahoma Department of Human Services ("DHS") and take his child into custody if he did not talk to police. Based on his testimony, it appears that the alleged threat was not made directly to defendant but, instead, by a female officer talking to Carreiro in the front yard. He claims that the female officer made "ignorant" and "rude" comments to Carreiro and Gorman's child and told the child that everyone at the home would be "sleeping next to strangers" that night. The female officer, Sokoloski, testified at the suppression hearing. She admitted that she made statements to Carreiro about taking the child into state custody because of the condition of the home, such as the lack of any light source in the child's room, and the existence of dangerous contraband and a weapon within reach of the child. She also testified that she spoke to defendant after he had received a *Miranda* warning and asked him about the poor condition of the home. She described her tone as firm, but she felt it was necessary to say something. Both Sokoloski and Leatherman testified that police have the authority to take a young child into protective custody, and this was not an empty threat.

"Based on Sokoloski's and Leatherman's testimony, police could take defendant's child into protective custody if they feared for the safety and well-being of the child, and these were not idle threats. Police found a loaded firearm within reach of a child and marijuana in an unlocked box on the floor. Combined with other unsafe conditions in the home, such as the lack of any light source in the child's room, police had a legitimate reason to be concerned about the child's safety. Police may not threaten to remove a person from a loved one for the purpose of coercing a confession. See United States v. Tingle, 658 F.2d 1332, 1336-37 (9th Cir.1981). However, police may make truthful statements that impact a child or loved one without rendering a defendant's statement involuntary. United States v. Jones, 32 F.3d 1512, 1517 (11th Cir.1994) (statement by police that the defendant's girlfriend would also be considered a suspect if the defendant refused to cooperate was truthful and not a ground to suppress the defendant's statements as involuntary). The mere fact that Sokoloski made statements about placing defendant's child in DHS custody does not require suppression of defendant's statements claiming ownership of the firearm and marijuana."

(Dr. Richard Leo testimony that threatening to arrest a suspect's girlfriend or to have the suspect's child removed in order to gain access to the suspect's residence would qualify as coercive threats was rejected by the court)

In *People v. Muratalla* (2007) Dr. Richard Leo suggested that the defendant's consent to search may have been given as the result of improper police questioning techniques. The Court of Appeals decision stated that "Leo opined that threatening to arrest a suspect's girlfriend or to have the suspect's child removed in order to gain access to the suspect's residence would qualify as coercive threats. Such threats, if used to gain consent, would also affect the suspect's subsequent perceptions about whether the suspect should make statements during an interrogation." The trial court found that "under the totality of circumstances, Muratalla's consent to search was voluntary. The court found that

assuming the officers had discussed the possibility of having DCFS take custody of the children and had handcuffed Dorame in Muratalla's presence, such conduct did not induce Muratalla "to do something that he otherwise might not have done." The court noted that it would have found Muratalla's consent to have been involuntary had the officers said to Muratalla that his son would be removed by DCFS and his girlfriend would be arrested unless he agreed to the search of his residence. But in the absence of such a direct threat by the officers, the trial court concluded that Muratalla's consent was obtained without police coercion." The Court of Appeals, 2nd Disrtict, California affirmed the trial court's decision.

Physical factors to be considered re confession inadmissibility

(*Defendant suffering from withdrawal is capable of giving a voluntary confession*)

In *Kott v. Cain*, *Warden* (October 2015) the US District Court, E. D. Louisiana upheld the trial court's decision to admit the defendant's incriminating statements and rejected his claim that because he was suffering through withdrawal from painkillers he was not capable of giving a voluntary statement. From the court's opinion:

Kott alleges that the inculpatory statements he made to police were the result of police coercion, because the officers withheld his medication which caused him to go into withdrawal. According to Kott, he was addicted to his legally prescribed painkillers, which he admittedly abused, and was in severe withdrawal after hours of interrogation. Kott alleges that he asked for his medication multiple times, and that the police offered him his medication in exchange for a confession—thus, the statements that he made were not given voluntarily, but rather as the result of police coercion.

The state trial court properly conducted a full evidentiary hearing on the admissibility of the inculpatory statements, and took the issue under advisement before issuing an opinion on the matter. The trial court received testimony from the officers, as well as evidence in the form of a waiver-of-rights form and the written statements. The trial court concluded that while Kott certainly wanted his pills, the police did not use them to induce or coerce his confession.

(Court rejects defendant's claim he confessed because of the physical problems and confusion caused by his diabetes)

In *US v Sturdivant* (August 2015) the US Court of Appeals, Seventh Circuit rejected the defendant's claim that he confessed because of the "obvious physical distress" his diabetes caused, as well as his claim that his confession was coerced because the police lied to him about the DNA evidence. From the court's opinion:

Sturdivant asserts that the "most significant" factor demonstrating that his confessions were coerced was the "relative indifference" that the officers displayed to his diabetes and the "obvious physical distress it caused."
Two interview sessions occurred on April 28. During the first session, Sturdivant made

an unrecorded oral confession to his involvement in the robberies; during the second session, he made a video recorded confession to the same. Between these two interview sessions, Sturdivant vomited while speaking to his mother. This fact, he asserts, demonstrates that he was suffering from the effects of diabetes when he made his confessions. In support of his claim, he points out that his mother, Thomas, testified that vomiting generally indicated that Sturdivant's blood sugar was "[v]ery, very low."

Although Thomas testified that she would "always know" if her son's diabetes was under control, she never expressed any concern, or otherwise told officers, that Sturdivant was ill, that he needed sugar or insulin, or that he was suffering from the effects of diabetes; nor did she testify that her son was indeed suffering from the ill effects of diabetes at the time he vomited. At any rate, even if Sturdivant's diabetes caused him to vomit, the record does not support the conclusion that Sturdivant's confessions were the involuntary product of coercion. With respect to his initial confession, which occurred before he vomited, Sturdivant did not tell the officers that he was suffering from the effects of diabetes or ask for his insulin... and neither of the interviewing officers, Sandoval and Moore, saw any signs that Sturdivant was suffering from the effects of diabetes--he was not sweating, did not appear confused, and was able to articulate and recount the details of the robberies. As for his second confession, Sturdivant confirmed on video that he was in the right frame of mind, was "feeling alright," and that he understood what was going on. Furthermore, after viewing the video recorded confession, we agree with the district court's findings that Sturdivant was attentive; he seemed to understand all of the officers' questions and was able to articulate clear answers, he did not appear to be ill, and he did not appear to be suffering from any sort of weakened mental condition. Also evidencing that Sturdivant had his mental faculties about him when he gave his second confession is the fact that, shortly before he vomited and merely hours before the second confession occurred, he was able to direct officers in a very clear, very concise, and very matter of fact manner to the gun he discarded the prior day. In sum, there is no basis to conclude that Sturdivant's diabetes led to an involuntary confession.

Sturdivant next argues that he was coerced by Sandoval's false representations that officers had recovered Sturdivant's DNA from the crime scene. This argument is also unpersuasive. "[W]e have repeatedly held that a law-enforcement agent may actively mislead a defendant in order to obtain a confession, so long as a rational decision remains possible." ... Sandoval's statement, although false, did not override Sturdivant's free will and coerce him into confessing. In fact, when confronted with the false DNA evidence, Sturdivant denied his involvement in the robberies, and he continued to deny his involvement for the remainder of the interviews that occurred on April 27, when the false statement was made.

Given the standard of review to which we must adhere, and the manner in which Sturdivant conducted himself on video, we see no reason to upset the district court's finding on this point.

(Intoxication (methamphetamine ice, cocaine and beer) did not render incriminating statements inadmissible: value of video)

In *US v. Hernandez* (May 2015) the US Court of Appeals, Sixth Circuit, upheld the admissibility of the defendant's incriminating statements, even though he claimed that he had smoked methamphetamine ice, snorted cocaine and consumed a 24-pack of beer before he was questioned. From the court's opinion:

"The March 13, 2013, interview was video recorded, and the recording of Hernandez's interview was played for the district court. ... The district court announced its decision in open court, stating, The 13th, according to Mr. Thomas [the investigator], and according to the recording here, the videotape, that Mr. Hernandez was advised of his *Miranda* warnings. That he did, in fact, sign and acknowledge a waiver of his rights.

Mr. Thomas further stated that Mr. Hernandez appeared to be able to know what was going on. He was calm and collected, able to respond. In my opinion, based upon my review of the tape, it did not appear that Mr. Hernandez was fidgety or in any way unable to answer the questions or understand the questions. He never said, huh or what, or I don't understand, or let me stop. He answered the questions about his telephone. In fact, he refused to give the officer the code to his telephone. I think he mentioned it later. The questions that were asked of him about his bringing the drugs or having drugs didn't appear to be at any time to be uncertain or unable to answer the questions.

Mr. Hernandez does state that he had taken both ice and cocaine and alcohol all on that evening before they came, before the officers came into the room. In fact, according to his testimony, he had been on it for about 30 days. Which in that time period you would have imagined that Mr. Hernandez could not have even been able to do anything if he would have been in that shape. However, he was able to obtain a room. He moved his belongings from one room to the other, or somebody did. He came into the room and apparently was quite lucid about what he recalled from the evening before.

So as Mr. Thomas indicated, a lot of what his impact upon somebody's ability to function, even under the influence, is how long they've been doing it, the strength, things of that nature. And obviously, Mr. Hernandez apparently was someone who was a frequent drug user, very frequent drug user, and could-obviously, was able to conduct his affairs and his business during that period of time even when he was under the influence. So based upon what I've seen both in the statements--excuse me, in the video tape, the communication between Mr. Thomas and Mr. Hernandez, the court finds that Mr. Thomas--I mean, Mr. Hernandez was lucid, was able to communicate, and that his statements given to Mr. Thomas on that evening were voluntarily given following his signature on the *Miranda* warning rights waiver, and I find that they were voluntary, and his consent was voluntary as well.

Hernandez argues that the district court erred when it permitted the use at trial of statements that he made during his interview with law enforcement agents after he had been advised of his *Miranda* rights and signed a waiver of those rights on the morning of March 13, 2013. He maintains that his waiver and his statements could not have been made knowingly, intelligently, and voluntarily because he was so heavily intoxicated as

the result of heavy drug and alcohol consumption on the evening of his arrest, more than twelve hours before the interviews were made. He intimates that Agent Thomas coerced him, taking advantage of his intoxicated state. We conclude that the district court did not err when it denied Hernandez's motion in limine and permitted the statements to be used at trial.

The district court viewed the video recording of the interview and observed that Hernandez was neither "fidgety" nor unable to understand or answer questions posed to him by law enforcement agents and that he did not appear uncertain during the course of the interview. Having observed Hernandez's testimony and having heard all of the evidence, the district court's conclusion that Hernandez's function was not as impacted by his use of drugs and alcohol as he claimed was properly supported by the evidence available."

(Defendant claims statements were involuntary because he had been given morphine, hydrocodone and promethazine)

In *Williams v. Stephens* (June 2014) the US District Court , N.D. Texas, the court upheld the admissibility of the defendant's incriminating statements. From the court's opinion, "In his second ground for relief, Petitioner asserts that his statements to the police were involuntary because he had been given "mind altering" drugs, i.e., morphine, hydrocodone, and promethazine, for pain prior to making the statement…. He also claims, in his first ground for relief, that his statement was involuntary because the police officer who took his statement threatened his sister with criminal charges.

During the first of the two-day hearing on the motion to suppress, Detective Thompson testified that he spoke to the medical staff about Petitioner's mental state, and that the attending nurse told him that Petitioner was not under any type of medication that would impair or hinder his ability to talk and make judgment calls. He also testified that Petitioner appeared lucid at the time of both statements and gave appropriate answers to Thompson's questions…. Thompson acknowledged speaking to Petitioner's sister at the hospital to gather information. He denied telling her she was a suspect, threatening to handcuff her, speaking to any of Petitioner's family members about being suspects, telling Petitioner that one of his family members was a suspect, or threatening to arrest a family member.

Bill Jones, the nurse administrator at Parkland, testified that he witnessed Petitioner make the second statement to police. He signed the statement, along with Petitioner and Thompson. Before the statement, Jones spoke to Petitioner to make sure he was coherent, lucid and not under duress. He asked Petitioner if he knew what he was about to do, and whether the police had anything to do with him deciding to make the statement. Petitioner stated that he knew what he was doing. (Supp. R.[5/8/09]:47–49). After Petitioner made his statement and the police officer began to read it back, Jones asked Petitioner whether he realized the implications of making the statement, and Petitioner said that he did. *Id.* at 49–50. Jones did not believe that Petitioner was suffering from any delusions; he believed that Petitioner was able to make an independent, informed

decision. *Id.* at 50. After the statement was taken and the police left the room, Jones against asked Petitioner whether anyone did anything to cause him to make the statement, and Petitioner said no. *Id.* at 55.

The record shows no coercive police conduct on the part of Detective Thompson, or any other officer, that would render Petitioner's two statements involuntary. Contrary to his assertion, he only received morphine in doses that were below what the defense expert considered normal dosage for Petitioner's size, and there was no evidence that Petitioner suffered mind-altering effects from this dosage. His second statement was coherent, related the facts in a cohesive manner, referred to the first statement, and was similar in parts to it. Finally, there was no evidence at the motion to suppress hearings that Petitioner was either suffering extensive pain or was overly encumbered by hospital equipment. The nurse administrator took steps to ensure that Petitioner understood what was happening and wanted to speak to the police. After speaking to the detective, the statement was read to Petitioner, and he read the statement himself and signed it. Petitioner's claim that his written statements were involuntary is without merit and should be denied."

(Influence of Xanax)

In *US v. Taylor* (2013) the US Court of Appeals, Second Circuit over ruled a lower court and found that due to the defendant's physical condition at the time of the interrogation his confession was not made voluntarily. From their opinion, "Taylor claims he was mentally incapacitated during the April 9 interview because of the quantity of Xanax pills he ingested immediately before his arrest. That claim finds support in the record. Detective Burch testified that Taylor's body "was somewhat shutting down," and that "at that time that he was answering questions ... his body was giving up on him." ... Granted, Burch also testified that, when Taylor was speaking, he was "coherent" and understood what was going on when he was not nodding off. Id. But it nonetheless appears that Taylor fell asleep at least two or three times during the interview, and the officers repeatedly had to awaken him, or (to use the nicer term) "refocus" him--at one point coaxing him, "Mr. Taylor, you have to answer our questions and focus with us."... Agent Tomas corroborated that Taylor was "a little bit out of it" and dozing off.

The district court credited testimony that Taylor was coherent at times. One such interval is when Taylor signed the "advice of rights" form on April 9, a finding that we do not disturb. But as that interview progressed, it became clear to the officers (as their testimony confirms) that Taylor was in and out of consciousness while giving his statement, and in a trance or a stupor most of the time when not actually asleep. Thus, the officers' persistent questioning took undue advantage of Taylor's diminished mental state, and ultimately overbore his will. Accordingly, we conclude that Taylor's statement on April 9 was not voluntary and should have been suppressed."

(Expert testimony allowed on the impact of opiate addiction on confession reliability)

In *State v. Granskie* (2013) the Superior Court of New Jersey, Appellate Division, upheld

the lower court's decision to allow expert psychiatric testimony concerning the potential impact of the defendant's opiate addiction and withdrawal symptoms on the reliability of his confession. From their opinion:

"Defendant was suspected of participating in a brutal sexual assault and murder. Two of his friends confessed to their involvement, but did not implicate defendant. He initially denied any involvement in the crime. However, a few days later, while he was in jail on an unrelated warrant, he confessed. Prior to his trial, defendant claimed that the confession was not voluntary and was unreliable, because he was suffering from severe heroin withdrawal symptoms at the time he gave the statement.

... the trial judge held that at an upcoming *Miranda* hearing and at trial defendant could present an expert psychiatrist to testify about the possible relationship between his heroin withdrawal and his confession. The expert would be permitted to testify that defendant was addicted to heroin and was suffering from withdrawal when he gave his statement to the police, and that his claims about the effects of withdrawal were "consistent with his claim that he was giving an unreliable statement at the time" of his confession, "given his history of issues with heroin dependence."

On this appeal, the State characterizes the trial judge's decision as a departure from established case law. We disagree. His ruling was consistent with settled precedent upholding a defendant's right to present expert testimony designed to explain to the jury why a particular defendant's psychological condition would make that defendant vulnerable to giving a false confession. By contrast, courts have routinely rejected efforts to present expert testimony concerning the phenomenon of false confessions in general or the impact of police interrogation methods in producing false confessions

(What level of intoxication renders a confession inadmissible?)

In *Smith v. Commonwealth* (2013) the Supreme Court of Kentucky held that the defendant's intoxication at the time of the police interview did not render statements to the police unknowing, unwilling or involuntary. In reaching their decision the court stated the following:

"Generally speaking, no constitutional provision protects a drunken defendant from confessing to his crimes. "The fact that a person is intoxicated does not necessarily disable him from comprehending the intent of his admissions or from giving a true account of the occurrences to which they have reference.

"However, there are two circumstances in which a defendant's level of intoxication might play a role in the suppression decision. First, intoxication may become relevant because a "lesser quantum" of police coercion is needed to overcome the will of an intoxicated defendant....Thus, trial courts must consider a defendant's level of intoxication when considering whether police coercion has overborne a defendant's will so as to render the confession involuntary for purposes of the Due Process Clause.

"Second, a confession may be suppressed when the defendant was "intoxicated to the degree of mania" or was hallucinating, functionally insane, or otherwise "unable to understand the meaning of his statements." ... quoting Marshall & Steiner, *The Confessions of a Drunk*, 59 ABAJ 497 (1973)) ("[W]hen intoxication reaches the state in which one has hallucinations or 'begins to confabulate to compensate for his loss of memory for recent events'... the truth of what he says becomes strongly suspect.").

"Neither of these exceptions is applicable here. First, there was no evidence of coercive influence by the police. All of the evidence tended to show that Appellant freely and knowingly accompanied the police to the headquarters for the express purpose of submitting to questioning about his alleged participation in the shooting. In addition, the record discloses that Appellant was read his *Miranda* rights at the beginning of the station interview, and that he signed a waiver form reflecting that he understood these rights and was voluntarily waiving them for the express purpose of the interview. Therefore, the first exception does not apply. It is well-established that no constitutional violation may occur in the absence of state-sponsored coercion.

"Further, a review of the interrogation discloses that Appellant was not so intoxicated to the degree of mania, hallucinations, or functional insanity. There is no basis to conclude that the interview should have been suppressed on the basis that Appellant was so intoxicated that his statement was inherently unreliable."

(Intoxication and sleep deprivation)

In *State v. Strozier* (2013) the South Dakota Supreme Court upheld the admissibility of the defendant's confession, who claimed that he was too intoxicated to make a knowing and intelligent waiver of his *Miranda* rights. This case clearly illustrates the value of electronically recording an interrogation to diffuse such claims. In their opinion the Supreme Court stated the following:

"There is also no evidence that Strozier's level of intoxication impaired his ability to waive his rights. "The test of voluntariness of one who claims intoxication at the time of waiving his rights ... is whether the individual was of sufficient mental capacity to know what he was saying—capable of realizing the meaning of his statement—and that he was not suffering from any hallucinations or delusions."…. Here, Strozier does not contend that he did not know what he was saying or that he was having hallucinations or delusions. On the contrary, *a review of the video recording* (emphasis added) indicates that he understood what he was saying, and he was not suffering from hallucinations or delusions. This record reflects that even though Strozier had consumed alcoholic beverages, he was not so intoxicated as to be incapable of waiving his rights."

The court also stated, "Although Strozier also claims that he was deprived of sleep, he never indicated during the interrogation that he was tired. On the contrary, *the video recording shows* (emphasis added) that he was alert and animated. We find that "there is no evidence that [Strozier] was so overcome by fatigue or stress as to prevent" a valid waiver of his rights…. Further, *our review of the interrogation's video recording*

(emphasis added) reflects that Strozier understood Detective Carda's advisement of rights and the consequences of waiving them. We conclude that under the totality of the circumstances, Strozier voluntarily, knowingly, and intelligently waived his *Miranda* rights.

(Can an intoxicated suspect make a voluntary confession?)

In *Frazier v. State* (2011) the Georgia Court of Appeals upheld the admissibility of the defendant's incriminating statement even though he was under the influence of alcohol at the time he made the statement. The court stated that "The mere fact that a defendant was intoxicated at the time of the statement does not render it inadmissible."

(Can "days of drug use and sleep deprivation" render a confession inadmissible?)

In *State v. Decloues* (2011) the Court of Appeal of Louisiana, Fourth Circuit upheld the trial court's decision to admit the defendant's confession, even though the defendant claimed that "he was impaired from days of drug use and sleep deprivation at the time he gave his statement." In their opinion the court stated that "The defendant argues that his demeanor during the taped confession and his testimony at trial clearly show that he was impaired at the time he gave his confession….. Our review of the taped confession indicates that at the beginning of the interview the detective read the defendant his rights. The defendant appears attentive while those rights were being read, acknowledging each one individually. When asked whether he understood his rights, the defendant gave a definitive yes. The defendant is noticeably fidgety and sometimes had to be asked to speak up, but… he was easily calmed. His answers were responsive to the questions asked by the detective…. Moreover, the defendant's confession coincides with the physical evidence presented at trial."

(Court rejects claim confession was involuntary due to marijuana and alcohol use)

In *Parker v. Allen* (2009) the United States Court of Appeal, Eleventh Circuit, upheld the trial court's decision to reject the claim that the defendant's confession was made involuntarily due to the influence of drugs and alcohol on his state of mind at the time. At trial the defense expert opined that by the time of his statement at 5:30 P.M., Parker would have been in a mixed state of alcohol and marijuana intoxication and alcohol withdrawal. He explained that Parker would have been suffering from anguish, desperation, discomfort, and pain as a result of alcohol withdrawal compounded by his inability to inject Talwin. He stated that the combination of withdrawal, brain damage, and neuropsychological deficits would have altered Parker's judgment and made it more difficult for him to control his impulses. He explained that, "driven by a combination of intoxication[,] addiction withdrawal[,] and memory problems" "more than his will," he may have understood the basic questions but would have felt "an extreme amount of urgency to say yes to anything that he thought would get him ... home." He noted that the sedative drugs that Parker was using, alcohol and marijuana, would have acted as a truth serum to "loosen his control over his own willful processes."

(Painkillers and "high" from crack cocaine)

In *State v. Ashley* (2009) the Louisiana Court of Appeal, Second Circuit, upheld the trial court's decision to admit the defendant's confession. The defendant had claimed that at the time of his alleged confession he was on painkillers and still "high" from crack cocaine. The court found that "No corroborating evidence was given regarding the existence of the prescription, the fact that it was filled by the jail, or what particular painkiller the defendant claimed to be on. He also claimed that he was in pain from the dog bite and hungry. He asserted that he felt threatened because he was told that he would not be allowed to eat until he answered all their questions.

The recording itself indicates that the defendant mentioned eating twice; when the comments were made, no one is heard indicating that food would be withheld until a confession was forthcoming. To the contrary, the officers responded in a positive manner that the defendant would be fed upon his return to the jail. Furthermore, the sound and content of the defendant's speech during the statement does not bear any of the earmarks of someone under the influence of an intoxicating substance, such as slurred speech or disorientation. Nor is there any indication that the confession was being made under the influence of fear, duress, intimidation, inducements, or promises."

Court decisions regarding the testimony of false confession experts

Richard Leo

(Court restricts the testimony of Dr. Richard Leo on false confession issues)

In *Jimerson v. State* (June 2016) the Court of Appeals Indiana, upheld the lower court's decision to restrict the testimony of Dr. Richard Leo on false confession issues. From the court's opinion:

At trial, Jimerson presented the testimony of Dr. Richard Leo ("Dr.Leo"), a law professor and expert in the field of false confessions. Dr. Leo opined that the "Reid method" of interrogation is widely used but "might be too effective" in some cases. Dr. Leo explained that interviewing and interrogation are different concepts. According to Dr. Leo, the goal of interviewing is information gathering, and the goal of interrogation is to produce incriminating evidence from a person a police officer believes to be guilty of a crime. The overall strategies used in interrogation derived from the Reid method are two-fold: convince the subject that his or her continued resistance is futile and identify a benefit that the subject will gain from confessing.

Dr. Leo described hallmarks of the method and provided some examples. An interrogation would typically take place in an isolated setting, where the officer might better be able to develop rapport with the subject. The officer might confront the subject with real or false evidence, or a combination, to convince the subject that there is so much evidence against him or her, he or she is essentially "trapped." Dr. Leo described this as an "evidence ploy." The officer might also "spin a scenario," such as an accident

scenario, which might “imply mercy” would be forthcoming. A subject might be made to feel that there was a window of time in which to provide an explanation and keep others from thinking the worst of his or her conduct. Ultimately, a subject was to be persuaded that a confession would be in his or her best interests.

After Dr. Leo provided this background, defense counsel confirmed that Dr. Leo had watched the videotape of Jimerson's statement. Defense counsel then ventured: “And there was a point where,” prompting an objection from the prosecutor. The jury was excused and the parties presented argument as to the breadth of false confession testimony….. The trial court ruled that Dr. Leo could testify “about the phenomena of false confessions” and about “problematic practices” but the jury was to determine whether a particular technique had been applied in Jimerson's case. The trial court expressed concern that allowing testimony such as “I saw Detective Tarrh do this” would invade the province of the jury.

Together with extensive background testimony from Dr. Leo, the jury was provided with Jimerson's statement in audio, video, and written form. Moreover, Jimerson testified and explained his subjective view, that is, he had said certain things he later recanted because he was “very scared.” He testified that he had been led into scenarios, told that his DNA was all over Spicer's body and house, and encouraged to demonstrate that he was not a monster. As such, the jury had been given adequate information to apply its common knowledge and experience. Where a jury is able to apply concepts without further assistance, highlighting individual exchanges or vouching for the truth or falsity of particular evidence is invasive…. The defendant was convicted.

Jimerson has not demonstrated that the trial court abused its discretion in the restriction of expert testimony.

(California Supreme Court upholds rejection of Dr. Richard Leo testimony)

In *People v. Peoples* (February 2016) the California Supreme Court upheld the lower court's opinion to reject the testimony of Dr. Richard Leo. At the suppression hearing before the lower court, Dr. Richard Leo, a professor in the Department of Criminology at University of California, Irvine, testified about the tactics used by police in securing defendant's confession. He opined that the detectives used coercive techniques to undermine defendant's free will.... "Specifically, Dr. Leo characterized the police's threats to involve defendant's wife and stepson in the interrogation as "classic" and "high-end" coercive techniques. Dr. Leo acknowledged that as a social scientist, he may define "coercion" differently than the law does."

In their analysis, the Supreme Court stated that, "Defendant argues that his statement to police after his arrest was the product of coercion and thus the trial court should have excluded it and any fruits of the allegedly tainted statement. But defendant's contentions that police detectives negotiated with him by offering "inducements" for his confession and that they threated to accuse his wife of the crimes are belied by the record. The detectives asked defendant questions designed to build rapport but never offered him

leniency for his confession and never threatened a harsher penalty if he remained silent. Further, the detectives made clear to defendant they had no influence over how he would be treated in prison or in court. In addition, police detectives told defendant that his wife had implicated him in the crimes and that they would have to "drag" her further into the case if he did not confess. The detectives did not suggest that they would charge his wife with a crime.

It is true that the duration of the interrogation was substantial, and at points defendant showed some signs of fatigue. These factors weigh against the admission of the statement. However, other factors weigh against a finding that the statement was involuntary. Defendant was given numerous breaks, drinks, and food, and he was offered the chance to speak with a lawyer numerous times. He was also given the opportunity to speak with his wife, which he declined. We have previously found that a similarly lengthy interrogation did not amount to coercion under the "totality of the circumstances" where, as here, the defendant was provided with food, drinks, and breaks upon request... On the whole, and on our independent review of the videotape recording of the confession, we conclude that the prosecution met its burden of establishing by a preponderance of the evidence that defendant's statement was not coerced."

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(Court should have allowed testimony on false confessions)

In *People v. Days* (September 2015) the Supreme Court, Appellate Division, Second Dept, NY found that the defendant should have been allowed to introduce expert testimony on false confessions. From their opinion:

Dr. Jessica Pearson, a clinical and forensic psychologist, interviewed the defendant, reviewed his educational and mental health records, and reviewed the videotaped confession. She opined that the defendant had intellectual deficits and personality traits that rendered him vulnerable to giving a false confession, especially where, as here, the police posed a number of suggestive or leading questions, the interrogation was particularly long, and the police used rapport-building techniques to gain the defendant's trust. With respect to her opinion that the defendant had borderline intelligence, Dr. Pearson reported that his full scale IQ was only 85 at age 14, and he was enrolled in special education classes in the ninth grade.

Dr. Pearson's records also reveal that the defendant had been hospitalized for mental illness on multiple occasions, and medication that he took to treat his lupus condition could cause or exacerbate psychiatric symptoms. Significantly, the day after his confession, the defendant was diagnosed with "psychosis not otherwise specified," and prescribed Haldol, an antipsychotic medication used to treat schizophrenia and acute psychosis. The defendant reported that the Haldol suppressed the voices he had been hearing, which permits a fair inference that he was suffering from auditory hallucinations at the time of his interrogation. Although the County Court permitted Dr. Pearson to testify at the defendant's trial about the discrete issue of whether the defendant was able to understand the *Miranda* warnings he was given (see *Miranda* v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694), she was not permitted to testify on the issue of false confessions.

The defendant's second proffered expert, Dr. Richard A. Leo, a psychologist who has both a Ph.D. in psychology and a J.D. degree, stated that he was an expert in the psychology of police interrogation, police interrogation techniques, psychological coercion, and false confessions. Consistent with Dr. Pearson's opinion, Dr. Leo opined that a number of individual and situational factors associated with the defendant's interrogation and confession created a heightened risk of a false confession in this case. Among other things, Dr. Leo observed that the confession did not fit the facts of the

crime, and was not supported by physical evidence. He further discussed a number of factors present in this case that are associated with false confessions, including the defendant's low intelligence, high suggestibility, mental illness, and the extraordinary length of his custody and interrogation. Dr. Leo specifically opined that the defendant's "mental handicaps unquestionably left him especially vulnerable to the pressures of accusatory interrogation, especially an interrogation as long as this one," and that this "put him at a high risk of giving or agreeing to a false confession."

Upon our consideration of the submissions and opinions of both experts, we find that the defendant made a thorough proffer that he was "more likely to be coerced into giving a false confession" than other individuals. His proffer clearly indicated that he was intellectually impaired, highly compliant, and suffered from a diagnosable psychiatric disorder, and also that the techniques used during the interrogation were likely to elicit a false confession from him... Moreover, in light of the foregoing, the fact that no one had videotaped the nearly six hours of the interrogation that had been conducted before the confession was made raises significant concerns.

Further, there was little evidence to corroborate the defendant's confession in this case, and his conviction turned almost entirely on his videotaped confession... There was no DNA or other physical evidence linking the defendant to the crime, and there was no eyewitness testimony. Although the County Court admitted into evidence prior trial testimony from the defendant's former girlfriend that, during an altercation between them in November 2000, he told her that he committed two murders, she did not report the defendant's statement to police for approximately three months, and she only reported the statement immediately after she had him arrested for allegedly violating an order of protection by approaching her home. This limited incriminating evidence did not undermine the usefulness of expert testimony on the issue of false confessions in this case.

For all of these reasons, the County Court improvidently exercised its discretion in denying the defendant's motion for leave to introduce expert testimony on the subject of false confessions.

(Court finds expert testimony regarding false confession phenomenon was not admissible)

In *Commonwealth v Pugh* (October 2014) the Superior Court of Pennsylvania found that "expert testimony regarding false confessions is impermissible as it provides no pedagogical purpose and interferes with the jury's exclusive duty to assess the credibility of witnesses." From their opinion the Superior Court stated the following:

"The Supreme Court's recent decision, *Commonwealth v. Alicia*, --- Pa. ----, 92 A.3d 753 (2014), held that expert testimony on the phenomenon of false confessions would impermissibly invade the jury's exclusive role as the sole arbiter of credibility. In Alicia, the defendant was accused of murder and other related charges. The police questioned the defendant and he eventually confessed to the murder. Defendant later moved to use a

false confession expert, citing his own low intelligence, mental health issues, and that his written confession contained a number of hallmarks which indicated his confession was false. The expert proffered by the defendant claimed, during an a hearing on the admissibility of his testimony, that he would testify generally about police interrogation methods that can put an innocent suspect at risk and also about the specific ones used in defendant's case. The trial court held that the testimony was permissible as to the general aspects of police interrogation techniques, but prohibited the expert from providing any testimony as to the specific allegations in defendant's case. This Court, in a divided panel, affirmed the decision.

The Supreme Court of Pennsylvania, following the lead of the United States Court of Appeals for the Tenth Circuit in *United States v. Benally*, 541 F.3d 990 (10th Cir.2008), reversed. The Court found that "expert testimony such as the proposed testimony of [the defense expert] Dr. Leo constitutes an impermissible invasion of the jury's role as the exclusive arbiter of credibility." *Alicia*, 92 A.3d at 764. First, the Court noted that regardless of whether an expert opined on whether the confession was true or false, the effect would be the same: jurors would be persuaded to disregard the confession and credit the defense's testimony that it was a lie. Second, if the expert testimony were allowed, the Commonwealth would likely counter with its own rebuttal expert testimony, which would lead to befuddlement rather than serve to educate the jury.

Ultimately, the Pennsylvania Supreme Court found that "the matter of whether Appellee's confession is false is best left to the jury's common sense and life experience, after proper development of relevant issues related to, among other things, the particular circumstances surrounding the elicitation of his confession, using the traditional and time-honored techniques of cross-examination and argument."

Instantly, there is no dispositive factual or legal basis with which to distinguish Pugh's claim from that of the recent Supreme Court decision in *Alicia*. Accordingly, as we can find no distinguishable difference between the claim advanced by Pugh and the Supreme Court's decision in Alicia, we must conclude that Pugh's claim warrants no relief."

(Pennsylvania Supreme Court finds that expert testimony of the issue of false confessions would impermissibly invade the province of the jury)

In *Commonwealth v. Alicia* (May 2014) the Supreme Court of Pennsylvania held that expert testimony from Dr. Richard Leo on the phenomenon of false confessions would impermissibly invade the jury's exclusive role as the arbiter of credibility. From the court's decision:

"Although this Court has not previously ruled on the admissibility of expert testimony concerning false confessions, courts in other jurisdictions have done so. Many have held such testimony inadmissible. For example, in *United States v. Benally,* 541 F.3d 990, 993 (10th Cir.2008), the Tenth Circuit Court of Appeals upheld a district court's refusal to admit a psychologist's expert testimony concerning whether false confessions occur, and if they do occur, why they occur. The defendant-appellant had testified that his

confession was false and claimed that it had been prompted by federal agents' coercive tactics. *Id.* In rejecting the defendant-appellant's proffered expert testimony, the Tenth Circuit held as follows:

[The psychologist's expert] testimony inevitably would encroach upon the jury's vital and exclusive function to make credibility determinations. While [the defendant-appellant] emphasizes that [the psychologist expert] would not have opined as to whether she believed [that he had] confessed falsely, with or without the opinion, the import of her expert testimony would be the same: disregard the confession and credit the [defendant-appellant's] testimony that his confession was a lie. Testimony concerning credibility is often excluded because it usurps a critical function of the jury and because it is not helpful to the jury, which is capable of making its own determination regarding credibility.

In *United States v. Jacques,* 784 F.Supp.2d 59, 60 (D.Mass.2011), a district court declined to admit the defendant's proffered expert testimony concerning the existence of false confessions generally and the features of the defendant's specific interrogation that allegedly increased the risk of a false confession. Citing *Benally, supra,* the court concluded, *inter alia,* that the proffered expert testimony was contrary to the well-established rule that an expert cannot offer an opinion as to a criminal defendant's guilt or innocence: "An opinion that a defendant's [confession] is unreliable cannot be logically disconnected from the implicit opinion that the defendant is, in fact, *not* guilty." *Jacques, supra* at 63 (emphasis in original)… *See also Brown v. Horell,* 644 F.3d 969, 978, 982–83 (9th Cir.2011) (in denying a petition for habeas corpus, upholding the exclusion of expert testimony as to interrogation methods that tend to produce false confessions, where the trial court had concluded that the defendant's explanation for his allegedly false confession, to wit, a threat of violence against another person, was within the jury's experience); *State v. Free,* 351 N.J.Super. 203, 798 A.2d 83, 95–96 (N.J.Super.App.Div.2002) (holding that the trial court abused its discretion in admitting expert testimony as to false confessions and interrogation techniques because, *inter alia,* it was not scientifically reliable, it was of no assistance to the jury, and the jury would recognize that coercive methods have the potential for causing a false confession).

After careful review of relevant opinions from courts of other jurisdictions, as well as our own precedent, we are not persuaded by the rationale of those courts that have admitted expert psychological/psychiatric testimony regarding the phenomenon of false confessions and police interrogation techniques. Rather, we conclude, in agreement with the Tenth Circuit Court's decision in *Benally, supra* at 995, that expert testimony such as the proposed testimony of Dr. Leo constitutes an impermissible invasion of the jury's role as the exclusive arbiter of credibility."

(Court bars Dr. Richard Leo from testifying: proposed area of expert testimony has not reached the "level of scientific reliability")

In *Woodall v. State* (2014) the Supreme Court of Georgia upheld the lower court's decision to exclude the testimony of Dr. Richard Leo.

"Appellant contends the trial court erred when it denied his request to tender Dr. Richard Leo as an expert in police interrogation techniques and false confessions. This Court has upheld rulings within the last several years that this proposed area of expert testimony has not reached the "level of scientific reliability" necessary to allow its admission at trial.... Having reviewed the hearing transcript on the expert's proffer FN 8 in this case, we conclude the trial court did not abuse its discretion when it barred the expert from testifying in this case.

FN 8. Dr. Leo, who is a social psychologist and criminologist, stated that he wrote his doctoral thesis on false confessions and he indicated that he had personally viewed two to three hundred videotaped confessions since 1994. He stated, however, that there is no database of false confessions and each researcher is limited by his own collection of data. He also testified that not every jurisdiction is required to videotape interrogations and so any data is also limited in that respect. Dr. Leo said he reviewed the videotape of appellant's confession, but was not asked to determine whether appellant's confession was true or false. He also admitted he could not opine to the jury as to whether any particular interrogation resulted in a false confession, stating that the most he could do for the jury was identify the police interrogation techniques being utilized in the video."

California Supreme Court upholds exclusion of testimony by Dr. Richard Leo – the proffered testimony was "extremely speculative")

In *People v. Linton* (2013) the Supreme Court of California upheld the lower court's decision to exclude the testimony of Dr. Richard Leo. From the Supreme Court's opinion:

"Prior to trial, defendant filed a motion to introduce the expert testimony of social psychologists Dr. Richard Ofshe or Dr. Richard Leo regarding police interrogation techniques and false confessions…. Defendant asserted such testimony was relevant to determine the voluntariness and trustworthiness of the statements he made at the police station. At trial, defendant sought to introduce the testimony of Dr. Leo.

"In a declaration submitted by defendant to the trial court in connection with his efforts to introduce this testimony, Dr. Leo averred that "[c]ontrary to public myth and mis-perception, it is well documented that police interrogators can and do elicit false confessions in response to common, psychological methods of interrogation." According to Leo, research has established that "certain police interrogation techniques are correlated with the likelihood of a false confession" and such "research findings are beyond the common understanding of the lay person." Leo's proposed trial testimony would address "the following *general* topics: the use of influence, persuasion and coercion during interrogation; how certain police interrogation techniques affect the decision-making of custodial suspects; why certain psychological techniques are coercive and their likely effects; how and why contemporary police interrogation techniques can lead guilty suspects to make the decision to confess; how and why contemporary police interrogation techniques can lead the innocent to make the decision to confess; and how

to apply generally accepted principles to evaluate the reliability of confessions statements."

"The prosecutor opposed the defense motion, arguing there was no foundation for such testimony because defendant had not recanted his confession and because there was no other evidence that his confession was false. The prosecutor also contended that the defense had failed to show the subject matter was a valid, accepted area of expertise or that the testimony would assist the jury.

"The defense countered that a recantation was unnecessary before an expert…could be called, that it would be unconstitutional to require defendant to testify his confession was false before the testimony could be admitted, that there was sufficient evidence of falsity in the testimony from both pathologists that Melissa could not have been strangled with the headphone cord in the manner defendant described, and that testimony regarding the general factors that might lead to a false confession was beyond the knowledge of an average person. The defense repeated the claims that express promises of leniency had been made to defendant and that the interviewers' questioning was coercive in light of defendant's personal characteristics.

The trial court ultimately excluded Dr. Leo's testimony …. Specifically, the court concluded the proffered testimony was "extremely speculative" because there was no "basis or foundation" to indicate defendant's confession was false. The court noted defendant was not required to testify, but there was no evidence defendant had otherwise recanted his confession and the pathologists' testimony and the physical evidence did not establish any falsity of defendant's interview statements because the testimony and evidence were not incompatible with defendant's explanation of how he choked Melissa. Therefore, the probative value of Leo's testimony, "if any," was substantially outweighed by its undue consumption of time."

(Court allows Dr. Richard Leo to testify on false confession issues)

In *Caine v. Jon Burge*, et al., (2013) the U.S. District Court, N.D. Illinois, ruled that "Dr. Leo will be permitted to testify to various factors that can cause false confessions, and to their presence in this case. Dr. Leo will also be permitted to generally testify that, based on his knowledge, experience, and study of confessions and police interrogation, false confessions frequently do not contain the type of crime scene knowledge that only a true perpetrator would have, and that some false confessions contain such detail because of police contamination. However, Dr. Leo will *not* be allowed to testify as to his opinion that Caine's and Patterson's confession statements were false. In particular, he will not be allowed to testify as to his comparison of the witnesses' confessions and the physical evidence of the crime. That is decidedly a jury question and allowing Dr. Leo to opine on that subject would invade the province of the jury. Specifically, the Court will not allow Dr. Leo to testify to the opinions included in his report dated January 10, 2013 at pages 31 (second full paragraph), page 32 (entirety), page 46 (second paragraph), and page 47 (first paragraph, carried over from page 46). Obviously, statements in his report beyond

these paragraphs that deal with the same type of testimony are similarly disallowed (*i.e.,* the statement in his conclusion that the confessions are unreliable). .

(U.S. District Court excludes the testimony of Dr. Richard Leo: "his theories are both unreliable and irrelevant")

In *US v. Deuman* (2012) the U.S. District Court, W.D. Michigan granted the government's motion to exclude the testimony of Dr. Richard Leo on the issue of false confessions....

In their opinion the court stated that, "If permitted to testify as an expert in this case, Dr. Leo would explain: (1) that false confessions or incriminating statements are counterintuitive; (2) why confessions are prejudicial; (3) risk factors for false confessions, such as interrogation techniques; and (4) the framework for how false confessions occur. Dr. Leo would not offer an opinion as to whether Defendant lied or made false statements or whether Defendant's statements are unreliable.

"Following the Daubert hearing, defense counsel submitted a lengthy affidavit from Dr. Leo, which discusses: (1) the background of Dr. Leo's research into false confessions; (2) his theory about the three decision points that lead to a false confession, i.e., the police decision to classify an individual as a suspect; use of psychological interrogation tactics as a means to move the suspect from denial of guilt to admission; and solicitation of a post-admission narrative from the suspect, in which the suspect provides an account of the crime that may be contaminated with non-public crime facts mentioned by the interrogator; (3) Defendant's account of events demonstrating that during and subsequent to the August 17, 2011, polygraph examination, the FBI agents used coercive interrogation techniques that can lead to false confessions; and (4) "dispositional" risk factors related by Dr. William Sanders that render Defendant more susceptible to making a false confession.

"...the Court will exclude Dr. Leo's testimony because his theories are both unreliable and irrelevant to the facts of this case, and any limited probative value they might have is substantially outweighed by the potential dangers of undue prejudice and misleading the jury.... Although this research confirms that false confessions do, in fact, occur and that certain coercive interrogation techniques may lead to false confessions, Dr. Leo's theory, at least at this stage in its development, provides neither a useful nor appropriate basis to assist a jury in assessing whether a particular confession, or even incriminating statement, was false.

"As Dr. Leo forthrightly admits, despite extensive research and review of false confession cases, his methodology cannot accurately predict the frequency and causes of false confessions.... His theories cannot discern whether a certain interrogation technique, used on a person with certain traits or characteristics, results in a predictable rate of false confessions. In addition, he has formulated no theory or methodology that can be tested.... While the Court is aware that some laboratory studies, such as the ALT key study by Professors Kassin and Perillo, suggest that coercive interrogation tactics produce a significant rate of false confessions, such studies shed no light on real-world

interrogation practices and results because they "were not conducted by law enforcement, were not part of a criminal investigation, did not involve actual suspects, and did not present the students with a serious penalty." *United States v. Jacques*, 784 F.Supp.2d 59, 66 (D.Mass.2011)."

(Court finds that the research by false confession expert Dr. Richard Leo utilized "unreliable methodology" and was prone to inaccuracy or bias)

In *People v. Kowalski* (2012) the Michigan Supreme Court ruled as follows:
"The circuit court excluded the testimony of two experts regarding the occurrence of false confessions and the police interrogation techniques likely to generate them as well as the psychological characteristics of defendant that allegedly made him more susceptible to these techniques.

We hold that the circuit court did not abuse its discretion by excluding the expert testimony regarding the published literature on false confessions and police interrogations on the basis of its determination that the testimony was not reliable, even though the subject of the proposed testimony is beyond the common knowledge of the average juror."

From the Supreme Court's opinion:
"The circuit court examined the manner in which Leo analyzed the confessions that he determined to be false:
[Leo] starts with the conclusion that the confession is false and then he works backwards.... He doesn't take into consideration why someone might falsely confess, other than because of a police interrogation technique.... [A]nd there are reasons why people would falsely confess, they might be trying to protect someone.... He hasn't determined a reliable means to have a study group consist of innocent people who wrongfully confess that weren't mentally ill or youth.

The circuit court criticized this methodology for failing to compare true and false confessions and identify factors that contribute to false confessions but not true confessions. As the circuit court stated, "[I]f true and false confessions can be derived from the same police interrogation techniques, [how] is it possible to blame police interrogation techniques with any degree of reliability?" Given what the circuit court considered to be inadequacies of Leo's data and methodology, the circuit court concluded that Leo's testimony was unreliable.

Nothing in the circuit court's analysis placed the exclusion of Leo's testimony outside the range of principled outcomes. The circuit court properly considered all stages of Leo's analysis and found it unreliable at every stage. With regard to the data underlying Leo's testimony, the circuit court reasonably determined that its sources were unreliable because they were prone to inaccuracy or bias and, in nearly all instances, had not been subjected to the rigorous standards of scientific peer-review. Additionally, the circuit court raised multiple legitimate concerns about the "manner in which [Leo] interpret[ed] and extrapolate[d] from those data." The unreliable methodology, as the circuit court

described, resulted in conclusions consistent with Leo's own preconceived beliefs rather than testable results consistent with an objective, scientific process. Therefore, because the exclusion of Leo's testimony was a reasonable and principled outcome, the circuit court's decision did not amount to an abuse of discretion. The Court of Appeals came to the same conclusion after making similar observations about the data and methods underlying Leo's studies, and we thus affirm the lower courts' decisions to exclude Leo's testimony.

(Court finds that Dr. Richard Leo's proposed testimony potentially confusing and misleading)

In *State v. Rafay* (2012) the Court of Appeals of Washington, Division 1 upheld the trial court's opinion to exclude the testimony of Dr. Richard Leo on the issue of false confessions. From the Court of Appeals opinion:

"counsel.... informed the court that Leo would testify generally about the psychology of police interrogations, the phenomenon of false confessions, and "the erroneous but commonly held belief that people of normal mental capacity do not make untruthful and [inculpatory] statements." Counsel asserted that Leo would not opine on whether the confessions were false but would state that "if the confession in this case is false, he'll characterize it in one of the four groups that he's laid out from his research."

"In sum, Leo was unable to testify about any meaningful correlation between specific interrogation methods and false confessions or provide any method for the trier of fact to analyze the effect of the general concepts on the reliability of the defendants' confessions. Given the defendants' alleged basis for their false confessions, such limitations rendered Leo's proposed testimony potentially confusing and misleading."

(Court excludes the testimony of Dr. Richard Leo: "the proposed expert testimony was little more than speculation.")

In *People v. Mullen* (2012) the Court of Appeal, Third District, California upheld the lower court's decision to exclude the testimony of Dr. Richard Leo on the issue of false confessions. In their decision the Appeals Court stated that, "Expert testimony in this regard would not have altered appreciably the jury's perception of the confession. While Dr. Leo would have testified that stress can make a suspect more compliant, his testimony would not have, and could not have, established that the confession was false. The court further stated that, "Taking into account the totality of the circumstances, the proposed expert testimony was little more than speculation and would not have changed the verdict of a reasonable jury."

(Jury rejects the testimony of Dr. Richard Leo)

In *People v. Hernandez* (2011) the Court of Appeal, Second District, California upheld the conviction of the defendant. At trial Dr. Richard Leo testified that in this case he "found evidence of coercive techniques. The detectives suggested Hernandez would be

less culpable if he did not plan the shooting, implying leniency, and mentioned not getting to see his son again. The detectives asked Hernandez, "Are you the guy that did that, or are you the guy that got caught up in the circumstance that just happened? [Be]cause that's something that can be explained." This suggested Hernandez's explanation of the incident might not be criminal. This theme recurs throughout the interrogation. The detectives suggest they are going to help Hernandez present the case to the District Attorney in a way that will be beneficial to him and will not prevent him from not seeing his son for 20 years. The detectives gave Hernandez the impression the shooter was culpable and Hernandez was less culpable. At the end of the interview, Hernandez asked about "the timeframe on ... being out there with my boy?" This indicates Hernandez believed he would be released if he gave the detectives an account they found to be truthful. Leo concluded the detectives used many coercive techniques in the interviews." The jury rejected the premise proposed by Dr. Leo and convicted Hernandez.

(Court rejects the testimony of Dr. Richard Leo on the issue of false confessions)

In *People v. Polk* (2011) the Appellate Curt of Illinois, First District, upheld the lower court's decision to exclude the testimony of Dr. Richard Leo. In this case the defendant offered Dr. Leo's testimony that "factors including defendant's low IQ and interrogation techniques used in this case, such as the detectives challenging defendant's denials and detaining defendant for a significant length of time, created a risk of a false confession."

"Similarly, Dr. Leo's testimony that defendant's low IQ and the police interrogation techniques used in this case could have resulted in a false confession was not beyond the understanding of ordinary citizens, nor a concept difficult to understand. In addition, the circuit court did not prevent defendant from challenging the credibility and weight of his confession throughout defendant's trial. Further, the jury received testimony in this case regarding defendant's education, age, and intellectual performance. This included psychologist Dr. Joan Leska's testimony that defendant had an IQ of 70, placing him in the second percentile, which is extremely low, in the borderline range of intellectual functioning. The jury also heard testimony regarding the conditions of defendant's interrogation, the length of time defendant was interrogated, the receipt and waiver of Miranda rights, and the content of the police questions and defendant's statements. The jury viewed defendant's videotaped statement and could assess the format in which the questions were presented and answers were provided. It was reasonable for the circuit court to conclude that the jury could decide the issue of the reliability of defendant's statement and could have reached the same conclusion as Dr. Leo based on the testimony of other witnesses about defendant's intellectual level and the evidence of defendant's interrogation. Therefore, we cannot say that the circuit court abused its discretion in excluding Dr. Leo's testimony."

(California Court of Appeals finds that "Dr. Leo's proffered testimony, presented in a vacuum, created a substantial danger of confusing the issues or misleading the jury")

In *People v. Dimas* (2011) the Court of Appeal, Second District, CA upheld the lower court's decision to exclude the testimony of Dr. Richard Leo on false confession issues. The Court of Appeal summarized the lower court's decision as follows:

"Prior to trial, the People moved to exclude the proffered testimony of a defense expert, Richard Leo, Ph.D., J.D., on the subject of false confessions. The trial court did not initially render a definitive ruling before trial, advising counsel it wanted to hear from Dr. Leo first. During trial, the court considered the issue at a hearing outside the presence of the jury pursuant to Evidence Code section 402.

Dr. Leo testified that he had reviewed Dimas's video-recorded interviews. He explained that if he were allowed to testify, he would note and explain certain interrogation techniques used by the police, and discuss the scientific research that has identified the aspects of those techniques posing "risk factors for false or unreliable statements." He would not offer any opinion about whether Dimas's statements to the police were true or false.

According to Dr. Leo, the techniques used during Dimas's interrogations were of a kind that have been linked to false statements. The officers used a "ploy" of informing Dimas that he had failed the polygraph examination, and told him that the results would be admissible in court. The interrogation was accusatory and based on a presumption of guilt. In addition, the officers tried to induce a confession by telling Dimas that admitting guilt would be in his self-interest. The interrogation the following day involved similar, albeit more "muted" inducements to give a confession.

On cross-examination, Dr. Leo acknowledged that he had not interviewed Dimas. Dr. Leo admitted he did not evaluate Dimas to assess his particular susceptibility to any interrogation techniques. Dr. Leo agreed that Dimas had spoken voluntarily to police during his interrogations, but opined that "any" interrogation which includes threats or promises, whether implied or explicit, will be "psychologically coercive" insofar as a confession is concerned. Dr. Leo conceded that there was no established scientific foundation for measuring how often false confessions are made because it is difficult to know the number of false confessions that have actually been provided by suspects. He acknowledged there is insufficient data on the subject."

After this review the Court of Appeals concluded "In our view, Dimas's case falls somewhere in between Hall and Page, and best fits the Ramos model. We reject Dimas's claim of expert witness error because the record supports the trial court's conclusion that Dr. Leo's testimony would not have been helpful. There is no evidence in the record suggesting that Dimas ever refuted his confession, or that Dr. Leo had any reason to believe Dimas's confession was false. Absent some evidence indicating that Dimas was susceptible to making a false confession there was little for Dr. Leo to offer to the jury other than an abstract, academic discussion on the subject of false confessions. Such testimony would have been unrelated to a substantive foundation concerning Dimas' case. Dimas did not testify about his experience during the interrogations, and Dr. Leo acknowledged that he never interviewed Dimas. We will not find the trial court abused its

discretion in rejecting Dr. Leo's testimony because we cannot say that the trial court's ruling was arbitrary or beyond the bounds of reason in light of all of the circumstances. For the same reason, we find the trial court's ruling under Evidence Code section 352 was also correct. Dr. Leo's proffered testimony, presented in a vacuum, created a substantial danger of confusing the issues or misleading the jury."

(Dr. Richard Leo's testimony of false confessions properly excluded)

In *US v. Redlightning* (2010) the US Court of Appeals, Ninth Circuit, upheld the trial court's decision to exclude the testimony of Dr. Richard Leo on the issue of false confessions. In reaching their decision the Court of Appeals pointed out that, "The district court excluded the proffered expert testimony of Dr. Leo for the following reason:

At the Daubert hearing regarding Dr. Leo's testimony, the court learned from Dr. Leo that there was nothing in the record at this point to support his theory that the interrogation techniques used in this case raised the risk of a false confession.... Here, the court, as gatekeeper, cannot permit Dr. Leo to testify regarding the possibility of a false confession due to police interrogation techniques when he can point to no evidence in the record that any of these techniques are present in this case.

The district court concluded that "Dr. Leo's opinion regarding Defendant's confession in this case is based solely on conversations Dr. Leo had with defense counsel wherein defense counsel informed Dr. Leo that Defendant had been promised leniency if he confessed."

The Court of Appeals went on to say, "The gatekeeping function requires that the judge assess whether "the reasoning or methodology underlying the testimony is scientifically valid," and "whether that reasoning or methodology properly can be applied to the facts in issue....Here, Redlightning did not sufficiently show how Dr. Leo's testimony would have applied to the facts of his case. Perhaps most importantly, Dr. Leo testified that nothing in the record, including the FBI reports of the October 2 interview and the testimony at the pretrial suppression hearing, showed that any coercive tactic that may lead to a false confession was used when the FBI questioned Redlightning. To be relevant, an expert's opinion must be based on "sufficient facts or data," and the witness must be able to "appl[y] the principles and methods reliably to the facts of the case."

(Court listens to but rejects Dr. Richard Leo's testimony that the interrogation was "psychologically coercive and the detectives "went over the line." Also, "suggesting possible justifications for a homicide (such as self-defense) is not coercive.")

In *People v. Vargas* (2010) the Court of Appeal, Fourth District, Division 3, California upheld the trial court's decision to admit the defendant's confession.

During the suppression hearing "An expert in the field of interrogation techniques, Professor Richard Leo, was called to testify by defendant during the pretrial hearing to determine the admissibility of defendant's statements during the interrogation. Leo

concluded the interrogation was psychologically coercive and the detectives "went over the line." Leo testified: "I can't get inside [defendant's] head, but the structure of the interrogation is ... 'we have all this evidence, it is irrefutable, this is your only chance. Here is an account, here is the explanation that we will get you a misdemeanor and is relatively painless. But, if you avoid this opportunity, you are looking at rotting in jail and getting charged with one, two, or three serious felonies.' [P] So the logic of it is 'if you don't do anything, you are going to be in the worst possible situation.' "

The trial court denied defendant's motion to exclude the interrogation tape and transcript from evidence. "[I]t just appears to the court that these implied promises and threats are of such a nature that they do flow naturally from these exhortations [to tell the truth] from the police."

The Appeals court further stated in their opinion that, "Accurately describing the possible consequences of a murder conviction is permissible. Suggesting possible justifications for a homicide (such as self-defense) is not coercive; this tactic instead suggests "possible explanations of the events and offer[s] defendant an opportunity to provide the details of the crime." (People v. Carrington (2009) 47 Cal.4th 145, 171 (Carrington).) Although it is a factor potentially supporting a finding of involuntariness, deceiving a defendant by inaccurately describing the existence of physical evidence linking defendant to the crime does not necessarily invalidate a confession. (People v. Thompson (1990) 50 Cal.3d 134, 166-167, 170 [confession voluntary even though interrogators falsely told defendant that tire tracks, soil samples, and rope fibers linked him to crime]; People v. Watkins (1970) 6 Cal.App.3d 119, 124-125 [confession voluntary even though defendant falsely told his fingerprints were found on the getaway car]; see Carrington, supra, 47 Cal.4th at p. 172 ["The use of deceptive statements during an interrogation ... does not invalidate a confession unless the deception is ' " 'of a type reasonably likely to procure an untrue statement' " ' "].)

(Court rejects testimony of Dr. Richard Leo on false confession issue)

In *People v. Lucas* (2009) the Court of Appeal, Third District, California upheld the trial court's decision to exclude the testimony of Dr. Richard Leo on the subject of false confessions and police interrogations. The trial court had refused to allow Dr. Leo to testify, concluding that nothing that the doctor had to say would assist the jury and that there was "not a shred of evidence before us at this point to render a basis for any opinion by Dr. Leo that the confession was false...." In their review of the case the Court of Appeals stated that "Because the jury's verdict was well grounded in convincing, objective evidence and did not demonstrate a blind acceptance of the prosecution's interpretation of defendant's "confession," we cannot say a more favorable verdict was more likely had Dr. Leo been permitted to testify."

(Court excludes testimony of Richard Leo)

In *State v. Law* (2008) the Court of Appeals of Washington found that the trial court's decision to exclude the testimony of Dr. Richard Leo was correct. They stated:

"Law sought to call Dr. Richard Leo, a social scientist who would testify about the social psychology of interrogation and the phenomenon of false confessions, including how police interrogation techniques induce false confessions and what the indicators of an unreliable confession were. He was also prepared to testify that the circumstances surrounding Peregrin's questioning of Law suggested unreliability, and that it was improper for Dr. Hoberman to opine that Law's confession to following minors was true.

"Initially the trial court ruled that Dr. Leo's testimony would be admissible based on Law's offer of proof. But after Law testified and denied making the statements to Peregrin, the trial court ruled that Dr. Leo's testimony would be excluded. The trial court concluded that this was not a false confession case, noting that during his testimony, Law "very much made it clear that he never made those statements.... [H]e never stated that he made those statements, but because he was threatened or forced or coerced, those statements are not true.... He simply denied the conduct."

The trial court's ruling was a proper exercise of discretion. Once Law denied making the alleged confession, any testimony about whether the confession was false was irrelevant and would not assist the trier of fact. Law contends that his testimony was not an outright denial, but ambiguous at best, and asserts that his testimony was simply that Peregrin misconstrued some of his statements. But claiming that one's statements have been misconstrued is not the same as claiming that one made a false statement. Expert testimony about false confessions is only relevant when a party claims that he confessed to something he did not do. And as the trial court correctly concluded, the record here does not support Law's argument that he gave a false confession. During direct and cross-examination, he denied that he told Peregrin that he had followed 30 to 40 minors, that he had sexual thoughts of past victims two to three times a week, and that when he saw someone of similar age to the victim it triggered a sexual thought. The trial court properly excluded Dr. Leo's testimony."

In *People v. Cerda* (2008) The Court of Appeal upheld the trial court's decision to deny the request from the defendant for an expert (Dr. Richard Leo) in false confessions. The Court stated "a request for services that would be merely convenient to the defense rather than reasonably necessary need not be granted."

In *State v. Law* (2008) The Court of Appeals upheld the trial court's decision to exclude Dr. Richard Leo's testimony after the defendant testified that he never made incriminating statements. "The trial court concluded that this was not a false confession case, noting that during his testimony, Law "very much made it clear that he never made those statements.... [H]e never stated that he made those statements, but because he was threatened or forced or coerced, those statements are not true.... He simply denied the conduct.""

In *People v. Steele* (2008) The Court of Appeal upheld the trial court's decision to exclude the testimony of Dr. Richard Leo, stating, "The defense offered the testimony of Dr. Richard Leo who would have testified on what psychological factors "might lead a

defendant to make a false statement." Dr. Leo would have testified on police tactics that lead to inaccurate and unreliable statements. But Dr. Leo would not have offered an opinion on whether appellant's statements were false confessions. ...The trial court properly excluded Dr. Leo's testimony. The issue, as appellant framed it, was whether his statements were voluntary. Dr. Leo would not have testified on this issue."

(Dr. Leo has not formulated a specific theory or methodology about false confessions that could be tested)

In *State v. Wooden* (2008) the Court of Appeals upheld the trial court's decision to exclude the testimony of Dr. Richard Leo, stating that, "Of particular significance to the Daubert analysis here, Dr. Leo has not formulated a specific theory or methodology about false confessions that could be tested, subjected to peer review, or permit an error rate to be determined. Dr. Leo's research on false confessions has consisted of analyzing false confessions, after they have been determined to be false..... Given the evidence before the trial court that Dr. Leo's expert testimony did not include a reliable scientific theory or anything outside the understanding of the jury that would assist it in assessing the reliability of Wooden's confession, the trial court did not abuse its discretion in refusing to admit Dr. Leo's testimony."

In *People v. Rathbun* (2007) the Court of Appeals, Second District, California rejected the testimony of Dr. Richard Leo, stating in part:

The court ruled that Dr. Leo would not be permitted to testify, his testimony being irrelevant because, as acknowledged, none of the stated influences was present with regard to appellant's confession. The court also ruled based on Evidence Code sections 352 and 801, and Kelly, supra, 17 Cal.3d 24.

Richard Ofshe

(Court should have allowed Dr. Richard Ofshe to testify in general about false confessions)

In *State v. Perea* (2013) the Supreme Court of Utah found that Dr. Richard Ofshe should have been allowed to testify at trial on the phenomenon of false confessions generally. From their opinion:

Mr. Perea argues that the district court also erroneously excluded the testimony of Dr. Richard Ofshe, a defense expert who intended to testify regarding false confessions. The district court ruled first that Dr. Ofshe could not testify as to the truthfulness of Mr. Perea's confession. It next questioned whether or not an expert was needed to testify to the phenomena of false confessions and concluded that “a jury of lay people can decide the question as to whether or not a confession is reliable, involuntary, or coerced without having an expert testify on that issue.” Finally, the court found that Dr. Ofshe's methods were not “science” and refused to allow any of his proffered testimony.

Because we find that any error was harmless, we decline to consider whether the district court erred when it prohibited Dr. Ofshe from directly testifying as to the veracity of Mr. Perea's confession. However, we find the district court did err when it barred Dr. Ofshe from testifying as to the phenomenon of false confessions generally.

(If the expert is only testifying generally about the fact that false confessions happen, that is well within the grasp of the average layperson and expert testimony would not be required under Rule 702)

In *Commonwealth v. Harrell* (2013) the Superior Court of Pennsylvania upheld the lower court's decision to exclude the testimony of Dr. Richard Ofshe. From their opinion:

"Prior to trial, a Frye hearing was conducted to determine whether expert testimony would be allowed on the subject of false confessions. The Court held a two-day hearing and took testimony from "experts" in the field of false confessions and from others who refute the validity of such scientific endeavors. The Court determined that evidence of false confessions was not sufficient to pass the *Frye* standard and precluded the admission of such evidence at trial.

Recently, …. we upheld the trial court's denial of the defendant's request to call Dr. Debra Davis, an expert in the field of false confessions:

[I]f the expert is only testifying generally about the fact that false confessions happen, that is well within the grasp of the average layperson and expert testimony would not be required under Rule 702. The components of a false confession, according to Dr. Davis, include factors such as the interrogation tactics employed, the training of the law enforcement personnel involved, and the stress tolerance of the suspect. This [c]ourt found that testimony concerning these factors can be elicited (and attacked) through the testimony of other witnesses and is capable of being understood by the average juror. The jury can then make its own determination as to the weight afforded to the defendant's confession. Therefore, Dr. Davis' testimony was not proper because expert testimony is inadmissible when the matter can be described to the jury and the conditions evaluated by them without the assistance of one claiming to possess special knowledge upon the subject.

"Similarly, here, in addition to identifying various problems with Dr. Ofshe's methodology, the trial court opined that the issue of false confessions was not beyond the ken of the average layperson:

"First, the Court is not convinced that any specialized knowledge is required for jurors to understand the proposition that a person possessing any of a number of unique factors (mental disability, fatigue, hunger, tender age, propensity… toward acquiescence to authority figures etc.) may be more susceptible to police interrogative techniques. Further, the jurors would certainly be able to evaluate any evidence or arguments presented at trial by the defense to advance a theory that the conditions of [appellant]'s interrogation, the techniques used by police, or the personal characteristics of [appellant]

had an impact on the veracity or voluntariness of [appellant]'s confession without the assistance of the proffered expert testimony. If anything, the testimony could confuse the issue by suggesting causal relationships which are not borne out by the research actually conducted."

"... appellant argues that his due process rights were violated by the failure to record his interrogation and confession. Appellant argues that the failure to record his interrogation deprived him of an opportunity to establish that his confession was involuntary and the product of police coercion. According to appellant, the police deliberately failed to record the interrogation so… that appellant would be unable to contest the voluntariness of his confession by examining the surrounding circumstances including the police tactics employed, the length of questioning, promises made, *etc.* (Appellant's brief at 24–25.)

In *Commonwealth v. Craft*, …. this court held that custodial interrogations do not need to be recorded to satisfy the due process requirements of the Pennsylvania Constitution…The majority of states, with the exception of Alaska and Minnesota, have not adopted a rule requiring police to record interrogations…. Nor has the United States Supreme Court been asked to determine whether the United States Constitution requires the recording of custodial interrogations as a matter of federal due process… This court determined that the Pennsylvania Constitution does not require contemporaneous recording of statements and that the adoption of a rule requiring contemporaneous recording of custodial interrogation should be left to the Pennsylvania Supreme Court or the General Assembly, not an intermediate appellate court."

(In light of the fact that Dr. Ofshe had never personally interviewed Petitioner or reviewed the police reports in this case and did not know whether Petitioner was personally vulnerable to coercive police techniques, the trial court's decision to exclude Dr. Ofshe's expert testimony was reasonable)

In *Thompson v. Warren* (2013) the US District Court, E.D. Michigan found that the petitioner's claim that the trial judge's decision to preclude Dr. Ofshe from testifying as an expert witness on false confessions or coercive interrogation techniques deprived her of the right to present a defense was unfounded.

The court stated that, "In the present case, Petitioner is not entitled to habeas relief on his first claim because there is no clearly established Supreme Court law which holds that a criminal defendant is entitled to present expert testimony on the issue of false or coerced confessions. Given the lack of holdings by the Supreme Court on the issue of whether a criminal defendant is entitled to present expert testimony on the issue of false confessions or coercive police interrogation tactics, the Michigan Court of Appeals' rejection of Petitioner's claim was not an unreasonable application of clearly established federal law…. Moreover, because numerous federal courts on both direct review of federal criminal convictions and on habeas review of state court convictions have ruled that a criminal defendant's rights were not violated by the exclusion of such expert testimony, Petitioner is not entitled to habeas relief because the cases cited above clearly show that "fairminded jurists could disagree that the state court's decision conflicts with" Supreme

Court's precedents…. Moreover, in light of the fact that Dr. Ofshe had never personally interviewed Petitioner or reviewed the police reports in this case and did not know whether Petitioner was personally vulnerable to coercive police techniques, the trial court's decision to exclude Dr. Ofshe's expert testimony was reasonable. Finally, in light of the fact that the jurors were able to watch the videotaped interrogations in their entirety and Petitioner's counsel was able to cross-examine the detectives who conducted the interrogations, Petitioner was able to present her defense to the jury that her confession was unreliable. Petitioner is not entitled to habeas relief on her first claim."

(Court does not allow Dr. Richard Ofshe to testify on false confession issues)

In *US v. Holmes* (2012) the U.S. Court of Appeals, Fourth District, upheld the lower court's decision to exclude the proposed testimony of Dr. Richard Ofshe. In their opinion the Court of Appeals relates the following: "The following day, Holmes notified the Government that he intended to call an expert witness, Dr. Ofshe, to "explain why people falsely confess and the factors that are considered." ... At the Government's request, Holmes later clarified that Dr. Ofshe would not "be offering an opinion about whether ... the statements made by [Holmes] in this case were in fact false," but would educate the jury "about the scientific research on false confessions, the fact that they occur, and some of the reasons why."

The Court of Appeals found that, "Neither Holmes' brief synopsis of Dr. Ofshe's opinion nor Dr. Ofshe's curriculum vitae provide the bases and reasons for his proposed testimony that individuals sometimes make false confessions. Accordingly, the district court did not abuse its discretion in concluding this consideration also favored granting the motion in limine."

(Court finds the proposed testimony on false confessions does not meet the Frye test)

In *Bell v. Ercole* (2011) the U.S. District Court, E.D. New York, found that the trial judge exercised discretion to exclude the expert testimony for the following reasons:

Defendant states that the expert in this case is prepared to testify about various aspects of the general phenomenon of false confessions, leaving the question of whether defendant's confession was accurate or false to the jury (Defense Memorandum p. 7 fn.2). Since abstract principles of social science as applied to a confession will be espoused, without anything to warrant their application to this defendant, the proposed testimony would unduly confuse the jury and confound the issues in the case.

The issue of whether defendant's inculpatory statements were voluntarily made is a question for the jury to determine. The circumstances of the questioning and confession will be presented to the jury which will be able to make this determination.

The District Court further stated that, "Many of the New York cases, particularly those of the Appellate Divisions, do not go into significant detail as to the reasons for exclusion of expert testimony relating to confessions, which is why I relied on a thorough and

exhaustive discussion of the Supreme Judicial Court of Massachusetts, which concluded that proposed testimony of one of the experts on whom Bell relied, Professor Saul Kassin, did not meet the requirement for admissibility of expert testimony because of a lack of general acceptance in the scientific community and the lack of a showing that the evidence is reliable or valid through an alternative means."

(Dr. Richard Ofshe testifies)

In *Contreras v. State* (2011) Dr. Richard Ofshe testified "as an expert witness on the subject of police interrogation tactics and influence. In particular, he testified about the significance of certain tactics and explained how they can be psychologically coercive. Further, Dr. Ofshe related to the jury that false confessions do occur and people sometimes confess to a crime they did not commit."

(Court rejects the testimony of Dr. Richard Ofshe)

In *Brown v. Horell* (2011) the US Court of Appeals, Ninth Circuit, upheld the lower court's decision to exclude the testimony of Dr. Richard Ofshe on the basis that his testimony would not help the jury assess the credibility of the defendant's confession.

(Military court rules that it was error to exclude the testimony of Dr. Richard Ofshe on the issue of coercive interrogation techniques)

In *US v. McGinnis* (2010) the US Army Court of Criminal Appeals agreed with appellant's claim that "the military judge abused his discretion in denying the defense request for expert assistance "in the area of coercive law enforcement techniques which may lead to a false confession." In their decision the Court stated the following: "Here, appellant "made a specific request for expert assistance necessary for his defense on a central issue in a closely contested case. The military judge erred in denying the defense the equal opportunity to obtain evidence and witnesses guaranteed by Article 46 of the Uniform Code of Military Justice." Lloyd, 69 M.J. at 101 (Effron, J., dissenting). While defense counsel was able to consult briefly with Dr. Ofshe, educate himself on coercive interrogation techniques and obtain CID's training slides, he was hindered from fully preparing his defense by having an expert as a member of his defense team.

.....While he was able to present the concession from the same CID agents who took appellant's confession that false confessions do occur, defense counsel was prevented from obtaining expert assistance, which might have allowed him, through cross-examination or direct testimony, to present evidence to the panel on the study of coercive interrogation techniques, why they work, and how some of appellant's specific characteristics and the circumstances of this case may have made appellant particularly vulnerable to the interrogators' coercive techniques. Defense counsel was also unable to obtain from the CID agents a concession that any of their interrogation techniques could have led to unreliable admissions in this case. Instead, as a result of the military judge's error, "the defense was compelled to rely on arguments by counsel drawing inferences from lay testimony without the benefit of" expert assistance to prepare for trial and

potentially, expert testimony to educate the panel regarding the study of coercive interrogations and the study of false confessions.

(Court rejects suppression hearing testimony of Dr. Richard Ofshe)

In *People v. Balbuena* (2010) the Court of Appeal, First District, Division 2, California upheld the trial court's decision to admit the suspect's incriminating statements. "Richard Ofshe testified as an expert "on the influence used in police interrogations." In his view, the interrogators, "working in tandem," used a "psychologically coercive" strategy "that is pushed forward by offering leniency through suggestion, and then ultimately through blatant statement of the same point to overcome resistance.... [I]t is a motivational strategy that is all about benefit if you comply, and more serious punishment if you don't. And that's the strategy that is used repeatedly, was developed and then used repeatedly throughout this interrogation. It's not a simple one statement." The detectives used a "coherent strategy" throughout the interrogation, promising appellant he would receive "the worst possible punishment" if he continued to maintain he had no involvement with the crime, while if he agreed to various suggestions it would "open the door to and result in his receiving great leniency, or relative leniency.... [P] Once compliance is gained, it's then used to overcome subsequent resistance." The court rejected this hypothesis.

During the defendant's interrogation the detectives again offered various scenarios: "[I]f it's a justifiable homicide or its something you did out of rage and you just weren't thinking straight then that's important for us to get down accurately. If you're just a killer that just wants to go around to kill people and skin cats and all that type of stuff, then by all means tell us and we'll document that as such." "Maybe you were shooting in defense and just, right maybe tying to scare him."

This tactic was permissible. (People v. Holloway, supra, 33 Cal.4th at pp. 116-117.) As the Holloway court explained, "[Detective] Hash's further suggestions that the killings might have been accidental or resulted from an uncontrollable fit of rage during a drunken blackout, and that such circumstances could 'make[ ] a lot of difference,' fall far short of being promises of lenient treatment in exchange for cooperation. The detectives did not represent that they, the prosecutor or the court would grant defendant any particular benefit if he told them how the killings happened. To the extent Hash's remarks implied that giving an account involving blackout or accident might help defendant avoid the death penalty, he did no more than tell defendant the benefit that might ' "flow[ ] naturally from a truthful and honest course of conduct" ' (People v. Jimenez, supra, 21 Cal.3d at p. 612), for such circumstances can reduce the degree of a homicide or, at the least, serve as arguments for mitigation in the penalty decision. As the appellate court explained in People v. Andersen [(1980)] 101 Cal.App.3d [563,] 583, 'Homicide does possess degrees of culpability, and when evidence of guilt is strong, confession and avoidance is a better defense tactic than denial.' " (People v. Holloway, supra, 33 Cal.4th at p. 116.) To the same effect, the court found in People v. Carrington (2009) 47 Cal.4th 145, 171, "Detective Lindsay's suggestions that the Gleason homicide might have been an accident, a self-defensive reaction, or the product of fear, were not coercive; they merely suggested possible explanations of the events and offered defendant an opportunity to

provide the details of the crime." Here, in presenting appellant with different scenarios for how the crime could have occurred, the detectives told appellant time and again that it was important for them to know what he was thinking. This was relevant and accurate, as appellant's mental state would bear on the determination of which offense he could be charged with and found to have committed."

(Court excludes the testimony of Dr. Richard Ofshe)

In *People v. Ekblom*, (2010) the Court of Appeal, Sixth District, California upheld the trial court's decision to exclude the testimony of Dr. Richard Ofshe. From their opinion the court stated that:

"Prior to the jury being impaneled, defendant made an oral motion in limine to allow Ofshe to testify as an expert. Lempert identified Ofshe as "a world [-]renowned expert in false confessions" who would testify regarding "reasons why someone who is not guilty of an offense would confess to it." The prosecution objected to the proffered testimony on the grounds that (1) the defense had not disclosed the specific nature of the proposed testimony; (2) Ofshe's qualifications varied from the subject matter of his proposed testimony in that his usual testimony concerned coerced confessions and police interrogation techniques, not the circumstances of an admission by a defendant to a victim during a police-initiated pretext telephone call; and (3) Ofshe's testimony was unnecessary to the trier of fact. Defense counsel acknowledged that he had received no reports from Ofshe concerning his anticipated testimony. In response to the court's request for an offer of proof, Lempert indicated that Ofshe would "dispel [the] myth" that "innocent people do not confess to having committed crimes" and "[t]hat when badgered by an individual and by addressing the individual's sympathy and beneficence, that a person will confess to something [he or she] didn't do." The court ordered the exclusion of Ofshe's testimony. It reasoned that the circumstances of the case were dissimilar to those in which a suspect is coerced or bullied by the police into making a false confession, and that "there are no facts that take the question outside the [ken] of the ordinary juror.... [P] ... [P] ... There is nothing that the jury is not capable of understanding about how that personal pressure, emotional plea, and begging might affect someone to say something you think will have no consequence other than to placate an obviously distraught person." Affirmed.

(After a Daubert hearing a trial court rules that Dr. Richard Ofshe's testimony was inadmissible)

In *State v. Lamonica* (2010) the Court of Appeal of Louisiana, First Circuit, upheld the trial court's decision to exclude the testimony of Dr. Richard Ofshe. The Court of Appeal stated that: "Dr. Ofshe's testimony at the Daubert hearing suggested that there was no methodology about false confessions that could be tested, or that would permit an error rate to be determined. In this area of research, the result of the lack of any reliable testing format to establish predictors of when a false confession might occur is a methodology consisting of analyzing false confessions only after a confession has been determined to

be false. The trial court did not err in finding Dr. Ofshe's proposed trial testimony inadmissible under Daubert."

(Trial judge found that Ofshe's testimony did not relate to a subject beyond the juror's common experience)

In *Brown v. Horell* (2009) the U. S. District Court, E.D. California upheld the trial court's decision to exclude the testimony of Dr. Richard Ofshe. The District Court stated:

"After the trial court ruled that Brown's firearm use admission could come into evidence, the defense offered Dr. Ofshe as an expert witness to explain to the jury "how some of the interrogators' tactics had the potential of inducing [Brown's] confession." The trial judge recognized that his finding that the admission was voluntary did not automatically render Ofshe's testimony irrelevant, but ultimately declined to admit it.

The trial judge found that Ofshe's testimony did not relate to a subject beyond the juror's common experience, and thus would not be helpful to the jurors as they assessed the credibility of Brown's firearm use admission. The judge explained that a significant factor in his decision was the fact that Brown made no reference to the interrogator's techniques when he retracted the firearm use admission, nor did he indicate any unsureness as to why he gave the false statement. Rather, Brown unequivocally stated that he "confessed" because someone had threatened to shoot his girlfriend if he did not take responsibility. In light of Brown's explanation for the alleged false admission, the judge reasoned that Ofshe's opinion regarding interrogation techniques would not assist the jury in assessing the credibility of the admission. Brown claims that this evidentiary ruling deprived him of his constitutional right to present a complete defense.

To the extent the jury decided to rely on Brown's admission, the sole question for their consideration was whether it was true. Ofshe was not in a position to offer anything useful in this regard. He had no expert opinion whether Brown's admission was true (RT at 48), and had no special expertise as to the truth or falsity of the remainder of Brown's statements. (RT at 56.) Upon the record of this case, the exclusion of Ofshe's testimony did not have had a substantial and injurious effect on the jury verdict at Brown's trial. See Brecht, 507 U.S. at 637."

(Judge rejects Dr. Ofshe testimony)

In *Smith v. State* (2009) the Court of Appeals of Alaska upholds the trial court's decision to reject the testimony of Dr. Richard Ofshe. From their opinion:

"Smith argues that Sergeant Kenny offered Smith a job as an informant, including an agreement that Smith would receive a full pardon after serving 5 years' imprisonment. Essentially, Smith claims to have confessed to murdering Enzler and Bellamy to "establish his credibility" so that he could serve as an informant.

Judge Link also made the following specific findings related to Smith's testimony that he

had received an agreement to act as an undercover informant:
[N]o agent of the State ever offered Smith a deal to provide information to the State. No agent of the State ever offered Smith leniency or any other inducement to encourage him to give interviews or statements. Specifically, Smith's statements regarding a deal ... to the effect that he would serve five years and then receive a full pardon, or that he would work as an informant ... is fabrication on Smith's part. Smith ... offered to provide information [several individuals], but these offers were never accepted by the State. Smith also argues that Judge Link's ruling was clearly erroneous because he failed to consider the testimony of Dr. Richard Ofshe. "[W]here there is a direct conflict in testimony, it is crucial that the trial court summarize the evidence, identify factual conflicts and resolve them on the record."

Dr. Ofshe testified that the interview transcripts suggested that Smith appeared to be motivated to work as an undercover agent. He opined that several aspects of the transcripts did not make sense without there having been some prior agreement between Smith and the officers. Nevertheless, Dr. Ofshe did not raise a direct conflict in the evidence about what happened between Smith and the investigating officers. He merely offered his opinion about how to resolve a latent conflict.

A trial court "ordinarily has no obligation to accept expert testimony when it finds other evidence more persuasive." Thus, Judge Link was free to make an independent evaluation of the facts on which Dr. Ofshe relied. FN11 Based on the same evidence evaluated by Dr. Ofshe, Judge Link found that Smith was not credible and that the purported off-the-record deal was fabricated. In view of Judge Link's detailed findings, his failure to mention Dr. Ofshe by name was not clearly erroneous."

(Dr. Richard Ofshe testimony limited)

In *Contreras v. State* (2009) the Court of Appeals of Texas ruled on the following - Appellant's first two issues involve the expert testimony of Dr. Richard Ofshe. In Point of Error One, Appellant challenges the trial court's ruling that this expert witness could not relate the specific facts of the case to his expertise and knowledge. In Point of Error Two, Appellant contends the trial court erred when it ruled Dr. Ofshe could not testify about ultimate issues to be determined by the jury.

The trial court ruled that:

"He can testify as to the general basis of interrogation methods. Obviously, we know they exist. We know they existed in this case. We know it exists for the Police Department. You-all tendered over those documents. But, Mr. Ponder, I will tell you: He will not testify as to the veracity of any statement. He will not testify as to the voluntariness of any statement, and he will also not testify as to any truth or false confession."

The Court of Appeals found that "We conclude that Dr. Ofshe's testimony was not beyond that of the average juror's knowledge and experience and that his testimony would not help the jury understand the evidence or determine a fact issue. The jury was

equally competent to form an opinion about the ultimate fact issues, namely the voluntariness of Appellant's second statement. Because Dr. Ofshe's testimony impermissibly offered a direct opinion as to the truthfulness of Appellant's statement, we find no error in its exclusion. We overrule the first two points of error."

("Dr. Ofshe's testimony did not contain 'sufficient evidence to confirm that the principles upon which the expert based his conclusions are generally accepted by social scientists and psychologists working in the field.)

In *People v. Rosario* (2008) this case the court considered the defense request to offer Dr. Richard Ofshe as an expert witness on false confessions. The court concluded, "Dr. Ofshe's testimony did not contain 'sufficient evidence to confirm that the principles upon which the expert based his conclusions are generally accepted by social scientists and psychologists working in the field. Therefore, his anticipated testimony that psychological coercion was employed during the interrogation of defendant, Argelis Rosario, which in his opinion would induce a person to falsely confess, does not meet the Frye standard for admissibility."

(Dr. Ofshe testimony limited)

In *Fox,II, Appellee-Plaintiff v Indiana* (2008) the defense counsel was permitted to question Dr. Ofshe generally about coerced confessions, but not to ask questions about this particular case. Fox contends the trial court erred in so limiting the scope of his expert witness's testimony. The Court of Appeals stated "The jury was also permitted to view a videotape of Fox's entire interrogation. Therefore, the jurors were fully able to apply the concepts about which Dr. Ofshe testified to the interrogation that produced Fox's confession. This is all Dr. Ofshe's permissible testimony could have accomplished. There was no reversible error here."

(Jury rejects testimony of Dr. Ofshe)

In *People v. Cota* (2007) the Court of Appeal, 4th District, Division 3, California reported the following:

"During trial, defense psychological expert Dr. Richard Ofshe testified about interrogation tactics used by police in order to elicit confessions from suspects and factors that contribute to suspects making false confessions. During closing argument, the prosecutor read an excerpt from a law review article in which Ofshe was quoted as saying: " 'While a guilty party will likely be very unhappy that he is being accused and confronted with evidence that supports the accusation, he is somewhat insulated from shock because he has always been aware of possible detection and can understand that he has been caught. An innocent suspect is likely to experience considerable shock and disorientation during interrogation because he is wholly unprepared for the confrontation and accusations that are at the core of the process and will not understand how an investigator could possibly suspect him.'

The prosecutor then proceeded to argue, "[w]hen you look at this videotape [of the defendant's interview with Campuzano], ask yourself that question. Where is the shock of being accused of these horrific crimes? ... There isn't because the defendant knew what he did, period. And because this evidence is so compelling, because it is so compelling, the defense is grasping at straws.... And all they need to do is fool one of you. If they fool one of you, then the defendant is not held responsible." The jury found the defendant guilty.

(Dr. Ofshe testimony not allowed because it did not contain 'sufficient evidence to confirm that the principles upon which the expert based his conclusions are generally accepted by social scientists and psychologists working in the field)

In *Lyons v. State* (2007) Lyons sought to have Dr. Richard Ofshe testify as an expert witness on false confession theory. Following a hearing outside the jury's presence at which Ofshe testified, the trial court ruled that it would not allow the testimony based upon the evidence in the case, because such theory had not reached a verifiable stage of scientific certainty, and because whether Lyons's inculpatory statements were the results of threats or coercion was a matter the jury could discern for itself. "This Court further observed in Riley that the admission of expert testimony based on the theory of false confessions was premature and unreliable inasmuch as there was insufficient scientific support and too many unanswered questions regarding such theory. Id. at 682-683(4), 604 S.E.2d 488. In short, false confession theory does not satisfy the evidentiary test in criminal cases set forth in Harper v. State, 249 Ga. 519(1), 292 S.E.2d 389 (1982)."

(The jury will not be, and cannot be, assisted in any way by Dr. Ofshe's views)

In *US v. Mamah* (2002) the US District Court, N.D. Illinois granted the government's motion to bar Dr. Richard Ofshe's testimony, stating that "The jury will not be, and cannot be, assisted in any way by Dr. Ofshe's views in determining whether Mr. Mamah's version of the interrogation is more accurate than that of the interviewing agents, assuming material conflict. It is a classic jury function to determine the credibility of witnesses. That Dr. Ofshe can say some people confess falsely when faced with certain stimuli is not relevant to the jury's credibility determination function. Nor can Dr. Ofshe testify, as part of his work, what the specifics of the interrogation consisted of as related to him by Mr. Mamah. Mr. Mamah's statements to him about the interview would be inadmissible hearsay and could not be disclosed by Dr. Ofshe to the jury pursuant to Rule 703. Beyond that, Dr. Ofshe employs mere conclusory statements in his report about tactics used without specifics or elaboration. As is recited in Hall at p. 1344, conclusory statements without any explanation why the expert can contribute to the jury's understanding of the subject are also subject to exclusion. That is also the situation here."

(Dr. Ofshe attempts to discredit the Reid Technique)

In *State v. Tapke* (2007) the Court of Appeals of Ohio upheld the defendant's confession which was obtained by an officer who was trained in The Reid Technique. Dr. Richard Ofshe testified about false confessions and attempted to describe The Reid Technique.

The jury subsequently rejected his testimony and "chose not to discredit it [the confession]."

It is interesting to note that in his testimony Dr. Ofshe testified that as part of The Reid Technique interrogators are taught the following:

"So what police have learned to do is to communicate the message through a series of suggestions * * * the idea being to communicate the understanding that there's a deal on the table, but without ever explicitly saying here's the deal." He used the example of a person accused of GSI. He testified that the police would say something like this to a suspect: "[Y]ou're not a sexual predator; you're someone who needs treatment. What would you rather do, go to prison as a sex offender, or get some therapy in treatment."

It is interesting to note that the exact opposite is the case - we teach not to make any statements that refer to punishment, threats or promises of leniency (see Criminal Interrogation and Confessions, 4th ed., 2001), and in our training seminars we highlight the case, Com. v. DiGiambattista, 813 N.E.2d 516 (2004), in which the Massachusetts Supreme Court indicated that "what seemed to disturb the Court the most was the apparent reference to counseling which they felt "implicitly suggested to him that "counseling" would be an appropriate avenue for him to pursue after making a confession." In other words, if he confessed he would get counseling instead of jail." **This is exactly what we teach not to do**.

(Military judge found that Dr. Ofshe's theory regarding coercive interrogations was not based on rigorous scientific analysis or even subject to scientific testing but was rather Dr. Ofshe's own subjective review of a group of particularly selected cases)

In *US v Wilson* (2007) the U.S. Navy-Marine Corps Court of Appeals upheld the trial judge's decision to exclude Dr. Richard Ofhe's testimony.

In their decision the Court of Appeals stated:

"In essence, the military judge found that Dr. Ofshe's theory regarding coercive interrogations was not based on rigorous scientific analysis or even subject to scientific testing but was rather Dr. Ofshe's own subjective review of a group of particularly selected cases. By way of example, at one point Dr. Ofshe testified that his theory concerning the impact of certain police interrogation techniques on the danger of false confessions was as intuitive as the fact that the sun will come up each day. Essentially he argues that we can't necessarily prove causation but we just know how it works. Id. at 5, Record at 1202.

The military judge's finding that the proffered theory was not scientifically sound was wholly supported by the affidavits of Professor Cassell and LtCol Slicner. Professor Cassell, after noting that he is familiar with Dr. Ofshe's research, opines that Dr. Ofshe's theories "have not been sufficiently tested ... have an unacceptably high rate of error ... depart from accepted standards ... and have not been accepted in the relevant scientific

community...." Appellate Exhibit LXVII at 2. LtCol Slicner, opining more generally on research into the causes of false confessions, observes that to her knowledge there are no "scientifically reliable studies" that associate particular personality traits or the nature of the interrogation with false confessions. She opines that one cannot "hold so many unusual and diverse variables constant in order to study the effect of one or more clearly identifying variables." Appellate Exhibit LXVIII at 2.

Having determined that Dr. Ofshe's theory was not based on sufficient scientific rigor to be reliable and that it was not widely accepted within the relevant scientific community, the military judge went on to rule that the witness could testify only to his rather commonsensical opinions that "false confessions do occur" and that "some persons have, after certain techniques have been used, made false confessions." Appellate Exhibit LXXII at 5. The military judge then found, as the appellant asserts, that the opinions Dr. Ofshe could legitimately testify to were not beyond the experience of the average member and therefore of such minimal value as to be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The underlying basis for the military judge's decision, however, was that Dr. Ofshe's expert opinion testimony was not scientifically reliable. We find, therefore, that there was ample evidence supporting the inadmissibility of Dr. Ofshe's expert testimony and that the military judge did not abuse his discretion when he excluded it."

(In this case Dr. Ofshe testimony is irrelevant)

In *Staye v. Angel Torres* (2006) the Court of Appeals of Ohio, Eighth District, Cuyahoga County rejected Torres claim "that the trial court erred by excluding the testimony of interrogation expert, Dr. Richard Ofshe. The trial court excluded Dr. Ofshe's testimony based on the fact his opinion was irrelevant to the facts of the case. We agree. Dr. Ofshe specializes in determining the voluntariness of a confession. However, in the instant case, Torres did not claim his confession was involuntary, but claims he never gave a confession and that the detective fabricated his confession. Therefore, Dr. Ofshe's testimony as to whether the confession was voluntary was irrelevant. In fact, Dr. Ofshe even stated he had never previously testified whether a confession was fabricated by a detective."

(Court rejects Dr. Ofshe opinion)

In *People v. Ladell Deangelo Brown* (2006) the Court of Appeal, Third District, California affirmed the conviction of Brown who had admitted that he had shot the victim, Victor Jones. At trial Dr. Richard Ofshe "testified about research showing that modern interrogation techniques lead to false confessions. Ofshe opined that Overall [the investigating officer] induced defendant to admit he shot Victor accidentally or in self-defense by leading defendant to believe he would receive leniency. He noted that Overall never told defendant he remained subject to serious criminal liability under the felony-murder rule. Citing the totality of the circumstances, the court ruled that defendant's admissions were voluntary and denied the motion to suppress."

(Jury rejects testimony of Dr. Ofshe in employee theft prosecution)

In *People v. Amy Marie Garvin* (2005) the defense offered expert testimony from Dr. Richard Ofshe who testified that "a poorly done interrogation could produce a false confession. Poorly trained interrogators use false "evidence ploys" in conjunction with inappropriate psychological "motivators" to coerce false confessions without knowing that the confessions are false. These interrogators focus only on producing a confession without thinking about the guilt or innocence of the person interrogated." The jury rejected this testimony and found the defendant guilty.

Saul Kassin

(Confession voluntariness - court rejects the concept of pragmatic implication)

Pragmatic implication is a theory proposed by Professor Saul Kassin which posits that a subject of an interrogation may cognitively perceive threats or promises even though the investigator never threatened the suspect or offered the suspect a promise of leniency. In the case of *People v. Benson* (2010) the Court of Appeal, Third District, California the premise of this theory was rejected. In this case the court found the following:

"Here, Detective Rodriguez did tell defendant there was "a big difference between ... someone getting hurt and trying to shoot someone." However, the detectives made no promises or representations that defendant's cooperation would garner more lenient treatment or lesser charges. "No specific benefit in terms of lesser charges was promised or even discussed, and [the detective's] general assertion that the circumstances of a killing could 'make[ ] a lot of difference' to the punishment, while perhaps optimistic, was not materially deceptive." (People v. Holloway (2004) 33 Cal.4th 96, 117.) The general assertion that the circumstances of a killing could make a difference was not materially deceptive. It is not deceptive to state that an accomplice to murder may be better off than the shooter. (People v. Garcia (1984) 36 Cal.3d 539, 546-547.)

In addition the court addressed the issue of giving the suspect false information:

"Nor does the detectives' use of false information render defendant's admissions involuntary. Lies told by officers to a suspect during questioning may well affect the voluntariness of a confession, but they are not per se sufficient to render a confession involuntary. Where the deception by the officer is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted. (People v. Farnam (2002) 28 Cal.4th 107, 182 (Farnam).) Courts prohibit only those psychological ploys that, under the totality of circumstances, are so coercive they tend to produce a statement that is both involuntary and unreliable. (Ray, supra, 13 Cal.4th at p. 340.)

In Farnam, supra, 28 Cal.4th 107, the court found the defendant's confession to an assault and robbery was voluntary. The officers falsely told the defendant that his fingerprints had been found on the victim's wallet. (Id. at pp. 182-183.) Nor did the court find a

confession coerced when an officer made false statements regarding evidence the officer said tied the defendant to a murder. (People v. Thompson (1990) 50 Cal.3d 134, 167.)

(Court limits testimony of Professor Saul Kassin on false confession issues)

In *State v. Cope* (2009) the Court of Appeals found that the trial court did not err when they excluded the testimony of the defendant's false confession expert about two cases of coerced internalized false confessions and "we find no error by the trial court in denying Cope's motion to suppress his confessions."

"In this case, Cope presented an expert, Dr. Saul Kassin, who testified regarding false confessions. Dr. Kassin testified as to the interrogation techniques used by the police in obtaining false confessions and the techniques used in this case: (1) false evidence-the officers telling Cope he failed the polygraph; (2) positive confrontation-the officers claiming they knew Cope did it; (3) the officers' refusals to accept Cope's denials of guilt even though he agreed to a polygraph and waived an attorney; (4) minimization-the officers suggesting the crime was accidental; and (5) interrogation while Cope was traumatized and tired.

Dr. Kassin proffered testimony about Peter Reilly, who falsely confessed to murdering and sexually assaulting his mother, and Gary Gauger, who falsely confessed to murdering his parents. In both of these cases, the defendants denied involvement, were administered polygraphs and told they failed, believed they must have somehow committed the crimes, and confessed. The trial court refused to allow Dr. Kassin to testify regarding specific cases of false confession unless they were "on all fours" with this case and ultimately refused to allow the testimony. "

(Expert testimony on false confessions does not pass the Frye test of general acceptance in its field)

In *Bell, Petitioner v. Ercole, et al.* (2008) the US District Court stated in their opinion that "Justice Cooperman denied the defense's request to admit expert testimony (Saul Kassin), concluding that the jury could determine the voluntariness of Bell's statements based on the facts presented and that expert testimony on false confessions does not pass the Frye test of general acceptance in its field. People v. Bell, Ind. No. 128/97, slip op. at 3-4 (N.Y.Sup.Ct. Apr. 28, 1999). This decision is consistent with a long line of New York cases, of which the most recent, People v. Wiggins, 16 Misc.3d 1136 (N.Y.Sup.Ct.2007), contains a particularly thoughtful discussion of the issue."

(Massachusetts Supreme Court finds Dr. Saul Kassin testimony inadmissible)

In *Commonwealth v. Robinson*, (2007) the Massachusetts Supreme Court upheld the trial court's decision to reject the testimony of Dr. Saul Kassin. Quoting from the Supreme Court's opinion:

"A hearing was held before the judge to consider the admissibility of the testimony of Professor Saul Kassin. The professor was offered by the defendant as an expert witness

on the subject of the psychology of police interrogations and confessions. The judge refused to admit his testimony because it did not meet the "general acceptance" or "reliability" criteria required by Commonwealth v. Lanigan, 419 Mass. 15, 25, 641 N.E.2d 1342 (1994), and also because it concerned issues within the knowledge and experience of laypersons."

"Nevertheless, on cross-examination the professor conceded that there was no empirical data on the number of false confessions, and that there is no scientific basis for distinguishing true from false confessions. Indeed, he admitted that one of his articles stated, "Further research in the field is sorely needed.... [T]he current empirical foundation may be too meager to support recommendations for reform or qualify as a subject of scientific knowledge." The professor also said that, in fact, in mock jury experiments, jurors were able to distinguish accurately voluntary from involuntary confessions. He agreed that he could not say that lay people could not accurately assess the techniques that would cause false confessions."

"The judge concluded that Kassin's testimony did not meet the requirements set forth in the Lanigan case. We agree. As the judge stated, Kassin conceded that his opinions are not generally accepted, require further testing, and are not yet a subject of "scientific knowledge." One of his own publications admitted as much. Accordingly, his proposed testimony that certain interrogation techniques have previously produced false confessions does not meet either the general acceptance or reliability criteria established by the Lanigan case. The judge did not abuse her discretion in refusing to admit Professor Kassin's testimony"

(Kassin testimony limited)

In *State v. Myers* (2004) the Supreme Court of South Carolina upheld the admissibility of a confession by investigators utilizing The Reid Technique, and also found that there was no error when the trial court limited the testimony of Dr. Saul Kassin.

<u>Deborah Davis</u>

(*Court excludes the testimony of Dr. Deborah Davis regarding false confessions*)

In *US v. Oppenhein* (April 2015) the US District Court, D. Utah, granted the government's motion to exclude the testimony of Dr. Deborah Davis on the issue of false confessions. The court stated the following in their opinion:

"The probative value of Dr. Davis's proposed testimony is minimal. Dr. Davis intends to present general testimony about false confessions. There is no indication that she has examined Defendant or that she intends to opine about the specific interaction between Defendant and law enforcement. The Tenth Circuit encountered similar testimony from Dr. Davis in *United States v. Benally*.... The court there found that such evidence had "minimal" relevance.14 The same conclusion is warranted here.

The Court further finds that the limited relevance of this testimony is substantially

outweighed by the potential of unfair prejudice, confusing the issue, misleading the jury, undue delay, and wasting time... As the court in Benally found, "a district court could reasonably conclude that the prejudice to the prosecution that would result from permitting an expert to opine that prior confessions should essentially be disregarded because they are just as likely to be true as untrue, substantially outweighs the testimony's minimal probative value."

Moreover, admission of testimony of this nature would impermissibly intrude on the jury's role in making credibility determinations. This conclusion has repeatedly been reaffirmed by the Tenth Circuit.... If admitted as evidence, the jurors will have the opportunity to view the interview at issue and can draw their own conclusions as to Defendant's credibility. Therefore, the Court will exclude Dr. Davis's testimony."

(Testimony of Dr. Deborah Davis on false confessions excluded by the court - minimally probative in this case because it did not go beyond the common experience of the jurors)

In *People v. Durst* **(**2014) the Court of Appeal, Third District, California upheld the lower court's decision to exclude the testimony of Dr. Deborah Davis on the issue of false confessions. From their opinion the Appeals Court stated:

"The court held a hearing on whether to admit the expert testimony concerning false confessions, which included a 250–slide PowerPoint presentation prepared by the expert. The court informed defense counsel that the expert would not be allowed to use the 250–slide presentation under Evidence Code section 352 because it was in the form of a lecture, not testimony of an expert.

The trial court recognized Dr. Deborah Davis as an expert in the field of false confessions. Dr. Davis testified at the Evidence Code section 402 hearing that (1) suspects sometimes falsely confess what they have not done and (2) many people mistakenly believe that no suspect falsely confesses. Circumstances such as interrogation techniques (presenting false or misleading evidence or using polygraph tests, for instance), as well as the length of the interrogation, sleep deprivation, high stress, and distrust of one's own memory may result in a false confession.

In summary, the court found that the evidence was minimally probative in this case because it did not go beyond the common experience of the jurors. The court noted various parts of the testimony that would be too general to be helpful or would be confusing. In fact, the jurors had been asked during voir dire concerning their acceptance of the phenomenon of false confessions and had indicated their acceptance. The minimal probative value was substantially outweighed by the danger that the evidence would confuse or mislead the jury and consume an undue amount of time.

The California Supreme Court, in *Linton,* recently considered a claim that exclusion of expert testimony about false confessions was an abuse of discretion and violated the defendant's right to present a defense. The *Linton* court rejected the claim, concluding that where there was a "dearth of evidence indicating a false admission or confession," as

well as a "multitude of corroborative evidence ... that suggested defendant's admissions and confession were true." … Under these circumstances, "it fell within the trial court's broad discretion to determine that [the expert's] proffered testimony had, at most, minimal probative value, which was substantially outweighed by its likely undue consumption of time. [Citations.]" (*Ibid.*)

Likewise, here, there was a dearth of evidence indicating that defendant's confession was false. The details of his confession matched the facts of the crime produced at trial. Defendant admitted that he entered the house, lit the candle, and opened the gas valve. The candle was from defendant's house, and defendant was present at the scene during the time when the acts occurred. Defendant readily admitted that he did not like Liu, and he had already stolen items from the house.
This is not a close case in which evidence concerning whether police interrogation tactics could produce a false confession would have been helpful to the jury. Therefore, the trial court did not abuse its discretion in excluding the expert testimony, and the exclusion of the testimony did not violate defendant's right to present a defense."

(Recording interrogations not required in Pennsylvania; false confession expert testimony excluded)

In *Commonwealth v. Harrell* (2013) the Superior Court of Pennsylvania found that the state constitution does not require the recording of interrogations, stating that, "In… this court held that custodial interrogations do not need to be recorded to satisfy the due process requirements of the Pennsylvania Constitution…. The majority of states, with the exception of Alaska and Minnesota, have not adopted a rule requiring police to record interrogations… Nor has the United States Supreme Court been asked to determine whether the United States Constitution requires the recording of custodial interrogations as a matter of federal due process… This court determined that the Pennsylvania Constitution does not require contemporaneous recording of statements and that the adoption of a rule requiring contemporaneous recording of custodial interrogation should be left to the Pennsylvania Supreme Court or the General Assembly, not an intermediate appellate court."

In this same case, regarding the testimony of a false confession expert, the court stated the following:

"Recently, …. we upheld the trial court's denial of the defendant's request to call Dr. Debra Davis, an expert in the field of false confessions:

[I]f the expert is only testifying generally about the fact that false confessions happen, that is well within the grasp of the average layperson and expert testimony would not be required under Rule 702. The components of a false confession, according to Dr. Davis, include factors such as the interrogation tactics employed, the training of the law enforcement personnel involved, and the stress tolerance of the suspect. This [c]ourt found that testimony concerning these factors can be elicited (and attacked) through the testimony of other witnesses and is capable of being understood by the average juror. The

jury can then make its own determination as to the weight afforded to the defendant's confession. Therefore, Dr. Davis' testimony was not proper because expert testimony is inadmissible when the matter can be described to the jury and the conditions evaluated by them without the assistance of one claiming to possess special knowledge upon the subject.

Similarly, here, in addition to identifying various problems with Dr. Ofshe's methodology, the trial court opined that the issue of false confessions was not beyond the ken of the average layperson:

First, the Court is not convinced that any specialized knowledge is required for jurors to understand the proposition that a person possessing any of a number of unique factors (mental disability, fatigue, hunger, tender age, propensity toward acquiescence to authority figures etc.) may be more susceptible to police interrogative techniques. Further, the jurors would certainly be able to evaluate any evidence or arguments presented at trial by the defense to advance a theory that the conditions of [appellant]'s interrogation, the techniques used by police, or the personal characteristics of [appellant] had an impact on the veracity or voluntariness of [appellant]'s confession without the assistance of the proffered expert testimony. If anything, the testimony could confuse the issue by suggesting causal relationships which are not borne out by the research actually conducted….. We agree and find that the trial court did not abuse its discretion by precluding Dr. Ofshe's testimony."

(Court excludes the testimony of Dr. Debra Davis on the issue of false confessions)

In *Commonwealth v. Szakal* (2012) the Superior Court of Pennsylvania upheld the lower court's decision to exclude the testimony of Dr. Debra Davis on the issue of false confessions, stating in their opinion that "her testimony would not be of any assistance to the triers of fact "given that the jurors, during voir dire, admitted that they already knew false confessions occur."

"... Basically, the defense in this case was that [Appellant] lied in his recorded statement to police about his role in the murders of Mr. and Mrs. Springer. He claimed to be telling the truth when he took the stand and implicated his co-defendant, Mr. Tartt, as the trigger man. In other words, [Appellant] asked the jury to believe that he falsely confessed to the murders. The issue then, is whether the average juror, in this case, needed to be told that false confessions occur? This [c]ourt found that the jury did not; as almost every juror in the pool indicated that [he or she] believed that false confessions do occur. In fact, defense counsel raised that point in his closing argument.

"Moreover, if the expert is only testifying generally about the fact that false confessions happen, that is well within the grasp of the average layperson and expert testimony would not be required under Rule 702. The components of a false confession, according to Dr. Davis, include factors such as the interrogation tactics employed, the training of the law enforcement personnel involved, and the stress tolerance of the suspect. This [c]ourt found that testimony concerning these factors can be elicited (and attacked) through the

testimony of other witnesses and is capable of being understood by the average juror. The jury can then make its own determination as to the weight afforded to the defendant's confession. Therefore, Dr. Davis' testimony was not proper because expert testimony is inadmissible when the matter can be described to the jury and the conditions evaluated by them without the assistance of one claiming to possess special knowledge upon the subject."

(Court rejects expert testimony on confessions (Dr. Deborah Davis); upholds confession admissibility (Reid Technique))

In *People v. Gallo* (2008) Dr. Deborah Davis testified for the defense at the suppression hearing (click here for a copy of her Power Point slides) but the court rejected the effort to suppress the confession, stating that the interrogator "used a technique [Reid Technique] he learned in his police training, and his use of it followed what the courts have deemed to be permissible."

(Dr. Davis's testimony did not meet the standards for relevance or reliability required by Daubert)

In *US v. Benally* (2008) the defendant notified the government he planned to call Dr. Deborah Davis, a professor of psychology at the University of Nevada at Reno, as an expert witness on false confessions. Mr. Benally offered her as "an expert in the field of social psychology" and "the subjects of confession, interrogation techniques ... [,] and the ability of those techniques to cause people to confess." Mr. Benally offered Dr. Davis's testimony on two subjects: (1) whether false confessions occur; and (2) why people confess falsely. Dr. Davis had never examined Mr. Benally, and would not offer an opinion as to whether he confessed falsely.

After a Daubert hearing, the district court ruled that Dr. Davis's testimony was inadmissible, concluding that it did not meet the standards for relevance or reliability required by Daubert.

In *Zao v. City of New York* (2008) the court also rejected the proposed testimony of Dr. Deborah Davis.

Bruce Frumkin

(Court excludes the testimony of defense expert Dr. Bruce Frumkin because it would "lead to confusion and misunderstanding.")

In *State v. Ackerman* (2012) the Court of Criminal Appeals of Tennessee upheld the lower court's decision to exclude the testimony of defenses expert Dr. Bruce Frumkin "about the defendant's susceptibility to suggestion."

"With regard to his potential testimony about the defendant's susceptibility to suggestion,

Doctor Frumkin testified that he performed a "comprehensive clinical interview" of the defendant and administered a test to measure intelligence quotient ("IQ"), a personality inventory test, a personality factor test, and "the Gudjohnsson."

".... Doctor Frumkin reiterated that he would not offer an opinion on whether the defendant's admissions to Ms. Ackerman and Detective Robinson were false. He said that he would instead provide the jury with psychological information about the defendant that would explain why he was more likely to provide false or inaccurate information in the face of that type of questioning. He said that he had no opinion on the accuracy of the defendant's statement, that he would not testify "in terms of the likelihood he gave a false statement or not," and that his only testimony would be that the defendant possessed psychological traits that made him more vulnerable to suggestion. He characterized his testimony as "additional data that [the jury] should look at [to] make a better determination of how much weight to give to what that person is saying."

At the conclusion of the hearing, the trial court took the motion under advisement and, in a later-filed written order, ruled that Doctor Frumkin would not be permitted to testify about the defendant's susceptibility to suggestion because of "the loose connection between D[octor] Frumkin's knowledge and experience and the facts in this case" and because his testimony would not substantially assist the trier of fact. The court also concluded that Doctor Frumkin's testimony would "lead to confusion and misunderstanding."

(Court finds testimony from Dr. Bruce Frumkin inadmissible on whether the defendant has a propensity to make a false statement)

In *State v. Pate* (2011) Court of Criminal Appeals of Tennessee upheld the lower court's ruling to restrict the testimony of defense expert Dr. Bruce Frumkin. The Appeals court found that "Where expert testimony is merely an iteration of what would be within the jurors' common sense, the admission of such evidence does not assist, much less substantially assist, the trier of fact to understand the evidence or determine a fact at issue. Accordingly, a court would not err by excluding an expert whose testimony consisted solely of providing a dressed-up and credentialed declaration of what would be already safely within a juror's common-sense understanding."

(*Court rejects forensic psychologist Bruce Frumkin's testimony as to the defendant's ability to make a knowing and intelligent waiver of his rights)*

In *State v. Keys* (2010) the Court of Appeals of Iowa upheld the lower court's decision to reject the testimony of forensic psychologist Bruce Frumkin on the intellectual capacity of the defendant to understand and waive his rights.

"Keys asserts he did not freely decide to forgo his *Miranda* rights....He relies on the testimony of forensic psychologist Bruce Frumkin, who opined it was "unlikely [Keys] would have been able to fully make a knowing and intelligent waiver of his *Miranda* rights." Frumkin based his opinion on five factors: (1) Keys's educational level, (2) the

results of an IQ test, (3) Keys's overall psychological functioning, (4) the results of comprehension tests, and (5) Keys's history of drug use.

With respect to the first two factors, it is undisputed that Keys was not an academic stand-out in high school, dropped out in the eleventh grade, and had IQ scores at the low end of the testing range. These facts, however, did not automatically render Keys incapable of waiving his *Miranda* rights. See *State v. Fetters*, 202 N.W.2d 84, 89 (Iowa 1972). Indeed, while Frumkin opined "that people of lower intelligence don't understand *Miranda* rights as well as people of higher intelligence," he conceded there is no cutoff IQ score that renders someone incapable of waiving his or her *Miranda* rights.

This brings us to the third factor, Keys's overall psychological functioning. This factor also does not support a finding that Keys was incapable of waiving his *Miranda* rights. It is true that Keys had a history of anxiety, preoccupation with intrusive thoughts, and a propensity for "cognitive slippage," which Dr. Frumkin defined as "some temporary inefficiency in processing information." However, these deficits were not apparent in the video recordings. To be sure, Keys had trouble coming up with certain descriptive words, but he responded quickly to the officer's questions and comments and his reactions were appropriate for the circumstances.

The fourth factor cited by Dr. Frumkin, the results of tests to measure Keys's current comprehension and appreciation of *Miranda* rights adds little to the analysis, as Dr. Frumkin admitted Keys did "relatively well" and "currently ha [d] a good understanding of the *Miranda* rights and currently is able to make an intelligent use of the *Miranda* rights." While Frumkin suggested the positive test results reflected Keys's efforts to educate himself after the interrogation, this suggestion belies his earlier assertion that Keys lacked the education and IQ to process the *Miranda* warnings at the time of the custodial interrogations.

The final factor cited by Dr. Frumkin, Keys's drug use, was not evident on the video recordings. Dr. Frumkin acknowledged this and the State's expert confirmed it. Additionally, all the officers who encountered Keys testified they did not believe the defendant was under the influence of drugs.

On our de novo review, we agree with the district court that Keys possessed "sufficient intellectual capacity to understand *Miranda* warnings and to validly waive those *Miranda* warnings ."

(Court determines the jury can assess a statement's reliability without the need for expert testimony from Dr. Bruce Frumkin)

In *State v. Bennett* (2007) the Illinois First District Apellate Court found that the proposed expert testimony from Dr. Bruce Frumkin on the defendant's suggestibility was not necessary in order for the jury to assess the defendant's statement:

In this case, the circuit court held that the portion of Dr. Frumkin's testimony regarding

his assessment of defendant's interrogative suggestibility was not beyond the common knowledge of lay persons and would not aid the trier of fact in reaching its conclusion. The court permitted defendant to comment upon the evidence during voir dire, opening statements, trial and closing arguments, and stated that the trier of fact could rely on its own common sense and experience in life without expert testimony in determining the issue of suggestibility. Defendant has not shown an abuse of discretion in excluding the expert testimony in this case.

Similarly, Dr. Frumkin's testimony that defendant was susceptible to police interrogations and suggestions based on his intellectual abilities was not beyond the understanding of ordinary citizens, nor a concept difficult to understand. In addition, the circuit court did not preclude defendant from challenging the credibility and weight of his confession. Rather, the court specifically stated that defendant could comment upon the evidence and the issue of suggestibility throughout defendant's trial.

Further, the jury received testimony in this case regarding defendant's school and intellectual performance. Defendant had a full opportunity to cross-examine the police officers and prosecutors that interrogated him about their techniques. The jury heard testimony regarding the conditions of defendant's interrogation, the length of time defendant was interrogated, the receipt and waiver of Miranda rights, and the content of the police questions and defendant's statements. The jury viewed defendant's videotaped confession and could assess the format in which the questions were presented and answers provided. It was reasonable for the trial court to conclude that the jury could decide the issue of the statement's reliability using its common knowledge and could have reached the same conclusion as Dr. Frumkin based on the testimony of the other witnesses and evidence. Consequently, the jury would not be aided by Dr. Frumkin's testimony. Accordingly, we cannot say that the trial court abused its discretion by excluding the testimony of Dr. Frumkin.

(Court finds test on suggestibility was "not a valid and reliable test to determine a person's suggestibility to admit to a crime")

In *People v. Nelson* (2009) the Illinois Supreme Court upheld the trial court's decision to refuse to allow Dr. Bruce Frumkin to testify concerning his use of the Gudjonsson Suggestibility Scale (GSS) in evaluating defendant's susceptibility to giving a false confession. The trial court found "that the test was not a valid and reliable test to determine a person's suggestibility to admit to a crime. The court found it difficult to accept that a test taken nearly three years after the murders regarding a subject that was not autobiographical in nature could be presented as evidence. The court further stated that it was unaware of any court in Illinois that had allowed the GSS to be presented to a jury on the issue of the defendant's interrogative suggestibility. Thus, the court concluded that the GSS did not meet the standard for admissibility under Frye."

Christian Meissner

(Military Appeals Court upholds decision to exclude testimony of false confession expert –Dr. Christian Meissner)

In *US v. Bell* (2013) the U.S. Army of Criminal Appeals upheld a lower court's decision to exclude the testimony of Dr. Christian Meissner, stating that, "The defense counsel did not provide any evidence that the appellant was unusually susceptible to coercion or had any abnormal mental or emotional problems that might make him more vulnerable to confessing falsely. The military judge found the defense could not articulate exactly what Dr. Meissner could do for the defense theory, and characterized the use of the expert as akin to a "fishing expedition."

(Military court limits the testimony of Dr. Christian Meissner on the defendant's "heightened suggestibility and manipulation" as a result of his interrogation)

In *US v. Markis* (2009) the US Army Court of Criminal Appeals ruled that "any legal error attached to the military judge's limitation on Dr. Meissner's testimony does not rise to the level of a constitutional magnitude and appellant was not denied "a meaningful opportunity to present a complete defense."

In this case, the military judge informed civilian defense counsel before Dr. Meissner testified, "You can't ask him any hypotheticals, unless you run it by me ... and I better not hear any hypothetical questions about the facts in this case from that guy." The record of trial demonstrates the military judge clearly did not want the witness to opine that appellant's confessions were merely the product of his suggestibility, as this would "usurp the exclusive function of the jury to weigh the evidence and determine credibility." *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A .F.2007). Specifically, the military judge expressed his concerns that "he is interposing his own judgment for that of the members" and "you're asking him to interpose his own judgment about whether or not the interrogation conducted by CID may have been suggestive or not. That's not for him to say. That's for the members to decide."

(Dr. Christian Meissner testifies on false confession issues - Jury finds defendant guilty)

In *Dodson v. State* (2008) the the jury convicted Kira Lynn Dodson of capital murder, and the trial judge assessed a mandatory life sentence. In two issues, appellant contends the evidence is legally and factually insufficient to support the conviction. We affirm. It is interesting to note that at trial, "Dr. Christian Meissner, an assistant professor of psychology and criminal justice, testified on appellant's behalf as an expert on false confessions. According to Meissner, interrogation techniques that lead to gaining a true confession from a guilty person may also lead to receiving a false confession from an innocent person. Generally, the interrogation process contains three phases: isolating the suspect in a room and building rapport phase, confrontation phase, and minimizing the suspect's perception of the consequences phase. There are several factors that may determine whether an individual gives a false confession, including the suspect's age, the

length of time the suspect is interrogated, and whether interrogation takes place in the middle of the day as opposed to the middle of the night. Meissner also testified his career has been as an academic, he had no experience in conducting law enforcement investigations, and he could not tell the jury whether appellant's confession was true or false."

James Walker

(Testimony of Dr. James Walker re false confession was not persuasive)

In *State v. Mark* (August 2015) the Court of Criminal Appeals of Tennessee, upheld the lower court's opinion to admit the defendant's confession, rejecting the testimony of Dr. James Walker, an expert in neuropsychology, who testified that the defendant exhibited characteristics that made her "very susceptible" to making a false confession. In this case the defendant was convicted of one count of first degree murder during the perpetration of aggravated child abuse, four counts of aggravated child abuse, and four counts of child abuse. From the court's opinion:

"The defense presented as its first witness Dr. James Walker, a forensic neuropsychologist, who was accepted by the trial court as an expert in neuropsychology. He testified with regard to "the phenomenon" known as false confessions in which a person admits to a crime that they did not actually commit. He stated that this was an area of "intense study and scrutiny" for him. Relevant to false confessions is the personality trait of suggestibility, which can be quantified using the Gudjonsson test. Dr. Walker testified that outside of one's suggestibility, police tactics also precipitated false confessions. He said that police are trained to elicit confessions by utilizing the following interrogation practices: isolating the subject; keeping them in a room surrounded by symbols of authority such as badges and guns; telling the subject that you know they are guilty and that this can all be over when they finally admit their guilt; telling the subject that they are not a bad person and that the officer understands they did not mean to do what they actually did; telling the subject that if they will just confess to what they are accused of, then everything will go much better for them. Dr. Walker said that some people falsely confess because of deference to authority. Others confess falsely because of sleep deprivation, depression, or anxiety. Still others do so to protect loved ones.

During his evaluation of appellant, Dr. Walker considered investigators' notes and administered the Greens Word Memory Test. The Greens test assessed the individual's truthfulness, and he said that appellant performed perfectly, indicating that she was trying to do her best. He also administered a Mini Mental State Evaluation to determine whether appellant's basic mental functions were intact. The test showed no mental dysfunction. Appellant's scores on the Personality Assessment Inventory were mostly within normal limits, but in some areas, her scores were elevated. On the Positive Impression Management Scale section, she answered some items in a defensive way, such as whether she would become angry when insulted or when someone forgot to empty the trash. Dr. Walker said, "She tended to say that she didn't do things like that, like a typical person would." Appellant scored "low dominance" on the inventory, which indicated that she

was non-confrontational, avoided conflicts, and felt she had lower self-esteem than others. He opined that those characteristics would make a person more likely to admit doing something she had not done. Dr. Walker administered an EQI to obtain appellant's emotional rather than intelligence quotient. The results indicated that appellant had low self-esteem, did not hold herself in high regard, and felt as though she was never able to achieve as her family expected. He said appellant is empathetic, sympathetic, compassionate, deferential, and unlikely to assert herself. He described that she had a great deal of social responsibility, was a rule-follower, and was not a good problem solver. She does not think "well on her feet," and it would take her longer and require more effort for her to solve a challenge. Appellant described herself as "a rather unhappy individual."

Dr. Walker also utilized the Gudjonsson Compliance Scale and the Gudjonsson Suggestibility Scale. The results of the compliance scale indicated that appellant answered all twenty questions in the "compliant direction." He said, "She described herself as an extremely compliant individual, someone who never goes against authority." The suggestibility scale was "designed to get at the heart of this idea of suggestibility. And it's done by directly measuring whether or not you can get the patient to change their mind about something that they know is actually true." When asked leading questions about a passage that Dr. Walker read, appellant answered affirmatively to those questions at a level that was "higher than average." On the next part of the test in which Dr. Walker challenged some of appellant's answers, she changed her answers eight times, "which is a very high number." He said, "She's a very suggestible person. She's very compliant. When I gave her the false feedback that she had done very poorly on the test and we should try to do better the next time, she appeared so crest fallen it was almost like I had slapped her across the face. She was just so mortified that she had not done a good job and she wanted to do better. I think that's why she changed her answers on this test."

With regard to appellant's interrogation, Dr. Walker opined:

I think that her interrogation by the police was of course as it would be with anybody, a very stressful time. But for [appellant] it was especially stressful because she was confronted by people in authority who wanted her to say things that she did not want to say, who wanted to get her to say that she had done the things that she didn't want to say that she had done. This was a tremendous dilemma for her.

He stated that based on Detective Harbaugh's interrogation techniques, the size of the room, the number of people in the room, the lack of windows, and the location of the exit, in conjunction with appellant's predispositions, she was "very susceptible" to making a false confession on July 1, 2010.

On cross-examination, Dr. Walker stated that he interviewed and tested appellant twelve days prior to the trial in this matter, and he confirmed that she had given a "very damaging confession." He admitted that he was unaware of the adoption paperwork appellant and Mr. Mark had completed wherein they wrote that although they were Chinese, they did not have a "strong grasp" of the Chinese culture. He acknowledged that

appellant had portrayed to him that she, in fact, had a strong tie with the Chinese culture. Dr. Walker agreed that it was a fair assessment that appellant "thinks ahead" when answering questions.

The State asked Dr. Walker whether he had an opinion about whether appellant's statement to the police was true, to which he answered, "I do not." He clarified, "Not within a reasonable degree of scientific certainty." He agreed that it was "very possible" that she was telling the truth in her statement.

Dr. Walker's assessment was that appellant was non-confrontational, avoided conflicts, and felt she had lower self-esteem than others. He opined that those characteristics would make a person more likely to admit doing something they had not done. Dr. Walker administered an EQI to obtain appellant's emotional rather than intelligence quotient. The results indicated that appellant had low self-esteem, did not hold herself in high regard, and felt as though she was never able to achieve as her family expected. He said that appellant is empathetic, sympathetic, compassionate, deferential, and unlikely to assert herself. He described that she had a great deal of social responsibility, was a rule-follower, and was not a good problem solver. He said, "She's a very suggestible person. She's very compliant."

Even so, on cross-examination, when the State asked Dr. Walker whether he had an opinion about whether appellant's statement to the police was true, he acknowledged that it was "very possible" that she was telling the truth in her statement.

We conclude that appellant's statement was freely and voluntarily given and was not the product of coercive action.

(Jury rejects testimony from Dr. James Waker of false confessions and suggestibility)

In *State v. Clark* (2012) the jury found the defendant guilty of multiple charges of rape of a child and aggravated sexual battery, even though defense expert Dr. James Walker testified "that he evaluated the Defendant for propensity to be unduly suggestible or overly compliant in interrogation." He also evaluated the Defendant for personality characteristics that might lead him to give a false confession or false implicating statement. He further testified that the defendant "was susceptible to leading questions in an interrogation situation and that the person would be much more likely than the average person to make false admissions."

James Stark

(Testimony from defense expert Dr. James Stark on false confessions excluded)

In *Humphrey v. Riley* (2012) the Supreme Court of Georgia upheld the trial court's decision to exclude the testimony of defense expert Dr. Stark on police interrogation tactics and the possibility that false confessions result from such tactics. The trial court excluded the testimony, reasoning that "false confession theory ha[d] not reached a

verifiable stage of scientific certainty" and noting that "the knowledge that a false confession c[ould] be obtained from a suspect by police [wa]s not beyond the ken of the average juror."

The Supreme Court stated that "We find no prejudice from trial counsel's alleged deficiency for two reasons. First, as we noted on direct appeal, the question of whether someone might be persuaded to give a false confession through persuasive interrogation techniques is "not beyond the ken of the average juror," and, therefore, the absence of expert testimony on that question would not be prejudicial... Indeed, a review of the trial record reveals that trial counsel clearly set the issue of interrogation techniques before the jury through the cross-examination of the investigator who obtained Riley's inculpatory statement and who readily admitted using such techniques with Riley... Second, we have held that testimony from the very expert relied upon by Riley in his habeas hearing was properly excluded in another case, demonstrating that similar testimony would have been properly excluded at Riley's trial."

Pamela Auble

(Jury rejects testimony that the Reid Technique risks unreliable and untrustworthy statements)

In *Rogers v. State* (2012) the Court of Criminal Appeals of Tennessee at Nashville, affirmed the denial of post-conviction relief after the defendant had been convicted of first degree murder, and subsequently filed an appeal. During the trial, Dr. Pamela Auble, admitted as an expert in neuropsychology and clinical and general psychology, testified that, at post-conviction counsel's request, she evaluated statements the Petitioner gave to law enforcement in order to determine whether his statement had been coerced. As part of her testimony she stated that "The purpose of police interrogation is to elicit statements from defendants that describe their role in the alleged offense. The Reid technique is the most commonly employed strategy to accomplish this goal.... The Reid technique can be reduced to three processes: 1. Isolation in an interrogation room; 2. Confrontation or maximization in which the suspect is accused of the crime, presented with evidence, and blocked from denial; 3. Minimization in which the crime is morally justified and sympathy is feigned." The jury rejected the suggestion that the defendant's incriminating statements were unreliable or coerced in any way.

[It should be noted that Dr. Auble erroneously repeated several mischaracterizations of the Reid Technique that are often espoused by Dr. Richard Leo and others]

Alan Hirsch

(Court rejects the testimony of Professor Alan Hirsch - no evidence the Reid Technique produces false confessions)

In *US v. Jacques* (2011) the US District Court of Massachusetts rejected the proffered testimony of defense expert Professor Alan Hirsch on the issue of false confessions,

stating, in part, that:

"This court excluded Professor Hirsch's testimony on two principal grounds: (1) he lacked specialized knowledge that would assist the jury in understanding or weighing the evidence; and (2) his testimony was not based on sufficient facts or data and did not involve the application of reliable principles or methods to the facts of this case."

In his testimony Professor Hirsch indicated that the Reid Technique generated false confessions, but could provide no evidence to support this position as the court pointed out:

"Professor Hirsch's criticism of the Reid technique appeared, at one point in his testimony, to be that it increased the overall number of confessions, both true and false…. ("I want to be very clear that, number one, the Reid Technique is too effective. The problem is not that it's ineffective. It breaks down guilty suspects. The problem is that it also breaks down innocent suspects.").) Again, he failed to point to any data supporting even this position, which does not address the central issue here: the relative frequency of false confessions and the factors contributing to it.

In sum, the proffered expert testimony to the effect that the Reid technique enhanced the risk of an unreliable confession lacked any objective basis for support whatever. Although Professor Hirsch insisted that "there is a wealth of information about the risks of the Reid technique," he could point to none…. It is true, as able defense counsel pointed out, that all science is not the same, and in the area of false confessions the kind of strictly mathematical support available in other areas may be lacking. But some objective basis other than say-so must be offered, and none was." .

Samuel Roll

(Court limits the testimony of expert witness Dr. Samuel Roll on the issue of false confessions)

In *US v. Ganadonegro* (2011) the US District Court, D. New Mexico, limited the testimony of expert witness Samuel Roll on the credibility of the defendant's statements.

During a suppression hearing at the trial, Dr. Roll testified as follows: "Based on his examination of Ganadonegro and the tests he administered to Ganadonegro, Dr. Roll concluded that Ganadonegro has low verbal skills, because, although his overall intelligence is in the forty-second percentile, his verbal I.Q. is at the eighteenth percentile and his verbal comprehension is in the twelfth percentile... Dr. Roll also concluded that Ganadonegro has a low estimate of his personal worth and experiences low self-esteem and limited self-confidence...Dr. Roll concluded that Ganadonegro has a deficient in attention and concentration, and that his capacity to coordinate and organize data, and weigh it for contradictions and consequences, falls below most people's skill level...Dr. Roll concluded that Ganadonegro demonstrated impairment of reality-testing capacities in which he tends to misperceive events, and tends to form mistaken impressions of

people and what their actions signify...Dr. Roll also concluded that Ganadonegro is susceptible to episodes of depression...Based on these conclusions, Dr. Roll concluded: "There are a host of language factors, cultural factors, and personality factors that would have increased the probability of ... Ganadonegro making false admissions. (emphasis added) Only an interview with the situational factors ameliorated and his personality dispositions taken into account could produce any reliable pattern of admissions on his part."

Upon their review of the case, the District Court ruled that "The Court will thus exclude Dr. Roll's testimony insofar as it relates to the credibility of Ganadonegro's statements in the interview..... the Tenth Circuit's opinion strongly suggests that Dr. Roll's testimony that there are a host of language factors, cultural factors, and personality factors that would have increased the probability of Ganadonegro making false admissions does little more than vouch for the credibility of Ganadonegro's statement, and thus encroaches on the jury's exclusive function to make credibility determinations.

E. Clay Jorgensen

(Court rejects expert testimony of E. Clay Jorgensen, Ph.D.)

In *State v. Sam* (2009) the Court of Appeals Washington, upheld the trial court's decision not to allow E. Clay Jorgensen, Ph.D., an expert witness hired by the defense to evaluate the voluntariness of Mr. Sam's statements, to testify. The court found that "Mr. Jorgensen did not make a diagnosis, and "testimony about traits is ... disguised character evidence." The court stated, "I have a real problem with whether this is also inappropriate character evidence, disguised character evidence, rather than being something serious that the jury could consider from an expert." Id. The court further reasoned, "I do believe that an argument can be made, without an expert, that the jury would understand."

Jarvis Wright

(Court refuses to let Dr. Jarvis Wright testify on false confessions)

In *Munoz v. State* (2009) the Texas Court of Appeals, El Paso upheld the trial court's decision to reject the testimony of Dr. Jarvis Wright. In their decision they pointed out that "In Point of Error Four, Appellant argues that the trial judge erred in refusing to allow Dr. Jarvis Wright's testimony relating to the field of false confessions. The testimony was intended to rebut the confession and Appellant's admission that he hit Xavier's head on a bedpost.

At the hearing conducted outside the presence of the jury, Dr. Wright testified that the field of false confessions was a relatively new area and an emerging field with which Dr. Wright was familiar by having read recent literature. Dr. Wright explained that psychologists in the field have identified several factors which indicate an increased likelihood that a given confession is false. These factors included the interrogation techniques used, low intelligence, lack of familiarity with law enforcement, and

susceptibility to suggestion. Appellant did not intend to ask Dr. Wright to give an opinion as to the truth or falsity of Appellant's confession, but only to testify to a theory that false confessions occur and that the existence of certain factors make it more likely that a specific confession is false. Dr. Wright never interviewed, observed, or tested Appellant, nor had he ever written on, or conducted any testing in the field of false confessions. Dr. Wright's qualification to testify as an expert was that he had read literature on the topic and the basis of his testimony was that he had reviewed Appellant's confession and school records.

Based on our evaluation of the testimony and application of the Kelly factors for reliability of scientific theory, we find that the Appellant did not meet his burden of providing by clear and convincing evidence that Dr. Wright's testimony was reliable and therefore relevant. Dr. Wright's testimony could not have assisted the jury in understanding the evidence or in making a determination of a fact issue. Dr. Wright did not intend to offer an opinion as to the truth or falsity of the Appellant's confession. During cross-examination Appellant admitted the truth of the portions of his confession that he earlier claimed were inaccurate. The trial court's decision to exclude Dr. Wright's testimony regarding false confessions is within the zone of reasonable disagreement. The trial court did not abuse its discretion in excluding it. Point of Error Four is overruled."

Christopher Lamps

(Court rejects the testimony of expert witness Dr. Christopher Lamps on the issue of confession voluntariness)

In *T.C., a minor v. State* (2011) the Court of Appeals of Arkansas upheld the trial court's decision to reject the testimony of expert witness Dr. Christopher Lamps. The defendant argued that "the trial court ignored crucial testimony from Dr. Christopher Lamps, who concluded that appellant did not freely, voluntarily, or intelligently waive his rights. The trial court found that Dr. Lamps's testimony was given in generalities that young children would not be able to understand the implications of waiving the right to an attorney. However, appellant argues that the doctor specifically testified that appellant was not able to make a knowing or intelligent decision in this case.

"...the trial court was free to reject Dr. Lamps's opinion on this or any issue. See Haynes, supra. The trial court listened to the testimony and viewed the same taped statements upon which Dr. Lamps based his opinions and concluded that the confession was not the result of any threats or inducements, but was given of appellant's own free will with knowledge of the circumstances. Further, coercion cannot be presumed because what was said to appellant between 6:45 p.m. and 10:20 p.m. was not recorded. There was no evidence that appellant was made any promises or subjected to any threats or coercion during this time.... Appellant asks this court to assume that a promise was made. However, this assumption flies in the face of the evidence, which included specific and unequivocal denials by all officers that appellant was promised anything. Accordingly, we affirm."

Jeffrey Vanderwater-Piercy

(Court does not allow expert testimony by Dr. Jeffrey Vanderwater-Piercy concerning false or coerced confessions)

In *Ruiz v. State* (2010) the Court of Appeals of Indiana upheld the trial court's decision to exclude the testimony of Dr. Jeffery Vanderwater-Piercy. From the court's opinion:

"Ruiz's counsel wanted to present expert testimony by Dr. Jeffrey Vanderwater-Piercy concerning false or coerced confessions. The Doctor is a licensed clinical psychologist who had practiced for twenty years and had testified as an expert fifty times. However, he had never been qualified in any court as an expert on coerced confessions specifically.

At the time of the hearing on the admissibility of the testimony, the Doctor had not yet conducted any testing of Ruiz, but if his testimony were to be admissible, the Doctor would examine Ruiz to determine if he had any personality traits that would make him susceptible to police influence and whether the police interrogation was psychologically coercive. The Doctor had examined five other defendants for the possibility of false confession but had not found any evidence those confessions were coerced.

The court declined to allow the Doctor's testimony because although the Doctor "possesses extensive psychological knowledge and experience," (App. at 149), his testimony "would not assist the triers [sic] of fact in this case to understand scientific, technical or specialized evidence or to determine a fact in issue," (id. at 149-150), and it would "be likely to cause unfair prejudice, to confuse the issues or to mislead the jury." Affirmed.

Bobby Miller

(Court rejects psychiatrist Bobby Miller, M.D., as an expert witness on false confessions)

In *State v. Black* (2010) the Supreme Court of Appeals of West Virginia upheld the lower court's decision to reject the testimony of psychiatrist Bobby Miller, M.D. on the basis that "this testimony does not come up to any standards of reliability as far as scientific testing go[es],…" .

Karen Fukutaki

(Court does not allow Dr. Karen Fukutaki to testify as an expert witness on confession voluntariness)

In *Gruwell v. State* (2011) the Supreme Court of Wyoming upheld the lower court's decision to exclude the testimony of Dr. Karen Fukutaki as to the "voluntariness of the confession and the psychology relating to confessions" due to the defendant not properly notifying the prosecution of their intent to call this witness in a timely manner.

John Di Bacco

(Court rejects the testimony of expert witness Dr. John DiBacco on the issue of coercive interrogation techniques)

In *US v. Preston* (2011) the U.S. District Court, D. Arizona, upheld the admissibility of the defendant's confession and rejected the testimony of expert witness Dr. John DiBacco, stating the following: "During the course of the interview, the agents asked Defendant suggestive questions such as whether it was a one-time event, whether the victim pulled down his own pants, whether Defendant unzipped his own pants or pulled them down, whether Defendant put on a condom, whether and for how long he penetrated the victim, whether he threw the condom away, etc. In response to these questions, Defendant made some admissions. At the end of the interview the officers wrote out a document which they represented to Defendant could contain his apology to the victim. In the document, the officers summarized the confessions that they had obtained from Defendant, included an apology to the alleged victim, and had Defendant review and sign the document, which he did.

At hearing, Defendant called Dr. John DiBacco as an expert witness. Dr. DiBacco offered evidence that the interview technique used by the agents was inappropriate and persistent; and that Defendant may be susceptible to the inappropriate questions and promises made by agents because he is substantially below average in his communication and comprehension skills. Dr. DiBacco further testified that Defendant has been in special education courses as a result of these poor verbal communications skills. Under such circumstances Defendant's expert opined, Defendant might have been willing to say what he perceived his questioners wanted him to say to bring the interview to an end."

The District Court found that "Having assessed the nature of the interrogation at issue, and the extent of Defendant to resist the pressure brought upon him by the agents, the Court is of the opinion that the government has met its burden that the statements were not the result of Defendant's will being overborne." .

Mark Vigen

(Court rejects the argument made by expert psychologist Dr. Mark Vigen that the defendant was susceptible to police manipulation)

In *State v. Blank* (2011) the Court of Appeal of Louisiana, Fifth Circuit, upheld the trial court's decision to admit the defendant's statements even though he had offered the testimony of Dr. Mark Vigen, an expert psychologist, "who described him as an illiterate and easily manipulated individual who was confronted by multiple law enforcement officers and then taken to a strange office for interrogation where, over the course of many hours, he finally broke down. Blank asserts that, under the circumstances of this case, the emotional stress upon him was sufficient to vitiate his consent, contrary to the trial judge's belief."

Scott Bresler

(Court rejects the testimony of Dr. Scott Bresler on false confession issues)

In *State v. Craven* (2010) the Court of Appeals of Nebraska upheld the lower court's decision to reject the testimony of Dr. Scott Bresler on false confession issues. As the Court of Appeals stated in their opinion, "Upon our review of the testimony of Bresler, which Craven wished to present to the jury, it is clear that the theory regarding false confessions was still being tested and subjected to peer review and publication, had no known rate of error, and had no specific standards to control its operation. Furthermore, the ultimate conclusion to be given to the jury by Bresler was not that of an "expert opinion" but merely a tool to assist the jury in its determination of the facts..... The jury had an opportunity to view the interview twice during the trial and to draw its own conclusions regarding the interview. Therefore, we find that the district court did not abuse its discretion by excluding the testimony of Bresler."

Robert Latimer

(Court excludes the testimony of psychiatrist Dr. Robert Latimer)

In *State v. Rosales* (July 2010) the Supreme Court of New Jersey upheld the lower court's decision to exclude the testimony of Dr. Robert Latimer. In this case the defense retained the services of "psychiatrist Dr. Robert Latimer, who met with defendant on three occasions at the prison. Dr. Latimer also reviewed most of the discovery materials generated from the investigation. In his September 22, 2005 letter-report, Dr. Latimer opined that defendant "ha[d] been vulnerable to severe anxiety and panic due to the power of the interrogation setting." He concluded that defendant's "will was overcome to the point where he confessed to a crime he did not commit."

The defendant submitted a March 23, 2006, supplemental letter-report prepared by Dr. Latimer in which the doctor referenced the works of several authorities on false confessions. Dr. Latimer noted that his testimony would "entail a psychological interpretation of defendant's fear-stricken, panicky reaction to direct death threats," and that the issues were beyond the knowledge of the average person. He explained that "during a stressful interrogation, the stress of denial becomes stronger than the stress of admitting[, and a]t that point, the suspect can easily break and issue a false confession." The State opposed the motion, arguing that Dr. Latimer's opinions were based on generalizations and were not tied to a recognized clinical diagnosis of defendant.

"Based on the record before it, the trial court concluded that Dr. Latimer failed to proffer "scientifically reliable evidence that would truly assist the trier of fact."

Solomon Fulero

(Court rejects the testimony of Dr. Sol Fulero)

In *State v. Langley* (2011) the Court of Appeal of Louisiana, Third Circuit, the court upheld the trial court's decision to reject the testimony of Dr. Sol Fulero on the basis that "the judge indicated that he did not think the testimony would assist him in reaching a decision regarding whether the defendant gave a false confession."

(Another Court excludes the testimony of Dr. Solomon Fulero)

In *United States of America ex rel. Tenisha Carter v. Transcoso* (2011) the US District Court, N.D Illinois, upheld the lower court's exclusion of the testimony or Dr. Solomon Fulero. In their opinion the District Court stated that, "Dr. Fulero's testimony was offered to show that Carter's environment was coercive and likely to lead to a false confession given her mental state as a juvenile. While these issues are related, it is by no means clear that Dr. Fulero's testimony would have been directly on point, as Carter claims. In fact, it is telling that Carter does not rely whatsoever on evidence Fulero would have introduced in arguing that the state court improperly decided that there was no seizure until Carter confessed. Thus, the Court cannot find that the state court's evidentiary ruling regarding Dr. Fulero's arguably unrelated testimony, which Carter had the opportunity to contest in state court, deprived Carter of a full and fair opportunity to be heard."

(Kentucky Supreme Court ruled that the trial court should have allowed false confession expert Dr. Solomon Fulero to testify)

In *Terry v. Commonwealth* (2010) the Kentucky Supreme court ruled that the "Trial court's improper exclusion of expert testimony on behalf of defendant regarding general scientific principles and studies surrounding police interrogations, on grounds that defendant failed to disclose witness prior to trial, was not harmless error in murder prosecution; defendant testified to coercive nature of interrogation, essential question presented at trial was whether defendant's confession was reliable, and denial of expert denied defendant a context and foundation supporting his only defense of calling confession into doubt."

(Court limits the testimony of false confession expert Dr. Solomon Fulero)

In *Williams v. Brunsman* (2010) the US District Court, S.D. Ohio, upheld the trial court's decision to limit the testimony of Dr. Solomon Fulero on false confession issues. The trial court's decision was:

"Prior to trial, appellant moved to permit the testimony of Dr. Fulero, and the trial court held a hearing pursuant to Evid. R. 702 and *Daubert v. Merrell* Dow Pharmaceuticals, Inc. (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469. Following this hearing, the trial court permitted Dr. Fulero to testify as an expert at trial, consistent with the U.S. Supreme Court's decision in *Crane v. Kentucky* (1986), 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636, regarding his knowledge of psychological law enforcement interrogation techniques and the impact they may have on inducing false confessions. However, the trial court specifically excluded testimony, " * * * regarding the number of wrongful

convictions or circumstances relating to other cases of claimed wrongful prosecutions and/or convictions based on false confessions, past or present * * *."
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Mark Costanzo

(Court excludes the testimony of Dr. Mark Costanzo)

In *People v. Purcell* (2011) the California Court of Appeal, Second District, upheld the lower court decision to exclude the testimony of Dr. Mark Costanzo on the issue of false confessions, indicating that, "At trial, appellant recanted his confession. He returned to his original description of the murder as Baltazar shooting Willis in anger at Willis's complaints about the cost of appellant's proposed carpentry work. He testified he falsely confessed to shooting Willis in order to ensure his family's safety. In support of his recantation, appellant offered the testimony of Dr. Mark Costanzo, an expert in police interrogation techniques and false confessions. Dr. Costanzo was prepared to opine for the jury that sheriff's investigators had used two techniques likely to induce a false confession: telling appellant he had failed a "fake" lie detector test, and promising him leniency if he told investigators the truth. The trial court excluded Dr. Costanzo's testimony in both trials."

In *People v. Martinez* (2008) this case the Court of Appeal upheld the trial court's decision to exclude the testimony of Mark Costanzo on why people make false confessions. "'Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness.'... A trial court may exclude the testimony of a false confessions expert where the defendant's testimony about why he falsely confessed is easily understood by jurors." Click here for the complete opinion.

Daniel Grant

(Court rejects expert testimony of defendant's limited mental capacity and suggestibility)

In *Vance v. State* (June 2011) the Supreme Court of Arkansas upheld the Circuit Court's decision to reject the testimony of Dr. Daniel H. Grant, a neuropsychologist and expert in forensic psychology, and Dr. Stephen Greenspan, an expert in psychology and developmental disabilities. Dr. Grant's testimony was that "he had conducted numerous tests on Appellant over the course of two days and determined that Appellant had a full scale IQ of 75, which placed him in the fifth percentile. He opined that Appellant had cognitive impairments or deficits involving language and memory. Dr. Greenspan, who had recently authored a book on the effect of cognitive impairment on a person's tendency to engage in foolish or gullible behavior, testified that people with limited intelligence are much more likely to give false confessions. In addition, Dr. Greenspan explained that persons with cognitive impairments have a "need to look more normal than they really are to cover up their limitations," so they confabulate or "fak[e]

knowledge that they don't have," and when the veracity of their account of an event is challenged, they change what they are saying "to create the appearance of competence ... or to get the people who are questioning them to leave them alone." Dr. Greenspan acknowledged that he had not interviewed Appellant but had reviewed the transcripts and tapes of Appellant's statements to police; he opined that he "saw lots of evidence of what I would consider confabulation as reflected in the fact that [Appellant] gave many different versions often changing the same version on a dime basically." The circuit court stated that, after hearing the foregoing proffered testimony, it was even more convinced that to allow such testimony would be to invade the province of the jury."

The Supreme Court of Arkansas ruled that "We see no abuse of discretion in such a ruling. Appellant had ample opportunity to cross-examine the officers who took his statements. In addition, the jury viewed a videotape of one of Appellant's statements and heard an audio recording of two others. The proffered testimony was not beyond the ability of the jury to understand and draw its own conclusions. Since Dr. Greenspan opined that Appellant was confabulating, the proffered testimony would have invaded the jury's function as trier of fact."

Rosalyn Shultz

In *State v. Wright* (2008) the Court of Appeals upheld the trial court's decision to exclude the testimony of forensic psychologist Dr. Rosalyn Shultz who sought to testify about factors which lead people to make false confessions "and the would have opined that Appellant possessed certain of those characteristics which tend to be present in people who make false confessions." The Appeals court stated that such testimony would "Invade the province of the jury."

Susan Garvey

In *Downs v. Virginia* (2006) the defendant appealed saying that "the trial court erred in refusing to allow Dr. Susan Garvey to testify regarding Downs' "suggestibility and a psychological diagnosis." Earlier in the trial the defense had called Dr. Solomon Fulero, a nationally recognized expert in the area of false confessions, as an expert witness. Dr. Fulero testified about factors and circumstances that can lead to a false confession and described the personality characteristics of a person likely to confess to a crime they did not commit. The court only allowed Dr. Fulero to testify generally about false confessions and did not allow Dr. Fulero to testify about Downs specifically because he had never examined her." The following day the defense sought to have Dr. Garvey testify as a second expert. Dr. Garvey is a psychologist who had examined Downs prior to trial in order to determine whether she was competent to stand trial. Although Dr. Garvey had never previously qualified as an expert on false confessions, her report concluded that Downs had "personality characteristics ... consistent with the type of individual who would be prone to making a false confession." Based on her prior examination of Downs, Dr. Garvey intended to testify about two of the "false confession factors" identified by Dr. Fulero, specifically, "suggestibility and a psychological diagnosis." The trial court held that the jury did not need "expertise" to assist them in

assessing whether Downs had the type of personality that Dr. Fulero described as being susceptible to giving a false confession. The Court of Appeals agreed.

Allison Redlich

(Court rejects the testimony of Dr. Allison Redlich on false confession issues)

In *People v. Powell* (June 2014) the Supreme Court, Queens County, New York rejected the proffered testimony of Dr. Allison Redlich on false confession issues, stating "Dr. Redlich's testimony was insufficient in that it not only failed to establish that her expertise is generally accepted in the scientific community, but also her testimony failed to establish whether or not there was a known or potential rate of error in her methods of research." From the court's opinion:

Dr. Redlich testified about the John E. Reid and Associates, Inc. (hereinafter "Reid") technique of interrogation, which she stated was the most often cited technique of interrogation used in the United States. To her knowledge, there are other techniques utilized to conduct interrogations. She stated that in her opinion they were all psychologically oriented and rely upon the principles of social influence which are similar to the Reid technique.

Dr. Redlich stated that she knew the steps of interrogation, although she failed to explain the basis of her knowledge. In her opinion the three steps of interrogation are 1) isolation; 2) tell the suspect that you know they are guilty; and 3) convert the oral statement to a written statement. Dr. Redlich testified that the goal of the Reid method is for the police to get a written confession.

Dr. Redlich also discussed two risk factors she believed were associated with false confessions. The two main categories she discussed were dispositional risk factors and situational risk factors. She defined dispositional risk factors as ones that are personal to the suspect that may render a suspect vulnerable. Situational risk factors are those that pertain more to the interrogation tactics such as the presentation of false information or evidence, lying to suspects, the length of interrogation and matters of that nature.

Dr. Redlich testified that mental illness is considered a dispositional risk factor and in her opinion someone who is mentally ill is more likely to give a false confession since it renders them more vulnerable. Dr. Reidlich opined that mentally impaired individuals as a whole are more prone to confusion, depression, fatigue, and delusions which she stated are very common mental health symptoms. Therefore, she concluded that their ability to withstand what she termed "psychologically oriented interrogation techniques" is much lower than people without this type of vulnerability.

Dr. Redlich discussed the second main category, situational risk factors that she believes play a significant role in false confessions. An example she gave was that lengthier interrogations are more likely to result in a false confession. She said that confessions typically last about one to two hours in length. She then stated that the "Reid Technique"

manual of interviewing and interrogation states that three to four hours is sufficient. Dr. Redlich went on to state that when you look at proven false confessions those interrogations tend to be lengthier. She testified that 80 percent of proven false confessions were six hours or longer and the average length of time for the interrogation was sixteen hours.

Dr. Redlich stated that the field of false confession studies is generally accepted within the scientific community and that one of the primary ways to establish general acceptance is through peer reviews and getting publications in peer review journals. She said peer review is important because in her opinion peer review establishes that the "sciences follow a scientific method."

In the instant case, the court finds that based upon the credible evidence presented to the court the defendant failed to meet its burden of establishing through the testimony of Dr. Allison Redlich that expert testimony on false confessions is readily acceptable in the scientific community. Dr. Redlich's testimony did not convince this court that an expert's testimony on the issue of false confessions is scientifically reliable.

Here Dr. Redlich's testimony merely established that it was her belief, as well as others who wrote articles and performed studies, that individuals can falsely confess. This testimony did not establish to this court's satisfaction that the proffered expert testimony on false confessions testimony has resulted in reliable scientific data or that there is a consensus in the relevant scientific community pursuant to *Frye.* Moreover, Dr. Redlich's testimony was insufficient in that it not only failed to establish that her expertise is generally accepted in the scientific community, but also her testimony failed to establish whether or not there was a known or potential rate of error in her methods of research.

(Court offers scathing rejection of false confession expert Dr. Alison Redlich)

In *People v. Oliver* (July 2014) the Supreme Court, Kings County, New York rejected the testimony of false confession expert Alison Redlich. In their opinion the court stated the following:

"Dr. Alison Redlich, one of a small group of social scientists who have repeatedly proffered themselves as experts on the subject of false confessions, describes herself as an expert in "the areas of social influence, decision making, scientific methods, and specifically interrogation techniques and confession." She asserts that her testimony "will give jurors a more accurate understanding how to weight [sic] the confession itself and how to avoid using inaccurate cues and assumptions to judge the truthfulness of the confession and/or the defendant's testimony about his confession," yet her proffer makes no reference to the defendant at all, nor to the particular circumstances of this case. Instead, she has provided what appears to be a general treatise on the subject of false confessions. For that reason alone, her proposed testimony does not meet the threshold standard required by the Court of Appeals-that the proposed testimony be relevant to the particular facts of the case before the court.

Moreover, while Dr. Redlich has impressive academic credentials, there are serious reasons to question the extent of her expertise, the legitimacy of the theories she propounds, and her objectivity. The *Bedessie* court's recognition that a qualified professional may, in the appropriate case, provide testimony about the factors that could induce a person to testify falsely does not mean that every researcher who claims an expertise in this area should be permitted to testify…. In other words, the mere assertion by the proposed expert that she is in fact an expert is not a basis to admit her testimony.

Similarly, the Court is not required to accept Dr. Redlich's assertion that her theories are "generally accepted among scientists," especially since many of the researchers she includes in that group are the very researchers whose testimony has been consistently rejected by New York courts. (*See* cases cited *infra.*). As some of those cases make plain, the "relevant scientific community" is not at all unanimous about false confession research, the methods employed by Dr. Redlich and her colleagues, and the conclusions they reach. Dr. Michael Welner, a board certified psychiatrist, is of the opinion that false confessions are "rare events," and that the only way to determine whether a confession is actually false is through DNA testing that disproves the guilt of the confessing defendant. *People v. Teon Williams, supra.* According to Dr. Welner, it is only through "rigorous psychological and psychiatric examinations" that a professional can determine whether a person is susceptible to confessing to a crime he did not commit. He dismisses the theories Dr. Redlich and her colleagues advocate as "soft science," pointing out that some of the research actually relied on newspaper reports of cases as sources of allegedly false confessions. *People v. Lowery, supra. See also U.S. v. Wilson,* NMCCA 200300734 (U.S. Navy–Marine Corps Court of Criminal Appeals 2007) (expert opined that Dr. Olfshe's theories were "not sufficiently tested," have an "unacceptably high rate of error," "depart from accepted standards," and are not "accepted in the relevant scientific community.").

There is even dissension among the researchers that Dr. Redlich cites. One of them, Dr. Saul Kassin, has conceded that there is no "scientific basis for distinguishing true from false confessions," that "further research in the field is sorely needed," and that lay people may be able to assess whether confessions are in fact false…. Dr. Redlich herself has admitted that her theories cannot be tested empirically.

An examination of Dr. Redlich's submission in this case underscores the wisdom of the decisions rejecting this particular brand of false confession testimony. Like the testimony proffered in *Bedessie,* Dr. Redlich's report is filled with speculation, unsupported theories, and advocacy rather than expertise. There is no empirical support for many of her assertions. For example, she maintains that there is "an alarmingly high incidence of wrongful convictions," and that "[a]pproximately 25%" of this unidentified number "involve false admissions." But her premise is itself unscientific. She does not quantify the supposedly "alarmingly high incidence" of wrongful convictions, does not detail how a conviction is determined to be "wrongful," and does not explain the method or formula by which a confession is determined to be false.

There is similarly no support for Dr. Redlich's hypothesis that jurors are incapable of entertaining the possibility that a confession could be false. The jury system is premised on the ability of citizens to determine whether particular evidence is true or false. Perhaps

the best refutation of Dr. Redlich's mistrust of a jury's competence in this regard is a case in which she had first-hand involvement, *Edmonds v. Mississippi, supra.* The defendant in that case, a juvenile, confessed to helping his stepsister kill her husband. The trial court precluded Dr. Redlich's testimony as insufficiently reliable, a decision that the appellate court upheld, while reversing Edmonds' conviction on other grounds and remanding for a new trial. The jury at the second trial heard the evidence of the defendant's confession and acquitted him, obviously fully capable of weighing the evidence without any assistance from Dr. Redlich.

Another pillar of Dr. Redlich's thesis is the role that police interrogation methods play in false confessions. This part of her theory also suffers from multiple flaws. A review of her curriculum vitae reveals that Dr. Redlich has never worked in any law enforcement capacity, nor does she articulate the basis of her theoretical expertise. She is nonetheless critical of law enforcement in general, and police interrogations in particular, which she describes as "confidence games" with "strategies based on the manipulation and betrayal of trust." Given these views, it is difficult to envision an interrogation of which she would approve. In any case, while she is a critic of the police, the Court does not accept her statement that she is an expert in police methods, at least insofar as this case is concerned.

Dr. Redlich does not appear to know anything about police practices in New York City, as demonstrated by her descriptions of particular interrogation methods. She assumes that all police departments use the same interrogation methods, including the "Reid Technique," which Dr. Redlich labels the "bible of police interrogation," as well as a Behavioral Analysis Interview, the importance of which, Dr. Redlich opines, "cannot be understated [sic]." Dr. Redlich also maintains, again without explanation, that "police have developed methods to get suspects to talk outside of Miranda.' " Another hallmark of all police questioning, according to the doctor, is a three phase process: 1)" custody and isolation" in which the suspect is "detained in a small room" to "experience the anxiety, insecurity, and uncertainty" of police questioning; 2) "confrontation," in which the suspect is "presumed guilty," "told (sometimes falsely) about the evidence" against him, and is "prevented from denying his/her involvement in the crime," and; 3) "minimization," where a "now sympathetic interrogator attempts to gain the suspect's trust," offers "face-saving excuses," and "implies" that the suspect will get a shorter sentence if he confesses, and a longer one if he does not.

Conspicuously absent from Dr. Redlich's submission is any scientific connection between these techniques and false confessions; there are no statistics about the number of false confessions caused by the utilization of the techniques. *See People v. Lowery, supra.* More important, there is simply no evidence that the New York City Police Department uses the "Reid technique," let alone any evidence that the investigating detective in this case did. In fact, Detective Angst's testimony on cross examination demonstrates exactly the opposite:

"Q: And when you first became a detective you went through extensive training in interrogation techniques and other aspects of detective work, right?

A: No.

Q: When did you first undergo interrogation training?

A: When I got to the detective squad.

Q. What did that training consist of?

A: Just mostly paperwork and interviews.

Q: Were you trained in methods of trying to get suspects to make admissions and confessions?

A: No

Q: You never got training in that?

A: In a method, no.

Q: Now, detective, have you ever been trained in isolation techniques for a suspect?

A: No."

The detective also denied that he said anything to the defendant about the consequences of a conviction for killing or injuring the child, or anything about a possible sentence. The fact that the detective did not employ the techniques that are central to Dr. Redlich's theories is yet another reason to preclude her testimony.

Nor does this case have any of "commonalities" that Dr. Redlich says exist in so-called "proven" false confession cases. According to her, false confession cases typically involve juveniles or people with mental impairments, and are characterized by very long interrogations where the suspect is isolated and deprived of sleep. The police employ deceit and trickery, and there is often little or no corroborating evidence. Even accepting all of Dr. Redlich's analysis at face value—a dubious proposition, since this section is also long on anecdotes and generalizations and short on science—none of her theories has anything to do with the facts of this case. *See Rathbun v. Scribner,* 2010 U.S. Dist. LEXIS 31520 (C.D.Cal.2010).

The defendant is not a juvenile, and has no mental or intellectual deficits. He was never isolated or in police custody; on the contrary, he appeared at the precinct of his own accord, with his family, in the middle of the day. The only person who was deprived of sleep appears to be the investigating detective, who did not know the defendant was coming in, and was just leaving the precinct after having worked for two straight days. The interrogation itself was slightly less than three hours, well below what Dr. Redlich deems excessive. Moreover, there is evidence that corroborates the details of the defendant's confession. Other witnesses are apparently prepared to say that the defendant

was alone with the baby at the time the fatal injuries were inflicted. Most significant, the defendant's recorded telephone conversation with his relative confirms what he said to the police.

Thus, even assuming for argument's sake that Dr. Redlich's proposed testimony had the requisite acceptance in the relevant scientific community, it has no relevance at all to this case. It would not aid the jury at all, and meets none of the criteria outlined in *Bedessie.* The Court therefore denies the defense application to introduce her testimony.

(Testimony of Dr. Allison Redlich on false confessions excluded by the court - testimony's probative value was outweighed by its potential to confuse or distract the jury)

In *Commonwealth v. Hoose* (2014) the Supreme Judicial Court of Massachusetts upheld the lower court's decision to exclude the testimony of Dr. Allison Redlich on the issue of false confessions, stating that "it was not an abuse of discretion to exclude the expert testimony where the judge could have concluded also that the testimony's probative value was outweighed by its potential to confuse or distract the jury." From their opinion the Supreme Court stated the following:

"…the defense proffered that Dr. Redlich's testimony would be limited to the fact that false confessions do occur, that they are an area of scientific study, and that there are certain factors related to interrogation methods and the internal disposition of individual suspects that have been identified as commonly occurring among false confessions. The defendant argued that such testimony would be helpful to the jury in assessing the reliability of the defendant's statements to police.

… After hearing argument on the Commonwealth's motion, the judge decided to take testimony from the expert witness in voir dire to determine whether such testimony should be admitted for the jury's consideration… The judge limited the subject of the voir dire to the witness's proffered opinion regarding the concept of false confessions as an area of scientific research, the factors that may contribute to such confessions, and any connection this information would have to the defendant's case and the jury's assessment of the evidence.

Dr. Redlich explained that as a result of this research, a taxonomy of false confession "types" has been identified… and certain factors have been linked to proven false confessions…. Based on her review of the defendant's recorded statements, Dr. Redlich also opined on those false confession factors that were present in the defendant's case… Additionally, Dr. Redlich acknowledged that no studies have been conducted comparing the prevalence of these factors among false confessions to either "true" confessions or all confessions. Furthermore, Dr. Redlich testified that the studies based on proven false confessions that have been used to identify these relevant factors were based on a sample size of approximately 150 to 200 proven false confessions.

At the conclusion of the *Lanigan* hearing, the judge ruled that the expert testimony could not be admitted in evidence because the principles and methods on which Dr. Redlich's opinions were based had not been shown to be sufficiently reliable to go before the jury. The judge emphasized that the research studies that identified the factors linked to false confessions were based on a limited sample size of proven false confessions and that no research or information would come before the jury regarding how frequently such factors also may be present in true confessions.

Thus, in light of the limited number of false confession factors present in this case, combined with the lack of evidence before the jury calling into question the veracity of the defendant's statements, the judge may have concluded that the proffered expert testimony was not relevant and would have distracted or confused the jury by giving rise to speculation based on facts and assumptions not in evidence…. Therefore, it was not an abuse of discretion to exclude the expert testimony where the judge could have concluded also that the testimony's probative value was outweighed by its potential to confuse or distract the jury.

We do acknowledge, however, that the phenomenon of false confessions is a growing area of psychological and social science research, and we are mindful that false confessions have been demonstrated to occur even in the context of serious crimes, including murder…. Therefore, we do not foreclose the possibility that under appropriate circumstances this sort of expert testimony could be relevant to a defendant's case and helpful to a jury….. Although the precise number of false confessions or prevalence data regarding false confession factors may never be identified, as research regarding factors present in proven false confessions continues to progress, information regarding these factors may be helpful in certain circumstances. For example, should a case arise in which a defendant attacks directly the veracity of his or her statements to police and where several of the false confession factors thus far identified are present, it may be appropriate for expert testimony of the sort proffered here to be taken into consideration…. Therefore, we leave further development of this issue for another day."

In the case of *Edmonds v. State* (2006) the Court of Appeals of Mississippi upheld the trial court's decision to reject the testimony of Dr. Allison Redlich. From their opinion the court stated:

"After a day-long, pre-trial Daubert hearing on whether Dr. Redlich would be allowed to testify, the trial judge entered an order finding that Dr. Redlich's proposed testimony did "not satisfy the dictates of Mississippi Rule of Evidence 702 and will be excluded." In its order, the court pointed out that "Dr. Redlich admitted that there is no empirical test available to determine whether a confession is truthful or not. Redlich also admitted that the hypothesis of false confessions cannot be tested empirically. Dr. Redlich testified that it would be impossible to do an empirical test of false confessions because to do so would require taking juveniles to police stations and accusing them of crimes they had not committed. The court found that, overall, "Redlich indicated that there was very little study of false confessions and juveniles."

Tom Wright

In *Flowers v State* (2007) the Supreme Court of Arkansas upheld the admissibility of the defendant's confession, even though he claimed an IQ of 57-62, and upheld the trial court's decision to refuse to allow the defense expert Dr. Tom Wright to testify that the defendant's IQ range precluded him from making a competent waiver of his Miranda rights.

Gregory DeClue

(Characteristics of a defendant who gave a false confession)

In *Floyd v. Cain* (2011) the Supreme Court of Louisiana ruled that "Considering all of the evidence, including Floyd's false confession to the murder of Robinson, Floyd's low IQ and susceptibility to suggestion, the missing police records, the lack of evidence linking Floyd to the murder of Hines, the exculpatory value of the fingerprint evidence, defendant is entitled to a new trial." As part of their decision making process the court examined the information that the defense offered re the characteristics of the defendant, including the following:

"The defense suggests that Floyd has an IQ of 59 (well below the threshold for mental retardation). Dr. Gregory DeClue, a forensic psychologist, who testified at Floyd's post-conviction hearing, administered the WAIS IV IQ test to Floyd at the Louisiana State Penitentiary in Angola in June 2009, and that test indicated Floyd has a full scale IQ of 59. The generally accepted cut off for mental retardation is 70. According to DeClue, 99% of all adults in the United States score higher on the test than Floyd.

Additionally, DeClue administered the Woodcock Johnson test to Floyd to assess his language and reading comprehension skills. DeClue testified that, based on the test results, Floyd can read at a second or third grade level. DeClue stressed that these results indicate Floyd cannot communicate at the complex level an average adult can.

DeClue also administered the Gudjonsson Suggestibility Scale to determine Floyd's levels of suggestibility and compliance. DeClue found that relator displayed a high level of suggestibility, and that Floyd's "self-reported description was that he's more compliant than the average person." DeClue testified that people classified as mentally retarded are 10 times more likely to give a false confession, that in many false confession cases, the confessor included details of the crime scene presumed to be known only by the police and the perpetrator.

Although mental retardation or illiteracy, alone, do not prevent a person from being able to knowingly and intelligently waive his rights, this Court has held that a mentally retarded 17–year–old with an IQ between 50 and 69 was not able to understand his rights and was incapable of knowingly and intelligently waiving his Miranda rights, and thus his confession should have been suppressed.

Shawn Roberson

(Court rules that Dr. Shawn Roberson would not be allowed to testify on false confession issues at trial)

In *White v. Patton* (August 2014) the US District Court, N.D. Oklahoma, upheld the lower court's decision to exclude the testimony of Dr. Shawn Roberson on false confession issues. The trial court had ruled that Dr. Roberson's testimony about a possible false confession did not meet the standards of acceptability. From their opinion the District Court stated the following: "Petitioner presented the testimony of Shawn Roberson, Ph.D., to explain the phenomenon of false confessions and its applicability to the voluntariness of Petitioner's confession..... Dr. Roberson identified three (3) areas of concern contributing to the possibility of a false confession in this case: (1) Petitioner's youth, (2) Petitioner's suggestibility, and (3) Petitioner's disenfranchisement from his family.... Dr. Roberson also testified that Petitioner was not incompetent and while mental illness is not a condition precedent for a false confession, Petitioner did not have a major mental illness.... At the conclusion of Dr. Roberson's testimony, the trial judge found that, while Dr. Roberson was an expert in the fields of forensic psychology and false confessions, under OKLA. STAT. tit. 12, S 2702, the information on false confessions had "not developed yet" to the point of giving it credence.... The trial judge further stated that "absent a showing of a demonstrable psychological condition or impairment ... the social science is simply not developed to a point where that decision should be presented to a jury." For those reasons, the trial judge allowed Dr. Roberson to testify during the *Jackson v. Denno* hearing, but ruled that the testimony would not be allowed at trial."

Michael Fuller

(Court rejects testimony of forensic psychiatrist that defendant fits the profile of someone who would be susceptible to giving a false confession)

In *Coleman v. State* (October 2013) the Court of Appeals of Texas, Houston, upheld a lower court's decision to exclude the testimony of a forensic psychiatrist's opinion that the defendant fit the profile of a person susceptible to giving a false confession. From the court's opinion:

"In his second issue, appellant asserts that the trial court violated his constitutional right to present a meaningful defense when it erroneously ruled that Dr. Michael Fuller could not testify as to his expert opinion that appellant fits the profile of someone who would be susceptible to giving a false confession... The erroneous exclusion of evidence offered under the rules of evidence generally constitutes non-constitutional error.... But, constitutional error occurs when the trial court erroneously excludes otherwise relevant, reliable evidence which "forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense." ... Appellant argues that such constitutional error occurred when the trial court ruled that Dr. Fuller would not be allowed to testify before the jury about his expert opinion that appellant fits the profile of

one who would be susceptible to giving a false confession.

The State objected that appellant had failed to satisfy the Nenno test, and the trial court ruled that Dr. Fuller could not testify as to his expert opinion that appellant fits the profile of one who would be susceptible to giving a false confession. Dr. Fuller testified at a hearing outside the presence of the jury so that the trial court could determine the admissibility of his testimony. Dr. Fuller stated that the area of false confessions was within the scope of his field of practice and area of expertise as a forensic psychiatrist. Dr. Fuller outlined three "sub sets [sic] of false confessions that are accepted in the literature and by researchers." He referred generally to 300 cases in the span of two decades in which the results of DNA testing had exonerated individuals convicted of a crime. Dr. Fuller stated that about fifteen to twenty-five percent of these individuals were found to have falsely confessed. According to Dr. Fuller, "false confessions frequently occur in individuals who are emotionally unstable, who have mental illness, [sic] who have impaired cognitive abilities." Dr. Fuller expressed his belief that there is a "legitimate clinical concern" as to whether appellant falsely confessed to the charged offense. According to Dr. Fuller, this concern is a result of appellant's testimony that he falsely confessed and appellant's "psychological profile" which Dr. Fuller described as "one that is very much like the psychological profile of an individual who would be at relatively or higher risk than, say, the average person for making a false confession." According to Dr. Fuller, appellant's psychological profile is consistent with the profile of someone who would falsely confess.

On cross-examination by the State, Dr. Fuller acknowledged that he had never before testified in a court as an expert specifically in the area of false confessions. Dr. Fuller testified he had read reviews of articles by a "Dr. Leo" and reviews of articles by Mr. Saul Kassin. Dr. Fuller also read a 2009 article by Dr. Leo on the topic of false confessions as well as excerpts from the work of Mr. Kassin. Dr. Fuller indicated he found these articles by searching the internet for "false confessions" after evaluating appellant several months before trial. Dr. Fuller stated he had not read *The Psychology of Confessions* by Saul Kassin. Dr. Fuller acknowledged that he did not teach any courses in false confessions and had not written any articles or books on the topic. Dr. Fuller stated that this case is the first time he has "focused more directly and thoughtfully" on false confessions as a primary issue. Dr. Fuller testified that he based his conclusion that appellant had the profile of a person who would confess falsely on his general mental-status examination of appellant, his clinical interview, and his discussion with appellant of the circumstances at or near the time of the alleged crime. According to Dr. Fuller, he based this conclusion on his findings that appellant was suffering from a major depressive episode with extreme hopelessness about his future, a sense of failure in general about the quality and direction of appellant's life, obsession with military themes of honor and chivalry, and preoccupation with "the notion of laying himself down as part of a tribe or as part of a group..." Dr. Fuller described appellant as a very needy, disturbed young man, who was depressed and hopeless but not psychotic, and probably intermittently intoxicated. According to Dr. Fuller, there is a possibility appellant made a voluntary, false confession to achieve notoriety, attention, and a disturbed sense of fame.

Dr. Fuller did not administer any formal psychological testing of appellant. The only examination he used with appellant was an examination for neurological function, cognitive function, and memory function. Dr. Fuller has heard of the "Johnson Suggestibility Scale," but he has not used that scale and is unfamiliar with it. Dr. Fuller did not tie his opinion that appellant had the profile of a person who would confess falsely to any specific study or article. Nor did Dr. Fuller provide the trial court with a copy of any study or article. Dr. Fuller had not read an article by Kassin cited by the State. Dr. Fuller did not explain how his testimony properly relies upon or uses principles in this field, nor did he cite any article or other source in support of this proposition. There is no objective source material in this record to substantiate Dr. Fuller's methodology as one that is appropriate in the practice of forensic psychiatry.

We presume, without deciding, that the field of Dr. Fuller's expertise is a legitimate one, and that the subject matter of Dr. Fuller's testimony is within the scope of the field. Nonetheless, based upon the lack of evidence showing that Dr. Fuller's testimony properly relies upon or utilizes the principles involved in this field, we conclude that appellant did not satisfy his burden of showing by clear and convincing evidence during the gatekeeping hearing the reliability of Dr. Fuller's methodology for determining whether appellant fits the profile of someone who would be susceptible to giving a false confession..."

David Mantell

(Court did not allow David Mantell to testify as an expert on false confessions)

In *State v Collin* (December 2014) the Appellate Court of Connecticut upheld the lower court's decision to refuse to allow David Mantell to testify as an expert of false confessions. From the Appellate Court's opinion:

"The defendant claims that the court abused its discretion by refusing to permit the defendant's expert, David Mantell, a licensed clinical psychologist, to testify on the topic of false confessions. The defendant argues that Mantell was qualified as an expert on the topic of false confessions and that such testimony was necessary to assist the jury in its assessment of the defendant's testimony regarding his confession. The state argues, inter alia, that the defendant failed to prove that Mantell had sufficient expertise on the topic of false confessions, and, accordingly, that the court properly declined to permit him to testify as an expert on the topic of false confessions. We agree with the state."

The Appellate Court went on to state: "During Mantell's testimony at the proffer hearing, which took place out of the presence of the jury, he stated that he had testified on the topic of false confessions in approximately fourteen cases. When questioned further, however, he explained that most of those cases dealt with *false denials, rather than false confessions*, or they were cases in which he *consulted with counsel on the case, but did not testify*. The court then asked Mantell what type of studies he had reviewed. Mantell explained that he had reviewed studies involving false confessions where the defendant, through DNA, later had been exonerated. He testified that "the researchers take a careful

look at these cases and dissect the way in which [the accused had been] interrogated and also ... look at the personality characteristics of the people who made these false confessions." He also stated that the commonality in the research findings was the tactics that were employed by the police during interrogations and the witness' reactions to those tactics. Mantell also stated that there was a second line of research with which he was familiar and that such research involved doing a personality evaluation of the defendants who later were exonerated. He explained that the common personality traits of these individuals included suggestibility, mental health problems, lower intelligence, and concentrated personal adversity that makes them less resilient to external pressure. The court asked Mantell whether he had evaluated the defendant in this case, and Mantell stated that he had not evaluated the defendant. Upon questioning by the prosecutor, Mantell also conceded that he was unfamiliar with any kind of psychological examination involving the defendant, that he had never seen the result of a psychological examination involving the defendant, and that he had no idea what such an examination might reveal. Additionally, Mantell admitted that he had no idea regarding the defendant's suggestibility, eagerness to please, level of intelligence, or propensity for mental illness. He also had no knowledge of the police interview process in this case, or whether there was DNA present in this case.

Mantell also explained that he had concerns when he reviewed the file in this case because there was no description of the interrogation process that was used, and he, therefore, was unaware of what tactics were used. He also stated that there was nothing in the defendant's confession that would help him "to understand the demeanor of the [defendant], what was motivating the [defendant] to provide such a detailed and explicit account of punishable, criminal offenses within such a relatively short period of time within that setting." He further explained that he "didn't understand the context in which [the confession] was achieved, and [he] didn't understand the motivation of the defendant to convey that kind of information, apparently, in a first interview with a police officer, presumably knowing or having some general knowledge of what the legal consequences would be for doing that." Mantell also stated that he had not reviewed or witnessed the in-court testimony of the police in this case regarding the questioning of the defendant.

Following the hearing, the court issued both an oral ruling and a written memorandum of decision. The court found, inter alia, that the defendant had failed to prove that Mantell was qualified to give an expert opinion on the topic of false confessions, and that, "even if he were qualified, the testimony proposed [was] incomplete and not directly applicable or relevant ... to assist the jury in understanding the evidence or in determining whether .... the defendant's testimony was false."

Jessica Pearson

(Court should have allowed testimony on false confessions)

In *People v. Days* (September 2015) the Supreme Court, Appellate Division, Second Dept, NY found that the defendant should have been allowed to introduce expert testimony on false confessions. From their opinion:

Dr. Jessica Pearson, a clinical and forensic psychologist, interviewed the defendant, reviewed his educational and mental health records, and reviewed the videotaped confession. She opined that the defendant had intellectual deficits and personality traits that rendered him vulnerable to giving a false confession, especially where, as here, the police posed a number of suggestive or leading questions, the interrogation was particularly long, and the police used rapport-building techniques to gain the defendant's trust. With respect to her opinion that the defendant had borderline intelligence, Dr. Pearson reported that his full scale IQ was only 85 at age 14, and he was enrolled in special education classes in the ninth grade.

Dr. Pearson's records also reveal that the defendant had been hospitalized for mental illness on multiple occasions, and medication that he took to treat his lupus condition could cause or exacerbate psychiatric symptoms. Significantly, the day after his confession, the defendant was diagnosed with "psychosis not otherwise specified," and prescribed Haldol, an antipsychotic medication used to treat schizophrenia and acute psychosis. The defendant reported that the Haldol suppressed the voices he had been hearing, which permits a fair inference that he was suffering from auditory hallucinations at the time of his interrogation. Although the County Court permitted Dr. Pearson to testify at the defendant's trial about the discrete issue of whether the defendant was able to understand the *Miranda* warnings he was given (see *Miranda* v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694), she was not permitted to testify on the issue of false confessions.

The defendant's second proffered expert, Dr. Richard A. Leo, a psychologist who has both a Ph.D. in psychology and a J.D. degree, stated that he was an expert in the psychology of police interrogation, police interrogation techniques, psychological coercion, and false confessions. Consistent with Dr. Pearson's opinion, Dr. Leo opined that a number of individual and situational factors associated with the defendant's interrogation and confession created a heightened risk of a false confession in this case. Among other things, Dr. Leo observed that the confession did not fit the facts of the crime, and was not supported by physical evidence. He further discussed a number of factors present in this case that are associated with false confessions, including the defendant's low intelligence, high suggestibility, mental illness, and the extraordinary length of his custody and interrogation. Dr. Leo specifically opined that the defendant's "mental handicaps unquestionably left him especially vulnerable to the pressures of accusatory interrogation, especially an interrogation as long as this one," and that this "put him at a high risk of giving or agreeing to a false confession."

Upon our consideration of the submissions and opinions of both experts, we find that the defendant made a thorough proffer that he was "more likely to be coerced into giving a false confession" than other individuals. His proffer clearly indicated that he was intellectually impaired, highly compliant, and suffered from a diagnosable psychiatric disorder, and also that the techniques used during the interrogation were likely to elicit a false confession from him... Moreover, in light of the foregoing, the fact that no one had videotaped the nearly six hours of the interrogation that had been conducted before the

confession was made raises significant concerns.

Further, there was little evidence to corroborate the defendant's confession in this case, and his conviction turned almost entirely on his videotaped confession... There was no DNA or other physical evidence linking the defendant to the crime, and there was no eyewitness testimony. Although the County Court admitted into evidence prior trial testimony from the defendant's former girlfriend that, during an altercation between them in November 2000, he told her that he committed two murders, she did not report the defendant's statement to police for approximately three months, and she only reported the statement immediately after she had him arrested for allegedly violating an order of protection by approaching her home. This limited incriminating evidence did not undermine the usefulness of expert testimony on the issue of false confessions in this case.

For all of these reasons, the County Court improvidently exercised its discretion in denying the defendant's motion for leave to introduce expert testimony on the subject of false confessions.

Craig Haney

(Court does not allow Dr. Craig Haney to testify about false confessions)

In *State v. Carlson* (May 2015) the Supreme Court of Arizona upheld the lower court's decision to preclude the testimony of Dr. Craig Haney on false confessions. In this case Michael Jonathon Carlson was convicted of two counts of kidnapping and two counts of first-degree murder.

During trial, Carlson sought to have Dr. Craig Haney testify about the brutality in the Texas prison system when Carlson was incarcerated there and also regarding "personality and behavior characteristics" and "risk factors" that might explain why Carlson might have falsely confessed to the television reporter. Defense counsel also sought to have Dr. Haney testify that Carlson told him that he (Carlson) had falsely confessed. The court allowed Dr. Haney to testify regarding the Texas prison system, but precluded testimony that Carlson told Dr. Haney that he had falsely confessed and Dr. Haney's explanation for why Carlson might have done so.

For two reasons, we conclude that the trial court did not abuse its discretion. First, Carlson never established whether reasonable experts in the field of false confessions would, as part of their analyses, rely on the defendant's own statement that he falsely confessed and that certain factors caused him to do so. Other courts have held that an expert should not be able to submit inadmissible hearsay from a biased witness as a basis for an opinion..... Here, Carlson's statements were inadmissible, biased hearsay, and he failed to show that a reasonable expert would rely on them in forming an opinion.

Second, the trial court did not abuse its discretion in determining that allowing Dr. Haney to testify that Carlson said he falsely confessed would have put Carlson's statements

before the jury cloaked with the implication that Dr. Haney believed those statements and relied on them, while shielding Carlson from the rigors of cross-examination. A defendant may not convey self-serving statements regarding the truth of his own confession through an expert's testimony. Nor may he have an expert opine on whether the defendant was telling the truth when asserting that his confession was false.

Carlson next argues that the trial court abused its discretion in preventing Dr. Haney from testifying about risk factors that would tend to make Carlson more likely to confess falsely. The court barred this testimony because Dr. Haney had not tested or examined Carlson to determine whether he exhibited the risk factors and did not base his potential testimony on any studies of his own or by others examining why a person would falsely confess in a voluntary news interview. His experience was in the police interrogation context.

The State did not challenge Dr. Haney's expertise in addressing why defendants may succumb to pressure to confess in police interrogations. But defense counsel admitted that Dr. Haney had no experience or publications dealing with voluntary confessions to the media. Nonetheless, given Dr. Haney's general expertise regarding false confessions, his "lack of specialization" should have gone "to the weight of the evidence rather than its admissibility [,] and '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' ... Nonetheless, the trial court did not abuse its discretion in excluding the testimony because Dr. Haney's testimony went to Carlson's general propensity to lie rather than to the mental or physical circumstances affecting the voluntariness of this confession.

We therefore conclude that the court's exclusion of Dr. Haney's testimony did not violate Carlson's right to present a defense or to a fair trial.

Steven Dinwiddie

(Expert should have been allowed to testify re defendant's mental disabilities on issue of confession reliability)

In *US v. West* (December 2015) the US Court of Appeals, Seventh Circuit held that expert testimony regarding defendant's mental disabilities was relevant on the issue of the reliability of his confession, and the erroneous exclusion of such expert testimony warranted a new trial. From the court's opinion:

Antonio West was indicted for possessing a firearm as a felon….. The government's case for possession rested heavily on West's admission to the police that the gun was his. West's attorney moved to suppress the statement based on expert testimony of Dr. Steven Dinwiddie, a forensic psychologist who examined West and administered a number of psychological tests, including the Gudjonsson Suggestibility Scale, which showed that he was prone to changing his answers when confronted by an authority figure; that West has

a low IQ, and suffers from mental illness. The district judge denied the motion, finding that West was competent to waive his *Miranda* rights and did so voluntarily.

Dr. Dinwiddie's expert testimony would have explained West's low IQ and mental illness and how these combined conditions might have influenced his responses to the officers' questions while in police custody. We think it plain that expert testimony that West is a suggestible, mentally ill person with a verbal IQ of 73 bears on the reliability of his statements to police. Testimony of this type is highly relevant to the jury's consideration of a defendant's "personal characteristics"—exactly the sort of evidence that a jury ought to be permitted to hear to assess the trustworthiness of the defendant's statements to the police.

More importantly, the defense wasn't proposing that Dr. Dinwiddie offer an opinion about the trustworthiness of the confession, only that he be allowed to explain West's mental disabilities. The expert evidence was improperly excluded.

Sanford Drob

(Defense expert on false confession issues should have been allowed to testify)

In *People v. Evans* (May 2016) the Supreme Court, Appellate Division, First Department, New York ruled that the lower court should have allowed the defense expert to testify on the issue of false confessions. From their opinion:

In June 2010, defense counsel requested that the court appoint Dr. Sandford Drob as an expert to conduct the psychological evaluation of defendant in regard to the confessions he provided to the police…. Counsel stated that he intended Dr. Drob to testify at trial about his assessment of defendant and generally on the subject of false confessions, including social scientific testimony about the phenomenon and causes of false confessions and tests like the Gudjonnson Suggestibility Scales (GSS), which measure a person's vulnerability to suggestion.

In response, the People objected to expert testimony on the general subject of false confessions and defendant's susceptibility to making a false confession, but did not object to assignment of an expert to evaluate defendant's ability to waive his *Miranda* warnings and/or to testify as to defendant's possible cognitive deficits.

The People maintained that there was no basis for Dr. Drob to conclude that particular traits that defendant possessed would make him more susceptible to making a false confession.

On June 2, 2011, prior to jury selection, the court ruled that it would not permit Dr. Drob to testify about the phenomenon of false confessions.

To the extent the denial was based on the People's argument that the science of false confessions is not generally accepted within the scientific community, the Court of

Appeals has now made clear that the "phenomenon of false confessions is genuine [and] has moved from the realm of startling hypothesis into that of common knowledge, if not conventional wisdom" (*Bedessie,* 19 NY3d at 156)…… As the Court of Appeals found, "[T]here is no doubt that experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions" (*Beddesie,* at 161). Indeed, there are "factors or circumstances correlated by psychologists with false confessions". Therefore, "expert evidence on [the] factors that the scientific community has determined may contribute to a false confession[,]" is warranted in the proper case. Although the trial court did not have the benefit of the *Bedessie* decision at the time of its ruling, it cannot now be said that expert testimony that is relevant to the defendant and the interrogation before the court may be precluded because the science of false confessions is not generally accepted in the scientific community.

Accordingly, the court improvidently exercised its discretion in denying defendant's motion to present expert testimony on false confessions to assist the jury in connecting the unique factors present in defendant's interrogation with the scientific research linking those factors with false and unreliable confessions, and a new trial is warranted. While we are certainly mindful of the fact that a trial court is vested with the discretion to determine the admissibility and limits of expert testimony, here, the court summarily rejected defendant's motion to introduce expert testimony on the issue of false confessions, solely on the grounds that the science of false confessions was not generally accepted within the scientific community, without undertaking any analysis or otherwise weighing the relevant legal issues.

Deborah Budding

(Court rejects expert testimony that defendant suffered from mental impairment that rendered him uniquely susceptible to coercive police tactics)

In *Platas v. Scribner* (February 2016) the US District Court, C.D. California rejected the defendant's claim that his confession (convicted of murder and armed robbery) was coerced and that ""[with [his] pre-existing characteristics leaving him susceptible to manipulation, the highly coercive context of his interrogation overpowered any ability he had to freely choose whether to provide a statement." From the District Court's opinion:

Petitioner contends that his confession "was coerced by the Culver City detectives who promised him protection and leniency in exchange for saying that he brought in a gun and was part of the robbery" and that his recorded statement accordingly was "unreliable," "false" and "the result of Petitioner doing what he thought he must do to save himself from imminent danger and a potential death sentence." … More particularly, Petitioner contends that "[with [his] pre-existing characteristics leaving him susceptible to manipulation, the highly coercive context of his interrogation overpowered any ability he had to freely choose whether to provide a statement." … However, as detailed below,

considering the totality of all of the surrounding circumstances and the record as a whole, Petitioner has not met his burden of establishing a constitutional violation.

Petitioner contends that his personal characteristics "demonstrate a unique susceptibility to coercion." (defense expert Dr. Deborah Budding, a board certified neuropsychologist, conducted an examination of Petitioner to evaluate "his intellectual and executive function currently and at the time of his arrest to determine the source, duration, nature and [e]ffect of any cognitive impairment, and to assess what if any [e]ffect did environmental influences have on his decision-making processes.") … In support, he cites Dr. Budding's conclusions that Petitioner suffers from "significantly impaired executive function and presents as highly dependent upon benign external structure"; that Petitioner has "significant cognitive processing deficits and trouble adjusting himself to novel and ambiguous circumstances"; that his processing speed was one to two standard deviations slower than expected for his age; and that Petitioner's Full Scale IQ was lower than 93% of the population.

Several factors, however, do not square with Petitioner's apparent claim that his mental impairments as identified by Dr. Budding preclude a conclusion that his recorded, inculpatory statement was a product of Petitioner's free will under the circumstances. Foremost, Petitioner freely admitted at the evidentiary hearing that he wanted the detectives to know that he did not shoot the victim, and that he voluntarily told the police that Lopez was the shooter, that he voluntarily described Lopez, and that he voluntarily told the police where and with whom Lopez lived. These non-inculpatory statements were made within the same short time frame and in the same physical surroundings that preceded Petitioner's inculpatory, recorded statement. Yet, Petitioner makes no claim as to these non-inculpatory statements that the circumstances when viewed through the lens of his mental impairments undermined his ability to exercise his free will.

Further, Dr. Budding concluded that Petitioner's "ability to store material in memory over time appears to be unimpaired[;]" she also found that his working memory is impaired, that he requires time to learn and process new and novel information, had "difficulty adjusting to new demands[,]" and "required significant repetition and time to learn material." As applied here, it would thus appear that the nature of Petitioner's deficits is incompatible with his essential claim that he processed and committed to memory (so as to be able to repeat) a detailed, fabricated, and false inculpatory statement fed to him by the detectives over the course of a few minutes, yet would not be incompatible with a conclusion that he relayed information which he had had time to process and had previously committed to memory. Although Dr. Budding viewed Petitioner's response to the detective's initial questioning as "sort of strikingly fragmented[,]" did not "flow naturally[,]" and could be consistent with a person with Petitioner's impairments having been instructed moments before to say at some point that he brought in a gun, Dr. Budding was not asked and did not volunteer her view as to the entire, very detailed statement and whether its flow and substance was consistent with a person with Petitioner's impairments having been instructed to give it, or whether, as suggested above, it would have been too much for him to take in and efficiently regurgitate. And, Petitioner's claim is not merely that he was coerced into saying that he brought in the gun

and helped plan the robbery, but that the whole of the recorded statement was inadmissible because involuntary.

Further, in his testimony at the evidentiary hearing, Petitioner was responsive, alert, gave cogent answers to questions asked by both sides, asked for clarification when a question was not clear, and explained his answers when asked to do so. He exhibited no difficulty considering each question and providing an answer notwithstanding the relatively quick pace of the examinations, particularly cross-examination, and makes no post-hearing claim to the contrary. Moreover, Petitioner's manner of speaking, tone of voice, and affect at the evidentiary hearing is not dissimilar to that evident in the recording of his taped confession.

In conclusion, the question is whether Petitioner's free will not to make a statement was overborne by fear induced by improper and coercive police tactics. The totality of the circumstances do not establish by a preponderance of the evidence that what admittedly began as a voluntary conversation motivated by Petitioner's desire to exculpate himself from responsibility as the shooter, evolved into an elaborate and deliberate effort to extract false admissions from him against his free will. Because Petitioner has not met his burden of establishing a constitutional violation, habeas relief is not warranted on this ground.

Brian Cutler

(Court excludes testimony from false confession expert Dr. Brian Cutler)

In *US v. Thomas* (October 2016) the US District Court, E.D. New York, denied the defendant's intent to call an expert witness on the issue of false confessions. From the court's opinion:

Defendant seeks to call Dr. Brian Cutler as an expert witness "in the field of interrogation and false confessions." According to Defendant's notice of intent to call an expert witness, Dr. Cutler would testify on: (1) "specific interrogation techniques and the relation of those techniques to false statements made by those interrogated" and (2) "the guilt-presumptive nature of the interrogation and the use of persuasion and coercion to attempt to obtain an admission of guilt."

The decision to admit or to exclude expert testimony falls squarely within the discretion of the trial court…. Under Federal Rule of Evidence 702, the Court must determine whether the proposed expert witness is qualified based on the following factors:
(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Here, the Court finds Dr. Cutler's proposed testimony is within the common knowledge of the trier of fact. An expert must demonstrate "knowledge, skill, experience, training, or education" that will help the factfinder… Expert witnesses are unnecessary when the factfinder is "as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training." … Dr. Cutler's proposed testimony about the relationship between interrogation techniques and false statements and the guilt-presumptive nature of the interrogation is within the common knowledge of the factfinder. The jury is competent to take into consideration the effects of interrogation without the aid of an expert.

In addition, the Court finds Dr. Cutler's proposed testimony would supplant his opinion for that of the factfinder. If Dr. Cutler were permitted to testify about the relationship between interrogation techniques and false statements and the guilt-presumptive nature of the interrogation, he would substitute his opinion as to the credibility and testimony of the witnesses in place of the jury's. As such, Dr. Cutler's testimony is inappropriate expert testimony because it would usurp the jury's role.

The exclusion of Dr. Cutler's testimony does not leave Defendant without protection. Cross-examination of witnesses is sufficient to achieve the same effect as the proposed testimony of Dr. Cutler.

Jorey Krawczyn

(Court excludes the testimony of Dr. Jorey Krawczyn on false confession issues)

In *Brant v. State* (December 2014) the Supreme Court of Nevada held that proffer of expert testimony on police interrogation techniques concerning defendant's allegedly false confession was insufficient to establish that testimony was relevant and reliable, and thus district court did not abuse its discretion in excluding testimony. From the Supreme Court's opinion:

"Brant did not move to suppress his confession as involuntary. Rather, his contention was, and is, that the latter part of his confession--the part where he admits killing Seaton, in addition to finding her body and burying it in his garage--is false. To support his false-confession theory, Brant designated an expert on police interrogation techniques, Dr. Jorey Krawczyn. The district court excluded Dr. Krawczyn's testimony on the grounds that it would not assist the jury in understanding the evidence or deciding a fact in issue The district court held a pretrial hearing on the admissibility of proposed expert witness testimony. Dr. Krawczyn did not testify at the hearing or prepare a written report. The district court "assume [d]" that Dr. Krawczyn "is qualified in methods of police interrogation" based on defense counsel's representation that Dr. Krawczyn is a clinical psychologist who "provides lectures on interview and interrogation techniques utilizing body language and neuro-linguistic dynamics" and was being offered as an expert on police interrogation techniques... Counsel further represented that Dr. Krawczyn had reviewed the audio-and videotapes of Brant's "interviews and interrogations," including "at the house, the ... formalized interrogation [at the police station] and also all the smoke

breaks in between." "Based upon what he saw in the review," Dr, Krawczyn "determined detective Gallop is using some standardized questions that 12/08/2016 back to a 1956 polygraph operator's course and eventually progressed in the Criminal Division"; Gallop may have "used the Reid techniques," but without asking Gallop, the defense "cannot with 100 percent certainty say that is the technique." There is "a question [of] is this a good technique to use with a brain injury" that "goes to susceptibility and reliability of the statement." Summing up, defense counsel stated that,

... there are identified factors or ... interrelated components that are part of the concept of interrogative susceptibility that just better form the social interaction between the interrogat[or and] the interviewee. This is what we need the expert to go through, the factors and explain how these factors came together.

The phenomenon of false confessions is a growing area of psychological and social science," and we "do not foreclose the possibility that under appropriate circumstances expert testimony [in this arena] could be relevant to a defendant's case and helpful to a jury." For this court to find an abuse of discretion in the exclusion of such testimony, though, there needed to be a specific proffer, supported by scientific or other proof, citing particularized facts, establishing that the testimony is relevant and reliable. The proffer in this case does not provide us the information needed to undertake that analysis.

This leaves the fact that, in interrogating Brant, Detective Gallop may have used the Reid technique (or a 1956 polygraph operator's technique) and the suggestion that a susceptible witness may make unreliable statements to establish the relevance and reliability of Dr. Krawcyzn's testimony. But with no evidence to establish a scientific or other recognized basis for challenging the interrogation techniques utilized in this case--which Dr. Krawczyn should have been able to identify if they were problematic, since he had complete audio--and videotapes of Brant's interview and interrogation--we have only Dr. Krawczyn's *ipse dixit* that the techniques possibly used may have influenced Brant's confession. This is not enough to establish an abuse of discretion in excluding such testimony.

Brant complains that he needed Dr. Krawczyn to establish that the phenomenon of false confessions exists. But he accomplished that through Detective Gallop, who acknowledged under cross-examination that false confessions can and do occur. And, as discussed above, the proffer with respect to Dr. Krawczyn does not establish what else Dr. Krawczyn might have said that would be of assistance to the jury."

Examples of erroneous testimony regarding the Reid Technique

(Dr. Richard Leo offers erroneous testimony about The Reid Technique)

In a deposition Dr. Leo gave in *Caine v. Burge* in April 2013 Dr. Richard Leo made numerous erroneous statements about the Reid Technique and repeatedly mischaracterized the Reid process. We have attached a pdf with some of our responses to statement he made in his deposition.

(Another example of how false confession experts misrepresent the Reid Technique - Richard Leo and Deborah Davis)

In an article published earlier this year, *The Problem of Interrogation-Induced False Confession: Sources of Failure in Prevention and Detection*, the authors, Dr. Richard Leo and Deborah Davis, continue the trend of misrepresenting the tenets of The Reid Technique of Interviewing and Interrogation.

On page 19 of the article the authors state, "Finally, specific investigations of the effects of training in the "Behavior Analysis Interview" developed and promoted by Inbau, Reid and colleagues in their manuals and training materials and seminars have shown that the training decreases accuracy relative to untrained controls (Kassin & Fong, 1999)."

The facts are exactly the opposite. When trained interviewers evaluated the responses of 80 different subjects in real-life Behavior Analysis Interviews they achieved an accuracy rate of 86% for truthful subjects and 83% for deceptive subjects (see Criminal Interrogations and Confessions, 5th ed, page 102 - NSA study). Furthermore, it has been demonstrated in the last several years that accuracy in detecting deception increases significantly with real-life subjects when the interviewer understands the context in which the interview was conducted, and when the interviewer has been properly trained in the in the field of behavior symptom analysis (Blair 2010 and Hartwig 2006 - details on page 103 in Criminal Interrogation and Confessions).

See the attached PDF for additional responses to the Leo/Davis article.

In *People v. Hernandez* (2011) Dr. Leo testified that "The Reid Manual, which is the Bible of modern interrogation, advises not to exceed four hours of interrogation because longer interrogations might be seen as coercive." This statement is false. In the 4th edition of Criminal Interrogation and Confessions on page 423 we state the following:

Many guilty suspects who confess after several hours of interrogation will claim: "The pressure was so intense I would have said anything to bring it to an end." A properly conducted interrogation that lasts 3 or 4 hours, for the ordinary suspect, is certainly not so long as to cause the levels of emotional or physical distress that constitute duress. However, if physical coercion is involved, even a 30-minute interrogation may warrant such a bona fide claim. The following guidelines are offered to evaluate claims of duress:

1. Can the excessive length of interrogation be explained by the suspect's behavior? For example, did the suspect offer a series of different versions of events, before offering the first incriminating statement? A suspect who has maintained his innocence and made no incriminating statements for 8 or 10 hours has not offered any behavior to account for this lengthy period of interrogation.

2. Did the suspect physically or verbally attempt to seek fulfillment of biological needs? If so, were such requests denied or used as leverage to obtain the confession (e.g., "You can use your asthma inhaler after you confess."). A suspect who made no such

verbal requests or physical efforts to bring the interrogation to a close has a much weaker case. In this instance, it would appear that only in retrospect, after reviewing the interrogation in his mind, or with an attorney, did the suspect decide that the conditions of the interrogation were intolerable.

3. Were there any threats made with respect to denying the suspect basic biological needs unless he confessed (e.g., "You're not leaving here until you confess—no matter how long it takes.").

Example of how false confession experts misrepresent the Reid Technique - Dr. Solomon Fulero

In the case *State v. Wright* (Jan. 2012) Dr. Solomon Fulero, Professor of Psychology at Sinclair College, offered testimony about the Reid Technique - his testimony (quoted below) provides a perfect example of how "false confession experts" misrepresent what the Reid Technique is - *oftentimes attributing to the Reid Technique tactics that we teach should never be used by any interrogator.* After the quoted testimony of Dr. Fulero we provide some brief comments (in blue).

"Dr. Fulero testified regarding the Reid technique--a police interrogation method used to elicit confessions by making suspects believe that confessing is in their best interest."

The Reid Technique consists of a three phase process including Factual Analysis in which the investigator attempts to determine possible suspects based on motive, alibi, relationship to the victim, possessing the knowledge necessary to commit the crime, the presence of any incriminating evidence, etc; a non-accusatory interview designed to develop investigative and behavioral information to determine investigative direction, followed by, when appropriate, an accusatory interrogation. The interrogation component is last element in the Reid Technique.

"According to Dr. Fulero, the Reid technique usually involves the use of a bare interrogation room, containing only a desk and chairs, located within a maze of hallways at a police station."

We emphasize that in both the interview and the interrogation phase of the Reid Technique be conducted in a quite, private environment with a minimum of distractions - we never talk about locating the interview room "within a maze of hallways at a police station."

Value of video recording

In General

(*The value of recording an interrogation to refute the defendant's claims of threats and promises*)

In *Thompson, Petitioner v. Bauman, Respondent* (August 2016) the US District Court, E.D. Michigan upheld the lower court's decision to admit the defendant's confession which he claimed was obtained by threats to prosecute his wife and remove their children from her custody. The lower court relied on the recorded interrogation to refute the defendant's claims. From the District Curt's opinion:

According to defendant, [police officer] Shanlian made comments to the effect that he would contact the prosecutor about bringing charges against defendant's wife for obstruction of justice if defendant did not provide a statement. Defendant claimed that Shanlian also advised him that if defendant's wife were arrested, their children would be placed in foster care.

Conversely, Shanlian testified that he affirmatively advised defendant that he did not intend to arrest defendant's wife, although he acknowledged advising defendant that the prosecutor could independently decide to charge her with obstruction of justice. A transcript of recorded portions of defendant's interview corroborates this account. Shanlian's acknowledgment that any decision to charge defendant's wife rested with the prosecutor, and not with him, negates an inference that Shanlian was attempting to induce a confession by offering leniency for defendant's wife as a quid-pro-quo for defendant's confession, or by threatening to bring criminal charges against defendant's wife as a consequence of defendant's refusal to cooperate and give a statement.

It was the trial court's prerogative to assess the credibility of the witnesses. Considering the totality of the circumstances in accordance with Shanlian's version of events, which the trial court apparently found more credible, we conclude that defendant's confession was not involuntarily given. The trial court did not err in denying defendant's motion to suppress his confession.

(*The value of videotaping: determining the extent to which a mental impairment can render a Miranda waiver ineffective*)

In *Smith v. Duckworth* (June 2016) the US Court of Appeals, Tenth Circuit, upheld the lower court's decision not to suppress the defendant's confession even though an expert testified that that Mr. Smith functioned "at a borderline or low average [IQ] range with deficiencies in the information processing speed and the influence of the chronic and current PCP use would affect his ability to understand the *Miranda* warnings and more

importantly to understand the consequences of waiving those warnings." The trial court rejected the offer of proof. From the Court of Appeals decision:

Mr. Smith argued on direct appeal that the trial court "failed to properly evaluate the validity of the *Miranda* waiver under the totality of the circumstances standard" because the trial court "refused to allow a neuropsychologist, Dr. Bianco, to testify at the suppression hearing as to [Mr. Smith's] intelligence."… Mr. Smith contended "Dr. Bianco's testimony was necessary to establish that [Mr. Smith] was of low intelligence and as a result was unable to comprehend the nature or consequences of the rights he was waiving."

…. After defense counsel offered Dr. Bianco's testimony that Mr. Smith is "borderline to low intelligence" and was "very slow in processing information," the trial court gave a detailed explanation of its findings that Mr. Smith had sufficiently understood the waiver of his *Miranda* rights. Based on its review of Mr. Smith's videotaped interview, the trial court observed that Mr. Smith was "very cocky" and "extremely verbal about how he tricks people and misleads them and has got them convinced how crazy he is"; that he "was able to plan how to switch clothes with different people and conceal his identity" to hide from police; that during the interview he was not "disoriented or unable to comprehend" but rather was "extremely animated and disturbingly explanatory about the murders he committed and how they were other people's fault"; and that he demonstrated the "ability to reason, make intelligent decisions, to co-op other people into his plan and to understand perfectly the consequences of his actions as he's trying to avoid capture." Ultimately, the trial court determined that "there are many indicia[ ] demonstrat[ing] that [Mr. Smith] possessed intelligence" and that, during the interview, "he demonstrated in many different ways his understanding of what was going on." Accordingly, the trial court concluded that "testimony regarding his specific IQ range" would not be relevant to its assessment of his *Miranda* waiver.

The trial court's findings demonstrate that it gave fair consideration to Mr. Smith's intelligence with respect to his ability to understand the nature of the rights he was waiving and the consequences of his waiver. The trial court's findings regarding Mr. Smith's intelligence are based on the court's own observations of Mr. Smith's behavior and interactions with the detectives over the course of a nearly two-hour interview, and Mr. Smith has not rebutted the correctness of these findings.

(*The value of video recording the interrogation to refute false claims of promises of leniency*)

In *US v. Carter* (January 2016) the US District Court, S.D. Georgia, found that the defendant's statements were entirely voluntary and were not the product of any "implied promise" of a reduced sentence or other benefit. From the court's opinion:

Defendant Leon Carter (indicted on gun charges) has moved to suppress the incriminating statements … As defense counsel explained at the hearing, "the main

thrust" of Carter's suppression motion is that the agents effectively coerced his confession by conveying the impression that he would receive a shorter sentence if he cooperated.

The notion that the agents promised Carter a lower sentence in exchange for his cooperation is squarely refuted by the record. From the actual recording the Court *verbatim* illuminates the heart of the exchange, where Agent Crawford told Carter:

Um ... so I know for a fact that you've had guns. Alright, I know for a fact that you've passed guns around and that kinda stuff. Look, and I want to get one thing straight with ya, okay? Um, we can't, I don't, *I don't want you [to] misconstrue anything that I say as being a promise or some kind of leniency or anything like that* you may, you know, that you, that you would like to get. Of course, everybody wants to get out of trouble and this that and the other, but at some point in this process, you know ... it ... how the federal system works is, if a guys goes admits that he done wrong, or she done wrong, then they get what they call "acceptance of responsibility." So, and what that means that everything in the federal system is on a point scale. If you got a really bad criminal history you have a lot of points. So that equates to more points equals time. Just think about it like that. Um, and if you automatically, you know off the bat, you know, start doing the right thing and accept responsibility and you are willing to give information about other crimes and all that is a point deduction, on most cases. *Now, you have to keep in mind that I have no say so in points.* I document what people tell me, but this has been my experience in the federal system. The points deductions come from decisions made by the United States Attorneys' Office, and probation, and the judges, and that kind of stuff.

Carter cites no raised voices, physical threats, the promise of a lower sentence, or anything beyond a general recitation of how the criminal justice system works and the *potential* benefits that accrue to those who cooperate.

As one commentator has noted, statements inducing the hope of leniency in the mind of the suspect " 'are only objectionable if they establish an express quid pro quo bargain for the confession.' " 2 Wayne R. LaFave, Criminal Procedure § 6.2(c) at 624 n. 101 (3rd ed.2007). A "mere *prediction* " of favorable treatment upon cooperation, unlike a *promise* of a lower sentence, does not qualify as a will-overbearing coercive tactic, *id.* at 624 n. 100, even where that prediction turns out to be wrong.

(*Value of video recording the interrogation to demonstrate confession voluntariness*)

In *McCray v. US* (March 2016) the District of Columbia Court of Appeals upheld the lower courts admission of the defendant's incriminating statements in which the video taped interrogation played a critical role in determining the voluntariness of those statements. From the court's opinion:

Mr. McCray argues that "the totality of the circumstances require a suppression of [his videotaped] statement." He emphasizes his youth (age seventeen) at the time his videotaped confession occurred and maintains that his "confession ... should have been suppressed as involuntary."

After indicating that he had again reviewed the videotape (parts of it several times) and reviewed case law, Judge Greene summarized his observations about the videotape in detail and articulated the "facts [that] emerge[d]"; he also reached conclusions drawn from the facts…. After reviewing the giving and waiver of *Miranda* rights, Judge Greene concluded that Mr. McCray "fully understood his rights and that he knowingly waived them" after initially invoking his rights. With respect to the question of "trickery," Judge Greene stated that the detectives' statements to Mr. McCray "were not always entirely truthful and may have stretched the truth," but "much of what they told him that could be viewed as most compelling in his decision to talk was that he already had been indicted by the grand jury. And, in fact, he had been indicted the day before his arrest." Moreover, Judge Greene found that Mr. McCray "[n]ever appeared intimidated or affected in any way by Detective Weeks raising her voice in response to similar conduct by the defendant."

… the judge declared, "Observing him in that interview ... I don't see how anyone could conclude that his will was ever overborne. He was thinking a whole lot about what was going on and what he would do about it. He was very calculated in how he responded." Furthermore, "[w]hile [Mr. McCray] was 17, he was certainly a mature 17 for purposes of the criminal justice system"; "he did not have any obvious disabilities"; "[t]here were no police promises of leniency in exchange for the statement," and no "badgering of the defendant." As a result of these findings, Judge Greene denied the motion to suppress statements, concluding, finally, that "there are no separate indicia here ... that would prompt the [c]ourt [to] exclude those statements on voluntariness grounds."

(Value of videotaping interrogation to demonstrate defendant's demeanor; lying about DNA evidence not coercive)

In *Melendez v. Koehn* (November 2015) the US District Court, N.D. California, upheld the defendant's conviction, rejecting his claims of an invalid *Miranda* waiver and of a coerced confession, in part, after reviewing the videotape of the interrogation. From the court's opinion:

Here, the California Court of Appeal reasonably determined that, in the context of the entire interview, Petitioner was not in custody. The court referenced the videotape in reasonably concluding that Petitioner "felt comfortable stating and restating his version that D.C. was a promiscuous young girl who planned enticing him... This, along with "the officers advis[ing] him he was not under arrest; he could stop talking at any time and they would take him back to work," sufficiently supports the court of appeal's determination that Petitioner was not in custody... And although Petitioner was questioned at length at the police station, he was not physically restrained or cuffed, and Detective Garay was assisting in Spanish during the meeting.

The California Court of Appeal's rejection of Petitioner's coerced confession claim was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of the facts... The state court of appeal

reasonably determined that Petitioner's statements were not involuntary because they were not extracted by threats or violence, obtained by direct or indirect promises, or secured by improper influence. Nor were they coerced by physical intimidation or psychological pressure. The record instead showed that Petitioner laughed with the officers, seemed calm and alert during the questioning, and felt comfortable enough to argue that the alleged victim's sexual instincts were the cause of his predicament. Under these circumstances, it simply cannot be said that the state court's determination that Petitioner's statements were not coerced was objectively unreasonable.

To be sure, it is undisputed that Detective Harrison misled Petitioner on the existence of DNA evidence from the victim before Petitioner advanced his claim that D.C. was the aggressor in the relationship. But this sort of deception by itself is compatible with lawful police behavior because it is not likely to result in an involuntary confession... Nor does Petitioner's contention that he was promised leniency compel a different conclusion. The record shows that during the interview, Detective Harrison said, "Please do not have me show that you are lying, please help me out...we will forget everything, let's just do the truth."... Harrison's statement may have motivated Petitioner to tell the truth, but is not enough to compel a judicial determination that Petitioner's statements were coerced.

(The value of videotaping the interrogation in disputing intoxication claim)

In *US v. Wigginton* (October 2015) the US District Court, E.D. Kentucky, upheld the lower court's rejection of the defendant's claim that he was too intoxicated to make reasonable decisions about what he was saying. From the court's opinion:

Defendant next argues that his confession was involuntary because he was intoxicated at the time of the interview... Defendant asserts that law enforcement "should have known that [Defendant] might have been under the influence at the time of his arrest and subsequent interview." ... According to Defendant, officers discovered various pill bottles containing medications and a nearly empty tequila bottle, and were informed that Defendant "went out" the night before... Further, he states that, because he "was sufficiently intoxicated such that his 'capacity for self-determination [was] critically impaired,' all his statements to law enforcement both before and after he received *Miranda* warnings must be suppressed."

Defendant alleges that law enforcement "should have known" that he was intoxicated at the time of his confession resulting in coercive conduct. At the evidentiary hearing, Special Agent Burke testified that Defendant seemed "coherent, clear" and Defendant conceded that "I look at the video and I look coherent[.]"... Further, the Court has reviewed the video of the interview and the objective circumstances support those descriptions. Throughout the interview Defendant remained upright, coherent, and demonstrated no other physical manifestations of intoxication. His speech was not slurred, and he engaged in meaningful conversation with the officers. His answers to law enforcement's questions were appropriate, and were focused on the task at hand. Moreover, his discussions with the officers indicates he was fully aware of the seriousness of the situation at hand and had detailed knowledge of the criminal justice

system.... Moreover, at no time did Defendant inform officers of his alleged intoxication. Based on this record, there were no circumstances from which law enforcement did know, or should have known, of Defendant's alleged intoxication. As such, there is no evidence of any form of coercion on behalf of law enforcement. Therefore, Defendant's confession was voluntary within the meaning of the Due Process clause.

(Value of video in demonstrating the fallacy of the defendant's allegations about the investigator's behavior)

In *State v. Jones* (September 2015) the Court of Appeals of Ohio, Second District, upheld the admissibility of the defendant's confession - rejecting his claims that the confession was the result of the police threatening him with increased penalties, making promises of leniency, engaging in bullying, misrepresenting certain facts as exonerative, misrepresenting the strength of the State's case against him, and using his family, faith, and other circumstances as leverage. From the court's opinion:

Under his First Assignment of Error, Jones contends the trial court erred in failing to suppress statements he made during his April 19, 2013 interview with Detective Dix, claiming those statements were involuntary as a product of coercive police conduct. Specifically, Jones claims that in order to obtain his confession, Detective Dix threatened him with increased penalties, made promises of leniency, engaged in bullying, misrepresented certain facts as exonerative, misrepresented the strength of the State's case against him, and used his family, faith, and other circumstances as leverage. We disagree with Jones's claims.

"In determining whether a pretrial statement is involuntary, a court 'should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.' For instance, " '[p]romises of leniency by the police * * * are improper and render an ensuing confession involuntary.' ... Moreover, "if an incriminating statement is forced from the mind of the suspect by the flattery of hope or by the torture of fear, [it] must be suppressed because it was involuntary."

On the other hand, a police officer's assurances that a defendant's cooperation will be considered, or that a confession will be helpful, do not invalidate an otherwise legal confession... . "[A] mere suggestion that cooperation may result in more lenient treatment is neither misleading nor unduly coercive, as people 'convicted of criminal offenses generally are dealt with more leniently when they have cooperated with the authorities.' ... "Likewise, an investigator's offer to 'help' if a defendant confesses is not improper." ... Furthermore, "[a]dmonitions to tell the truth, coupled with a benefit that flows naturally from being truthful, are not coercive in nature."

We have reviewed the transcript of the suppression hearing and the exhibits admitted at that hearing, including the video recording of Jones's interview with Detective Dix. At no point during the interview did we observe Detective Dix bully or intimidate Jones as he

has alleged. In fact, contrary to Jones's claims otherwise, Detective Dix was respectful and calm towards him at all times. Moreover, Detective Dix made no threats or promises of leniency in an effort to get Jones to confess, nor did he make any misrepresentations or leverage a confession. To claim otherwise is simply a mischaracterization of the record before this court.

For the foregoing reasons, the totality of the circumstances establishes that Detective Dix's questioning of Jones was not unlawfully coercive. The recorded interview establishes that Jones, a 27-year-old with a partial college education, understood the questions Detective Dix asked, as well as the gravity of the situation that he faced. Jones was interrogated on one occasion for approximately two and one half hours, during which time Jones was not subject to any physical deprivation or mistreatment. In addition, at no point in time did the recording show Jones's free will being overborne by the circumstances surrounding his confession. Instead, Jones was treated respectfully during the entire interview and never once requested to stop the interview. His entire conversation with Detective Dix was voluntary and, as previously discussed, his confession was not the result of any threats or inducement. Accordingly, we conclude the trial court did not err in overruling Jones's motion to suppress the statements he made to Detective Dix during his interview.

(The defendant's claim that he could not read the Miranda waiver form because he did not have his glasses was disproved by the video of the interrogation)

In *State v. Griffin* (July 2015) the Court of Appeals of Ohio relied on the videotape of the defendant's interrogation to disprove his claim that he could not read the waiver form because he did not have his glasses with him. From the court's opinion:

"In this case, Griffin claims he did not knowingly, intelligently and voluntarily waive his *Miranda* rights because he: (1) was unable to read the rights and waiver contained in the pre-interview forms without his glasses; (2) was under the influence of alcohol and prescription drugs at the time of the first interview; (3) had an overwhelming urge to urinate during both interviews due to a medical condition, which, according to Griffin, created an exigency to say and sign whatever necessary to conclude the interviews; and (4) was misled by the detectives into believing that if he agreed with the detectives' statements and signed the pre-interview forms, he would be allowed to return home. Griffin also claims that his statements during the interviews were involuntary as a result of his intoxicated state, his need to urinate, and coercion by the interviewing detectives.

After reviewing the testimony and evidence presented at the suppression hearing, which included the pre-interview forms and the video recordings of Griffin's interviews, the trial court found that Griffin demonstrated an ability to read the pre-interview form without his glasses during the first interview and that he testified falsely at the suppression hearing when he claimed otherwise. Specifically, the trial court found that during both interviews, Griffin mentioned that he did not have his glasses, but did not request his glasses at any time. The trial court also found that during the first interview, Griffin was able to confirm that his social security number and date of birth were correctly written on

the pre-interview form after reviewing the form without his glasses. In addition, the trial court found that Griffin read aloud the first *Miranda* right written on the form at both interviews, as well as the entire "Waiver of Rights" section on the form during the first interview, all without his glasses.

Continuing, the trial court found that Griffin did not appear to be intoxicated during either interview. Rather, the trial court found that Griffin spoke clearly, without slurred speech and was coherent and alert at all times. In addition, with respect to Griffin's need to use the restroom, the trial court found that Griffin requested to use the restroom three times during the first interview, but that no admissions were ever made after those requests. During the second interview, the trial court found that Griffin did not ask to use the restroom until the very end of the interview, after he had already made his confession.

While Griffin testified that he had asked to use the restroom immediately prior to both interviews, the trial court found his testimony lacked credibility given that his requests were not captured on the video recordings and due to the false testimony he gave regarding his ability to read the pre-interview form. Furthermore, the trial court found that during both interviews, Griffin never advised the detectives that he had a medical condition causing an urgency to urinate, did not exhibit any signs of physical discomfort as a result of his alleged need to urinate, and at no point requested to stop the interview to use the restroom.

The trial court also found that during the first interview, Griffin stated that he had been advised of his *Miranda* rights in the past. In addition, the trial court found that during both interviews, Griffin correctly defined the meaning of the word "coercion," and stated that he had completed 12 years of schooling and obtained a GED. In confirming his understanding of his rights, the trial court found that Griffin asked Detective Daniels if he was allowed to stop the interview at any time, to which the detective responded: "That's correct, Chris. Yes you are. That's your right." ... The trial court further found that after Griffin read the first of his *Miranda* rights aloud from the form, the detective then proceeded to read each of the remaining rights to Griffin at a speed that Griffin could understand. During both interviews, Griffin thereafter stated that he understood each right without hesitation and initialed each right on the form to confirm his understanding.

Finally, the trial court found that while Griffin testified that he signed the waiver of rights on the pre-interview form only because he thought it would allow him to get home quicker, on cross-examination, Griffin conceded that the detectives never promised him that he would get to go home if he signed the form. The trial court also found that at no point during either interview did the detectives either explicitly or implicitly convey any threats or promises to Griffin.

Upon reviewing the record in this case, we find that the foregoing findings of fact made by the trial court are supported by competent, credible evidence; namely, the video recordings of Griffin's interviews, the pre-interview forms, and Detective Daniels' testimony.... Regardless, the video did depict Griffin reading aloud the first of his *Miranda* rights and confirming his social security number and birthdate written on the

form without his glasses. Therefore, exclusive of this one erroneous finding, we adopt the trial court's factual findings as true.

Having accepted the trial court's findings of fact as true, we find a preponderance of the evidence supports the trial court's finding that Griffin knowingly, intelligently and voluntarily waived his *Miranda* rights, as the totality of the circumstances indicates that Griffin's waiver was made with full awareness of the nature of the rights that he was waiving and the consequences thereof. The totality of the circumstances also indicates that Griffin's waiver was not the product of intimidation, coercion or deception.

(Competency and the value of video recording the interrogation)

In *State v. Woods* (May 2015) the Supreme Court of Kansas upheld the lower court's decision to admit the defendant's incriminating statement and to reject his claim of incompetency. From the Supreme Court's opinion:

"At trial, Woods renewed his objection to the statements made during the taped interview "pursuant to pretrial motions."

... This court considers a nonexclusive list of factors when determining if a confession is voluntary under the totality of the circumstances, including: (1) the defendant's mental condition; (2) the manner and duration of the interrogation; (3) the defendant's ability to communicate with the outside world; (4) the defendant's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the defendant's proficiency with the English language.... "Any one factor or a combination of factors ' "may inevitably lead to a conclusion that under the totality of circumstances a suspect's will was overborne and the confession was not therefore a free and voluntary act."

Woods focuses on his mental condition and intellect. And in a related argument, Woods appears to claim that he wrongly believed he had to speak with police to get information about his wife and kids. But Woods again overstates the facts regarding his mental illness. The COMCARE competency evaluation noted Woods had been previously diagnosed with schizophrenia but concluded he was not psychotic when the evaluation was made. This evaluation, of course, occurred after the police interview; **but the unredacted video,** which the district court reviewed prior to ruling on the suppression motion, supports the conclusion that Woods easily understood the questions posed and answered appropriately. In short, there is no evidence Woods' responses were unknowing or involuntary because he was suffering from schizophrenia.

Regarding Woods' intelligence, there is conflicting evidence whether Woods completed high school. He told the detective he had graduated from high school, but the competency evaluation reported he had dropped out of school when he was 15 years old. The evaluation indicates Woods' IQ fell in the mild mental retardation range, and it is apparent from the video that Woods wanted to speak with detectives because he was hoping to learn something about his wife and kids. In this regard, he made several statements indicating he wanted information both before and after the interviewing

detective explicitly told him the interview's purpose was to get Woods' story, not to provide Woods with information. Woods appeared to continue harboring this belief even after the detective explicitly disavowed it.

But even if we assume Woods' low intelligence caused him to believe he was required to speak with the detective to learn about his wife's condition, this would be insufficient to render the confession involuntary without more.... ("[I]t is well established that low intelligence alone does not preclude a finding that an accused knowingly and voluntarily waived his or her *Miranda* rights."). Woods must show he was coerced into confession.... And here there is no evidence of coercion or inducement. In fact, the detective explicitly told Woods the officers were not there to give information.

We hold that under the totality of the circumstances, the district court did not err by determining the confession was voluntary.

(Value of video recording interrogation to determine competency to waive rights)

In *People v. Johnson* (July 2015) the Monroe County Court, New York, rejected the defendant's claim that due to his intellectual disability his incriminating statements should have been suppressed because he was incapable of making a knowing, voluntary and intelligent waiver of his *Miranda* rights. The court's review of the videotaped interrogation was critical in reaching this decision.

From the court's opinion:

"Doctor Jerid Fisher examined defendant (for the defense) to assess his ability to understand the five prongs of *Miranda* and determine whether he was capable of making a knowing, voluntary and intelligent waiver of his *Miranda* rights on November 14, 2013. ... The doctor testified that a diagnosis of mental retardation requires an IQ that falls between 55 and the low 70's, but that the diagnosis cannot be based on IQ alone. He testified that the diagnosis must also be based on a person's functional capacities and adaptive skills, such as a person's ability to communicate and function in the community. Mentally retarded people, according to Doctor Fisher, are limited in their social actions and the kind of work they can perform. Some hallmark traits of mental retardation, says Doctor Fisher, include pronounced limitations in abstract thinking, profound impairment in the executive thinking, i.e., planning and organizational difficulties, and consideration of consequences. The doctor also testified that mentally retarded people tend to be acquiescent, or readily willing to agree with almost anything, impulsive, and possess a limited ability to understand behavioral risks. He testified that mentally retarded people frequently require support to live in the community and very often live with their families who assume much of the responsibility for their customary daily activities, such as handling and managing their money, shopping, cooking, and transportation. Doctor Fisher concurred with "what [experts in] the field say[ ] about mental retardation and the capacity to appreciate and waive all five prongs [of *Miranda*]" that mentally retarded people have "an inability to understand and make a knowing [*Miranda*] waiver"... . He emphasized that one study found that "[e]ven individuals with IQ's between 71 and 88

were found to lack the necessary understanding of the rights ..."

The doctor testified, based upon his review of defendant's interview with investigators Klein and Kamykowski ... , that Investigator Klein downplayed the significance of the *Miranda* warnings in his preamble and incorrectly interpreted defendant's answers regarding his educational background, not truly appreciating the extent of defendant's intellectual disability. The doctor testified that Investigator Klein's total presentation of the five prongs of *Miranda* spanned approximately twenty-three seconds. He felt that, given defendant's intellectual limitations, the investigator's administration of *Miranda* was inadequate to insure that defendant sufficiently understood the rights he was waiving. According to doctor Fisher, to adequately administer *Miranda* to an adult person with this level of cognitive deficiency, "ideally what should have happened was after each prong was read to [defendant] [the investigators] should have said ... what does that mean? What's the implication of that? Because that goes to the depth of processing question[ ]" .... Indeed, the doctor went so far as to say, "given [defendant's] intellectual deficits[,] ... his processing abilities ... preclude him from ... th[e] level of understanding ... [a person of normal intelligence] would have ... [when] ... having ... *Miranda* Warnings read to [him][ ]" ....

Doctor Trica Peterson testified for the People in rebuttal.... Doctor Peterson testified that a person's IQ is "not a good indication of someone's overall functioning in the world ... [S]omebody with low intellectual functioning ... may do very well in the world and be able to navigate ... common sense, real world situations better than ... would be expected ..." (tr at 154). The doctor elaborated by reference to defendant's adaptive functioning scores. She testified that defendant's adaptive functioning scores from 2002 were 90 and 83 and that the State benchmark to qualify for services through the Office for People with Developmental Disabilities is 70.

Doctor Peterson testified that there is "no broad brush to say intellectual disability equals lack of *Miranda* (sic) knowledge; it's oversimplifying[ ]" .... She testified that "there's a wide range of ability within intellectual disabilities" ... and that 10 people with the same IQ could have very different levels of functioning in different circumstances. For this reason, in Doctor Peterson's opinion, in assessing a suspect's ability to understand *Miranda* it is vital to obtain as much information as possible about the suspect's interactions with the police.

With respect to defendant's behavior and speech **during his videotaped interview** (emphasis added) at the PSB, the doctor noted that the defendant "spoke at a normal conversational tone and speed[,]" that he was able to "process the ... questions [he was asked] and respond in a fairly normal pace" and that "there weren't long delays between a question being asked and him responding[ ]"... She also testified that defendant "use[d] some fairly advanced vocabulary terms during the interrogation video[ ]" such as "traumatized," "tragedy," "devastated," and "composure," .... and that he used these words without prompting and in proper context and placement in the conversation.

Doctor Peterson concluded, based upon the totality of the evidence she reviewed, to

include consideration of defendant's subnormal IQ as but one factor, that the defendant is capable of making a knowing, voluntary, and intelligent waiver of his *Miranda* rights.

There is no dispute here that the defendant was subjected to custodial interrogation, and that the primary statement sought to be introduced at trial is the product of that interrogation.... The defendant argues that his statements should be suppressed primarily on two grounds: (1) because he was unable to make a voluntary and knowing waiver of his *Miranda* rights due to his limited mental capacity and the specific circumstances of the interrogation; and (2) because his intellectual disability, combined with improper interrogation tactics, rendered his statements involuntary. The Court disagrees.

While the facts here are generally analogous to Knapp, for the reasons that follow the Court finds that the credible evidence presented at the hearing--to include, perhaps most significantly, the videotaped interrogation of defendant (emphasis added) with investigators Kamykowski and Klein--sufficiently distinguishes this case from Knapp to warrant the conclusion that defendant's November 14, 2013 custodial statements accorded with the requirements of *Miranda* under the particular circumstances of this case.

The totality of the circumstances surrounding the interrogation here, in this Court's view, warrants denial of suppression on both grounds alleged by defendant.

The Court's review of the video, in view of the totality of the circumstances and evidence presented, reveals that the defendant's oral statement was voluntarily made during a custodial interrogation after a proper advisement of *Miranda* rights and a knowing, voluntary, and intelligent waiver of those rights. The Court credits the testimony of investigators Kamykowski and Klein, and the videotape bears out, that nothing about defendant's presentation or responses to their questions suggested that he lacked the capacity to appreciate or did not understand what was taking place. Defendant was appropriately engaged and responsive to all the questions he was asked throughout the interview. Investigator Klein inquired with defendant regarding his level of education, and in observing defendant's demeanor, responses, and reactions at that time, besides having previously interviewed defendant at length on a prior occasion, the Court finds that defendant's overall behavior revealed no sign posts or queues that would or should have suggested to the investigator that defendant needed a more detailed and simplified explanation of *Miranda* ....

Nor, in reviewing the videotape, does the defendant's demeanor, speech pattern, or manner of responding to the questions posed to him during the interrogation suggest, either individually or collectively, that he lacks the depth of processing to understand his *Miranda* rights as they were administered, relative to the context and overall tenor of the interview in its entirety.

Equally pertinent on review of the videotape is the readily apparent conversational flow of the interrogation, as well as defendant's seemingly effortless summons and use of certain more sophisticated terms (as referenced in Doctor Peterson's testimony, supra) in

context during its course. Moreover on this point, although not highlighted by the experts or counsel, the Court also notes defendant's apt use of the term "decisive" at approximately 5:04:10 p.m on the interview monitor. Under the circumstances and within the context of the interrogation at that time, there may have been no better choice of words.

(Value of video to help determine if schizophrenia caused "unknowing or involuntary" responses)

In *State v. Woods* (May 2015) the Supreme Court of Kansas upheld the lower court's decision that the defendant's confession was voluntary. From the court's opinion:

"This court considers a nonexclusive list of factors when determining if a confession is voluntary under the totality of the circumstances, including: (1) the defendant's mental condition; (2) the manner and duration of the interrogation; (3) the defendant's ability to communicate with the outside world; (4) the defendant's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the defendant's proficiency with the English language... "Any one factor or a combination of factors " 'may inevitably lead to a conclusion that under the totality of circumstances a suspect's will was overborne and the confession was not therefore a free and voluntary act." [Citations omitted.]'.

Woods focuses on his mental condition and intellect. And in a related argument, Woods appears to claim that he wrongly believed he had to speak with police to get information about his wife and kids. But Woods again overstates the facts regarding his mental illness. The COMCARE competency evaluation noted Woods had been previously diagnosed with schizophrenia but concluded he was not psychotic when the evaluation was made. This evaluation, of course, occurred after the police interview; but the unredacted video, which the district court reviewed prior to ruling on the suppression motion, supports the conclusion that Woods easily understood the questions posed and answered appropriately. In short, there is no evidence Woods' responses were unknowing or involuntary because he was suffering from schizophrenia.

Regarding Woods' intelligence, there is conflicting evidence whether Woods completed high school. He told the detective he had graduated from high school, but the competency evaluation reported he had dropped out of school when he was 15 years old. The evaluation indicates Woods' IQ fell in the mild mental retardation range, and it is apparent from the video that Woods wanted to speak with detectives because he was hoping to learn something about his wife and kids. In this regard, he made several statements indicating he wanted information both before and after the interviewing detective explicitly told him the interview's purpose was to get Woods' story, not to provide Woods with information. Woods appeared to continue harboring this belief even after the detective explicitly disavowed it.

But even if we assume Woods' low intelligence caused him to believe he was required to speak with the detective to learn about his wife's condition, this would be insufficient to

render the confession involuntary without more..... Woods must show he was coerced into confession.... And here there is no evidence of coercion or inducement. In fact, the detective explicitly told Woods the officers were not there to give information.

We hold that under the totality of the circumstances, the district court did not err by determining the confession was voluntary."

(Videotaped interrogation admissible even though investigator repeatedly accused defendant of lying)

In *Sheppard v State* (November 2014) the Supreme Court of Florida upheld the admission of the videotaped interrogation of the defendant even though the investigator repeatedly accused the defendant of lying. From the Supreme Court's opinion:

"The redacted version of the videotaped statement that Sheppard gave to detectives after Sheppard was taken into custody was played for the jury. Sheppard contends that admission of the videotape was fundamental error because the jury heard Detective Bowers repeatedly accuse Sheppard of lying, and heard Bowers say the detectives knew he was either the shooter or the driver of the car from which Wimberly was shot. At the outset of the interview, Detective Bowers advised Sheppard that he does not care for lying and was not going to lie to Sheppard, but he expected the same from him. Bowers said, "You don't have to answer anything that you don't want to" but he expected the truth when Sheppard did answer.

Sheppard was asked if he was with the PYC gang and Sheppard denied it. Bowers then told Sheppard that he knew the answers to the questions he was asking and said, "All I'm here to find out, is Billy that cold that he needs to be locked up forever. Is everything that comes out of his mouth a lie? Because so far, you're batting a thousand.... All I'm trying to do, Billy, is find out are you a stone-cold killer and a liar or is there goodness in you." Sheppard then confirmed he had a PYC tattoo on his arm, and later said that "it" was in his "file," referring to a PYC notation.

Detective Bowers then confronted Sheppard with evidence of his presence at the Prime Stop convenience store and witness statements that Sheppard and Evans took Dorsette James's car at gunpoint, which Sheppard denied. Then Bowers said, "My main concern with you knowing is are you the trigger man, are you the driver? Because you're one or the other." Bowers then said, "[Y]ou may have been an unwilling participant. You may have been along for the ride. It may have been an accident, the fact that he got shot. It may have been the intention you were going to scare someone without the intent of killing them...." Sheppard continued to deny a carjacking, but then admitted to taking James's car for a "joyride." Detective Bowers told Sheppard, "Tell me the whole truth or none of the truth. We're trying to get on a (inaudible) where I can believe *1166 you because that's important to you, and you know that if I can't make (inaudible) you know you won't be able to convince 12 people." Sheppard ultimately admitted that he and Evans took the car when James was in the store and that Sheppard got in the driver's side of the car, although Sheppard said he later got out of the car at Acorn Street and Evans

assumed the driver's seat. Sheppard never admitted anything concerning either of the murders. No objections were made to any portion of the redacted videotaped statement that was presented to the jury.

Sheppard contends that Bowers' statements in this interview constituted fundamental error because they accuse Sheppard of lying numerous times; tell him that if he cannot make the detectives believe him, he will never convince a jury; and say that the detectives know he is either the shooter or the driver. Sheppard contends these statements were so prejudicial that his right to a fair trial was violated. Error is fundamental if it "reach [es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." The principle is applied only in rare cases where the interests of justice present a compelling demand for its application. Id. As we explain, we conclude that fundamental error did not occur in presentation of the edited videotape of Sheppard's interview with Detective Bowers.

Even though we find no fundamental error in admission of the videotape, we reiterate that a jury is inclined to give great weight to the statements made by law enforcement officers by virtue of their position... For this reason, great care should be taken by law enforcement and by prosecutors that such statements expressing belief in the defendant's guilt or belief that the defendant is lying generally not be placed before the jury. There is "increased danger of prejudice when the investigating officer is allowed to express his or her opinion about the defendant's guilt." ... With this caveat, we find no merit in Sheppard's claim of fundamental error in this issue.

(Use of a psychologically oriented techniques during questioning is not inherently coercive; request to have his mother in the room was not an assertion of his right to remain silent – the value of video recording to evaluate the issues)

In *State v Faucette* (January 2015) the Superior Court of New Jersey, Appellate Division, upheld the lower court's decision that incriminating statements made by the defendant were voluntarily made. From the Superior Court's decision:

"Defendant argues his confession was "the product of intimidation, coercion and deception," as police capitalized on his fear of Clemons' retaliation against him or his mother, essentially forcing him to talk. He cites as a threat, Detective Craig's comment he would "drop [him] downstairs," meaning take him to the county jail where Clemons was being detained, "if he didn't start talking."

Having considered the events depicted on the DVD, we reject defendant's argument as lacking merit. Use of psychological tactics is not prohibited... "Unlike the use of physical coercion, ... use of a psychologically-oriented technique during questioning is not inherently coercive." Such ploys may "play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary."

Here, no physical force or threats of same were made. The interview was not lengthy,

lasting a little more than an hour. During the interrogation, there were no signs defendant was fatigued, confused or under the influence of intoxicating substances. Detective Craig's comments expressed frustration with defendant's changing story, but the remark "[w]e're not offering to do anything for you other than drop you downstairs in the middle of the population and you fend for yourself," merely stated police responsibility to effectuate the arrest warrant and place defendant in jail.

As to the police discussion of Clemons' past violence and affiliation with a gang, these facts were known to defendant, who admitted he had known Clemons for a long time. Police acknowledgement and discussion of these facts was not the " 'very substantial' psychological pressure[ ]" necessary for finding a defendant's will was overborne. Accordingly, we reject the notion Detective Craig's comments acted to "strip[ ] defendant of his capacity for self-determination and actually induce the incriminating statement...."

Defendant suggests requests to have his mother present in the room constituted equivocal assertions of his right to remain silent. We disagree.

Before Detective Craig informed him of the charges, defendant, who was age twenty-two, asked "[w]here's my mom," as he thought "my mom[ ] is gonna be here." Once informed of his arrest, defendant exclaimed, "I thought you were going to be bringing my mom in here." Subsequent to revealing his role in the robbery, defendant requested "[c]an my mom be in here while ... we do this, please?" At that point, Detective Craig replied "she's a little tied up right now," but later he would "take a break at a certain point [and he would] go find out where she's at [sic]...." Toward the end of the interview, defendant again asked for his mother.

The Court recently considered the analytical implications of requests by an adult to speak with someone other than an attorney, concluding that such requests do not imply or suggest that the individual desires to remain silent.

The Court explained, "[a]lthough the mere request by an adult to speak with a parent does not equate to an invocation of the right to remain silent, it does necessitate a review of the context in which the request was made." Often "it [is] not the request to speak with the parent, but that request in the context of other facts that [gives] rise to the conclusion that the right to silence had been invoked."
Here, defendant made an inquiry of his mother's whereabouts and repeated his belief she was to be present. Detective Craig told him he would check during a break and later advised defendant could see his mother before he was placed in jail. Nothing about defendant's requests reflect continuation of the conversation was contingent on his mother's presence. Rather, defendant's statements suggest a desire for support and cannot be construed as an assertion of his right to remain silent.

(Confession voluntariness and the exclusion of clinical psychologist at guilt phase (value of video recording))

In *Loza v. Mitchell* (September 2014) the US Court of Appeals upheld the Ohio Supreme

Court's decision to admit the defendant's incriminating statements, and their decision to exclude the testimony of Dr. Roger Fisher during the guilt phase. From the Court of Appeals opinion:

"Loza argues that Detectives Knable and Jeffery threatened Dorothy Jackson and Loza's unborn baby to coerce Loza into confessing. For example, the detectives asked Loza if he "want[ed] Dorothy to have her baby in a penitentiary" or if he wanted "[his] baby to be put up for adoption to somebody you've never heard of" and told Loza that "[t]hat's what's going to happen."

The Ohio Supreme Court rejected Loza's argument that these statements constituted threats, reasoning:

The detectives' references to Jackson were made in response to appellant's repeated inquiries about what would happen to her. No threats were made concerning Jackson or what would happen if appellant did not confess. The detectives merely informed appellant of the possible consequences of his actions. By the time the detectives were questioning appellant, Jackson had already told the police about appellant's involvement in the murders. Appellant sought the release of Jackson and he initiated the bargaining for her release. Under these circumstances, the statements made to the detectives were voluntary beyond doubt.

After reviewing the video recording and transcript of Loza's interrogation, we conclude that the Ohio Supreme Court's determination that the detectives did not threaten Dorothy Jackson or Loza's unborn child was not unreasonable. The record supports the court's conclusion that "detectives merely informed appellant of the possible consequences of his actions" when they told Loza that both he and Dorothy Jackson could be imprisoned for their involvement in the killings.... As the court noted, most of the detectives' references to Jackson during the interrogation were in response to Loza's questions about what would happen if Jackson were charged and prosecuted. Viewed in context, the detectives' comments do not appear to be threats. Even if we believed that some statements could be characterized as threats, our mere disagreement is not enough to supersede the Ohio Supreme Court's factual determination on habeas review.
Loza argues that the Ohio Supreme Court's decision upholding the trial court's exclusion of the testimony of Dr. Roger Fisher, a clinical psychologist, at the guilt phase of trial was contrary to and an unreasonable application of *Crane v. Kentucky,* 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). In *Crane*, the Supreme Court held that the "blanket exclusion" of evidence concerning the circumstances of the defendant's confession on the ground that it related only to voluntariness, not credibility, violated the defendant's right to present a complete defense.

Loza sought to introduce testimony from Fisher at the guilt phase of trial to help explain his confession... Loza's counsel stated that he expected Fisher to testify that "Loza's acknowledgment of his participation in the offense and his desire to take full responsibility would have been [the] product of psychological coercion and duress brought upon by the statements of the police officer that his girlfriend would be placed in

the electric chair and this child would be sent to never-never land." He said that he expected Fisher to testify that Loza's "letters and repeated affirmations of [his confession] would have been consistent with Mr. Loza's coerced desire to protect his girlfriend and unborn child." The trial court prohibited Loza's counsel from introducing Fisher's testimony at the guilt phase of trial because it had already determined Loza's confession to be voluntary.... He stated that, in his opinion, Loza would have lied to protect Dorothy Jackson and that he would have done anything necessary to protect his unborn child. The Ohio Supreme Court affirmed the trial court's decision to exclude Fisher's testimony at the guilt phase.

Loza argues that the Ohio Supreme Court's decision upholding the exclusion of Fisher's testimony was contrary to and an unreasonable application of *Crane*. The Ohio Supreme Court reasoned:

The testimony of Dr. Fisher is clearly outside the holding of *Crane*. The testimony of the witnesses in *Crane* related to how the physical and psychological environment of the interrogation could have impacted the voluntariness and credibility of the confession. Dr. Fisher's proffered testimony relates to how Loza's individual, psychological makeup, independent of the circumstances surrounding the interrogation, could have impacted the voluntariness and credibility of the confession. Consequently, *Crane* does not require the admission of Dr. Fisher's testimony.

The jury was able to accurately consider the credibility and weight of the confession by watching it on videotape. They could see and hear the tone and manner of the interrogation, the number of officers present, the physical characteristics of the room, and the length of the interrogation. The jury had the opportunity to evaluate the credibility of the appellant and to give the confession its appropriate probative weight. Because the trial court already had ruled on the voluntariness of the confession and the jury had the opportunity to evaluate the credibility of the confession, the trial court did not abuse its discretion by excluding the testimony of Dr. Fisher during the guilt phase of the trial.

(Value of video recording to demonstrate confession voluntariness)

In *State v. Glasscock* (September 2014) the Court of Appeals of Utah upheld the lower court's decision that defendant's confession was not coerced. From their opinion:

"Glasscock argues that his confession was involuntary because the detectives employed "coercive police interrogation tactics" to take advantage of his unstable mental condition, and he argues that "[s]everal of the [court's] findings of fact" supporting the court's denial of his motion to suppress "were clearly erroneous." Specifically, Glasscock maintains that he was "significantly impaired from alcohol, heroin, pain pills" and that "he suffered from multiple disorders, including 'bipolar Type I,' 'post-traumatic stress,' and 'borderline personality.' " And even though the detectives "knew that Glasscock had consumed a number of impairing substances" that had "significantly impacted [Glasscock's] memory," Glasscock contends that they employed a "false friend technique" and other coercive strategies that "basically forced [him] to say what they wanted [him] to say."

After carefully reviewing the evidence in the record, including the video of Glasscock's police interrogation, we agree with the district court that Glasscock's confession was not coerced.
Here, the district court found that Glasscock "was lucid and properly oriented" during his interview with the detectives. Although Glasscock's answers evinced some "hesitation at first," the court determined that he "voluntarily cooperated" throughout the interview. The court also determined that there "was insufficient evidence of intoxication, mental defect, or coercion to justify excluding the interview," so the "confession was fully knowing and voluntary." At Glasscock's urging, we have reviewed the video recording of Glasscock's interrogation and find that the district court's findings and conclusions are unassailable."

(Video of interrogation demonstrates that juvenile did not make a knowing and intelligent waiver of his rights)

In re J.M., a Minor (People v. J.M.) (April 2014) the Appellate Court of Illinois found that "J.M.'s youth, his mental deficiencies, the DVD which shows not only his inability to read his rights, but also his trust in Jany and Vespa despite their intention to get a statement to use against him, and Dr. Cuneo's credible, expert testimony, we find that the trial court's decision that respondent knowingly and intelligently waived his *Miranda* rights is against the manifest weight of the evidence."

In their opinion the court stated the following: "The critical test used in determining whether an accused knowingly and intelligently waived his or her rights is whether the words in the context used, considering the age, background, and intelligence of the individual being interrogated, convey a clear and understandable warning of all his or her rights… Whether a waiver is knowing and intelligent is determined by the particular facts and circumstances of each case, including the defendant's background, experience, and conduct… Illinois courts have long recognized that a defendant's mental capacity at the time of the alleged waiver must be considered in determining whether his or her actions were knowing and intelligent, and while mental deficiency alone does not render a statement unintelligent, it is a factor that must be considered

Moreover, our supreme court has specifically stated that "[t]he greatest care must be taken to assure that a juvenile's incriminating statement was not the product of ignorance of rights or of adolescent fantasy, fright or despair."… In addition, our supreme court has explicitly stated that care must be taken with defendants who are mentally deficient due to the following:

"[I]t is generally recognized that the mentally retarded are considered more susceptible to police coercion or pressure than people of normal intellectual ability, they are predisposed to answer questions so as to please the questioner rather than to answer accurately, they are more likely to confess to crimes they did not commit, they tend to be submissive, and they are less likely to understand their rights." ….

Therefore, when dealing with a mentally deficient juvenile, extreme care must be used to assure that he knowingly and intelligently waived his rights.

… J.M. was also 13 years of age; however, his mental capacity was that of a 7–year–old. His IQ was either 54 or 56, which, … puts him in the mild mentally retarded range. J.M. also attended special education classes and was unable to explain the meaning of the word “silent” with regard to the first *Miranda* warning. Additionally, an expert testified that J.M. did not knowingly and intelligently waive his *Miranda* rights.

Here, Dr. Cuneo evaluated J.M. on two separate occasions: first, to determine whether J.M. was fit to stand trial and, second, to determine whether he could knowingly and intelligently waive his *Miranda* rights. Dr. Cuneo specifically found that J.M., who only reads at a first-grade level and who was intellectually in the bottom .04% of the population, was incapable of reading or understanding his *Miranda* rights. Our own review of the videotaped statement contained on the DVD shows that J.M. was incapable of reading his rights.

J.M. could not even read the word “silent” in the first warning. The DVD shows that after J.M. had trouble reading the word “silent,” Officer Jany took over and read him his rights, trying to explain them along the way. Jany also told J.M. that J.M.'s mother was outside and she just hoped J.M. would be honest. After Jany read J.M. each of his rights, he told J.M. to initial and then sign the form. J.M. complied. Even though J.M. said he watched rights being given on television and had been read his rights “at the other station” on a different occasion, our review of the DVD does little to alleviate our concerns that J.M. did not fully appreciate that it was the State's intention to use his statement to secure a conviction against him or that he had the right to stand mute and request a lawyer. Instead, it appears to us that J.M. was compliant and wanted to please the officers, which, as previously discussed, is common among those suffering a mental deficiency.”

(Video contradicts defendant's claim he was too intoxicated to waive his rights)

In *McNear v. State* (March 2014) the Court of Appeals of Georgia rejected the defendant's claim that his statements to police were voluntary and admissible. McNear asserted that his statements were not voluntary because they were made over a six hour period of time while he was "exhausted and still inebriated" from an evening of heavy drinking. From the courts opinion:

"The record in this case shows that after conducting an evidentiary hearing and reviewing the three video-recorded interviews, the trial court issued a seven-page order in which it concluded that McNear "was advised of each of his *Miranda* rights, he understood them, he voluntarily waived then, and he thereafter gave his statements freely and voluntarily without any hope of benefit or fear of injury." With regard to McNear's intoxication, the trial court made the following finding:

While Defendant contends that he was intoxicated at the beginning of his interview with

the officers, Defendant's intoxication did not prevent him from a making a rational, voluntary statement. Defendant was lucid, answered questions forthrightly, and recognized the nature of his detainment. Officers adequately explained to Defendant his rights several times throughout the interview, and Defendant clearly understood what the officers were telling him. Consequently, considering the totality of the circumstances, Defendant's statements were voluntary in spite of his possible intoxication.

Based upon our review of the waiver form signed by McNear and the video-recordings of his interviews with the police officers, "we find that the trial court was authorized to conclude that, despite [McNear]'s possible intoxication [and lack of sleep], he gave a voluntary statement and made a knowing and intelligent waiver of his *Miranda* rights."

(Video identifies improper interrogation - confession suppressed)

In *People v. Hughes* (December 2013) the Appellate Court of Illinois, First District, Third Division relied extensively on the video recorded interrogation to determine that the defendant's confession should be inadmissible. The court stated that, "We watched the video recording of Hughes' interrogation from start to finish. Our bird's-eye view of what occurred before the first confession and, more tellingly, between the time of the first confession and the second confession, raises intolerable doubts about the validity of the second confession. The methods the detectives used during the interrogation process contaminated this confession. The totality of the circumstances underlying Hughes' second confession establish that he lacked the ability to make a rational, unconstrained decision to confess. Accordingly, we reverse and remand for a new trial."

From the court's opinion:

"Hughes was 19 years old at the time of the interrogation. He attended school through the ninth grade, and received C's and D's. He used marijuana five to six times a day and drank several glasses of cognac twice a week. His arrests as a juvenile involved unlawful use of a weapon and criminal trespass to a vehicle.

Hughes' age, intelligence, education, experience, and physical condition at the time of the detention and interrogation address his character and capacity to resist police coercion. Courts recognize that youth, education, and experience increase susceptibility to police coercion. We agree that Hughes' youth (Hughes was 19 years old at the time of interrogation) and lack of education (Hughes only attended school to the ninth grade) heightened his vulnerability to the coercive tactics used on him.

As to the length of the interrogation, Hughes was picked up in Michigan around 2 p.m. and the interrogation ended around 6 a.m. the following day. Just over half of that time Hughes spent alone. Over the course of the interrogation, Hughes' clarity and cadence of speech, alertness, and concentration deteriorate. While in the afternoon he speaks freely, by the early morning hours before and during the polygraph examination Hughes mumbles several answers and appears exhausted.

Hughes also cites his regular drug use (smoking five or six joints a day, and drinking four or five glasses of cognac twice a week) to show involuntariness..... While nothing indicates that Hughes confessed as a result of any withdrawal effects ... he did smoke marijuana immediately before the polygraph exam.

Hughes next cites a number of untruths told by the detectives during the interrogation. In limited circumstances, interrogators may use subterfuge in attempting to elicit a confession. But where the State extracts a confession using deceptive interrogation tactics calculated to overcome the defendant's free will, suppression may be appropriate. ... Hughes cites numerous lies told by the detectives, which the State does not contest in its brief: (i) that his fingerprints were found at the scene; (ii) that numerous witnesses placed him at the scene; (iii) that the leg wounds, and not the head wound, killed Coleman; (iv) that he had failed the polygraph; and (v) that the court needed to know Hughes was sorry for what he had done.

The detectives' claims of having nonexistent evidence is a common police strategy, and while falsified evidence raises concerns as to voluntariness of a confession, usually, courts go along with these ruses. While the false-evidence ploys may be disturbing contextually and cumulatively, Hughes' "failed" polygraph and being told after the polygraph that the court needed to know Hughes was sorry for what he had done, weigh the heaviest against voluntariness due to their proximity and causal connection to the confession.

Moreover Detective Figueroa-Mitchell, the polygraph examiner, repeatedly represented to Hughes that she was "here to help" him, and that if he did not show remorse for shooting Coleman, his situation would only get worse. She also told Hughes that she was "fighting" for him, and that--if he showed remorse for shooting Coleman--she would testify in court on his behalf.

Looking at the totality of the circumstances, Detective Figueroa-Mitchell's trickery and its cumulative effect, along with Hughes' character and the circumstances of the interrogation, indicate that his confession to shooting Coleman was not voluntary."

(Value of recording: Video of interrogation contradicts defendant's claims)

In *People v. Kronenberger* (March 2014) the Appellate Court of Illinois, First District, First Division, upheld the lower court's decision to admit the defendant's confession, relying on the videotape of the interrogation to discredit the defendant's claims.

From the court's opinion: "The defendant makes a number of arguments that his videotaped confession to the police was given involuntarily, because the interrogation techniques used by police detectives to obtain it included repeated threats, coercion and deception. Such repeated threats and coercion, he asserts, precluded him from voluntarily waiving his *Miranda* rights or otherwise voluntarily providing a statement. He further contends that certain comments made by the detectives, to the extent that they contradicted and undermined his right to remain silent and right to counsel, nullified the

Miranda warnings provided to him. Specifically, he points to comments made by the detectives during interrogation, such as "your silence speaks volumes here. Your silence is making you a dirty gang banging [expletive]," "[you will] swing for this," and "the only [expletive] way you're going to get any of us out of here is to [expletive] tell us what happened."

Viewing the complained-of statements in context of the entirety of the interrogation, we find that the first two quoted remarks by the detectives did not undermine or conflict with his right to silence, as the defendant suggests. These two remarks, when viewed in context, show the detectives' explanation to the defendant that the only version of the events that the police possessed came from Emil's father, Edward, who had placed all of the blame for the crime on the defendant. Indeed, our review of the videotaped interrogation reveals that the detectives repeatedly tried to convince the defendant to tell "the truth," to tell his "story," to take this opportunity to "flip the script," to "help" himself, and to not let others tell his side of the "story," while the defendant repeatedly lamented over the seriousness of the situation by making statements that it was a "lose-lose situation," and that he was "[expletive]," "done," going to get "locked up," "going to jail," and that his "future" was "gone." Nor do we find any of the statements to be a nullification of the *Miranda* warnings provided to him.

… Based on our examination of the videotaped statement, we find that the defendant's portrayal of the interrogation as containing repeated threats and coercion to be an out-of-context view of the detectives' comments. The running theme of the bulk of the interrogation was that the police tried to convince the defendant to tell his version of what happened and tried to appeal to his sense of doing the "right thing." Throughout the interrogation, the detectives told the defendant that they *knew* he was involved in the crime but did not think he was the shooter, and that they thought Emil was actually the mastermind behind the robbery and killing. We find that the detectives' references to an "L–I–F–E" sentence, to "save" himself, and to avoid doing "a lot of time" only highlighted the reality that he could avoid the maximum sentence if he was not the shooter. Likewise, we find that the police did not offer any inducement or promises of leniency to obtain the defendant's confession. Rather, the alleged "promise of leniency," when viewed in context on the videotape, shows that Detective Murray informed the defendant that the detective did not "cut deals," that the detective's objective was to have the "absolute truth in knowing that [he was] putting the right person in jail," and that he wanted to be able to state with certainty that the defendant did not personally discharge the firearm…. Indeed, during the interrogation, detectives never misrepresented to the defendant that he would escape legal consequences if he confessed, but instead, they candidly told the defendant that "no doubt" he was in a bad situation, that no one would get a "free walk," but that he should do the "right thing" by telling the police what had occurred. Moreover, we find that, at the time of questioning, the defendant, who was 22 years old, was no stranger to the criminal justice system and was well aware of the severity of the circumstances in which he found himself. Under the totality of the circumstances, we find that the defendant's subsequent videotaped confession was voluntary.

(Video contradicts defendant's claim he was too intoxicated to waive his rights)

In *McNear v. State* (2014) the Court of Appeals of Georgia rejected the defendant's claim that his statements to police were voluntary and admissible. McNear asserted that his statements were not voluntary because they were made over a six hour period of time while he was "exhausted and still inebriated" from an evening of heavy drinking. From the courts opinion:

"The record in this case shows that after conducting an evidentiary hearing and reviewing the three video-recorded interviews, the trial court issued a seven-page order in which it concluded that McNear "was advised of each of his *Miranda* rights, he understood them, he voluntarily waived then, and he thereafter gave his statements freely and voluntarily without any hope of benefit or fear of injury." With regard to McNear's intoxication, the trial court made the following finding:

While Defendant contends that he was intoxicated at the beginning of his interview with the officers, Defendant's intoxication did not prevent him from a making a rational, voluntary statement. Defendant was lucid, answered questions forthrightly, and recognized the nature of his detainment. Officers adequately explained to Defendant his rights several times throughout the interview, and Defendant clearly understood what the officers were telling him. Consequently, considering the totality of the circumstances, Defendant's statements were voluntary in spite of his possible intoxication.

Based upon our review of the waiver form signed by McNear and the video-recordings of his interviews with the police officers, "we find that the trial court was authorized to conclude that, despite [McNear]'s possible intoxication [and lack of sleep], he gave a voluntary statement and made a knowing and intelligent waiver of his *Miranda* rights."

(Value of recording an interrogation to demonstrate voluntariness)

In *Hansen v. Johnson* (2014) the US District Court, S.D. California found that reviewing the electronic recording of the defendant's interrogation and confession to be critical in evaluating the voluntariness of the statement. From their opinion:

"Applying these Supreme Court principles, the Court of Appeal first noted that Petitioner was not subject to any "overt physical brutality."… However, in recognition that police coercion can be mental, the Court of Appeal analyzed "whether psychological coercion, by means of an implied promise of leniency, occurred." … The Court of Appeal next examined the two statements made by Detective Smith to Petitioner while driving to the police station following her arrest. With respect to the first statement (*i.e.,* "the next hour ... would be the most important hour of [her] life"), the Court of Appeal concluded that the "statement is neither an express nor implied promise of leniency. Rather, it appears [Detective] Smith was emphasizing the seriousness of the situation. Although one could interpret the statement as implying that now was the time to start being truthful, such an implication does not constitute psychological coercion."

The Court of Appeal found the second statement (*i.e.,* "Hansen's behavior would affect how she spen[t] the rest of her life") to be "more problematic."… The Court of Appeal reasoned that the second statement arguably implied that Hansen might or might now spend the rest of her life in prison, depending on how she conducted herself during the interview. Smith's postconfession attempts to clarify that he did not intend this implication do not cure the problem, since Hansen had already confessed; an after-the-fact explanation cannot remedy an improper inducement.

The Court of Appeal then looked at the totality of the circumstances to determine whether "the implied promise that if Hansen were to confess, she would not spend the rest of her life in prison, motivated her to confess-that is, whether such inducement was sufficient 'to overbear [her] will to resist and bring about [a] confession[ ] not freely selfdetermined.' … The Court of Appeal ultimately concluded Detective Smith's second statement did not coerce an involuntary confession. In reaching this conclusion, the Court of Appeal stated:

The interrogation was recorded on a DVD player. Throughout the interview, Hansen who was one month shy of her 18th birthday, displayed a calm and rational demeanor. She showed emotion only during breaks and at the end of the interview. Hansen's responses and her level of engagement in the interview indicate that she understood what was being discussed and that she was aware of her predicament. She also told the detectives that she was familiar with her *Miranda* rights. The interview lasted about 80 minutes and thus was not excessive in length. The detectives removed Hansen's handcuffs for the interview. Throughout the interview, the detectives' tone and demeanor were civil and professional. The detectives did not use deceptive practices during the interview. In fact, Hansen remarked during the interview that the detectives were "both very nice," and said, "I think you guys are the most straightforward people I've seen."

The DVD recording of the interview supports the trial court's finding that Hansen did not confess because of coercion applied by the police, but rather, that she confessed freely and voluntarily. After independent review of the interrogation DVD, we agree."

(Video identifies improper interrogation – confession suppressed)

In *People v. Hughes* (2013) the Appellate Court of Illinois, First District, Third Division relied extensively on the video recorded interrogation to determine that the defendant's confession should be inadmissible. The court stated that, "We watched the video recording of Hughes' interrogation from start to finish. Our bird's-eye view of what occurred before the first confession and, more tellingly, between the time of the first confession and the second confession, raises intolerable doubts about the validity of the second confession. The methods the detectives used during the interrogation process contaminated this confession. The totality of the circumstances underlying Hughes' second confession establish that he lacked the ability to make a rational, unconstrained decision to confess. Accordingly, we reverse and remand for a new trial."

From the court's opinion:

“Hughes was 19 years old at the time of the interrogation. He attended school through the ninth grade, and received C's and D's. He used marijuana five to six times a day and drank several glasses of cognac twice a week. His arrests as a juvenile involved unlawful use of a weapon and criminal trespass to a vehicle.

Hughes' age, intelligence, education, experience, and physical condition at the time of the detention and interrogation address his character and capacity to resist police coercion. Courts recognize that youth, education, and experience increase susceptibility to police coercion. We agree that Hughes' youth (Hughes was 19 years old at the time of interrogation) and lack of education (Hughes only attended school to the ninth grade) heightened his vulnerability to the coercive tactics used on him.

As to the length of the interrogation, Hughes was picked up in Michigan around 2 p.m. and the interrogation ended around 6 a.m. the following day. Just over half of that time Hughes spent alone. Over the course of the interrogation, Hughes' clarity and cadence of speech, alertness, and concentration deteriorate. While in the afternoon he speaks freely, by the early morning hours before and during the polygraph examination Hughes mumbles several answers and appears exhausted.

Hughes also cites his regular drug use (smoking five or six joints a day, and drinking four or five glasses of cognac twice a week) to show involuntariness….. While nothing indicates that Hughes confessed as a result of any withdrawal effects … he did smoke marijuana immediately before the polygraph exam.

Hughes next cites a number of untruths told by the detectives during the interrogation. In limited circumstances, interrogators may use subterfuge in attempting to elicit a confession. But where the State extracts a confession using deceptive interrogation tactics calculated to overcome the defendant's free will, suppression may be appropriate. … Hughes cites numerous lies told by the detectives, which the State does not contest in its brief: (i) that his fingerprints were found at the scene; (ii) that numerous witnesses placed him at the scene; (iii) that the leg <u>wounds</u>, and not the head <u>wound</u>, killed Coleman; (iv) that he had failed the polygraph; and (v) that the court needed to know Hughes was sorry for what he had done.

The detectives' claims of having nonexistent evidence is a common police strategy, and while falsified evidence raises concerns as to voluntariness of a confession, usually, courts go along with these ruses. While the false-evidence ploys may be disturbing contextually and cumulatively, Hughes' “failed” polygraph and being told after the polygraph that the court needed to know Hughes was sorry for what he had done, weigh the heaviest against voluntariness due to their proximity and causal connection to the confession.

Moreover Detective Figueroa–Mitchell, the polygraph examiner, repeatedly represented to Hughes that she was “here to help” him, and that if he did not show remorse for shooting Coleman, his situation would only get worse. She also told Hughes that she was

“fighting” for him, and that—if he showed remorse for shooting Coleman—she would testify in court on his behalf.

Looking at the totality of the circumstances, Detective Figueroa–Mitchell's trickery and its cumulative effect, along with Hughes' character and the circumstances of the interrogation, indicate that his confession to shooting Coleman was not voluntary.”

(Video recording protects the confession)

In *State v. Walker* (2013) the Court of Appeal of Louisiana, Second Circuit held that the defendant's confession was admissible.

"Defendant complains that he did not understand his *Miranda* rights or have the ability to comprehend his actions. He asserted that he did not knowingly, intelligently, and voluntarily waive his rights prior to giving the confession. On appeal, he argues that his confession was the product of fear, duress, intimidation, menaces, threats, inducements and/or promises.

The trial court was correct to conclude that defendant's statements, including his confession, were freely and voluntary made. Twice on the video, the defendant is re-advised of his rights. He begins reciting the events as they occurred and appears relieved to be doing so. He is brought dinner during the confession, and he eats. He is allowed to smoke. There is no coercion.

The defendant emphasizes that:

* the officers worked in shifts on him;

* they played on his concern for his family;

* he has only a sixth grade education;

* he was hungry, tired, scared, wanted to smoke, and see his family;

* the officers used all of these emotions to coerce a confession from him.

None of these accusations are borne out by the testimony of the troopers or by a review of the DVD. The defendant told the officers that he had completed his GED and had no difficulty reading and writing. He was provided food, beverages, breaks when requested, and was assured he would see his family. Once dinner was finished, he was provided a cigarette to smoke. The totality of this record displays a free and voluntarily decision to confess. The trial court did not abuse its great discretion in finding that the state met its burden of proof."

(Value of recording to protect a confession's admissibility)

In *Reed v. Woods* (2013) the US District Court, E.D. Michigan upheld the lower court's decision that the defendant's confession was not coerced. From their opinion:

"Petitioner's second claim asserts that his statement to police violated his Fifth Amendment rights. Petitioner states that the police offered him leniency if he cooperated and that he was scared. Respondent argues that the state court adjudication of the claim was reasonable.

... Even so, "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good.... Admissions of guilt resulting from valid *Miranda* waivers are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."..... The cases in which a defendant can make a colorable argument that a confession was compelled despite the fact that law enforcement authorities adhered to *Miranda* are rare....

The Michigan Court of Appeals rejected Petitioner's claim as follows:

Viewing the totality of the circumstances, the trial court did not clearly err in finding that defendant's statement was voluntary. The trial court had an opportunity to evaluate the testimony, view the video recording of the interview, and to evaluate the effect of the police officers' statements. Defendant was advised of his rights before he was questioned and voluntarily, knowingly and intelligently waived those rights, although he refused to sign a written waiver. [Citation omitted.] Although the officer made promises to defendant, most reflected a promise to make an effort to gain a more lenient outcome depending [on] the information defendant could provide. As noted, an officer told defendant that the police had no actual charging authority. Thus, the interrogating officer did not make any explicit promises to defendant with respect to actual criminal charges and sentencing. With regard to other factors, the interview was not prolonged. There was no evidence that defendant was threatened or abused, or that defendant was intoxicated under the influence of drugs, deprived of food or drink, or sleep deprived. Although defendant claims that he was "scared", there was no evidence that his psychological state was altered by fear to a degree that he was unaware or not operating of his own free will. Further, defendant was 33 years old, had a GED, and could read and write, he also had previous experience with the police and the criminal processes.

This decision did not involve an unreasonable application of clearly established Supreme Court law. The record reasonably supports the state court's conclusion that the interrogating officers did not coerce Petitioner into making his statement. While Petitioner indicated that he was scared, and that the police told him that the value of any cooperation might work to his benefit, such facts did not compel the state court to find his statements to be involuntary. To the contrary, the record supports the conclusion that Petitioner voluntarily spoke with police in an effort to gain favorable treatment. The fact that Petitioner did not receive the benefit he was hoping for does not mean that the representations made by the police were illusory or that his statements were involuntary. Petitioner is therefore not entitled to habeas relief based on this claim."

(Value of recording - defendant claimed interrogator's hostile and aggressive tone of voice led to a coerced confession)

In *US v. Mitchell* (2013) the US District Court, N.D. Texas, upheld the admissibility of the defendant's waiver and statements even though he had claimed that the "detective's alleged statements to Defendant, the detective's alleged tone of voice, and Defendant's lack of sleep, lack of food, and medical condition" prevented him from making a free and deliberate choice to waive his *Miranda* rights. The court ruled that, "These factors did not intimidate, coerce, or deceive Defendant into waiving rights that he did not want to waive. First, the government's Exhibit A shows that before the detective read the *Miranda* rights to Defendant, the detective simply asked Defendant to share a few things about himself, such as where he grew up, what his grades were, how far into high school he went, and whether he played any sports. The detective stated that he likes to give people an opportunity to tell him about themselves. None of these statements prevented Defendant from making a free and deliberate choice to waive his *Miranda* rights, and Defendant knew what rights he was waiving and the consequences of that waiver. Additionally, based on the government's Exhibit A, the detective did not raise his voice or become hostile before Defendant waived his rights.

Additionally, given the totality of the surrounding circumstances after Defendant waived his *Miranda* rights, Defendant's will was not overwhelmed by the circumstances surrounding the statements that he made. The detective's alleged statements that simply encouraged Defendant to say something positive about himself, the detective's alleged hostile or aggressive tone, and Defendant's alleged lack of sleep, lack of food, and medical condition do not reach a level that would overwhelm Defendant's will to voluntarily make statements during the interrogation. Simply telling Defendant that he needs "something positive" on his side does not come close to the type of coercion that would make Defendant's statements involuntary. While there is no Fifth Circuit precedent precisely discussing an interrogator raising his or her voice in this context, other circuits have held that an officer raising his voice "does not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne." ... After listening to the audio of the interrogation in its entirety, the court does not believe the tone of voice rose to the level that would cause Defendant to be "overborne" and thereby render any of his statements involuntary. The court certainly does not expect an interrogator to act in a coercive, threatening, or overbearing manner; however, an interrogation is not a playbook for civility. An interrogating officer can, and often does, use terms and language that would not be appropriate in another venue. As the Fifth Circuit has noted, "there is nothing inherently wrong with efforts to create a favorable climate for confession." ... Further, it is universally known that an interrogation can be stopped at any time by a custodial suspect. .
(Value of video recording interrogation)

In *Dowell v. Lincoln County* (2013) the US District Court, E.D. Missouri, Eastern Division, upheld the trial court's decision that the defendant's statements were coerced. In this case, "Dowell claims that his statements were made involuntarily for a number of reasons. He argues that there is a question of fact as to whether defendants read him his

Miranda warnings before questioning him in the van. Dowell further argues that defendants yelled at him, threatened him with the death penalty, and spit on the floor of the interrogation room, and that they continued to interrogate him after he requested to have an attorney present, to remain silent, to have the interrogation cease, to be placed in a jail cell, to be presented before a judge, to use a restroom, and to make a phone call.

The undisputed facts do not support Dowell's Fifth Amendment claim. Even if defendants failed to read Dowell the *Miranda* warnings in the van, "[p]olice cannot violate the Self-Incrimination Clause by taking unwarned though voluntary statements." ... The evidence shows that Dowell's statements in the van, as well as at the police station, were voluntary. In his deposition, Dowell stated that he felt threatened during the interrogation. However, Dowell also testified that defendants never used physical violence against him, nor did they say anything that he interpreted as a threat of violence....

It is also evident from the videotaped interrogation that Dowell was of at least average intelligence, had previous contact with law enforcement, and had been read the *Miranda* warnings on some prior occasion.... Further, the video shows that upon arriving at the station immediately after the van ride, Dowell was calm and composed, and did not give any indication that the officers had so intimidated him as to overbear his will.... There is no evidence that would allow a fact-finder to conclude that his statements were involuntarily made. Instead, the undisputed, objective evidence shows that Dowell was thoughtful and calculating about his responses, and that his capacity for self-determination was not impaired.

(Value of video in protecting a confession)

In *US v. Smith* (2013) the US District Court, E.D. Michigan, Southern Division, upheld the defendant's confession relying extensively on the videotape of the interrogation.

On February 27, 2013, defendant Smith was interviewed at the Taylor Police Department. Prior to his interview, detective Schwein provided him with *Miranda* warnings. The government claims that Smith waived his *Miranda* rights. Smith alleges that he invoked his Fifth Amendment right against self-incrimination numerous times during the interrogation, or in the alternative, that any waiver of his *Miranda* rights was not voluntary. During the interview, Smith admitted to his role in several robberies, including the February 12, 2013 armed robbery of a Verizon Wireless store located in Taylor, Michigan. (Exhibit A, Interrogation Video, 00:15:01-00:16:02)... According to Smith, the questioning lasted nearly five hours, during which time he was subjected to sleep deprivation and a cold temperature while he was barefoot and wearing a short-sleeved shirt. Smith claims that he told the officer on as many as eight times that he was done talking and that on two occasions he asked to speak with an attorney but his requests were ignored.

A careful review of the videotaped interrogation reveals that early on in the questioning, after Smith was advised of his rights, he said numerous times, "I'm done," or "I'm done talking." (21:11:24-34; 21:11:43-44; 21:18:58-59; 21:21:24-28). In each of the

approximately eight times that Smith said he was done, however, he continued talking and questioning continued. At certain points, Officer Schwein was the one stating that he was "done" talking. (21:23:58). Early in the interrogation Smith said, "I'm going to call for a lawyer or an attorney." (21:23:31-32). A few minutes later, Officer Schwein said, "you talked about an attorney. Is that what you want to do, or do you want to talk to me?" (21:31:30-35). Smith responded, "I don't want no attorney, I want to get home." (21:31:40). About thirty minutes later, Smith said more forcefully, "I'm done talking ... that's that." (22:03:46-22:04:04). At that point, Officer Schwein terminated questioning and led Smith to a holding cell. While leaving the room, Smith complained that he needed boots, and Officer Schwein provided him with shoes. (22:04:18). Approximately ten minutes later, the two returned to the interrogation room, and prior to resuming questioning, Officer Schwein showed Smith a copy of the *Miranda* rights form that Smith had signed and reminded him that his rights were still in effect. (22:16:25). Officer Schwein stated, "while we were downstairs ... you asked me to bring you back up here to talk to me. Fair statement?" to which Smith responded, "Yeah." (22:16:40).

A short while later, Smith stated that he needed to "call my girl so I can tell her to get me a lawyer ready." (22:39:35). At that point, Officer Schwein asked him, "Do you want to end this?" (22:39:45), to which Smith responded, "I just want to call my girl." (22:40:02). A few moments later, Officer Schwein left the room and Officer Cox entered the room and began interrogating Smith. (22:40:15). Questioning ceased about fifteen minutes later when Smith stated that he would wait for his court date. (22:54:01). Again the officers stopped questioning him and led Smith out of the interrogation room. (22:54:19). Several minutes later, Smith and Officer Schwein returned to the interrogation room and questioning resumed. (23:00:09). Upon return, Smith appears eager to answer questions. Officer Cox brought Smith a drink and a slice of pizza. (23:02:08). Smith admitted to driving the get-away vehicle in one of the robberies. (23:03:26-23:07:38). Later, Smith said he was dizzy and jittery and he stood up and stated that he wanted to call his girl. (23:29:33-45). Again, the officers stopped questioning him and led him out of the interrogation room. (23:30:20). As he reentered the interrogation room about ten minutes later, the video shows Smith waving Officers Schwein and Cox back into the room, and in response to Officer Cox's statement, "Do you want to talk to me?" Smith responded, "yeah." (23:40:30). After this point, Smith made many damaging admissions. (23:43:00-00:18:50). Smith admitted to his involvement in the attempted robbery of a T-Mobile store and a Verizon store, and the robbery of an AT & T store. (23:43:31-23:44:57). Finally, Smith admitted to his involvement in the robbery of a Verizon store where he entered a side door, ordered an employee to open the safe, loaded a duffel bag with cell phones, and carried the bag out of the store. (00:15:01-00:16:53). These admissions were made to Officer Cox while Officer Schwein was out of the room.

Smith claims that Officer Schwein's questioning tactics were coercive because he pounded on the table, cursed at Smith demanding that he "own" that he was culpable and inevitably going to jail, and told Smith that "[t]his is MY house!" and that he, not Smith, was entitled to direct the conversation. (21:22:43-21:23:30). These tactics occurred hours before Smith reinitiated the interview by waving the officers back into the interrogation room, indicated that he wanted to talk, and confessed.

Smith did not clearly and unambiguously invoke his right to remain silent. Although early in the interrogation, Smith said several times, "I'm done talking," "that's it," "that's all I'm saying," "I'm done," (21:11:24-34; 21:11:43-44; 21:18:58-59; 21:21:24-28), at each point that Smith said, "I'm done," he continued talking. In fact, Officer Schwein also said that "we're done." (21:23:56). When Smith said more forcefully, "I'm done talking" (22:03:52) and that he wanted to "call his girl," Officer Schwein stopped questioning him and led him out of the interrogation room. When the questioning resumed later, Smith was reminded of his *Miranda* rights and indicated that he had asked to return to the interrogation room and that he wanted to keep talking. It was not until questioning was resumed and Smith indicated his intention to waive his *Miranda* rights and keep talking that Smith made the incriminating statements. Thus, even if Smith's statements early in the custodial interview that he was "done" could be considered to be unequivocal invocations of his right to remain silent, his damaging admissions were not made until much later in the interview after Smith had clearly waived those rights.

The law is well settled that once a defendant invokes the right to stop talking, all questioning must cease unless the defendant initiates further communication, exchanges, or conversations with the police... In this case, the court finds that it was Smith who reinitiated questioning each time the police interview resumed. In each instance where he returned to the interrogation room, the video depicts him as eager to tell his side of the story, and it is clear that the questioning resumed at his request. Moreover, during the final minutes of the interrogation where Smith makes the most damaging admissions, he not only waves Officer Cox back into the room with him but responds, "Yeah" when Officer Cox asks him if he wants to talk to him. Because Smith returned for questioning on his own initiative, he waived his *Miranda* right to remain silent.

Under this reasoning, Smith's first request for counsel wherein he stated, "I'm going to call for a lawyer or an attorney" (21:23:31-32) was ambiguous where just a few moments later, Smith said, "I don't want no attorney, I want to get home." (21:31:35-40). Later in the interview, Smith stated that he wanted to "call my girl so I can tell her to get me a lawyer ready." (22:39:35). This statement was also ambiguous as when Officer Schwein asked him for clarification as to whether he wanted to end the interrogation, Smith responded "I just want to call my girl." (22:39:58). Smith's statement that he wanted to call his "girl" to get a "lawyer ready" was not an unequivocal request for counsel during the police interrogation, but may just as easily have been a request that he have an attorney "ready" at some future point in time. Under the objective standard, the police officers may not have understood that Smith was requesting counsel during custodial interrogation.

Even if Smith did invoke his Fifth Amendment right to counsel, he later waived that right. Smith did not make his most damaging admissions until after a break in questioning whereupon the interview resumed at his request. From the video, it is obvious that Smith now wants to talk as he is seen physically waving the officers back into the room with his hands and states that he wants to answer their questions. (23:40:30). Smith himself reinitiated the police interview after asking for counsel; thus,

under the holding of the Supreme Court in *Oregon v. Bradshaw*, there is no *Edwards* violation in this case.

In this case, Smith argues that his confession was involuntary because officers screamed at him and questioned him for five hours. Smith further contends his confession was involuntary because he was cold and tired, was 19 years old, and only had an eleventh grade education. The government responds that Smith was not deprived of any physical necessities, was offered food and was served pizza even when he declined it, and when he complained that he wanted to wear boots, Detective Schwein stopped the interview and provided Smith with shoes. The government contends that Smith's complaints of police coercion fall well short of the types of cases where police coercion has been found to exist.

The facts of this case are not analogous to those situations where the Supreme Court has found police coercion to be present. While Smith complains that Officer Schwein screamed at him, this only occurred for a short while during the beginning of the interrogation and not after Smith reinitiated questioning and confessed. In addition, Smith does not appear at all intimidated by the screaming as he yells right back at Officer Schwein. Although the duration of the questioning lasted for five hours, this duration does not compare to the days of questioning noted to be constitutionally infirm in Ledbetter. Smith's claim that he was cold and barefoot does not amount to coercion where the officers provided Smith with shoes when he complained he wanted his boots, and offered and served him food during the interrogation. This court recognizes that police coercion need not be only physical and can be psychological....; however, the Sixth Circuit has cautioned that "not all psychological tactics are unconstitutional."..... The Sixth Circuit has stated that "there is nothing inherently wrong with efforts to create a favorable climate for a confession," and " 'neither 'mere emotionalism and confusion' nor mere 'trickery' will alone necessarily invalidate a confession."

In addition to a lack of evidence of police coercion, Smith also cannot show that his will was overborne. Despite Smith's claims that he was young and poorly educated, he was an adult, had completed eleventh grade, was living independently and holding down a job, and caring for his younger brother. Moreover, Smith had experience in the criminal justice system based on his contacts with police for domestic violence, unlawful use of a motor vehicle, and retail fraud. Throughout the interview, Mr. Smith went toe-to-toe with his questioners, shouting as much at officers as they were shouting at him. Smith has not shown that his circumstances made him susceptible to having his will overborne, or that his will was, in fact, overborne by police coercion. Accordingly, Smith cannot show that his waiver of his rights was involuntary and his confession should not be excluded on this basis.

(The value of video recording – Spanish speaking defendant and intoxication)

In *State v. Palacios-Rodriguez* (2013) the Superior Court of New Jersey, Appellate Division, upheld the defendant's confession, *relying extensively on the trial court judge's review of the videotape of the interrogation*. (emphasis added) In this case the "Defendant

contends that his confession should have been suppressed on several theories, namely that he was illiterate and non-English speaking and therefore did not understand rights; he was so intoxicated that he was incapable of knowingly and voluntarily waiving his rights during the police interview….."

The Superior Court stated in their opinion, "As noted, the motion judge viewed the videotape, and with regard to this portion of the interview, the judge stated:

I was very impressed with ... the amount of time that was spent with defendant by [Brazofsky] in terms of hi going over the form with this defendant, the Miranda form, even to the point of explaining what a yes and no meant, even to the point of explaining to him the checklist, even to the point of explaining to him the ramifications of each question, which was explained in Spanish to this defendant. And I must say from looking at the video ..., it appear to me that no[t] only was the language communicated to in a very correct manner—there's nothing to indicate that didn't understand the terminology that being explained to him through the interpretation....

"Likewise, in the case at bar, the trial court recognized that defendant exhibited some degree of intoxication, however, the court determined that defendant knowingly waived his rights. As evidenced by the Miranda hearing proceeding and the court's observation of the interview tape, defendant appeared to be under the continuing influence of alcohol yet was capable of communicating with the detectives and was responsive in answering questions."

(The value of recording interrogations –violation of rights)

In *State v. Swindler* (2013) the Supreme Court of Kansas found the video recording of the defendant's interrogation compelling evidence that his rights were violated. "In this case, Swindler does not claim officers manufactured information or evidence in order to get him to confess, ….. But he argues that the investigators' bait and switch about his ability to terminate the interview and leave had the same coercive effect.

The video in the appellate record makes it very clear that Swindler wanted to exercise the power the investigators had initially guaranteed that he possessed. From the time that he said "I'm done. I want to go home. I'm done," it is obvious that Swindler wanted to terminate the interview and leave the KBI office. His girlfriend and two small children were waiting for him in the hallway, and he expressed his desire to go to work to provide for his children. He repeated that he was "done" and wanted to go home.

Swindler's first clearly inculpatory statement was not made until he had said that he was confessing "just to get this over with so I can go home." Instead of being allowed to leave, the investigators persisted in questioning him. In particular, we note that Attebury admitted he left the room to consult with Hawkins to avoid an expected invocation of Swindler's right to remain silent. Also, Hawkins met Swindler's repeated efforts to do what he had been told he was free to do with "Well, tell me what happened." The

message of these investigators was unmistakable: If Swindler wanted to stop talking and leave, he needed to confess to raping L.C.

In short, the investigators set the rules of engagement and then did not hesitate to break them as soon as they thought Swindler might slip away without telling them what they wanted to hear. Under the totality of these circumstances, the State cannot carry its burden to show that Swindler's resulting oral confession, written confessions, and drawing were given voluntarily under the Fifth Amendment. The district judge's refusal to suppress the confessions and drawing was error."

(Value of recording interrogations to discredit defendant's allegations)

In *Malloch v. State* (2012) the Court of Appeals of Indiana relied extensively on the video recording of the defendant's interrogation to evaluate the credibility of his allegations.

Specifically, "Malloch argues that Detective Lauer obtained a false confession with promises of leniency or mitigated punishment… Malloch claims that Detective Lauer promised leniency or mitigated punishment by comparing an employed person who steals a cell phone accessory to an unemployed person who steals a can of chicken to feed his family and then indicating that the latter was the kind of person "you're gonna want to work [with]." ….. He also claims that Detective Lauer indicated that he would let him off the hook if he confessed: "I don't want you to walk out of here, I don't want to go to bed tonight thinking, I just let this ... guy go out, who's gonna go out and—and victimize other people, okay? The only way I can know that it's done, and over with, is by you [confessing and saying it was a mistake]."…. Malloch further points to Detective Lauer's response after the second time Malloch admitted to being awake at the time he fingered C.P. At that time, Detective Lauer said he wanted to be sure that Malloch was telling the truth and that "what's going on right now are the important things. Whether you're man enough to accept responsibility, and show a judge that you're remorseful, and how you show remorseful is by saying, 'Yes, this is what I did, it's never gonna happen again, I learned my lesson.' "

Malloch also argues that his will was overborne by Detective Lauer's interrogation tactics…. Malloch notes that Detective Lauer asserted forty-nine times that Malloch was awake and consciously touched C.P., that he urged Malloch to tell the truth but then dismissed him when he claimed to be asleep, and that he frequently challenged Malloch's manhood in light of his failure to take responsibility. Malloch also claims that he was bullied by Detective Lauer when he was sarcastically told that he was a "great guy," an "[o]utstanding individual," and a "sleep fondler" who "just need[ed] some kind of sleep test." …. Malloch further asserts that he was worn down by Detective Lauer's accusations of other disturbing acts, for example, that maybe Malloch had married Anita to gain access to C.P., and that he may one day fall asleep with his son, wake up, and "just fondle the heck out of [his] penis."

Detective Lauer asserted, repeatedly and falsely, that his investigation clearly established that Malloch intentionally touched C.P. However, his deception does not necessarily render the confession involuntary.

We have examined each of Detective Lauer's statements that Malloch highlights on appeal. In considering the totality of the circumstances, we also note that Malloch was thirty-five years old at the time of the interviews, had an associate's degree in architectural engineering, and supported his family with a job as a network engineer. Before each interview, he was read his *Miranda* rights and indicated that he understood them. As we concluded above, Malloch did not request an attorney, and Detective Lauer made no promises in order to get the confession. Further, there is no indication, nor does Malloch suggest, that he was intoxicated or sleep-deprived. The second phase of the first interview, the only portion in which Detective Lauer was confrontational in his questioning, lasted just under an hour.

We acknowledge that Detective Lauer's interrogation of Malloch was confrontational and intense in light of the serious offenses being investigated. Nonetheless, *after our own careful review of the video recordings* (emphasis added) and consideration of the totality of the circumstances, we conclude that there is substantial evidence to support the trial court's conclusion that Malloch's statements in both interviews were voluntary under federal and state standards of review.

(Value of recording to disprove defendant's claims of fatigue)

In *Van Jackson v. State* (2012) the decision by the Texas Court of Appeals, Austin, points out the value of investigators video recording the interrogation. In their decision the court stated that , "Jackson argues that the video proves that he was "fatigued, hungry, injured[,] and left isolated in a small room for some time" and that the detective induced his confession by suggesting that he might receive a lighter sentence if he was honest and apologized for robbing Rivas. However, the detective never made a positive promise to Jackson that he would receive a benefit by confessing. Rather, he told Jackson that juries want to hear defendants say they are sorry and that prosecutors want to know if defendants are cooperative, truthful, and apologetic. These general statements were not enough to render Jackson's statements involuntary.....

..... Although Jackson was arguably tired during the interrogation, the video shows that he was alert, coherent, and could answer the detective's questions. The detective's questioning lasted less than twenty minutes, and at no time was the detective threatening or overbearing.... Therefore, we conclude that Jackson's confession was voluntary, and the trial court did not err in denying Jackson's motion to suppress the confession. Jackson's second point of error is overruled.

(Value of video recording interrogation: pregnancy did not affect defendant's ability to understand what was going on)

In *Lewis v. Miller* (2012), the U.S. District Court, E.D. California upheld the lower

court's decision to admit the defendant's incriminating statements, even though the "Defendant contends the "[t]he totality of circumstances demonstrate that [she] did not voluntarily waive her *Miranda* rights" and that she did not voluntarily confess to police. She bases these contentions on similar arguments: she invoked her privilege against self-incrimination by asking to speak with her mother; she was young, pregnant, in pain, and naive; the detective's introductory comments "softened" the impact of the *Miranda* advisements; and the detective's lie that Ramsey had called her the mastermind of the crimes suggested "coercion." As we explain, we agree with the trial court the statements were properly admitted."

In reaching their opinion the videotape of the interrogation proved invaluable to the Court, which stated, "This court has reviewed the videotape of petitioner's interrogation and agrees with the California Court of Appeal that petitioner's confession to police was not given involuntarily. There is no evidence petitioner was coerced to confess to a crime she did not commit or that she was intimidated or worn down by improper interrogation tactics, lengthy questioning, or anything else. On the contrary, petitioner answered the detective's questions fully and freely during an interrogation that was not unduly lengthy and never harsh. There is also no evidence that petitioner's will was overborne by the overall circumstances or the conduct of the interrogation. Petitioner was alert and articulate throughout the interrogation, she was offered breaks whenever she appeared to be in pain or upset, and she was given food and water and allowed to walk outside the interview room. The interrogation was not conducted in an uncomfortable location and petitioner was frequently asked how she felt and whether she needed anything.

Although petitioner was pregnant, there is no evidence the pregnancy interfered with her ability to respond to the detective's questions, that it prevented her from paying attention or following during the interview, or that it caused her to falsely confess. The one occasion in which petitioner appeared to be in pain occurred before the questioning began and was resolved by a short walk in the hallway outside the interview room. In fact, before the interrogation began, petitioner assured the detective that she was fine and ready to proceed. Of course, pregnant women are not categorically incapable of being interrogated, and there is no presumption that pregnancy itself results in involuntary statements. Certainly, that was not the case here. To the extent petitioner's pregnancy may have caused her to be in some physical discomfort, there is no evidence on the videotape that the discomfort interfered in any substantial way with the questioning. Nor is there evidence that hormonal changes compromised petitioner's ability to understand what was going on."

(The value of video recording in determining the ability of a suspect with a low IQ to make a knowing and intelligent waiver)

In *People v. Walker* (2012) the Appellate Court of Illinois, First District, the trial court had reviewed the videotaped interrogation of the defendant twice to determine whether or not he made a knowing and intelligent waiver of his rights. From the Appellate Court's opinion:

"Although Walker's overall score of 80 on the IQ test is between the "mentally defective range" and "low-average range" of functioning, there is no indication he did not understand his Miranda rights. Also, his previous experience with the criminal justice system indicates a familiarity with his rights and negates his claim that his limited mental capacity rendered his statement involuntary. In fact, the record shows that Walker willingly and actively took part in his defense throughout the proceedings.

The trial court also viewed Walker's videotaped statement twice and found that the statement was voluntarily, knowingly, and intelligently made. We find that Walker's statement was voluntary and the trial court properly denied his motion to suppress." Click here for the complete opinion

(The value of video recording an interrogation - discredits defendant's allegations)

In *State v. Lee* (2011) the Court of Appeal of Louisiana, First Circuit, upheld the trial courts decision to admit the defendant's confession, relying on the videotape of the interrogation to review the defendant's allegations. The court found that "The videotape of defendant's confession does not support his contention that the remarks improperly induced him to confess. Defendant gave the confession after being advised of his rights and indicating that he understood them. The videotape reflects that he was advised of the reason for the interrogation, and was questioned by the police for only approximately twenty-five minutes before confessing. No promises were made to him. In fact, Detective Favaron specifically told defendant that he wanted him to understand that he had no control over what would happen.

Under these circumstances, the detectives' statements that defendant should try to help himself by telling his side of the story did not amount to prohibited promises or inducements designed to extract a confession."

Also see ***US v. Burton*** (2011) the United States Court of Appeals, Seventh Circuit, for another example of the value of recording an interrogation.

(The value of recording interrogation discredits claim there was no advisement of rights)

In *Rodriguez v. Martel* (2011) the U.S. District Court, E.D. California, rejected the defendant's claim that his statements to police should have been suppressed at his trial because they were "obtained involuntarily and without a valid waiver of his Miranda rights."

The defendant claimed that he was "never asked whether he wished to waive his right to counsel or against self-incrimination and never did so." He denies that he impliedly waived his constitutional rights by continuing to speak to investigators after his rights were explained to him. "Petitioner notes that he did not speak English, was illiterate and unsophisticated, and did not know his exact birthday. He argues that his answers to the

interrogating deputy's questions reflect that he did not understand what he was being told by the officers.

Petitioner also argues that his statements to law enforcement were involuntary "as a result of his lack of understanding of his rights and the significance of the admonitions concerning them as well as the coercive tactics of the investigators." Petitioner states that he was "questioned mostly while shackled to a chair;" that he had "as little sophistication as is imaginable;" that he was "in a weakened state," and that he had "not eaten in more than 24 hours and is provided food only after his confession." He claims that "the prosecution did not prove [petitioner's] statements were made after a knowing and intelligent waiver of his right to refuse to make them and thus should not have been admitted for any purpose."

However, when the videotaped interview was reviewed, the court stated that it "corroborates the absence of any coercive tactics. There was no physical or psychological pressure placed on defendant, and no threats or promises made to him, to induce him to talk to the detectives. The detectives were polite toward defendant, their tone cordial and friendly. When defendant expressed he was thirsty, he was brought water. He manifested no hesitation or uncertainty during questioning about whether he wanted to speak to the detectives. In sum, our review of the taped interview reveals nothing in the detectives' treatment of defendant or his response to them to indicate that he was intimidated or worn down in any way by improper interrogation tactics, lengthy questioning, or anything else."

(Video helps determine level of impairment)

In *State v. Decloues* (2011) the Court of Appeal of Louisiana, Fourth Circuit, relied on the taped confession to determine whether or not the defendant was too impaired to offer a voluntary confession. From the court's opinion:

" Our review of the taped confession indicates that at the beginning of the interview the detective read the defendant his rights. The defendant appears attentive while those rights were being read, acknowledging each one individually. When asked whether he understood his rights, the defendant gave a definitive yes. The defendant is noticeably fidgety and sometimes had to be asked to speak up, but as Doctor Vosburg observed, he was easily calmed. His answers were responsive to the questions asked by the detective. Significantly, the confession is detailed in the description of how the murder occurred. The defendant explained that he had stayed out all night the night before and when he returned home, he and his mother argued. After retreating to his room to watch television and smoke more crack cocaine, he left the house again. When he returned, he thought he could slip into his mother's room while she slept and take her credit card from her purse and a phone book that contained the pin number to the credit card. When he entered the room, she was awake and the defendant asked her for some Tylenol. He then went to the kitchen, retrieved a knife, returned to his mother's room, and approached her. When his mother became vocal, he attacked her. The defendant admitted stabbing her, trying to break her neck, and suffocating her. He stated that the drugs made him deranged. He then

explained how he removed all of his clothes and placed them in a black bag along with a glove and the knife that he wrapped in newspaper. The defendant placed the shoes that he was wearing under his bed. Afterwards, when he was looking for her purse, the defendant came across the lock box. He broke into the lock box and found thirty dollars. During the interview, the defendant expressed remorse for his actions.

Moreover, the defendant's confession coincides with the physical evidence presented at trial. The tape and testimony show that appellant was advised of and understood his rights. Doctor Vosburg's observations of the defendant's taped confession appear accurate. The district court viewed the taped confession and heard the testimony of Detective Pardo and Dr. Vosburg before finding the confession to be voluntary. Because the confession is supported by the evidence, we do not find the trial court abused its discretion by denying the motions to suppress the statement and evidence."

(The value of recording interrogation to demonstrate understanding of English)

In *US v. Hristov* (2010) the US District Court, D. Massachusetts, upheld the admissibility of the defendant's confession. In making their decision the lower court put great reliance as to the credibility of the defendant's confession based on the behavior he displayed during the interrogation. As the District Court point out in their opinion, "Hristov argues that his waiver was not knowing and intelligent because his poor English prevented him from fully understanding the rights that he was giving up. After reviewing the videotape, I find that the waiver was knowing and valid. Hristov shows no sign of having below-average intelligence, having played an integral part in an ATM skimming scheme that involved the installation and operation of sophisticated technology. Furthermore, Hristov appears to have a decent, albeit not perfect, grasp of English. The videotape indicates that Hristov was able to understand and answer most of Detective Cleary's questions without difficulty. He demonstrated a fairly substantial vocabulary....."

(The value of an electronic recording of the interrogation when a defendant claims that he confessed because he was "susceptible to psychological coercion")

In *State v. Madison* (2010) the Court of Appeals of Minnesota rejected the defendant's claim that his confession should have been inadmissible because he was susceptible to psychological coercion.

The district court found that Madison, who was 21 years old at the time of the interrogation, is a man of average intelligence who has a high-school education and some vocational training. The district court found that Madison validly waived his *Miranda* rights, understood Sergeant Banham's questions, and knew what the interrogation was about. The district court found that Madison has experience with the criminal-justice system, noting that since 2007, Madison has been convicted of felony possession of a short-barreled shotgun, arrested for misdemeanor domestic assault, and issued a citation for misdemeanor theft. The district court found that Madison was interrogated during the afternoon hours (approximately 3:30 p.m.-5:00 p.m.) by only one officer and that the interrogation did not last for an unreasonable length of time (approximately 90 minutes).

At the beginning of the interrogation, Madison was offered water, and he was not deprived in any way of his physical needs. The record supports all of these findings.

The district court's order, which extensively recounts the custodial interrogation and states that the court had "reviewed the complete audio and video recording of [Madison]'s confession," makes it clear that the district court considered all of Madison's statements, including those to which Madison now refers."

(Recording demonstrates confession was the result of rational intellect and free will)

In *Commonwealth v. Chaperon* (2010) the Appeals Court of Massachusetts upheld the admission of the defendant's confession after reviewing the videotape of the interrogation.

In their decision the court stated that, "The defendant claims that, after administering *Miranda* warnings, the detectives undermined them by promising him that they would not place him under arrest if he admitted to criminal conduct. This claim is unfounded. The detectives told the defendant (truthfully, as it turns out) that whatever he might say during the encounter, he would not be arrested that day. At the outset of the interview (which is neither included in the transcript supplied by the defendant nor mentioned in either party's brief), Detective Eason stated, "You're not being arrested tonight, but I still have to read you your [*Miranda*] rights" (emphasis added). Later statements were to the same effect-that whatever the defendant might say he would not be arrested on the spot. The detectives did not state or imply that, regardless of the warnings he received, his confession would insulate him from arrest. *Cf. Commonwealth v. Shine*, 398 Mass. 641, 650-651 (1986).

While the detectives engaged in a form of "minimization" (repeatedly stating that people will forgive a person who made a mistake, but will not forgive a liar), and also told the defendant that he should get therapy, these features of the interrogation do not preclude a finding that the defendant's statements were voluntary; rather, they are to be considered as part of the totality of circumstances. See *Commonwealth v. DiGiambattista*, supra at 438-439.

Viewed in that way, we agree with the motion judge that the manner in which the defendant was questioned did not render the defendant's statements involuntary. Significantly, throughout the interrogation, the defendant remained composed and did not seek to terminate the interview; he carefully calibrated his answers, offering explanations (both plausible and implausible) to deflect suspicion; and, despite eventually admitting that he had touched or rubbed the victim's vagina on a number of occasions, he steadfastly denied that he ever penetrated her with his fingers as she alleged. See *Commonwealth v. Roberts*, 407 Mass. 731, 733 (1990). In these circumstances, it was not error for the judge to conclude that the defendant's statements were the product of a rational intellect and free will.

(Value of electronically recording interrogations - "I'm going to hang your ass if you don't start telling the truth.")

In *People v. Robair* (2010) the Court of Appeal, Second District, Division 6, California upheld the trial court's decision to admit the defendant's confession. The trial court had relied heavily on reviewing the video and audio recordings of the defendant's interrogation to determine the voluntariness of his statements. From the opinion, the Appeals Court found that:

"Prior to trial, the People filed a brief seeking to admit the statements appellant made during the May 26 interview, and the apology note he dictated and signed at the conclusion of that interview. Appellant filed a motion to exclude the evidence on the ground that his confession was involuntarily obtained through coercive police conduct.

"At the hearing on the motion, the court viewed the entire video recording of the May 26 interview and listened to an audio CD of the May 31 interview.

"After noting that appellant had waived his *Miranda* rights just as he had in prior cases, the court stated, "The overall tenor of the interview was courteous. The officers were using a normal tone of voice. Nobody was yelling at him. He was offered food and beverages which he didn't want, but then at the end when he wanted a soda, one was provided to him very promptly. They did accuse him of lying. They urged him very strongly to tell the truth on multiple occasions. They questioned him very persistently, but not in an overbearing manner. Nobody was leaning over him or shaking a fist in his face or anything like that." The court further found "[t]here was never any offer of leniency. They did tell him that they would take him to see if he could show them where this Eric lived so that they could talk to him and follow up on his story about Eric, and they did suggest that it was getting close to the time when they were going to be doing that and he would have to go show them, but that didn't seem to be an improper threat. It just-except that he might understand that if he wasn't telling the truth that that story was going to fall apart pretty quickly."

"In addressing Detective Smith's comment, "I'm going to hang your ass, if you don't start telling the truth," the court noted that appellant had essentially admitted he did not view the statement as a physical threat. Rather, he correctly understood it to mean "that he was going to build as solid a case as he could and was not going to do anything to help this defendant. [P] ... [Detective Smith] wasn't expressing frustration with the defendant trying to remain silent to exercise his right of silence. He was frustrated with ... what he perceived to be untruthful statements." The court reasoned that appellant's understanding to this effect was further supported by his response, " 'Well, he's going to do that anyway.' "

The court concluded, "[B]ased on my review of the totality of the circumstances of this interview and the cases that have been cited by both sides in this case, I do not find that [appellant's] confession was coerced by false promises or threats. So the motion to suppress [sic] is denied."

(Video protects voluntariness of the confession)

In the Matter of Richard Uu (2008) the Supreme Court, Appellate Division, Third Department, New York points out the value of recording an interrogation. In this case Richard Uu had made incriminating statements about sexual contact with a four year old girl. At a juvenile delinquent proceeding he tried to suppress his statements "on the grounds that he did not make a knowing and intelligent waiver of his *Miranda* rights and that the waiver was obtained in violation of his right to counsel."

The court stated that "viewing the totality of the circumstances surrounding the *Miranda* waiver and subsequent confession, we conclude that Family Court correctly declined to suppress respondent's statements as involuntary." The court went on to say, "Furthermore, upon a review of the videotape of respondent's interview, we find no basis to conclude that respondent's admissions were involuntary. The entire interview was brief in duration, lasting approximately 45 minutes and took place at a reasonable time of the day in a room certified for the questioning of juveniles. Additionally, a DSS caseworker was present with respondent during the entirety of the interview. There is no evidence that respondent was tricked, threatened or coerced into confessing, or that the strategies used by the investigator were so fundamentally unfair so as to have denied respondent due process or "create[d] a substantial risk that [he] might falsely incriminate himself" Considering the totality of the circumstances surrounding respondent's questioning, we cannot say that his statements were involuntarily made." This case also illustrates a valid waiver from a 14 year old. .

(Video protects voluntariness of the confession)

In *Perales v. State* (2008) the Court of Appeals of Texas, Fort Worth upheld the trial court's decision to admit the defendant's video taped confession. The defendant had claimed that it should have been excluded because his confession was involuntarily given because "(1) he was too young and inexperienced to intelligently waive his rights, and (2) his confession was induced by promises of benefits that he would receive if he confessed and by lies that the investigating detective told him during the interrogation."

In their decision the Court of Appeals points out that "We have reviewed the video and the transcript of the video admitted at trial. The video reveals that Detective Dishko, the investigating detective, read Perales his rights-as set forth in the code of criminal procedure article 38.22, section 2(a) - within the first minutes of the interrogation. He asked Perales if he understood his rights, and Perales indicated that he did. Perales then signed a form to further verify that he understood his rights.

Later the Court of Appeals points out "During the interrogation, Detective Dishko told several lies, as he candidly admitted during the suppression hearing. Although Detective Dishko knew that Perales could not receive the death penalty because of his age (he was seventeen at the time of the offense), he told Perales that he possibly could receive the death penalty. At the suppression hearing, Detective Dishko admitted that he had lied

about the use of the death penalty and explained that he had done so because he "wanted to plant that seed in [Perales's] head" to encourage Perales to cooperate.

Detective Dishko told Perales during the interrogation, "How was it an accident? I want you to explain it to me so I-convince me. 'Cause if you want me to believe that Julis, I've got to convince a jury." At the suppression hearing, Detective Dishko admitted that this was also inaccurate. The detective also told Perales, "It would benefit you to speak to me about your involvement because I know that [Birmingham] was the one that pulled that trigger." At the suppression hearing and at trial, Detective Dishko maintained that he never promised Perales anything in return for Perales's statements.

At the end of the suppression hearing, the trial court concluded that Perales's statements were the result of a custodial interrogation, that Perales received the statutorily required warnings, and that "under subsection 2B [Perales] waived those rights and proceeded to answer the officer's questions."

(Video confirms advisement of rights and waiver)

In *People v. Duchine* (2008) the defendant claims that his police station confession should have been excluded from evidence because he did not expressly waive his Miranda rights. The Court found that the "Defendant's videotaped police interrogation shows that he was fully advised of his *Miranda* rights, and said he understood those rights. The police never asked defendant to waive his rights; the interrogating officer started questioning defendant after advising defendant of his rights without obtaining an express waiver. However, it is clear from the circumstances that defendant knowingly and voluntarily waived his rights." The Court stated, "[A]n explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case."

(Recording protects confession)

In *US v. Bruce* (2007) "Bruce confounds unpalatable choices with coercion. He is not entitled to suppression simply because Detective Rietzler accurately observed to him that his "ass is in a pickle." As Detective Rietzler herself told Bruce during his interrogation, her job was to flip drug dealers in order to catch the bigger fish. None of her words or acts during her attempt to flip Bruce was improper, howsoever frightening and unwelcome Bruce might have found them. As noted at the outset, Bruce claims that "he was simply doing his best to say what the detectives wanted to hear to try to save himself and his family." Reply, dkt. 47, at 10. This is only partly right: he was trying to save himself, not his family, and his efforts were undertaken with free will and with careful, self-interested calculation. However much Bruce wished he didn't have to make a choice between snitching and two decades in prison, his decision (on which he subsequently reneged) was not legally involuntary." This case is also an excellent example in which the recording of the interrogation was critical to the court's ability to assess the intent of the interrogator's statements.

The following cases all demonstrate the value of recording an interrogation. In several instances they provided the court with the record they needed to determine whether a proper *Miranda* waiver was made; whether the defendant understood their rights; whether the interrogator engaged in any illegal activities; to rebut an insanity defense, etc.

Hurt v. Virginia, Court of Appeals of Virginia, March 18, 2008

State v. Bumgardner, Court of Appeals of Ohio, Eleventh District, April 11, 2008

State v. Decker, Supreme Court of Iowa, February 8, 2008

People v. Bolton, Court of Appeal, First District, Division 4,, California September 4, 2008

Sparks v. State, Court of Appeals of Texas, Fort Worth, August 28, 2008

State v. Warledo, Supreme Court of Kansas, August 8, 2008

State v. Chestnut (2008) In this case the court found that there was no error in allowing a videotape of defendant's interview with police to go to the jury during deliberations.

(Recording disproves claim of coercion)

In *People v. Arrue* (2007) the California Second District Court of Appeal upheld the admissibility of the defendant's confession and found that the trial court's ability to listen to the interrogation was very important in reaching this conclusion. The trial court noted:

"I've had the benefit of not just reading the transcripts, of course, but I have also listened to the tapes which is helpful in a situation like this because you get to hear not just-you don't just get the sterile reading of the words, but you also get the inflection of voice and intonation and so on. I'm m not persuaded there's any undue coercion in this case. I think the statements are probably admissible, if that is the ground for seeking to exclude them, because it appears to me that the statements themselves were voluntary. Having had a chance to listen to the actual dialogue on the tapes, I'm satisfied that the defendant's statements to the officer were voluntary. The words used, I guess, by both sides occasionally included four-letter words, things of that nature, swear words, but it's the type of conversation I think you could expect to see on the streets, so to speak, between individuals who are considering themselves to be on equal footing, just have a conversation about a particular issue. They weren't used, I think, in a way that was designed to coerce the defendant into making any statements. They were used really, I suppose, just to bring themselves either up to or down to the level of the defendant so they could be talking on equal footing. I guess it's a common investigatory technique. And there doesn't appear to be anything in the words of the officers or the situation involved that would render this particular statement involuntary."

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What the courts say about recording

(*In New York no adverse instruction required if police do not electronically record the interrogation*)

In *People v. Durant* (November 2015) the Court of Appeals of New York ruled that "common law does not invariably require a court to issue an adverse instruction against the People at trial based solely on the police's failure to electronically record the custodial interrogation." From the court's opinion:

To begin, no adverse inference instruction could lie in this case based on the government's alleged dereliction of a legal duty, for generally there exists no legal duty which may be breached by the failure to make an electronic recording of an interrogation. No statute requires the police to generate a video or audio recording of their interrogation of a suspect, and leaving aside any suppression matters, our case law has not recognized a constitutional duty to record interrogations. Thus, while our precedent does permit—and sometimes requires—a court to issue an adverse inference instruction as a penalty for the government's failure to satisfy applicable legal duties, the rationale of that precedent does not support the issuance of an adverse inference instruction based on the police's failure to satisfy a nonexistent duty to record an interrogation.

(Electronic recording of the confession is not required)

In *Carmical v. Norman* (August 2014) the US District Court, E.D. Missouri, ruled that electronic recording of interrogations is not required, stating that, "… the right against self-incrimination does not require police officers to record confessions electronically. See *Reinert v. Larkins,* 379 F.3d 76, 94 n. 4 (3d Cir.2004) ("Insofar as Reinert invokes the Fifth and Sixth Amendments of the Federal Constitution, he invokes a purported federal right to have a custodial interrogation recorded. He does not, however, cite any authority for this proposition; again there is none."); *United States v. Dobbins,* 165 F.3d 29 (6th Cir.1998) ("federal law does not require that a state electronically record custodial interrogations and confessions"); *United States v. Owlboy,* 370 F.Supp.2d 946, 948–49 (D.N.D.2005).

(New Mexico court expresses concerns interrogation was not recorded)

In *US v Bundy* (2013) the US District Court, D. New Mexico found that the defendant's statements should have been suppressed, and expressed concern that the interrogation was not recorded. From the court's opinion:

"This case arises out of a March 5, 2011 rollover accident in which Larry Mark, one of three occupants of a pickup truck, received fatal injuries. The two remaining occupants, Defendant and Roland Deale, the owner of the truck, were seriously injured, but recovered. Other than the three occupants, there were no eyewitnesses.

The identity of the driver is hotly disputed.... The parties have retained "dueling" accident reconstructionists who have reached conflicting conclusions as to whether Roland Deale or Defendant was driving at the time of the accident.

The Court is severely handicapped in its assessment of the voluntariness of Defendant's statements by the United States' failure to electronically record the interrogation leading to her statements. The FBI agents who conducted the interrogation clearly knew and intended that any inculpatory statements given by Defendant would be the centerpiece of the United States' case if charges were brought against Defendant. Yet, consistent with FBI standard operating procedures, the interrogation was not recorded, resulting in the loss of irreplaceable information, such as the actual words spoken by the participants, their body language, facial expressions and tone of voice, and other nuances that cannot be conveyed by an after-the-fact, written report. The following excerpt from Agent Sullivan's report of the interrogation provides a perfect illustration of this loss of crucial information:

Bundy was told that she had failed the polygraph examination. Initially she maintained that she had blacked out and did not recall driving, however ,eventually became emotional and stated that it was likely that she was the driver considering that she had been the driver throughout that day. (Emphasis added).

Agent Mackay's report presents similar problems:
BUNDY *initially* claimed to not remember the incidents that led up to the vehicular collision or who actually drove the vehicle during the collision. A few minutes later BUNDY recanted and admitted she knew for a fact that she was the driver of the vehicle during the collision. (Emphasis added).

What is missing are the details of what was said in the critical intervals during which Defendant moved from no recollection to certainty that she was driving. What portion of the three and onehalf hours that Defendant was present in the interview room was consumed between "initially" and "eventually"? How long was "a few minutes"? What techniques were employed during these gaps at critical points in the interrogation? The Court cannot require the United States to record interrogations. But if the United States fails to record interrogations, it must bear the consequence in cases such as the present where the actual words employed by the participants, their tone of voice, and their body language are necessary factors in the Court's voluntariness analysis... The irretrievable loss of crucial information bearing on the voluntariness of Defendant's statements was underscored by Agent Sullivan's testimony during the January 23, 2012 evidentiary hearing that "my recollection would have been much clearer back in May 2011 that it would be now. I can only defer to what the report says." [Doc. 47 at 85-86] Since the United States, not Defendant, bears the burden of proof, these evidentiary lacunae at critical points in the interrogation constitute a failure of proof on the United States' claim that Defendant's statements were voluntary.

During the interrogation, Defendant steadfastly maintained that she had no recollection of the accident. This is not a case in which such a claim of loss of memory is inherently

suspect. It is undisputed that Defendant was extremely intoxicated at the time of the accident and was ejected from the truck, suffering severe injuries.

The Court is concerned that Agent Sullivan, by her manner of questioning, led Defendant to accept the flawed hypothesis that if she was driving as the truck left the Deshnod residence, she must have been driving at the time of the accident... This is borne out by Defendant's statement that "it was likely that [I] was the driver considering that [I] had been the driver throughout that day," [Ex. R. at 3] and her statement "[I] do[ ] not feel any one else could have been driving the vehicle" [Ex. S. at 1]. Defendant appears to this Court to have been reasoning by inference from the incomplete facts provided by Agent Sullivan rather than actually recalling the accident.

The United States, not Defendant, bears the burden of proof. The United States must convince the Court, by a preponderance of the evidence, that Defendant's confession was voluntary. No single factor is determinative in the analysis. Here, the evidence discloses that during her interrogation, Defendant, a Navajo woman, was emotionally vulnerable, was fearful of losing her children, was experiencing pain resulting from severe injuries sustained in the accident, and was on several medications including percocet, oxycodone and muscle relaxants. Most importantly, there are good grounds to believe that at the time of her interrogation Defendant had no actual recollection of the events immediately preceding the accident, including who was driving at the time of the accident. In light of all of the circumstances, this Court concludes that the United States has not met its burden of proof. The United States has not persuaded this Court that it is more likely than not that Defendant's inculpatory statements were her own voluntary recollection of events as opposed to the products of suggestive and confrontational questioning by Agents Sullivan and Mackay that overbore her will.

Because the United States has not met its burden of demonstrating that Defendant's inculpatory statements were made voluntarily, her statements must be suppressed."

(Kansas Supreme Court recommends electronic recording of interrogations)

In *State v. Randolph* (2013) the Kansas Supreme Court recommends the electronic recording of interrogations from the beginning of the process through the confession. In this case, the defendant claimed that his confession was coerced. In considering the issue the Supreme Court stated that, “In determining whether the statement was the product of an accused's free and independent will, a trial court looks at the totality of the circumstances surrounding the statement and determines its voluntariness by considering the following nonexclusive list of factors:

“ ‘ “(1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused to communicate on request with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency with the English language.”

In this case only the confession was recorded – not the interrogation. As a result, "Randolph emphasizes that "[w]hether the 15–minute recorded statement ... was voluntary or involuntary was squarely dependent on what happened during the 1–hour–15–minute interrogation that preceded it." He argues a recording of the entire interview would be more reliable evidence than the conflicting testimony of Randolph and Cantwell regarding what was said during the interview and "the formal recorded confession, and the unrecorded interrogation that preceded it, are so inextricably intertwined that the voluntariness of the first cannot be determined without knowing precise details of the second."

"Certainly, a recording would be more accurate than most human's memories. And the State, by not recording the entire interview, has unnecessarily raised a negative inference that it has something to hide. It also risks a ruling that the recording is not admissible because it does not accurately reflect the entire interview. *Consequently, the better practice and the one we advise is for law enforcement officers to record the entire interview with a suspect when they are planning to record parts of the interview and recording equipment is available.* (emphasis added)

"Nevertheless, Randolph does not cite any authority for his argument that a trial court does not have a sufficient basis for making findings following a *Jackson v. Denno* hearing if a portion of an interrogation is not recorded. Certainly, the lack of a recording does not make this case unique from numerous cases considered by this and other courts. Nor is there anything unique about the specific facts of this case. The State presented the trial court with Cantwell's testimony regarding both portions of the interrogation, and Randolph had the opportunity to cross-examine Cantwell. The evidence submitted was sufficient to overcome the negative inference the State unnecessarily created and to meet the State's burden of proof. In addition, Randolph's trial testimony mitigates any suggestion he was coerced into a false confession by Cantwell's suggestions."

(Superior Court of PA - no requirement to record interrogation)

In *Commonwealth v. Harrell* (2013) "... appellant argues that his due process rights were violated by the failure to record his interrogation and confession. Appellant argues that the failure to record his interrogation deprived him of an opportunity to establish that his confession was involuntary and the product of police coercion. According to appellant, the police deliberately failed to record the interrogation so… that appellant would be unable to contest the voluntariness of his confession by examining the surrounding circumstances including the police tactics employed, the length of questioning, promises made, *etc.* (Appellant's brief at 24–25.)

In *Commonwealth v. Craft*, …. this court held that custodial interrogations do not need to be recorded to satisfy the due process requirements of the Pennsylvania Constitution…The majority of states, with the exception of Alaska and Minnesota, have not adopted a rule requiring police to record interrogations…. Nor has the United States Supreme Court been asked to determine whether the United States Constitution requires the recording of custodial interrogations as a matter of federal due process… This court

determined that the Pennsylvania Constitution does not require contemporaneous recording of statements and that the adoption of a rule requiring contemporaneous recording of custodial interrogation should be left to the Pennsylvania Supreme Court or the General Assembly, not an intermediate appellate court." .

(No requirement to record interrogation in Second Circuit)

In *Ezquerdo v. Lee* (2012) the U.S. District Court, N.D. New York, rejected the defendant's claim that his confession should have been found inadmissible because it was not recorded.

"Ezquerdo's interrogation by the police was not electronically recorded. Ezquerdo contends this denied him due process. In rejecting Ezquerdo's argument the Appellate Division held that there was "no Federal or State due process requirement that interrogations and confessions be recorded."... Ezquerdo has not cited any decision of the Supreme Court or the Second Circuit holding that due process requires that the police electronically record interrogations or confessions, and independent research by this Court has not revealed any such decision. Ezquerdo's reliance on decisions by the Alaska and Minnesota Supreme Courts is misplaced."

(Hawaiian Constitution does not require recording of custodial interrogations)

In *State v. Eli* (2012) the Supreme Court of Hawaii re-affirmed their opinion that "the due process clause of the Hawai'i Constitution does not require the recording of custodial interrogations. Id. at 408-09, 886 P.2d at 745-46. This court stated that "whether the failure of the police to create a record of the defendant's confession undermines its accuracy and detracts from the credibility of later testimony is an issue uniquely left to the sound discretion of the trier of fact." Id. at 409, 886 P.2d at 746. In the present case, the court did not find that Detective's failure to record his pre- Miranda conversation with Defendant undermined the accuracy of Defendant's statement or detracted from the credibility of later testimony.

(Fourteenth Amendment does not require law enforcement to videotape custodial interrogations)

In *Hodges v. Bezio* (2012) the U.S. District Court, E.D. New York, found that the Fourteenth Amendment does not require law enforcement to videotape custodial interrogations. In this case the defendant claimed "that his guarantee of due process under the Fourteenth Amendment was violated by the failure of inquiring detectives to videotape his interrogation."

The District Court found that "the Fourteenth Amendment does not require law enforcement to videotape custodial interrogations, notwithstanding any perceived benefits that might accrue from such a practice. It is noteworthy that Hodges has cited no federal authority to support this claim. And there is good reason. Several circuits have

held that there is no federal constitutional right to a videotaped interrogation..... Therefore, Hodges's claim fails on the merits as well."

(Rhode Island Supreme Court decides not to require electronic recording of interrogations)

In *State v. Barros* (2011) the Supreme Court of Rhode Island rejected the defendant's contention that "custodial interrogations conducted in a place of detention should be electronically recorded from start to finish and that his confession should have been suppressed due to the fact that the interrogations that he underwent were not recorded in toto." The court stated that "we very recently stated that, "neither the United States Supreme Court nor this Court has ever held that due process requires that a custodial interrogation must be contemporaneously recorded."….. ("[W]e see no hint that the Supreme Court is ready to take such a major step."). To date, no federal appellate court has held that the federal due process clause provides a criminal suspect with a right to mandatory electronic recording…… After studying the issue afresh in a de novo manner, we remain convinced that the federal due process clause does not require electronic recording of custodial interrogations."

(No Federal due process requirement to record the interrogation)

In *Peppard v. Fischer* (2010) the U.S. District Court, W.D. New York, upheld the Appellate Division decision when they rejected Peppard's claim that the failure to videotape the interview deprived the trial court of the "best available evidence." The Appellate Division had rejected this claim, holding that "he was not denied due process based on the failure of the police to record the interrogation resulting in his statement. 'There is no Federal or State due process requirement that interrogations and confessions be electronically recorded[.]'

"Notably, several circuit courts have concluded that the federal Constitution does not obligate police officers to record interrogations or confessions. E.g., Reinert v. Larkins, 379 F.3d 76, 94 n. 4 (3d Cir.2004); Ridgley v. Pugh, 176 F.3d 484 (9th Cir.1999) (habeas claim based on police officer's failure to tape-record a portion of petitioner's interrogation "does not state a violation of a federal constitutional or statutory right"); United States v. Yunis, 859 F.2d 953, 961 (D.C.Cir.1988) (finding "no constitutional requirement to record confessions by any particular means," including videotaping, even if such equipment is available). In the absence of a federal constitutional violation, there is no basis upon which habeas relief can be granted."

(Superior Court of Connecticut indicates that there is no federal precedent that the constitution imposes a recording requirement)

In *State v. Mitchell* (2011) the Superior Court of Connecticut (Waterbury) the court addressed the issue of electronically recording an interrogation and found that "our Supreme Court has already concluded that "there is no federal precedent in support of the proposition that the federal constitution imposes a recording requirement ... The federal

Courts of Appeal that have considered a similar claim have uniformly rejected it." State v. Lockhart, 298 Conn. 537, 550, 4 A.3d 1176 (2010). Additionally, the Supreme Court has recently reiterated its position that the Connecticut constitution does not mandate electronically recording interrogations in order to make them admissible." .

(Connecticut Supreme Court declines to require electronic recording of interrogations)

In *State v. Lockhart* (2010) the Supreme Court of Connecticut decided not to exercise its "supervisory authority to impose electronic recordation requirement" for police interrogations. The court expressed the opinion that this was an issue for the legislature to address. In reaching their conclusions the court provided a detailed discussion of what other state Supreme Courts have ruled on this issue. Due to the high-profile nature of this issue we have included extensive excerpts from their opinion:

"Finally, we find persuasive the reasoning of courts that have determined that, where a recording requirement is not mandated by the state constitution, the legislature is better suited to decide whether to establish a recording policy. The Supreme Court of Vermont, for example, concluded that "[t]he most appropriate means of prescribing rules to augment citizens' due process rights is through legislation.... In the absence of legislation, we do not believe it appropriate to require, by judicial fiat, that all statements taken of a person in custody be tape-recorded." (Citation omitted.) *State v. Gorton*, 149 Vt. 602, 606, 548 A.2d 419 (1988). The Supreme Court of Tennessee expressed a similar view, reasoning that because historically, "[t]he determination of public policy is primarily a function of the legislature ... the issue of electronically recording custodial interrogations is one more properly directed to the General Assembly." (Citations omitted; internal quotation marks omitted.) *State v. Godsey*, 60 S.W.3d 759, 772 (Tenn.2001); see also *People v. Raibon*, 843 P.2d 46, 49 (Colo.App.1992) ("[w]e decline ... to mold our particular view of better practice into a constitutional mandate which would restrict the actions of law enforcement agents in all cases"), cert. denied, 1993 Colo. LEXIS 15 (January 11, 1993); *State v. Grey*, 274 Mont. 206, 213-14, 907 P.2d 951 (1995) ("[a]lthough [recording interrogations] may be the better practice and would help assure that the accused receives a constitutionally adequate *Miranda* warning while, at the same time, enhancing the prosecution's ability to meet its burden to prove voluntariness, we leave the imposition of any such procedural requirement to the legislature and to individual law enforcement agencies"). This judicial restraint is consistent with our own well established precedent. See *Thibodeau v. Design Group One Architects,* LLC, 260 Conn. 691, 715,802 A.2d 731(2002) ("primary responsibility for formulating public policy resides in the legislature"); see also *State v. Peters*, 287 Conn. 82, 97-98, 946 A.2d 1231 (2008) (where pro rata reduction is not required by federal medicaid law, determination of whether to provide reduction is policy matter more appropriately addressed by legislature).

Conversely, only the Supreme Court of Alaska has concluded that electronic recording is mandated by the due process clause of its state constitution. In *Stephan v. State*, supra, at 711 P.2d 1159, the court concluded that all custodial interrogations must be electronically recorded whenever feasible, noting that the United States constitution imposes a "heaving

burden"; id., at 1160; when a defendant claims that his confession is involuntary. The court observed that "[t]he contents of an interrogation are obviously material in determining the voluntariness of a confession"; id., at 1161; and reasoned that "recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial." Id., at 1159-60.

Three other courts have established a recording requirement, in some circumstances, pursuant to their supervisory powers. In *State v. Scales*, supra, at 518 N.W.2d 591-92, the Minnesota Supreme Court expressed frustration that law enforcement officials had failed to respond to its admonitions, articulated in two previous cases, that electronic recordings should be used to preserve custodial interrogations. See *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn.1991) (urging "law enforcement professionals use [the] technological means at their disposal to fully preserve those conversations and events preceding the actual interrogation" and warning that "[l]aw enforcement personnel and prosecutors may expect that [the] court will look with great disfavor upon any further refusal to heed these admonitions"); *State v. Robinson*, 427 N.W.2d 217, 224 n. 5 (Minn.1988) ("recordation of all pre-statement conversations would afford the reviewing court an objective record upon which to rule, rather than one based upon self-serving or subjective assertions of the principals involved"). Notably, the court did not consider whether the due process clause of the Minnesota constitution mandated a recording requirement. *State v. Scales*, supra, at 592. Similarly, the Supreme Court of Wisconsin imposed a recording requirement for custodial interrogations pursuant to its supervisory power, but limited that rule to the interrogation of juveniles. In re Jerrell C.J., 283 Wis.2d 145, 172, 699 N.W.2d 110 (2005).

In *State v. Cook*, 179 N.J. 533, 847 A.2d 530 (2004), the Supreme Court of New Jersey took yet another route. The court first rejected the defendant's argument that due process requires the recording of all custodial interrogations, stating "[b]ecause there is otherwise fair-minded disagreement concerning the appropriateness of imposing a sweeping requirement of electronic [recording] of custodial statements we hold that [the] defendant's point of error is not of constitutional dimension." (Internal quotation marks omitted.) Id., at 559, 847 A.2d 530. The court then established a committee to study electronic recording of custodial interrogations and to make recommendations regarding a recordation rule; id., at 562, 847 A.2d 530; and pursuant to that committee's recommendations, exercised its supervisory authority to establish a rule requiring electronic recording of all homicides and numerous other felonies. N.J. Court Rules 3:17.FN11 These cases, however, provide little support for the defendant's proposed rule in light of more persuasive analysis from other states concluding that the procedures already used to prevent admission of involuntary confessions satisfy a state due process clause that, in these circumstances, offers no greater protections than its federal counterpart."

(Iowa Supreme court encourages video taping of custodial interrogations)

In *State v. Madsen* (2010) the Court of Appeals of Iowa confirms that there is no

requirement to electronically record non-custodial interrogations. In discussing their decision the reference the Iowa Supreme Court decision on the case of *State v. Hajtic* (2006) - "Madsen claims that information obtained as a result of the first interview should be inadmissible because it was not electronically recorded. In *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006), the Iowa Supreme Court stated, "We believe electronic recording, particularly videotaping, of custodial interrogation should be encouraged, and we take this opportunity to do so." Madsen cites to a statement by the Iowa Attorney General that "the Hajtic decision should be interpreted as essentially requiring this practice." The Court of Appeals points out that, "The Hajtic decision, 724 N.W.2d at 456, specifically refers to custodial interrogation. It is clear that Madsen was not in custody at the time of the first interrogation."

(Court expresses concerns when the entire interrogation is not electronically recorded)

In *Scott v. City of Chicago* (2010) the US District Court, N.D. Illinois, the District Court expressed concern that the interrogation of the defendant was not recorded, but just the confession. From their opinion:

"Scott's Motion 1 seeks to bar from admission at trial (1) his videotaped confession, (2) the transcript of that confession and (3) what is called "the graphic demonstrative exhibit showing a transcription within the videotaped confession." In essence Scott's counsel argues that such a bar is supported by our Court of Appeals' very recent decision in Fox v. Hayes, 600 F.3d 819 (7th Cir.2010), which upheld the decision by this Court's colleague Honorable Jack Darrah to bar a videotaped confession in a case having great similarity to this one.

Here is what Fox said on the subject:

But there are no allegations of physical harm that the video could verify, and all of the allegations of coercion stem from events leading up to the video-events that the defendants chose not to record. Most importantly, the video represents just 23 of the 870 minutes or so of Kevin's interrogation, and thus cannot provide a complete picture of either the interrogation itself or Kevin's level of distress. Under those circumstances, we cannot say that the court abused its discretion in concluding that the video's prejudicial effect and potential for confusing the jury outweighed its probative value with respect to the issue of coercion or Kevin's demeanor following the interrogation.

And here is Scott's argument as to why Fox should control here (Motion at 4, emphasis in original):

The striking resemblance between what the Fox plaintiff experienced and what the Plaintiff in this matter alleges is uncanny. They both claim to have been subjected to emotional/psychological coercion, they both deny physical abuse, they both allege that their requests for an attorney were ignored, they both volunteered to take a polygraph examination to clear themselves, they both claim that their repeated denials of involvement in the murder fell on deaf ears, they both were offered a quid pro quo in

exchange for confessing, and they both agreed to confess to have the police officers stop what they were doing. Critically, and most importantly, they both allege that the coercive interrogation tactics all occurred off camera.

Because defense counsel really cannot dispute the just identified parallels between the two cases, and because it is obvious that the content of the confession is really not relevant (and even it if were, it poses a major danger of unfair prejudice so as to bring Fed.R.Evid. ("Evid. R.") 403 into play), a good deal of defendants' response to the motion is unpersuasive. But on the other hand, there is force to the defense contention that the video's depiction of Scott's physical appearance at the time of the confession could be found probative by the jury.

Accordingly the video (but not the audio or the transcript, or the third item to which Scott objects, which sounds like the equivalent of closed captioning on a TV program) will be a permitted exhibit. For that purpose the bowdlerized tape will have to be submitted to this Court for review and approval materially in advance of trial, so that any other necessary changes may be decided upon."

(No federal requirement to electronically record interrogation)

In *US v. Meadows* (2009) the United States Court of Appeals, First Circuit, ruled that the judge was not required to give the instruction that since the interrogation was not recorded "the jury should weigh evidence of the defendant's alleged statement with great caution and care."

"Meadows directs us to precedent from the Massachusetts Supreme Judicial Court that requires, upon a defendant's request, a cautionary instruction about unrecorded statements made during custodial interrogation. See *Commonwealth v. DiGiambattista*, 442 Mass. 423, 813 N.E.2d 516 (2004). FN6 Meadows relies on the DiGiambattista decision to argue for such a rule and objects to the fact he did not receive such an instruction.

The instruction was not required. Meadows is in federal court, not state court, and as we have held, there is no federal constitutional right to have one's custodial interrogation recorded. *United States v. Torres-Galindo*, 206 F.3d 136, 144 (1st Cir.2000); see also Roberto Iraola, The Electronic Recording of Criminal Interrogations, 40 U. Rich. L.Rev. 463, 471 (2006) ("The federal courts uniformly have rejected the argument that the Constitution mandates, as a matter of due process, that a defendant's confession be electronically recorded."). .

(New Jersey Supreme Court requires police to electronically record interrogations)

In October, 2005 the New Jersey Supreme Court issued a new set of rules which will require police agencies to electronically record homicide interrogations beginning in January 2006. This requirement will expand in January 2007 to include interrogations involving arson, robbery, burglary and sex, drug or weapons crimes punishable by more than five years in prison. Click here for the full report

(Massachusetts Supreme Court decision provides for special jury instructions when interrogation is not videotaped)

In *Com. v. DiGiambattista* (2004) the Massachusetts Supreme Court stated that "... when the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt."

In examining the use of trickery and deceit the Court stated that misrepresenting evidence "does not necessarily compel suppression of the statement." Also, the court said that "We do not suggest that an officer's use of the standard interrogation tactic of "minimization," by itself, compels the conclusion that a confession is involuntary." However, what seemed to disturb the Court the most was the apparent reference to counseling which they felt "implicitly suggested to him that "counseling" would be an appropriate avenue for him to pursue after making a confession." In other words, if he confessed he would get counseling instead of jail.

Admissibility of video recorded statement

(*Is it proper to introduce as evidence the videotaped interrogation of the defendant when no incriminating statements were made?*)

In *State v. Gaudreau* (June 2016) the Supreme Court of Rhode Island considered the lower court's decision to allow the admissibility of the defendant's videotaped interrogation even though there were no incriminating statements made. The Supreme Court concluded that "Ultimately, it is our opinion that the trial justice should have conducted a balancing test and carefully weighed the low probative value of the recorded comments from the officers against the prejudicial impact to defendant. But, to the extent that there was any error in admitting the videotaped interrogation, we conclude that it was harmless." In their analysis the Supreme Court discuss the decisions that other states have made on this issue. From the Supreme Court's opinion:

The parties battled over the admissibility of the videotape over two days, and it is significant that defendant repeatedly argued that he was not challenging his own comments on the tape being shown to the jury, but was instead arguing that the detectives' comments were irrelevant and highly prejudicial. However, the first trial justice denied defendant's motion with the following explanation:

"My basis for allowing the video to be played in the [s]tate's case is that the [c]ourt finds that the video statement is relevant and probative. Having viewed it several times now, the [c]ourt finds that the video contains what can be viewed depending on again the jury's assessment of the evidence but certainly there are statements in this video that can be viewed as false statements made by this defendant in the hopes of extracting himself from suspicious circumstances.

The issue that this Court must grapple with is novel. Although we have not yet adopted a rule requiring that all police interrogations be audio or video recorded, several organizations within the state have either adopted such rules or have recommended that police departments adopt them. Now, as more interrogations are being recorded, this Court is faced with new issues that are associated with those recordings.

Often, defendants move to suppress confessions that have not been recorded because "[b]oth the Rhode Island and the Federal Constitutions bar the use in a criminal trial of a defendant's involuntary statements." … It is a frequent argument that a videotape is the best evidence of whether a defendant's inculpatory statements have met that test.

However, when a defendant does not challenge the admission of his own statements as being involuntary, but, as is the case here, seeks to suppress the statements of the police, trial courts must engage in a very different type of analysis. In these situations, it is our opinion that the evidence should be viewed like any other evidence; other grounds may exist for the introduction of such evidence, in its entirety or in a redacted form, pursuant to the Rhode Island Rules of Evidence.

Several states have addressed the particular issue of whether a recorded interrogation is admissible when the defendant neither confesses nor challenges his statements as involuntary, but rather attacks the admissibility of comments made by police that are contained in the recording. The law is quite unsettled on this point, and there is a clear split in authority between the jurisdictions that have addressed the issue, with no apparent majority.

Some courts have found the evidence to be inadmissible opinion testimony that should not be admitted indirectly in the form of a recording, and they have held that such statements must be redacted. In other words, those jurisdictions have reasoned that if the police statements would not be admissible from the witness stand, they should not come in through the backdoor via a videotape…. Other courts have held that such statements from police during an interrogation should not automatically be excluded as opinion testimony, but, rather, must be analyzed under the existing rules of evidence.

…. the Supreme Court of Kansas addressed a similar issue in a trial for rape and sodomy, the only difference being that the defendant, throughout the interrogation and in later statements, repeatedly changed his story about the events of the night in question. The defendant told the police several varying versions of the facts, from having never seen the victim that night, to being too drunk to remember, to her agreeing to have oral sex for

$25, and more variations, all the while denying that he committed rape. The court held that, under its rules, a trial court has no discretion to allow one witness to testify about another's credibility, and so reviewed the admission of the tape *de novo*.... The court then held that the trial court erred when it admitted the videotape, explaining the following: "A synthesis of the referenced case law leads us to conclude that it was error for Detective Hazim's comments disputing Elnicki's credibility to be presented to the jury. The jury heard a law enforcement figure repeatedly tell Elnicki that he was a liar; that Elnicki was 'bullshitting' him and 'weaving a web of lies.' * * * A jury is clearly prohibited from hearing such statements from the witness stand in Kansas and likewise should be prohibited from hearing them in a videotape, even if the statements are recommended and effective police interrogation tactics. As far as context for Elnicki's answers are concerned, the State could have safely accomplished its goal simply by having Detective Hazim testify and point out the progression of Elnicki's various stories as the tape was played—minus Hazim's numerous negative comments on Elnicki's credibility. The absence of a limiting instruction merely compounded the already serious problem, misleading the jury into believing that Hazim's negative comments carried the weight of testimony."

Thus, even where the defendant's story shifted throughout the course of the interview, that court found that the statements of the detective on credibility were absolutely prohibited.

Similarly, an intermediate appellate court in Pennsylvania held that videotaped comments by the police accusing the defendant of lying "were akin to a prosecutor offering his or her opinion of the truth or falsity of the evidence presented by a criminal defendant, and such opinions are inadmissible at trial." … The court held that each of the defendant's own statements made during the interrogation—wherein she admitted her relationship with the victim and the co-defendant, and to her presence at the scene, among other things—were relevant to determination of her guilt as an accomplice to the murder…. Ultimately, the court held that instances where police accused the defendant of lying, where the defendant did not respond to questioning, and where police stated that they had a strong case against the defendant had to be redacted.

The Supreme Court of Wyoming analyzed whether the trial judge committed plain error in allowing the state to present improper vouching evidence of a deputy in a recorded video and in testimony from the stand that he met with the victim and that he believed she was being truthful in her accusation. The court held that, although the defendant had not objected to any of that evidence, the deputy's statements "violated in a clear and obvious way th[at] [c]ourt's long-standing rules prohibiting a witness to express opinions about the accused's mendacity and guilt and about the alleged victim's truthfulness and credibility * * *."

A majority of the Supreme Court of Washington held…. that an officer's accusations amounted to opinion evidence regarding the defendant's veracity should not have been admitted, but that the trial court did not commit reversible error in admitting the officer's accusations because of the wealth of evidence against the defendant. The four-justice

minority, who opined that the evidence was admissible, rested their decision on the fact that the evidence was not "testimony" because it was neither given under oath nor from the witness stand, nor was it offered to prove the officer's opinion.

On the other hand, courts have found that statements made by officers during the course of an interrogation were not admitted in error. The majority of those courts held that the comments by law enforcement were probative because they provided context for the defendants' shifting stories during the course of the interrogations.

A small minority of states that have considered the issue have held that a police officer's statements have probative value for providing context even where the defendant, as here, made no inculpatory statements and had not changed his story during the interrogation.

…. the Supreme Court of Kentucky reviewed the range of decisions that have addressed this issue, noting that "it is quite difficult to synthesize a majority rule, especially given that the evidentiary rules in these various states differ significantly." The court declined to adopt a rule that such evidence should be *per se* excluded as opinion testimony, reasoning that "[a]lmost all of the courts that have considered the issue recognize that this form of questioning is a legitimate, effective interrogation tool."…. However, the court also "recognize[d] that the introduction of such comments, no doubt, entails the possibility that the jury will misunderstand and accord to those comments an impermissible weight during deliberation." While specifically disagreeing with the Supreme Court of Kansas that the comments must be redacted, the court held that the appropriate remedy was for the court to provide the jury "a limiting admonition" "to inform the jury that the officer's comments or statements are 'offered solely to provide context to the defendant's *relevant* responses.'

(Court allows surreptitious video recording of incriminating statement into evidence)

In *US v. Robinette* (August 2014) the US District Court, E.D. Tennessee, ruled that the surreptitious video recording of the defendant making an incriminating statement was admissible. From the court's opinion:

"On February 28, 2013, defendant called E-911 to report that his home, which he shared with his girlfriend Kimberly Allen, had been invaded by an unknown person or persons, and that his girlfriend was holding someone at gunpoint in their bedroom. Several officers with the Washington County Sheriff's Department quickly responded to defendant's home, including Officer Wayne Phillips and Lieutenant Edwin Graybeal, III.

Officer Phillips, using a video camera affixed to his uniform, recorded his conversation with defendant. During that recorded conversation, defendant related the circumstances of the invasion of his home, and how there had been multiple similar attempts over a five-year period. In the course of his description of the evening's events, he made at least one incriminating statement regarding his possession of a loaded firearm.

It is defendant's argument that the officers knew at the time defendant was a convicted

felon, and their investigation shifted from investigating an alleged invasion of his home to defendant himself as a convicted felon in possession of a firearm. Counsel argues that the recording was secretly made to serve as evidence in defendant's ultimate prosecution and that defendant should have been given a *Miranda* warning.

Officer Phillips activated his camera to record his conversation with a victim, not a suspect. He did not know defendant was a convicted felon as he conversed with defendant and recorded their conversation, and it was not unusual for Phillips or any other officer to record a victim's account of a crime.

He was not in custody, and his freedom of action was not restricted to any degree. His "interrogation" was merely the statement he made to the officers in support of the complaint he made to the E-911 dispatcher. The fact that the officers then believed it was defendant who committed a criminal offense did not require either a *Miranda* warning, or a cessation of the recording, since defendant was not in custody. Therefore, it is recommended that defendant's motion to suppress, be denied."

Interrogation room setting

("Small" interrogation room (10 x 10) was not coercive)

In *Halcomb v. State* (2014) the Court of Appeals of Indiana upheld the lower court's decision that the defendant's confession was voluntarily made.

"Next, Halcomb argues that his statements on both November 9th and February 2nd were involuntary under both the United States Constitution and the Indiana Constitution. "A confession is voluntary if, in light of the totality of the circumstances, the confession is the product of a rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will." .... "The critical inquiry is whether the defendant's statements were induced by violence, threats, promises, or other improper influence." .... In evaluating a claim that a statement was not given voluntarily, the trial court is to consider the totality of the circumstances, including: "the crucial element of police coercion, the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health."

With regard to the November 9th statement, Halcomb again argues that the small room and the vigorous interrogation overcame his free will. A ten-foot by ten-foot room is not particularly small, and the fact that the interview was conducted in that room is clearly not sufficient to make his confession involuntary. Also, there is no indication that the interview involved coercion, and the interview only lasted for one hour. The trial court properly admitted Halcomb's November 9th statements to Detective Potts under both the United States Constitution and the Indiana Constitution.

As for the February 2nd statement, Halcomb argues that he did not confess until after four hours of interrogation and that he was misled into admitting that C.C. initiated the

contact. Halcomb voluntarily agreed to undergo a polygraph examination, and after finishing the examination, Detective Potts asked to speak to him. Halcomb voluntarily talked to Detective Potts for approximately an hour. In talking to Halcomb, Detective Potts gave the impression that there was a difference between Halcomb forcing C.C. to touch his penis and C.C. voluntarily doing so. Police deception does not automatically render a confession inadmissible.... Our supreme court has held that police deception during an interview is only one factor to consider in the totality of the circumstances. Id. "[S]ubterfuge, trickery, and deception can be acceptable interrogation tactics." ... "Various interrogation techniques--'good cop, bad cop,' providing a morally acceptable answer, blaming the victim, and bargaining--do not necessarily create an involuntary statement." ... Detective Potts did not tell Halcomb that C.C. voluntarily touching his penis was not a crime. Rather, he offered Halcomb various explanations as to how the events could have occurred and implied that the use of force would be worse. This interrogation technique did not necessarily create an involuntary statement.

Under the totality of the circumstances, we conclude that Halcomb's confession was voluntary. Halcomb had the opportunity to leave the State Police Post after the polygraph interview. Instead, he said that he wanted to talk with Detective Potts. Halcomb, a former military police officer, should have been aware that his conduct with an eight-year-old child was a criminal offense regardless of whether C.C. was forced. There is no evidence of coercion, and the confession was admissible under the United States Constitution.

(There is no expectation of privacy for phone calls in police interview room)

In *Napper v. US* (2011) the District of Columbia Court of Appeals upheld the lower court decision to admit statements that the defendant made during cell phone calls while he was in the police interview room. In one call the defendant stated, ", "[T]ell everybody they hip. These mother* * *ers know every [ ]. When I say everything, everything." In another call he said, Tell everybody they know everything. I think Ray snitched."

"In his motion to suppress, appellant argued that Detective Russell–Brown had "lulled [him] into thinking his conversations would be private and confidential" by informing him that their conversation was not being recorded. As a result, appellant argued, he had both a subjective and an objectively reasonable expectation of privacy in the interview room. He argued in addition that the phone calls qualified as "oral communications" under the wiretapping statute, and that the police unlawfully "intercepted" them. The trial court denied appellant's motion to suppress in a bench ruling, finding that appellant "knew that he was being recorded." In subsequently issued supplemental findings of fact and conclusions of law, the trial court found that the interaction between appellant and the detective regarding the polygraph machine was focused on that particular equipment, and "did not constitute an assurance that [appellant] enjoyed a private sanctuary for telephone calls." The court also found that appellant did not exhibit an actual, subjective expectation of privacy, but "[i]n fact, his actions exhibited the contrary," demonstrating that he "obviously understood that he faced the prospect of surveillance" and "was openly trying to avoid it." The court further found that appellant "did not have a reasonable expectation of privacy that society is prepared to recognize," noting that "the

unique function and nature of areas controlled by the police mean that courts generally do not recognize a legitimate expectation of privacy in such places."

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Length of interrogation

(*26-hour period of videotaped interrogation was not coercive*)

In *People v. Clark* (May 2016) the Supreme Court, Appellate Division, Fourth Department, New York rejected the defendant's contention that the [lower] court erred in refusing to suppress statements he made to the police during the 26–hour period of videotaped interrogation. From the court's opinion:

We reject defendant's contention that the court erred in refusing to suppress statements he made to the police during the 26–hour period of videotaped interrogation. It is axiomatic that the length of the interrogation period "does not, by itself, render the statement[s] involuntary" …. Instead, we must view " 'the totality of the circumstances surrounding the interrogation' " …. The detective ascertained defendant's date of birth, that he had completed the 10th grade and was obtaining his GED, that he could read and write, that he was not under the influence of alcohol or marijuana, and that he had never before been read his *Miranda* rights. The detective "did not restrict himself to a mere reading of the rights from a card ... [but][i]nstead ... described the rights in more detail and simpler language, verifying that defendant understood [them]" …. We further conclude that his will was not overborne by coercive police tactics…. Contrary to defendant's contention, the tactics used by the police, i.e., telling defendant that they thought he was a "good kid," stating that he would feel better when he told the truth, and challenging the inconsistencies in his statement with the evidence, were not improper or unusual where, as here, there is no evidence that defendant was of subnormal intelligence or susceptible to suggestion.

Indeed, defendant never admitted that he committed the offenses, and he changed his version of events regarding the murders at the Bernice Street home, admitting that he was present when the murders were committed by someone else, only when confronted with fingerprint evidence establishing that he was at the home. Defendant thereafter admitted that he was present at the Skuse Street murder when he implicated another person for that murder. He explained that it was that other person who also had committed the murders at the Bernice Street home, and not the three people whom he initially implicated, but whom the police established had alibis for the time those murders were committed.

The record establishes that defendant was provided with food, water, cigarettes, and bathroom breaks throughout the period… The record further establishes that there were two breaks in the interrogation, approximately six and one-half hours and five hours long, respectively, when the police were pursuing leads and that defendant slept during those breaks….. Moreover, we note that the length of the interrogation was in large part owing to "the nature of the crime[s] and defendant's conflicting and constantly changing stories to the police," which the police investigated and attempted to verify. Although defendant

made four requests to make a telephone call throughout the period, it was not until the end of the period of interrogation that he requested to call his mother. A 17–year–old defendant is considered an adult for the purpose of criminal prosecution and defendant does not contend that the police engaged in " 'deception or trickery' " to isolate him from his family, nor does the record support a conclusion that the police did so.

(*7 hour interrogation not coercive*)

In *Ross v. Miller* (April 2016) the US District Court, S.D. New York upheld the conviction of the defendant, rejecting his claim that the length of the interrogation was a coercive factor. From the court's opinion:

As to Ross's specific claims, Justice Farber noted that although this was a lengthy interrogation, it did not amount to coercion and Ross gave the statements voluntarily. Though the police arrested Ross at 6:30 a.m., Detective Byrne did not begin questioning him until nearly 1:00 p.m. Then, between 8:30 and 9:00 p.m., Ross began to confess. Therefore, though in custody for an extended period of time, Ross was only interrogated for approximately seven hours. Additionally, throughout this period, he was not handcuffed, he was offered food, drink, and cigarettes, and Ross admittedly did not ask to use the restroom. In similar situations, courts have concluded that the custodial circumstances did not render the interrogation coercive. *See, e.g.,* United States v. Shehadeh, 586 F. App'x 47, 48 (2d Cir.2014) (voluntary statement after a four hour interrogation); *United States v. Smith,* No. 14–CR–485 (JFB), 2015 WL 7177190, at *2–3 (E.D.N.Y. Nov. 16, 2015) (voluntary statement after a seven hour interrogation); *United States v. Medina,* 19 F.Supp.3d 518, 541 (S.D.N.Y.2014) (find statements to be voluntary despite being in custody for seven to eight hours before being given *Miranda* warnings).

Therefore, the Court concludes that the state court's decision to admit Ross's statements was not an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence in the state court proceeding.

(Lengthy and persistent questioning does not render a confession inadmissible)

In *Walker v. Davis* (2014) the US District Court, E.D. California, upheld the lower courts finding that the defendant's confession was not coerced by the investigators.

"Petitioner argues that the criminal justice system naivete of her client, when juxtaposed with the skill and persistence the interrogators utilized in questioning over a three day period, made for a due process violation, i.e., an involuntary number of damaging admissions.

The undersigned has reviewed the statements in their entirety and the video of the statements as well.

Defendant talked to the police six times between October 22, 2007, and her arrest on

October 24. She briefly spoke to Officer Cunningham at her home around 6:30 a.m. on October 22. She was interviewed by Officer Joseph moments later. Detective Henry Jason interviewed her around 10:24 a.m. Later that day, Detective Jason interviewed her at the police station for a few hours.

At Detective Jason's request, defendant returned to the police station around 3:13 p.m. on October 23, 2007, where she was interviewed for about five hours, and also participated in a polygraph examination conducted by Sacramento Police Detective Mark Tyndale. After the test, Detective Tyndale told defendant that he had trouble with her response regarding whether she intentionally did something to the child. Toward the end of the interview, defendant told Detective Tyndale that she had wrapped the child too tightly in a sheet and blanket.

Defendant's last interview took place on October 24, 2007. Detective Jason administered a *Miranda* [footnote citation omitted] warning, and defendant waived her rights. At the end of the interview, defendant stated she held her hand over the child's mouth until she stopped crying.

* * * *

Defendant's argument centers on representations from the detectives during the interviews on October 23 and 24. On October 23, Detective Tyndale informed defendant that she failed the polygraph examination, and he was having a hard time with whether she intentionally caused the child's death. He told her that people would forgive a mistake, but if someone made a mistake and was not honest about it, "people aren't as forgiving." He also said: "I don't think you're someone who would intentionally kill a child.... [P] ... [P] But if there was something that happened that was an accident, ... [P] ... [P] that's what you need to tell me. 'Cause otherwise the detective[']s gonna think you did do something on purpose."

Later, Detective Tyndale told defendant he would like to design a polygraph test she could pass, and he would have to explain to Detective Jason why she did not pass the polygraph. Detective Tyndale repeatedly asked defendant if the child's death was an accident, and continued: "When you tell me what it was, that's how I'm gonna design the polygraph test.... [P] ... [P] Because if it's an accident, that's what people understand. Especially when you're sorry for it. When you don't tell the truth, people don't believe you're sorry."

Detective Tyndale continued this line of questioning, assuring defendant he believed the killing was accidental, and telling her: "if you tell me the truth, I promise you're gonna pass the test. If it was an accident, I can show that. But you gotta be honest with me about it." He repeatedly promised defendant that if she told the truth, he would develop a test she could pass. He also told defendant, "You know, what kind of person would kill a small child on purpose? Are you that kind of person?"

Detective Tyndale then told defendant he knew she was "worried" and "scared" as some

day "12 people sitting in a jury" would be looking at her, wondering whether she did it on purpose or it was an accident. He reiterated that it would be important for him to "walk out of here and be able to go up to Detective Jason and say, she's telling me the truth? She did it, but she didn't do it on purpose. It was an accident." As the interview wound down, he told defendant she took on more children than she could handle, and "I can help you show that it was an accident." By the end of the interview, defendant admitted she accidentally killed the child.

The following day, Detective Jason asked defendant if she had put her hand on the child's mouth to stop her from breathing. Defendant said "No," and Detective Jason replied that defendant had come a long way since the previous interview, and "you know, getting this off your chest. You got to be feeling better about that ."

Detective Jason told defendant he understood that defendant knew how to take care of a child. Detective Jason told defendant she "had to have done something." He reiterated several times that he thought it was an accident. Later, Detective Jason asked defendant if she put her hand over the child's mouth. After she gave an inaudible response, Detective Jason told defendant she was not being honest with him, and she would feel better if she told the truth. After equivocating on whether she had put her hand over the child's mouth, defendant admitted doing so, and stated that she kept her hand over the child's mouth until she stopped crying.

The Court of Appeal opinion, accurate as it is, nevertheless does not reflect the persistency of the questioning. The first two days of the interviews by Detective Jason were plodding, polite and persistent. Petitioner was asked again and again to describe the circumstances which led to the infant's death. The tireless questioning led to petitioner being caught in inconsistencies/absurdities, e.g., she administered CPR at the time when she found the infant dead in the middle of the night, and later, after she "panicked," several hours later, when she repeated CPR on a known lifeless body in the process of a conversation with a 911 dispatcher. After a polygraph was administered on October 23, Detective Tyndale attempted to force the issue. This interview on October 23, and that of detective Jason on October 24, 2007, was of a more aggressive character, although at all times, the interrogation was civil. In the latter interviews, if the police detectives told petitioner she was not telling the truth regarding the causation of the death once, they told her 100 times. The detectives were not going to accept any answer by petitioner that she did not take the actions which led to the death. Similarly, the numerous statements to petitioner stressing the different possible outcomes depending on whether "it was an accident" or "purposeful," was a red herring in that Cal.Penal Code 273ab only required purposeful actions of petitioner in causing injury, which resulted in death. The prosecution would not have to prove that petitioner intended the death of the infant by her actions. And, the police knew at the time that the injuries to the infant were incompatible with an accident. Many times petitioner was coaxed to be honest, and that the truth would make her feel better. She was in fact told on occasion that she was being honest, but the questioning continued with the clear indication that she was not. She was also confronted numerous times with the alleged falsity of her polygraph exam, often coupled with the "accident-purposeful" dichotomy, i.e., people would understand if the death was an

accident.

Although there are surely superficial similarities with the type of questioning in Doody and that of petitioner's case, the interviews with petitioner herein were simply not of the same pressure as exhibited in Doody's case. First of all, the interviews in petitioner's case took place over three days; it was not compressed into one marathon session. Secondly, Doody's interrogation was a tag team of three detectives giving Doody no respite from the pressure to "be honest," "have honor," "let us help you" and the like. Petitioner's interrogation was conducted singly, albeit two detectives were involved. Most importantly, Detective Jason, who did the lion's share of the interrogation, was simply (persistently) getting petitioner to repeat her story during the first two days of questioning. Although the purpose of the repetition is clear, get petitioner caught in inconsistencies, the type of pressure exhibited in *Doody*, a *relentless*--we need you to answer NOW--was absent. Certainly, some of that pressure was brought to bear on petitioner, especially by Detective Tyndale after the polygraph, and by Detective Jason on the third day of questioning, but simply not to the extent as set forth above.

Moreover, petitioner's unsupported-in-degree by the record, "naivete" assertion is not the same as the "critical" factor of Doody's juvenile status, although the undersigned recognizes that Doody was almost an adult at the time of his interrogation. Many persons who are interrogated by the police are being questioned for the first time; these persons may not have developed a skill set of "admission avoidance." But something more than unfamiliarity with police techniques is necessary before persistent questioning will be found to have overborne the will of the person being questioned. It appears to the undersigned that petitioner believed she could talk her way out of her problems; many people make that mistake as the interrogators are politely weaving the web ever tighter on the person questioned. Good interrogation technique should not be confused with undue pressure. As recounted above, petitioner was permitted to go home after the first and second day of questioning to recover and reflect on the day's interrogation.

In sum, the Court of Appeals' determination that petitioner's confession was not involuntary cannot be termed unreasonable as that term is defined in AEDPA.

(Questioning a suspect four times over a 60-hour period of custody did not render the confession inadmissible)

In *State v. Bean* (2011) the Court of Appeals of Wisconsin was "unconvinced" with Beans argument that his confession was not voluntary because "[h]e was in custody for 60 hours, he was questioned on four separate occasions, the last of which was after he invoked his right to remain silent."

In their opinion the Court of Appeals highlighted the fact that if progress is being made in the investigation custody can be maintained. "In Wisconsin, "post-arrest detention will be permitted as long as the detention is for a proper purpose, and the period of detention is not unjustifiably long under the circumstances of the case." Id. at 76, 277 N.W.2d 849 (internal citations omitted). "Activities that the authorities might reasonably undertake in

order to determine whether to release or to charge include interrogating the suspect or witnesses, checking out the story told by the suspect or witnesses, and gathering evidence." Id.
"From the time Bean was arrested for probable cause until he confessed to the carjacking sixty hours later, the police were attempting to gather evidence and eliminate discrepancies in the various suspects' stories. In other words, they were continually moving forward, for the purpose of determining whether to charge Bean with participation in the carjacking."

"The circuit court concluded, and we agree, that there is nothing about Bean that makes him particularly susceptible to police pressure. He is an adult, has been arrested before, and is familiar with the criminal justice system. At the time of his confession, he had been in custody for sixty hours, but during that time he had eaten and had been provided an opportunity for a full night's sleep before the interrogation during which he confessed. Police had only questioned Bean for a total of two hours before his confession, and that two hours had been divided up among three different interrogations. Before each interrogation Bean was aware of his Miranda rights, and when he invoked his right to remain silent at the beginning of the third interrogation, that invocation was scrupulously honored. The circuit court described the tone of the fourth interrogation as "low-key" and found that "Detective Spano was anything but threatening." Click here for the complete opinion.

(17 hour interrogation not too long while police are still investigating the case)

In *Lumpkins v. Secretary Dept of Corrections* (2011) the U.S. Court of Appeals, Eleventh Circuit, rejected the defendant's claim that his confession was involuntary because the interrogation in its entirety lasted 17 hours.

"We also conclude that the state court's determination that Lumpkins's confession was voluntary was supported by considerable evidence. As to length of the interrogation, the state court was not unreasonable in finding that the interview was extended in part because Lumpkins was attempting to establish his alibi. Lumpkins identified potential alibi witnesses and agreed to wait at the sheriff's office while the detectives located and interviewed the potential witnesses. The 17 hours thus included a 5 or 6 hour break while the detectives interviewed Lumpkins's alibi witnesses. Under these circumstances, the length of the interrogation did not render Lumpkins's confession involuntary."
Click here for the complete opinion.

(Length of interrogation is one factor to consider in the totality of circumstances)

In *Moore v. Curtin* (2010) the defendant claimed that his confession was not voluntarily made because he was subjected to three days of intensive interrogations which drove him to the point of emotional and physical exhaustion, and that he suffers from mental illness, which made him vulnerable to psychological coercion. The US District Court, E.D. Michigan, Southern Division, disagreed, stating:

"The state courts' findings and conclusions are supported by the record. Petitioner was thirty-six years old at the time of his interrogation, and he had earned the equivalent of a high school diploma. He had three prior convictions, and he was advised of his constitutional rights before each interview. He waived his rights according to the undisputed testimony of the officers, and he was not physically punished, nor deprived of food or sleep.

One factor that suggests Petitioner's confession may have been coerced is the fact that he was interrogated for several hours and was confined for a few days before he confessed. Taken by itself, this factor could support Petitioner's allegation of coercion, but courts apply a totality-of-circumstances test in this area, not a singular-fact test, and that makes all the difference. "[I]nterrogations of great [ ] duration" have been deemed improper only when "they were accompanied ... by other facts indicating coercion." See *Berghuis v. Thompkins*, --- U.S. ----, 130 S.Ct. 2250, 2266, 176 L.Ed.2d 1098 (2010). And it is not even clear that a 24-hour interrogation amounts to one of "great[ ] duration."

(Court rules that interrogation lasting more than 4 hours does not render confession inadmissible)

In *State v. Phillips* (2010) the Missouri Court of Appeals, Southern District, upheld the admissibility of a confession after a four and one half hour interrogation, stating, in part, that "Missouri courts have found confessions to be voluntary which resulted from interrogations that lasted as long as or longer than Defendant's. See *State v. Smith*, 735 S.W.2d 65, 68 (Mo.App.1987) (holding defendant's confession to be voluntary when it came after six and a half hours in custody with intermittent interrogation); *State v. Simpson*, 606 S.W.2d 514, 517 (Mo.App.1980) (holding that continuous questioning for four hours is not coercive)."

In this case, the defendant, objected to "Detective Hope's exhortation that he be honest so that God would forgive him of his sins. While the cynic may question the sincerity of the Detective's spiritual advice, these remarks clearly did not represent promises of worldly benefit, nor did they suggest that by confessing Defendant would be able to escape punishment or incur a lesser one.... An appeal to a suspect's religious beliefs does not render his confession involuntary unless other circumstances indicate that his will was overborne, and Defendant in this case has put forth no such evidence."

(10 hour interrogation of a suspect with a low intellect and lacking sleep should have been admissible)

In *US v. Aguilar* (2008) the US Army Court of Criminal Appeals reversed a trial court judge's opinion who had ruled that "The accused was in custody and subject to questioning by CID from 0200 hours until after 1200 hours, a total of over [ten] hours. The accused was properly read his rights under Article 31 [UCMJ]. However, the length of the interview and the lack of sleep of the accused and his low intellect made for a setting which was not conducive to the taking of a knowing and voluntary statement." The Court of Criminal Appeals concluded that "There were no findings of unfair or

coercive activity by SA Starry and under the circumstances appellee's will was not overborne by fatigue and low intelligence. Applying the correct law to the correct facts, the Court concludes appellee voluntarily signed a statement he chose to make."

(US Supreme Court rules that confessions obtained after six hours by federal investigators may not be admissible)

In *Corley v. US* (2009) the United States Supreme court ruled the following:

"We hold that S 3501 modified McNabb-Mallory without supplanting it. Under the rule as revised by S 3501(c), a district court with a suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was "reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate]"). If the confession came within that period, it is admissible, subject to the other Rules of Evidence, so long as it was "made voluntarily and ... the weight to be given [it] is left to the jury." Ibid. If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the McNabb-Mallory cases, and if it was, the confession is to be suppressed.

In this case, the Third Circuit did not apply this rule and in consequence never conclusively determined whether Corley's oral confession "should be treated as having been made within six hours of arrest," as the District Court held. 500 F.3d, at 220, n. 7. Nor did the Circuit consider the justifiability of any delay beyond six hours if the oral confession should be treated as given outside the six-hour window; and it did not make this enquiry with respect to Corley's written confession. We therefore vacate the judgment of the Court of Appeals and remand the case for consideration of those issues in the first instance, consistent with this opinion." Click here for the complete opinion.

(16 hours of interrogation over several days not coercive)

In the case of *State v. Campbell*, (2009) the Wisconsin Court of Appeals affirmed the trial court's decision to admit the defendant's confession. On appeal the defendant claimed (among other factors) that "the sheer length of the interrogation" produced a coerced confession. Campbell was interrogated for about 16 hours in three interrogation sessions over several days. In upholding the confession the Appeals court pointed out that "[T]he supreme court [has] declined to adopt a rule that custody and/or interrogation of a given length is inherently coercive." State v. Markwardt, 2007 WI App 242, P 45, 306 Wis.2d 420, 443, 742 N.W.2d 546, 558. In the instant case, Campbell was questioned for a significant period of time, but this factor alone does not demonstrate improper pressure or coercive tactics when the questioning was accompanied by breaks and appropriate opportunities to eat and sleep."

(Court upheld admissibility of confession from defendant who was questioned for 24 hours over a 77 hour time period)

In *State v. Wells* (2008) the Defendant was questioned for 24 hours over a 77 hour time

period in which he was in custody. The trial court upheld the admissibility of the confession. The Court of Appeals agreed:

"He was interviewed for twenty-four of the seventy-seven hours in which he was in custody during that time. While those are both significant amounts of time, "the length of interrogation and custody, while certainly relevant to the discussion of voluntariness, simply is not dispositive in and of itself." State v. Turner, 136 Wis.2d 333, 364, 401 N.W.2d 827 (1987). We must look to how those twenty-four hours of interrogation were executed. The four interviews were non-consecutive and were separated by breaks of four, twelve, and forty hours. During these breaks, Wells was free to eat regular meals and sleep in a private cell. Additionally, Wells was allowed to make requests for smaller breaks and creature comforts during the interview sessions. When requested, he was given sandwiches, sodas, water, and allowed time for bathroom breaks, some of which were "rather lengthy." The length and physical conditions of Wells' interviews were not sufficient to show coercive tactics by police."

(28 hours of questioning – broken up by periods of rest and food provided – not coercive)

In *State v. Segarra* (2007) "The circuit court found that Segarra had been interrogated for a total of about twenty-eight hours. The circuit court found that the police had advised Segarra of his *Miranda* rights appropriately and repeatedly during the time they had interviewed him. The circuit court also found that Segarra had "waived those rights, agreed to give a statement, was cooperative with the police in terms of giving statements, never asked for a lawyer, and never asserted his right to silence." The circuit court also found that the police had offered Segarra "creature comforts from water, to food, to cigarettes," and that he had been given time between the interviews to rest and "gather his thoughts."

The circuit court found that none of the police officers had acted in a coercive manner, and that there was no evidence that any of the officers had attempted to bring undue pressure on Segarra during the interviews. The circuit court considered the circumstances of the interviews including, among other things, the location, who initiated the contact, and Segarra's age, physical condition, and prior experience with the police. The circuit court concluded that Segarra's statements were voluntary and denied the motion to suppress." The Court of Appeals agreed.

(New Jersey court uses Reid textbook, Criminal Interrogation and Confessions, as reference re proper length of interrogation)

In *State v. Knight* (2004) the New Jersey Appellate Court found that the trial court erred in admitting the defendant's confession. In their opinion the Appellate Court said that 'The length of the interrogation alone exceeded the bounds of due process. Gregory acknowledged that he questioned defendant for 'hours' before and after the written waiver was signed. While there is no hard-and-fast rule delineating when the length of an interrogation becomes coercive, '[w]hen fatigue, withdrawal, hunger, thirst, or a craving for other biological needs serve as the primary incentive for a confession, duress may be

claimed.' Fred E. Inbau, et al, Criminal Interrogation & Confessions, 422 (4th ed. 2001)

Investigator pattern of practice considerations

(Defendant is entitled to discovery of evidence relating to officer's alleged propensity to obtain confessions through coercive conduct)

In *State v. Jakes* (December 2013) the Appellate Court of Illinois held that the defendant was entitled to discovery of evidence relating to the officers' alleged propensity to obtain confessions through coercive conduct. Here are excerpts from their opinion:

"A jury found Anthony Jakes guilty of murder, based largely on a confession Jakes signed after questioning by Detectives Michael Kill and Kenneth Boudreau. Jakes testified that he signed the statement because Kill beat him and threatened him while Boudreau watched. Kill and Boudreau denied that they beat or threatened Jakes. The jury and the trial court that assessed the credibility of Kill, Boudreau and Jakes never heard evidence that Kill and Boudreau beat and threatened suspects in other cases to obtain signed confessions, and… that they committed perjury to convince courts and juries to rely on the coerced confessions.

Because the matters in issue involve alleged beatings and threats by Kill, the court should permit discovery of evidence that affects the credibility of the testimony of Kill and Boudreau about the means by which they persuaded Jakes to sign the statement the assistant State's Attorney wrote. Evidence of other cases in which Kill and Boudreau coerced confessions directly relates to the issues here. Evidence that Kill and Boudreau lied under oath in other proceedings, especially when those proceedings involved statements signed following interrogations by Kill or Boudreau, also should affect the credibility of their testimony here….. The court must permit sufficient discovery to establish a pattern or practice of coerced confessions and perjury, if Kill or Boudreau engaged in such practices….. Kill himself, in a deposition, swore that he obtained confessions in 90% of the murder cases on which he worked, for a total of about 1,500 murder confessions in his career. He added that in 90% of those cases, defense attorneys filed motions to suppress "based on allegations of unnecessary use of physical force."

(Alleged false confession obtained by interrogator in prior case not admissible to prove pattern of practice)

In *State v. Adams* (2013) the Court of Appeal of Louisiana, Fifth Circuit, upheld the trial court's decision to exclude evidence that the investigator obtained an alleged false confession in a prion case so as to suggest a pattern of behavior. From the court's opinion:

"Defendant gave two statements to police. In his first statement, defendant denied any participation in the victim's murder. In his second statement, defendant confessed to the murder, though he claimed he shot the victim in self-defense. At trial, and now on appeal, defendant asserts that his second statement taken by Detective Meunier was a coerced

false confession. In support of this assertion, defendant... sought to introduce evidence of an unrelated criminal case in which he alleges Detective Meunier, through physical force and coercion, obtained a false confession from the suspect.
Defendant sought to admit evidence of the alleged false confession taken by Detective Meunier in the unrelated criminal case for two reasons: (1) to impeach Detective Meunier's credibility and (2) to prove that Detective Meunier had the habit, custom, or routine practice of eliciting false confessions from suspects through force or coercion and that he acted consistently with that habit or practice when he elicited defendant's confession....

We find that, even if defendant could prove that Detective Meunier obtained a false confession in the unrelated *Lindsey* case, that singular occurrence is not sufficient to prove that Detective Meunier has a habit or routine practice of eliciting false confessions from suspects through coercion. Accordingly, we find the trial court did not abuse its discretion in excluding the evidence and that exclusion of the evidence did not deprive defendant of his right to present a defense.

Juvenile considerations

(10-year-old can make voluntary waiver of rights and can understand the wrongfulness of his acts)

In *People v. Joseph H.* (June 2015) the Court of Appeal, Fourth District, Division 2, California, upheld the lower court's decision that a 10-year-old understood the wrongfulness of his acts (shooting his father in the head) "despite the statutory presumption of incapacity" and voluntarily waived his *Miranda* rights. From the Court of Appeal's decision:

"After being taken to the police station, the minor was interviewed by Detective Hopewell, a detective assigned to the Sexual Assault and Child Abuse Unit, whose role was to interview Joseph and his siblings. Prior to admonishing Joseph of his *Miranda* rights or interviewing him about the shooting itself, the detective asked him questions pursuant to a Gladys R. questionnaire, designed to determine if an arrestee under the age of 14 understands the wrongfulness of his or her actions, within the meaning of section 26. Following that questionnaire, the detective asked Joseph if stealing candy from a store without paying for it was right or wrong; Joseph replied it was wrong. She then asked Joseph to give her an example of doing something right and doing something wrong. Joseph responded that doing wrong things could hurt people, while it was good to care, and to help people. After asking him for an example of something that he would do that would be right, she asked Joseph to give an example of doing something that was wrong, to which Joseph replied, "Well, I shot my dad." Shortly thereafter, the detective advised Joseph pursuant to *Miranda* and proceeded to question him about the shooting.

The minor refers to the videotape and transcript of the interview as support for the assertion that Joseph fundamentally misunderstood the nature of *Miranda* and his right to be free of coercive confessions. He argues that his equivocal response when the detective

asked if understood what she was saying, his body language, and his hesitation showed he did not understand what was being explained. We disagree.

Here, the minor points to his age, and the fact that he suffers from ADHD and other mental disabilities, to argue that he was susceptible to suggestion. The minor relies on the testimony of Dr. Geffner's opinion that "[H]aving borderline intellectual functioning and other cognitive deficits can make a person more easily suggestible." This may be true, but Dr. Geffner's suggestion that it was "possible" he was more easily suggestible, is not evidence that Joseph was, in fact, suggestible or confused. The detective repeatedly asked Joseph if he understood what she was explaining about his rights, and when he demonstrated misunderstanding, she provided additional explanation; Joseph's responses indicated he understood. Nothing in the record supports the premise that he was confused or suggestible.

The minor also argues that his communication deficits made it "self-evident that he would have had trouble effectively communicating his reservations and preserving his rights." The videotape of the interview shows he had no trouble communicating, aside from needing explanation of a few terms. In this respect, the detective was careful to follow up the explanation of his rights with questions to insure he understood what she was explaining, so the assertion he had difficulty communicating his reservations is not supported by the evidence.

Further, the record does not support the minor's assertion that his hesitation, confusion, and misunderstanding of the full scope of what it meant to "waive" his rights, showed involuntariness. To the contrary, the video shows he felt guilty for what he had done. Absent coercive conduct by police, and despite his young age, his ADHD, and low-average intelligence, the finding that Joseph voluntarily waived his rights, guaranteed by the Fifth Amendment, is supported by the record.

Pursuant to section 26, a minor under the age of 14 is presumed to be incapable of committing a crime. Thus, a finding of capacity is a prerequisite to an adjudication of wardship for a minor under 14... The presumption of incapacity may be rebutted by the production of "clear proof" that the minor appreciated the wrongfulness of the conduct when it was committed.... "Clear proof" means clear and convincing evidence.

In determining capacity pursuant to section 26, the juvenile court must consider the child's age, experience, and understanding.... A minor's knowledge of his act's wrongfulness may be inferred from the circumstances, such as the method of its commission or its concealment.

Here, Dr. Salter testified that Joseph knew the difference between right from wrong. The court heard the testimony of Drs. Geffner and Salter, and read all the reports and statements that were admitted into evidence, including Joseph's own statements that he understood right from wrong, and understood he would be punished when he did something wrong. The court also considered Joseph's age and the circumstances of the crime, including Joseph's planning of the event while lying in bed (when he decided to

end the "father-son thing") and the fact he hid the gun under his bed to avoid getting caught. These factors support the trial court's finding.

(*13-year olds statement "Could I have an attorney? Because that's not me" was an Unequivocal and Unambiguous Invocation of his Rights*)

In *People v. Art T.* (February 2015) the Court of Appeal, Second District, Division 7, California, ruled that a 13-year-old boy's statement--"Could I have an attorney? Because that's not me"--made during the course of a custodial interrogation after watching a video of a shooting was an unequivocal and unambiguous invocation of his rights. From the court's opinion:

"In this case, the detectives knew at the time of the interrogation that Art was 13 and an eighth grade student in middle school. While neither the juvenile court nor this court has had the benefit of viewing the videotape for the purpose of considering the circumstances of Art's statements to the officers in considering the motion to suppress, we find that Art's age of 13 and middle school level of education, combined with his repeated requests for his mother, would have made his lack of maturity and sophistication objectively apparent to a reasonable officer. In this context, Art's statement after viewing the video of the shooting, "Could I have an attorney? Because that's not me," was an unequivocal request for an attorney."

(Juvenile interrogation - confession volutariness issues)

In *State v. Anderson* (September 2014) the Court of Appeals of Ohio upheld the admissibility of a juvenile's confession; considering the issues of whether or not the defendant (16 years old) made a knowing and intelligent waiver of his rights, and the influence of deceptive interrogation techniques. From the court's opinion:

"Under this assignment of error, Anderson presents two main arguments. The first is that the State failed to prove that he intelligently and knowingly waived his constitutional rights. Anderson's second argument is that the use of deceptive interrogation techniques undermines a vulnerable child's voluntary waiver of rights. We will address each matter separately.

In arguing that Anderson's waiver of rights was neither intelligent nor voluntary, Anderson focuses on the fact that he was treated in the same manner as an adult, without recognition of his individual circumstances or of current research and precedent, which indicate that children need greater protection than adults.

At the time of the interrogation, Anderson was 16 years old, and had prior experience with the criminal justice system. Consistent with the dictates of *Miranda*, the police explained each right to him and confirmed that he understood his rights. The questioning took place over a period of less than two hours, with one interview lasting about 20 to 30 minutes and the other lasting about a half hour. Although the police did not offer Anderson food or water, or a restroom break, they would have let him take a break if he

had asked.

It is true that the police did not call Anderson's parents before speaking with him. However, "the law in Ohio does not require that a juvenile's parent or legal custodian be present during a custodial interrogation." ... "The presence of a parent or custodian during a juvenile's interrogation, therefore, is only one factor to consider in determining whether, under the totality of the circumstances surrounding the juvenile's statements, there is a valid waiver of the juvenile suspect's *Miranda* rights ." (Citations omitted.) Id.

Anderson's second major issue concerning voluntary waiver involves deceptive interrogation techniques. As was noted, the interrogating detectives falsely told Anderson that he had been identified by witnesses. Anderson contends that a child's ability to understand and resist manipulative tactics is hampered by youthfulness, and that the International Association of Chiefs of Police, in fact, discourages use of deceptive interrogation tactics with children.
"Deception is a factor bearing on voluntariness, but, standing alone, does not establish coercion * * *." ...

Anderson does not suggest, and we have not found, Ohio authority condemning deceptive interrogation techniques in situations involving children. In Ohio, as in other jurisdictions, deception in interrogation is only one factor in assessing voluntariness. For example in *State v. Jackson*, 333 Wis.2d 665, 2011 WI App 63, 799 N.W.2d 461, the defendant was 15 years old, had an IQ of 73, and was charged with attempted first degree intentional homicide.... The defendant claimed his confession was involuntary due to his IQ and age, as well as the fact that the police had lied to him... However, the court of appeals disagreed, noting that:

The State responds that, while it may not have been true that multiple people had identified Jackson in a lineup, one person had. And misrepresentation or trickery does not make an otherwise voluntary statement involuntary--it is only one factor to consider in the totality of the circumstances. *State v. Ward*, 2009 WI 60, P 27, 318 Wis.2d 301, 767 N.W.2d 236. As we explained in *State v. Triggs*, 2003 WI App 91, P 19, 264 Wis.2d 861, 663 N.W .2d 396,

"Inflating evidence of [the defendant's] guilt interfered little, if at all, with his 'free and deliberate choice' of whether to confess, for it did not lead him to consider anything beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime."

After reviewing the totality of the circumstances, we find no evidence that Anderson's waiver was involuntary. Although Anderson was a juvenile, he was 16 and had prior experience with *Miranda* warnings. Furthermore, there is no indication that Anderson was under the influence of any medication or other substance, that he had low intellectual ability, or that the police used coercive tactics."

(The criteria to be considered in determining custody for a juvenile suspect)

In *US v. IMM*, *Juvenile Male* (2014) the US Court of Appeals reversed the district court's decision, concluding that the district court erred when it admitted into evidence an inculpatory statement obtained from IMM in violation of his Fifth Amendment rights. The district court ruled that IMM was not in custody so that *Miranda* advisements were not required. The Court of Appeals disagreed and stated in their opinion the following:

"IMM argues that the district court erred in refusing to suppress his inculpatory statement under *Miranda. Miranda* is violated when a suspect is placed in custody and is then interrogated without receiving *Miranda* warnings or without knowingly, intelligently, and voluntarily waiving the rights described in those warnings.

In *United States v. Kim,* we identified a non-exhaustive list of five factors that have often proven relevant in deciding whether a suspect was in custody: "(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual." … As we recognized in *Kim,* "[o]ther factors may also be pertinent to, and even dispositive of, the ultimate determination whether a reasonable person would have believed he could freely walk away from the interrogators." *Id.*

Although this inquiry is objective, the Supreme Court held in *J .D.B.* that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to any reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." … The Court cautioned that "a child's age [may] affect[ ] how a reasonable person in the suspect's position would perceive his or her freedom to leave," and warned that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." … Thus, *J.D.B.* recognized that for *Miranda,* as for so many other rights, common sense dictates that we must take into account the unique characteristics and vulnerabilities of children.

Here, the district court concluded that IMM was not in custody. We review the "in custody" determination de novo

IMM does not challenge the district court's factual findings and, having carefully reviewed the record, we conclude that those findings are not clearly erroneous. However, applying the legal standard set forth above to the "determination" regarding IMM's custodial status, we conclude that IMM was "in custody" for *Miranda* purposes. A reasonable person, and especially a reasonable twelve-year old child, in IMM's position would not, under all of the circumstances, have felt that he was free to terminate the interrogation and leave.

The first *Kim* factor, "the language used to summon the individual," slightly favors a finding that IMM was in custody. In general, when a suspect voluntarily agrees to

accompany police with an " *understanding that questioning would ensue,*" this factor weighs against a finding of custody…. although IMM's mother agreed to a voluntary meeting with the detective, there is no evidence that IMM himself ever agreed to an interview, understood it to be voluntary, or understood his mother's role in making the necessary arrangements. Because the ultimate issue is whether IMM himself understood that he was free to leave, we cannot impute his mother's subjective awareness of the circumstances of the interview to IMM. The evidence shows only that, from IMM's vantage point, an armed detective arrived at his house one Saturday morning, drove him and his mother 30 to 40 minutes to a police station, and brought him to a small room where he remained for nearly an hour of questioning. Although the officer did not menace IMM or order him into the car, it is doubtful that a juvenile in IMM's position would have seen the circumstances of his arrival at the police station as the result of a free and voluntary choice to be questioned.

The second *Kim* factor, "the extent to which the defendant is confronted with evidence of guilt," overwhelmingly favors a finding of custody. "We have found a defendant in custody when the interrogator adopts an aggressive, coercive, and deceptive tone." … Here, although the detective did not raise his voice, he repeatedly confronted IMM with fabricated evidence of guilt and engaged in elaborate deceptions. The detective fed IMM facts that fit the detective's predetermined account of what must have happened, accused IMM of dishonesty whenever IMM disagreed with the detective's false representations, and forced IMM to choose between adopting the detective's false account of events as his own and calling his own grandfather a liar. This last tactic directly played upon IMM's close relationship with his grandfather, whom he called "dad," and employed intense psychological coercion of a sort to which juveniles are uniquely vulnerable…. Further, although the detective did not explicitly threaten IMM, he bluntly warned that the situation would "turn into a big thing if you're not going to be honest." Thus, while the detective told IMM at the outset of the interview that IMM could stop it if he felt uncomfortable, the detective's aggressive, coercive, and deceptive interrogation tactics created an atmosphere in which no reasonable twelve year old would have felt free to tell the detective, an adult making full use of his position of authority, to stop questioning him.

The third *Kim* factor, "the physical surroundings of the interrogation," also weighs strongly in IMM's favor. While "[t]he fact that questioning takes place in a police station does not *necessarily* mean that such questioning constitutes custodial interrogation,"… it often does. That is especially true for juveniles, who are more likely to be overwhelmed by entry into a police station staffed by armed, uniformed officers…. Here, IMM was placed in a small room with the door closed. Although the door was unlocked, there is no evidence that IMM was aware of this fact. To the contrary, the detective twice exercised control over IMM's practical ability to enter and exit the room—first by ordering IMM to knock on the door if he needed to use the restroom and later by directing IMM to sit alone in the small room until the detective returned.

In short, with respect to the third *Kim* factor, IMM was interrogated alone behind a closed door that appeared to be locked, in a small room in a police station located 30 to 40

minutes away from his home. He was told that, if he wanted to leave to use the restroom, he needed to knock and obtain the detective's permission. Faced with this situation and level of police control, a reasonable person would not likely have felt free to terminate the interrogation and leave the police station at will.

The next *Kim* factor, "duration of detention," strengthens the conclusion that IMM was in custody. IMM spent 30 to 40 minutes in the unmarked police car and then nearly an hour being questioned. Although our precedents do not specify a precise amount of time at which a detention turns custodial, we have found an adult defendant to have been in custody when she was interrogated for 45 to 90 minutes…. Under all the circumstances, including the fact that IMM, as a juvenile, was likely more overwhelmed and intimidated than an adult would be by such prolonged direct questioning by an adult police officer, this *Kim* factor supports a finding of custody.

The fifth and final *Kim* factor, "the degree of pressure applied to detain the individual," confirms that IMM was in custody. As in *Kim,* "this was a full-fledged interrogation, not a brief inquiry," in which IMM was "detained for 'some time' " and then questioned for "at least [50 total] minutes."… This questioning was both hostile and accusatory, and, when conducted in isolation in a small room in a police station, quite capable of causing IMM considerable concern regarding his future. Although IMM was neither handcuffed nor arrested, "the scenario was not without pressure resulting from a combination of the surroundings and circumstances encompassed by the other factors."

Ultimately, guided by the *Kim* factors, considering the totality of the circumstances of IMM's detention, and taking into account IMM's status as a juvenile, we conclude that a reasonable person in IMM's position would not have felt free to terminate the questioning and leave the police station. We therefore conclude that IMM was "in custody" during his interrogation by the detective. Here, IMM was never read his *Miranda* rights and the district court agreed with that description of what happened. Certainly it is clear that the detective did not explain the meaning or consequences of the *Miranda* rights to IMM. Accordingly, IMM's inculpatory statements during his interrogation by the detective must be suppressed."

(Denial of juvenile suspect's request to see mother during interrogation did not render the confession inadmissible)

In *Robinson v. Commonwealth* (April 2014) the Court of Appeals of Virginia upheld the lower courts admission of the defendant's incriminating statements even though his request to speak to his mother was denied during the interrogation.

From the court's opinion:

"Appellant was placed in a room without restraints, given a drink, and an opportunity to use the restroom. He gave no indication of being under the influence of drugs, responded to questions asked, and remained calm, despite crying towards the end of the interview when he confessed. The portion of the interview leading up to appellant's confession

lasted less than half an hour. Additionally, Detective Rodey read appellant his *Miranda* rights aloud at the beginning of the interview and appellant signed the waiver form. Throughout the videotaped interview, Detective Rodey sat across a table from appellant and his demeanor, tone, and language while questioning appellant were neither aggressive nor threatening. While it is clear from Prioleau's and appellant's mother's testimony that appellant had some emotional and learning disabilities, those issues did not prevent appellant from progressing through school and earning passing grades. While his attendance and academic records are not ideal, neither are they so lacking that we can say appellant's ability to understand the extent and nature of his rights was so impaired as to render his confession involuntary.

Furthermore, while Detective Rodey's statements to appellant that he was considered an adult for purposes of the new charges were inaccurate, appellant never argued that the misrepresentation was intentional or made in bad faith. More importantly, the misrepresentation does not rise to the level of such deliberate deception or coercion as would compel appellant to involuntarily confess. Indeed, Detective Rodey's statement did not "impede [appellant's] ... 'ability to understand the nature of his rights and the consequences of abandoning them.' …. Appellant had been made aware of and acknowledged his *Miranda* rights and, moreover, it was not his first experience with the justice system.

… For these same reasons, we cannot say that Detective Rodey's refusal of appellant's requests to see his mother rendered appellant's confession involuntary or coerced. At its core, this case assesses the significance of a juvenile's request for a parent in the context of determining the *voluntariness* of a subsequent confession, an issue that has not been specifically addressed by the Supreme Court or this Court. Indeed, while this case may highlight significant concerns previously raised in the jurisprudence relating to law enforcement personnel declining to honor a minor's request to see his parent when subjected to custodial interrogation, given the specific facts of this case, we cannot say that appellant's confession was coerced. Appellant was not unfamiliar with the justice system. He had recently pled guilty to and was awaiting sentencing on very similar charges of armed robbery and malicious wounding. Detective Rodey did not do anything to overbear appellant's will or physically intimidate appellant to obtain the confession. To the contrary, Detective Rodey stated that appellant could talk to his mother later. Finally, before ever asking for his mother and less than thirty minutes before his confession, appellant had been informed of his *Miranda* rights, acknowledged his understanding of them, signed a waiver to that effect, and never requested counsel."

(Repeatedly threatening a seventeen-year-old with the death penalty is "objectively coercive")

In *Dye v. Commonwealth* (2013) the Supreme Court of Kentucky found that the defendant's confession was coerced by threats of the death penalty if he did not confess.

"First, the officers incorrectly and repeatedly informed Appellant that, if convicted, he

could receive the death penalty (i.e., that he was "death eligible"). ... the U.S. Supreme Court held that the Eighth and Fourteenth Amendments to the U.S. Constitution impose a categorical bar to executing individuals who were under eighteen years old at the time of the crimes.... It is undisputed that all four interrogating officers knew Appellant was seventeen years old....

Each death penalty reference was immediately followed by an officer asserting that the only way for Appellant to avoid execution was to confess to the murder. Perhaps the most troubling exchange between Appellant and the officers regarding the death penalty occurred about an hour into the interrogation. To this point, Appellant had not made any incriminating statements and the officers had left the room to give Appellant a break. During the break Appellant began to cry. When the officers returned to the room, the following exchange occurred:

Officer: Are you sure you don't want anything? Use the bathroom or anything? You hungry or anything?

Appellant: I don't know what I am. I'm just scared.

Officer: I know you're scared, man. I know you are.

Appellant: Is it the death penalty?

Officer: I'm sorry?

Appellant: Are they gonna give me the death penalty?

Officer: Oh yeah.

Appellant: [inaudible]

Officer: Now, you'll probably spend twenty or thirty years on death row in a room all by yourself.... That's why I was trying to tell you man, this is the only chance you got to avoid all that right now. Tonight, tonight will be your only chance.

Not only did the officer erroneously convey that Appellant was death-eligible, but also that he was certain to receive a death sentence unless he confessed to his sister's murder. We hold that repeatedly threatening a seventeen-year-old with the death penalty is "objectively coercive."

Likewise, the officers made several inappropriate allusions to prison violence or rape throughout the interrogation. For example, about an hour into the interrogation one of the officers warned Appellant: "I can tell you right now, a seventeen-year-old or eighteen-year-old young buck straight into [the Kentucky State Prison (KSP) at] Eddyville, killing a nine-year-old--you can imagine what they're going to do to you on a daily basis." A

second officer told Appellant that he "wouldn't want nobody to have to do that to my own son, but that's exactly what they're going to do to you."

(12-year-old should have been advised of his Miranda rights when questioned at school)

In *State v. D.P.* (2013) the Court of Appeals of Oregon ruled that a 12-year-old should have been advised of his *Miranda* rights when he was being questioned at school about allegedly having sexual intercourse with a 10-year-old girl.

The court ruled that "taking into account the length of the interview, the location, youth's age, maturity level, the repetitive and escalating nature of the questions throughout the interview, and the increasingly coercive tactics used by the detectives, a reasonable twelve-year-old of similar age, knowledge and experience, placed in youth's situation, would have felt required to stay and answer all of the detective's questions... In sum, we hold that, given the totality of the circumstances and in view of youth's age and experience--or lack thereof--the setting in which the interview took place was "compelling." Thus, *Miranda* warnings were required. The juvenile court erred in denying youth's motion to suppress."

In determining whether the circumstance of the interview were "compelling" the court described the details as follows: "Here, the detectives initially made a concerted effort to be unimposing in both dress and demeanor, and attempted to keep the interview "low key" so that they would not scare or intimidate youth. The detectives shook hands with youth when he entered, kept their voices down, asked specific questions, avoided leading questions, used simple language, and gave youth time to answer each question. Neither detective wore a uniform or displayed his badge or firearm. At the beginning of the interview, the detectives explicitly told youth that he was free to leave, and that he was not required to answer questions. Youth affirmed that he understood those things. The detectives also explained to youth that they were not going to arrest him that day no matter what happened during the interview. The detectives requested youth's permission to record the interview, youth declined, and the detectives complied with youth's directive.

On the other hand, the detectives deliberately chose an interview location--an office at youth's school--in part, so that youth's parents would not interrupt the interview. Youth did not come to the interview room of his own volition; instead, he was summoned by the school's principal, removed from class, and escorted into the interview room, where he was then left alone with two police detectives. He was seated with his back facing the closed door, so that he could not see the exit. The detectives did not call youth's parents before the interview. Youth did not have anyone familiar in the interview room with him, such as a parent, counselor, or teacher. The detectives did not tell youth that any of those people could be present. The detectives did not inform youth that he had a right to refuse the request for the DNA swab. The interview lasted for one hour and forty minutes. Further, although youth had consistently denied any sexual contact and any wrongdoing, throughout the interview the detectives revisited topics and questions in an effort to elicit different answers from youth. The detectives spoke about DNA, DNA transfer, and the

sexual assault kit multiple times; they reiterated that if youth did not tell them the truth, then "the decision maker would have to make assumptions." Throughout the entire interview, the detectives repeatedly renewed their directive that youth had to tell his parents "the truth," despite youth's statements that he feared doing so and that he had not done anything wrong.

The detectives' initial inquiries were to find out "what happened"; later, the detectives said that youth could decide "to tell the truth or not tell us what happen[ed]." In contrast to the "low key" approach employed at the outset, by the end of the interview the questions were pointed and presumed youth's guilt--e.g ., asking "how long [youth's] penis had been in [the victim]'s vagina." The detectives told youth that the victim needed an explanation, and repeated multiple times--all while youth continued to deny any wrong doing--that, if youth had been older, he would be going to prison. Instead, they explained that since he was only 12 years old, it would be handled "differently"--but they did not to explain what consequences he might actually face. Finally, near the end of the interview, Smith stood up, donned blue plastic gloves, opened the DNA testing kit, and asked youth to consent to a DNA swab-after repeatedly explaining to youth how DNA can transfer from person to person and without informing youth that he could withhold consent.

Although the detectives were unaware of the extent of youth's prior behavioral problems--such as youth's propensity to be argumentative; youth's marked emotional, social, and intellectual immaturity; or youth's need for concrete and succinct answers to questions--they were aware of youth's age, his prior behavioral issues, his need for an unconventional schooling environment to address his behavioral problems, and the conditions surrounding the allegations against youth. Thus, at a minimum, the detectives should have known from the circumstances that youth was in a category of children that require a heightened level of precautions to ensure that he understood that he was not required to stay or answer the detectives' questions."

(A promise of leniency: "[e]verybody gets a clean slate when they turn 17" – confession involuntary)

In *People v. Travis* (2013) the Appellate Court of Illinois, Third District, carefully examined the elements that are necessary to establish that a juvenile confession was voluntary. The court concluded that in this instance the defendant's confession was involuntarily given. The focal point of this decision is outlined by the court:

"Furthermore, we believe the manner in which the police conducted the recorded, fifth interview weighs toward a finding that the defendant's confession was involuntarily given. Specifically, Nicodemus made misleading promises of leniency to the defendant during the recorded, fifth interview.

"To constitute an offer of leniency that renders a confession inadmissible, a police statement must be coupled with a suggestion of a specific benefit that will follow if the defendant confesses." …. At the time of the defendant's offense, a juvenile who was at

least 15 years old at the time of the offense and who was charged with first degree murder had to be tried as an adult…. While we acknowledge that the defendant had not been charged before he confessed and that it is the prosecutor who has the discretion to decide what charges to bring against an accused… we believe the clear import of Nicodemus's statements to the defendant was to assure him that he would remain in juvenile court no matter what crime he was charged with in connection with the shooting of Villagomez. Nicodemus stated to the defendant:

"People make mistakes. You're a juvenile. Juvenile system's very forgiving, very understanding when people mess up. Crimes that you commit when you're a juvenile you're not even tried as an adult sometimes. You don't even get the maximum penalties. You don't even do that. Everybody gets a clean slate when they turn 17. You're lucky that you're less than 17, okay? But in order to get those breaks, to get those chances, you have to show some remorse, some compassion, and not just be * somebody that doesn't have a conscious [*sic*], somebody that throws other people's names out there. You gotta be somebody that takes responsibility for their actions because if you don't do that, you're never gonna get any breaks. No one's ever gonna look at you as this kid's worth taking a chance on."

Significantly, Nicodemus's statement to the defendant that "[e]verybody gets a clean slate when they turn 17" indicated to the defendant that if he confessed to shooting Villagomez, he would receive some leniency as a juvenile. The videotape shows that these statements were not lost on the defendant, either, as he asked twice after confessing when he would be taken to the River Valley Juvenile Detention Facility in Joliet. Under these circumstances, we find that Nicodemus's misleading promises of leniency to the defendant during the recorded, fifth interview weigh in favor of a finding that the defendant's confession was involuntarily given.'

(Circumstances that indicate juvenile interrogation was not custodial)

In *Commonwealth v. Bermudez* (2012) the Appeals Court of Massachusetts upheld the lower court's decision that the interrogation of a juvenile was not custodial. The court stated, "Applying these factors to the facts found by the judge and the objective circumstances depicted in the interrogation videotape, we conclude that the defendant's interrogation was not custodial. Although the interrogation occurred at the police station, the defendant appeared there voluntarily, accompanied by his mother, in response to a police request. He was neither under arrest nor escorted to the station by the police. The interrogation lasted seventy minutes, and the defendant sat next to the door throughout the interview. One of the two interviewing officers left the room from time to time, and the other sat across from the defendant behind a desk next to a computer. The questioning was conversational and nonthreatening in tone, and the detectives repeatedly told the defendant, who was not handcuffed or restrained in any way, that he would be allowed to return home with his mother, as he ultimately was. The defendant's age, a few months shy of his eighteenth birthday, placed him on the cusp of majority, and far removed from the tender years of early adolescence. Viewing all the pertinent factors objectively,

including the defendant's age at the time of the interview, we conclude that the interrogation was not custodial so as to require Miranda warnings."

(Juvenile interrogation – voluntariness considerations; value of video recording)

In *People v. Murdock* (2012) the Illinois Supreme Court addressed the issue of whether or not the defendant's statements to the police were involuntary because he, a juvenile, was interrogated as an adult. The State counters that defendant's statements were voluntary and the trial court was correct in denying the motion to suppress. Defendant concedes that Detective Mushinsky did not engage in any behavior that would be considered coercive when applied to an adult. However, defendant argues that he was a juvenile, 16, at the time of the interrogation, and that the Supreme Court of the United States has recognized that "special caution" is required when reviewing the voluntariness of a minor's confession. The court stated the following in their opinion:

"The taking of a juvenile's confession is a sensitive concern, and for this reason the greatest care must be taken to assure that the confession was not coerced or suggested. … The confession should also not be the product of adolescent fantasy, fright, or despair…. Illinois courts have recognized an additional factor not applicable in cases involving adults: the presence of a "concerned adult." … This factor considers whether the juvenile, either before or during the interrogation, had an opportunity to consult with an adult interested in his welfare… In weighing this factor, courts also consider whether the police prevented the juvenile from conferring with a concerned adult and whether the police frustrated the concerned adult's attempt to confer with the juvenile...

However, a juvenile's confession or statement should not be suppressed merely because he was denied the opportunity to confer with a parent or other concerned adult before or during the interrogation…. The concerned adult factor is particularly relevant in situations in which the juvenile has demonstrated trouble understanding the interrogation process, he asks to speak with a concerned adult, or the police prevent the concerned adult from speaking with him…. The concerned adult factor is just one of the many factors to be examined when determining whether a juvenile's confession was voluntary….

We agree with the trial court that Mushinsky made no promises to defendant, and see no reason to disturb the trial court's credibility determination on this point. On direct examination Mushinsky testified that he made no promises of leniency to defendant in exchange for information. When asked on cross-examination about whether defendant was promised freedom if he "g[a]ve up the trigger man," Mushinsky replied that defendant's claim was "absolutely false." Mushinsky testified that he "already knew who both trigger men were by the time" he talked to defendant. Defendant testified on direct examination that Mushinsky promised him, before the video statement was recorded, that he could go home if he "helped [Mushinsky] get the trigger man." On cross-examination, however, defendant conceded that on the videotape, when asked by Mushinsky if he had

been promised anything in exchange for providing a statement, defendant answered “no.” Also, on direct examination, when asked if it was “really brought home to him” that he did not have to talk to the police if he did not want to, defendant said “no” and that Mushinsky never told him that. However, on the videotape, when asked if he understood that he did not have to talk to Mushinsky or answer his questions unless he voluntarily chose to do so, defendant immediately and clearly answered “yes.” Defendant claimed he only said “yes” on the videotape because he was tired and he thought Mushinsky would let him go.

We also agree with the findings made by the trial court regarding the videotape. Defendant claimed at the suppression hearing that, when the video was made, he was “tired and scared.” Defendant claimed he did not really understand the *Miranda* rights Mushinsky was reading to him. Defendant's statements are belied by his appearance on the videotape. Defendant's overall demeanor during the interview is calm. Defendant does appear somewhat nervous at times, but no more nervous than would be anyone else in his situation. Defendant appears able to understand his situation and the questions posed to him. Defendant is able to provide answers in a clear, narrative structure. Defendant does not appear on the videotape to be in any sort of physical or mental distress. He does not appear to be exhausted or in any sort of suggestive state. He does not appear to misunderstand or be confused by any of the questions asked by Mushinsky. Defendant never asks Mushinsky to repeat a question. We can find no reason, based on the transcripts and videotape, to disturb the trial court's findings of fact. The trial court's factual findings are not against the manifest weight of the evidence.

Upon review, we agree with the trial court that the totality of the circumstances indicate defendant's statements were voluntary. We first consider defendant's age, experience, educational background, and intelligence. Defendant, at 16, is on the older end of the juvenile scale. While he did testify that he attended Greeley Alternative School, it is not clear if he attended because of learning difficulties or behavioral problems. Defendant, in his brief, notes that his presentence investigation report showed he had only completed one semester of high school and had poor grades. However, based on the evidence from the suppression hearing and videotape, defendant was able to understand and give full, concise, and clear answers to questions posed to him. While in his letter to Judge Lucas defendant claimed to have never been in trouble with the police before, he did not appear to misunderstand or be confused by Mushinsky's questions or the discussion of *Miranda* rights. Thus, defendant appears to be of normal intelligence and mental capacity for someone his age.

Second, there is no evidence of physical or mental abuse. Defendant testified that Mushinsky made promises to him that he would be released if he gave information on the shooter, but the trial court found Mushinsky more credible on this matter than defendant, and we see no reason to disturb the trial court's finding in that regard. Mushinsky testified that he never made any threats toward defendant. Defendant was not handcuffed during the interview. On the videotape, Mushinsky's tone with defendant is conversational, not confrontational. There is no evidence that any sort of police trickery was employed to

extract information from defendant. The absence of trickery weighs in favor of voluntariness.

Third, we consider defendant's physical condition. Defendant did appear nervous at times during the videotaped statement, but some nervousness on defendant's part is not inconsistent with voluntariness. On the videotape, defendant does not appear to be sweating or shaking. He does not appear to be in any type of distress. Rather, defendant appears for the most part calm and alert. He does not appear tired or exhausted. Mushinsky testified that defendant was offered food, drink, and the opportunity to use the bathroom. Based on the videotape and the testimony of Mushinsky, which the trial court found more credible than that of defendant, defendant was in good physical condition during his detention and interview.

Fourth, the length of defendant's detention and interview does not render his statements involuntary. The seven-hour duration of defendant's detention is somewhat lengthy. However, Mushinsky testified that he only interviewed defendant from around 6:45 to 10 p.m. that day, and that based on Mushinsky's recollection, defendant was in the interview room from about 5:30 p.m. to 10 p.m. the day of September 19, 2001. Weighing in favor of voluntariness, the interview was conducted in the evening hours, instead of, for example, the very early morning hours, when sleep deprivation can lead to a potentially more coercive environment. … Defendant's total time of detention was less than 12 hours… Defendant was detained for six to seven hours. The interview took place in the evening and the actual interview only lasted three hours. The interview time was reasonable and we cannot say it contributed to a coercive atmosphere that would render defendant's statements involuntary."

(Ohio juvenile not statutorily entitled to counsel during an interrogation which occurs prior to invocation of court's jurisdiction)

In *In re M.W.* (2012) the Supreme Court of Ohio held that "As a matter of first impression... police interrogation of juvenile prior to an invocation of juvenile court's jurisdiction was not "proceeding" in which juvenile was statutorily entitled to representation by counsel."

From the court's opinion: R.C. 2151.352 provides: "A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152 of the Revised Code."

The fallacy of M.W.'s argument is highlighted by the fact that he invokes a right to counsel pursuant to R.C. 2151.352 before the delinquency matter is brought against him in juvenile court. His reliance on R.C. 2151.352, which requires a court to appoint counsel or ascertain whether a party is aware of his right to counsel, is weakened by the fact that the jurisdiction of the juvenile court had not yet been invoked, and thus no court had authority to act.

In view of these reasons and the plain language of R.C. 2151.352, we conclude that an interrogation that occurs prior to the filing of a complaint alleging delinquency or prior to an appearance in juvenile court is not a proceeding that falls within the scope of R.C. Chapter 2151. This determination is consistent with our duty to construe statutes to avoid unjust and unreasonable results. R.C. 1.47(C).

(The need to have clear and unequivocal Miranda waiver forms for juveniles)

In *R.W. v. State* (2012) the Indiana Court of Appeals found the lower court was in error to admit the juvenile defendant's confession because the *Miranda* waiver form was not "clear and unequivocal."

In the context of juvenile delinquency proceedings, our Supreme Court has stated that "[w]ritten waiver forms are not required to satisfy the constitutional demands of *Miranda* or the statutory requirements of [I.C. S] 313251, but they are particularly strong evidence."... Moreover, when used, "they should be clear and unequivocal." Id. In the present case, only Mother signed the top half of the waiver form pertaining to the acknowledgment of the advisement of R.W.'s rights, but only R.W. signed the bottom half, which is the portion of the waiver form that conveys the actual waiver of the rights. Based upon the way the form was completed, one may speculate as to how it came to pass that only one signed the top half and only the other signed the bottom half. Such speculation, however, cannot cure the fatal flaw in the document, i.e., that R.W.'s mother's signature does not appear on the line denominated "PARENT'S SIGNATURE", signifying that Mother acceded to the waiver of R.W.'s constitutional rights. Thus, we must look elsewhere to find evidence that Mother consented to the waiver. Mother did not testify at the denial hearing. Detective Brice Adams, the IMPD officer who advised Mother and R.W. of his rights and presented them with the waiver form, and who conducted R.W.'s questioning, offered no testimony on the subject of Mother's consent to waiver. The videotape itself is similarly unhelpful. In short, we find no evidence indicating that Mother consented to the waiver of R.W.'s rights. Absent a valid waiver of rights, it was error to admit R.W.'s confession."

(The importance of discussing the Miranda rights with a juvenile suspect)

In *Commonwealth v. Wade W.* (2012) the Appeals Court of Massachusetts overturned the lower court's admission of the defendant's incriminating statements because of concern regarding the subject's understanding of the Miranda warnings. From the court's opinion:

"On November 10, 2008, Saugus police officers were investigating a bomb threat that had been written, in some fashion, in the boys' bathroom at Saugus High School. Two officers spoke with the sixteen year old juvenile, in the presence of his mother and stepfather, at the Saugus police station. The motion judge found "the interrogation was custodial." At the beginning of the interview, one officer, Detective Frederick Forni, read to the juvenile his Miranda rights. Forni read them one after another fairly rapidly, and without stopping between them; at the end of the recitation, he asked if the juvenile understood his rights, and then passed the form to the juvenile's mother and asked her to

look at it. Forni did say more than once that both the juvenile and his mother could ask questions if they wished. The juvenile's mother looked briefly at the form and then handed it to her son, who signed it immediately without appearing to read it. Forni then directed the juvenile to a place on the form saying, "[T]his next line just is the waiver; keeping these rights in mind that you still want to talk to us." The juvenile began to write and his mother said, "So he's not waivering his rights?" Forni said, "I'm sorry?" The mother said, "Is that what he's doing? He's not waivering his rights?" Forni responded, "Well, no...." At this point, the second officer, Detective Donovan, spoke over Forni and said, "He's just saying that he'll talk to us." Forni added, "Yeah, that's what we say. If you would, just sign as a witness and then just put mother there."

At the hearing on the motion to suppress, the juvenile's mother testified that she did not understand that she was there to advise her son about his rights, or that he was waiving his right to remain silent, or that "an attorney would have been appointed ... prior to any questioning at [her] request." She also testified that, before she joined her son and his stepfather in the interview room, Detective Donovan had told her that he wanted to speak to her son before she spoke with him or told him anything.

"In reviewing a ruling on a motion to suppress, '[w]e accept the judge's subsidiary findings absent clear error but conduct an independent review of his ultimate findings and conclusions of law.' *Commonwealth v. Bostock*, 450 Mass. 616, 619 (2008), quoting *Commonwealth v. Jiminez,* 438 Mass. 213, 218 (2002). '[O]ur duty is to make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found.' *Commonwealth v. Bostock,* supra at 619." *Commonwealth v. Hoyt,* 461 Mass. 142, 148 (2011). In addition, as in Hoyt, we have before us in the record the interrogation video recording and the transcript of the interrogation. "We are thus 'in the same position as the motion judge in viewing the videotape.' " Hoyt, supra, quoting from *Commonwealth v. Prater*, 420 Mass. 569, 578 n. 7 (1995). See *Commonwealth v. Novo*, 442 Mass. 262, 266 (2004), quoting from *Commonwealth v. Bean,* 435 Mass. 708, 714 n. 15 (2002) (court "will 'take an independent view' of recorded confessions and make judgments with respect to their contents without deference to the fact finder, who 'is in no better position to evaluate the[ir] content and significance' "). "A juvenile defendant over the age of fourteen may properly waive his constitutional rights if, after having been advised of those rights, he was afforded an opportunity to consult with an interested adult who was informed of and understood those rights " (emphasis supplied). *Commonwealth v. McCra,* 427 Mass. 564, 567 (1998). Under all of the circumstances here, we are persuaded that the Commonwealth did not meet its burden of proving beyond a reasonable doubt that the juvenile's waiver of his rights was knowing and intelligent, because it is not clear that his mother, the interested adult, in fact understood those rights. To her question whether the juvenile was waiving his rights, Forni's first response was "No." It may be, as the Commonwealth argues, and as the officer himself testified, that Forni intended the answer to be a contradiction of the mother's statement that the juvenile was not waiving his rights; we do not mean to suggest that the officer intended any deception. However, the officer's state of mind is not the issue.

In addition, Detective Donovan's response, "He's just saying that he'll talk to us," undercut, rather than reinforced, the earlier warnings. In order to show a knowing and intelligent waiver under these circumstances, the officers were required either to respond that the juvenile was in fact waiving certain rights and to explain those rights again or, at a minimum, to ask the mother to explain her question so that they could respond appropriately. The mother's question "clearly indicated that [s]he was confused about the legal consequences of making a statement, and [s]he was effectively, though not intentionally, deceived by the officer's response." *Commonwealth v. Dustin,* 373 Mass. 612, 613 (1977).

(Court considers criteria to determine if a 15-year old student was in custody when questioned by the police at school)

In *Marquita M., a Minor v. State* (2012) the Appellate Court of Illinois, Fourth District, considered the issue of whether a 15-year old student was in custody when she was questioned by the police at school. Fron the Appellate Court's opinion:
Our supreme court has noted the circumstances establishing police custody are not always self-evident..... However, "the Court in Miranda was concerned with interrogations that take place in a police-dominated environment containing 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'..... "In looking at the circumstances of interrogation, courts look at several factors to determine whether a statement was made in a custodial setting, including:

"(1) the location, time, length, mood, and mode of the questioning;

(2) the number of police officers present during the interrogation;

(3) the presence or absence of family and friends of the individual;

(4) any indicia of formal arrest procedure, such as the show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused."

In this case, the evidence indicates respondent was not in custody for Miranda purposes when she made the statements at issue. Respondent was 15 years old at the time. See *J.D.B. v. North Carolina,* 564 U.S. ----, ----, 131 S.Ct. 2394, 2406, 180 L.Ed.2d 310 (2011) (noting a child's age, when known or objectively apparent to a reasonable officer, is a relevant consideration in the Miranda custody analysis). Dinkheller and Officer Hermsmeier came to respondent's classroom during her second-hour class and walked her back to Dinkheller's office. She was not taken to or questioned at the police station. See *People v. Giacomo,* 239 Ill.App.3d 247, 255, 180 Ill.Dec. 435, 607 N.E.2d 329, 334 (1993) (finding 15-year-old's statements were voluntary when made, not at the police station, but at school, "a nonthreatening atmosphere"); *People v. Savory,* 105 Ill.App.3d 1023, 1029, 61 Ill.Dec. 737, 435 N.E.2d 226, 230 (1982) (noting a room adjacent to the principal's office was a less coercive environment than the police station). Moreover,

nothing indicates Hermsmeier handcuffed or physically restrained respondent. Only one law-enforcement officer was present in Dinkheller's office, and nothing indicates Hermsmeier displayed a weapon or exhibited a show of force. Also, no formal booking procedure or search of respondent's person took place before the questioning.

Based on the circumstances, a reasonable person in respondent's situation would not have felt she was in police custody during the questioning that took place in Dinkheller's office. Thus, no Miranda warnings were necessary."

(If a juvenile is questioned in a police car, is he in custody? In this case the court said no.)

In *Sturm v. Darnell* (2012) the U.S. District Court, S.D. Ohio upheld the trial court's decision that in this case the juvenile offender was not in custody, even though he was questioned in a police vehicle. They stated in their opinion that: "The trial court found the following facts in support of its conclusion that Sturm was not in custody when he was interviewed by Detective Warden. First, the officers interviewed Sturm in an unmarked police car in front of Sturm's residence. This vehicle was indistinguishable from a regular passenger vehicle, except for the presence of a small police radio, which was not turned on during the interview. Also, the entire passenger compartment of the vehicle was open and all four doors on the vehicle had working door handles. Second, the officers obtained permission from Sturm's father before questioning Sturm. Third, Sturm's father sat in the unmarked car with him for the first portion of the interview. Fourth, before any questioning began, Detective Warden told Sturm that he was not under arrest, that he was free to leave at any time, and that he did not have to speak with the officers. Sturm responded that he understood. Based on these findings, which are supported by the record, the trial court did not err in concluding that Sturm was not in custody at the time of the questioning."

(Is the request by a 15 year old to speak to their mother (in a custodial setting) tantamount to requesting an attorney? In this case, no.)

In *People v. Nelson* (2012) the California Supreme Court considered the issue of whether the defendant (15 years old) made a post waiver invocation of his *Miranda* rights by asking several times to speak to his mother or by making certain other statements while being questioned. If he did, then the investigators' failure to stop the interrogation compelled suppression of the statements he made after the invocation.

In this case the trial court determined that defendant made a knowing, intelligent, and voluntary waiver of his *Miranda* rights. The Court of Appeal agreed...

"Here, investigators Salcedo and Sutton questioned defendant for over five hours, and the entire interrogation was both recorded and transcribed. At the hearing on the motion in limine, the trial court stated it had reviewed the videotape and considered what transpired at the interrogation. The court also received testimony from Salcedo and Sutton, as well as from defendant himself. Defendant acknowledged he had understood the *Miranda*

rights that were read to him at the start of the interrogation, and admitted there were no threats, no weapons, no handcuffs, and no promises from the investigators during the investigation. Defendant said he knew what an attorney was, because he had been represented by an attorney in juvenile court. Defendant had agreed to speak with the investigators, because he felt it would "seem funny" if he did not do so. He explained that, as the hours went on, he was "sort of being worn down" and getting tired and stressed as the investigators got tougher in their questioning. Defendant also admitted having lied to the investigators during the interrogation. The recording of the interview showed that defendant was deceptive throughout the five-hour session and admitted to wrongdoing only when confronted with evidence or caught in a lie.

In announcing its ruling, the trial court made an explicit finding that, based on its reading of the transcripts, listening to testimony, and viewing the recorded interview, defendant had "zero credibility." Then, after determining that defendant had made a knowing, intelligent, and voluntary waiver of his *Miranda* rights at the outset of the interrogation, the court addressed the issue at the heart of this matter. Summarizing the details of the interrogation and viewing defendant's statements in context, the court found that, whenever defendant requested to speak to his mother, he did so because he wanted to tell his mother what was going on and to ask her what he should do. The court further found that, even if defendant subjectively desired attorney assistance, his statements were objectively ambiguous because they were limited to the issue whether or not he should take the polygraph test. That is, although defendant indicated reluctance to take the test without speaking to his mother or a lawyer, he "continued to consent to voluntarily talk" to the authorities on other topics. The court also observed that, "even though in his own mind he thought his mother was [only] ten minutes away," defendant went ahead and signed a written confession without waiting for her arrival. Relying on ..... the court found that defendant did not invoke his *Miranda* rights, and that even if there was a request for an attorney, it was ambiguous and did not require cessation of the interview. As we shall explain, the trial court's conclusions are both legally and factually supported.

Our review of the transcribed and videotaped interview finds ample support for the trial court's resolution of the conflicting inferences that may be gleaned from defendant's various requests and statements.... After waiving his *Miranda* rights, defendant was open and responsive to questioning on any topic. Defendant, who was 15 years old, appeared confident and mature. About three and a half hours into the interview, the investigators asked why defendant hurt Thompson and whether he was willing to take a polygraph test. Defendant responded by asking to call his mother, and, when asked the reason for the call, he offered no indication that he wanted an attorney or that he did not want to talk further. Instead, he specifically stated he wanted to let his mother "know what's happening" and to ask her what he should do because he was being accused of murder. On this record, the trial court properly concluded that a reasonable officer in the circumstances would not have viewed defendant's request to call his mother as a clear and unequivocal invocation of the *Miranda* rights.

As the interrogation proceeded, defendant asked several more times to call his mother when the investigators again asked about a polygraph test, or why he hurt Thompson. The

investigators generally did not inquire into the reasons for the subsequent requests, but defendant clarified a second time that he wanted to let his mother know "what's going on right now" and where he was. Given the circumstances surrounding each of defendant's requests, a reasonable officer would not have understood any of them as an unambiguous assertion of *Miranda* rights. Although defendant became increasingly upset during the interview, and quieter toward the end, the questioning properly continued because defendant never communicated an intent to stop the interview altogether.

On this record, we conclude the trial court did not err in denying defendant's in limine motion. A reasonable officer in the circumstances would not have understood defendant's requests to call his mother, or any of his other statements, to be unambiguous and unequivocal invocations of his *Miranda* rights.... Accordingly, investigators Salcedo and Sutton were not required to stop their questioning, and defendant's custodial statements were properly admitted at trial."

(Was defendant's request to speak to his mother an assertion of his right to silence? In this case, no.)

In *State v. Diaz-Bridges* (2012) the Supreme Court of New Jersey considered the issue of whether the defendant's statements about his desire to speak with his mother were assertions of his constitutionally-protected right to silence.

"Because of the nature of the analysis undertaken by the trial and the appellate courts and the issues raised before this Court, we recount in detail what happened during the nearly ten hours of interview that followed.

At 11:25 a.m., when the questioning started, the detectives advised defendant of his *Miranda* rights, which he acknowledged that he understood and waived. The detectives then reminded defendant that there were outstanding warrants for him in New Jersey in matters unrelated to the O'Brien murder and advised him that he had the right to have a public defender present for any questioning concerning those unresolved matters. Defendant was also told that an attorney had been assigned to represent him in his unrelated Morris County cases and that he had the right to have that attorney present during their interview with him. After acknowledging that he was aware of these rights, defendant waived them as well.

During the first three hours of the interrogation, defendant denied committing the murder. Instead, he gave an account of his activities on the day of the murder and attempted to divert attention from himself by suggesting that two other young men in the neighborhood were probably the culprits. Eventually, he told the detectives that the victim's son Tyler had committed the murder and had confessed to him. His explanation, all delivered in a tone and with gestures suggesting he was only trying to help the detectives find the killer, was inconsistent with some of his prior statements and with other information about the crime that the detectives had already learned.

..... At approximately three hours and forty-two minutes of elapsed time, defendant was

asked again what happened on the day of the murder. After a momentary pause, defendant said, "Can I just call my mom first?" Wilson then responded by telling defendant that they wanted "to hear first what you have to say because we, you want ... right now you got to get it off your chest." As defendant continued crying softly, Caruso asked if he wanted to talk to his mother because he was ashamed. For the next few minutes the detectives both consoled him and tried to prompt him to tell them what happened. Apart from several comments not responsive to any questions, defendant cried and sniffled.

..... After defendant confessed, the detectives asked if he wanted anything and offered him a tissue. He responded by saying that he wanted to talk to his mother. Wilson told defendant that they would arrange a call with his mother, but that they wanted defendant to relax and get his thoughts together. The detectives then took a thirty minute break while Dangler remained with defendant. During the break, defendant again asked if he could speak to his mother, and Dangler replied that they would arrange it. Minutes later, after defendant again asked if he could make that phone call, Dangler left the room, telling defendant that he would ask about the phone.

... When the interrogation resumed, defendant again began to ask to talk to his mother, repeating his request numerous times during the next three-quarters of an hour. Most significant were his comments to the detectives about the reasons why he wanted to speak with her. In particular, he explained that he wanted to talk to her so that he could "stay calm," that he believed she was the only one who would understand, and that he wanted her to hear what he had done from him rather than from the police. In response to one of these statements, Wilson asked defendant directly, "Do you, do you still wish to talk to us?" and defendant replied by saying: "yes[.] I have no problem talking to you; I just want to talk to my mom. That's it."

... In this appeal, that review leads us to the inescapable conclusion that defendant's request to speak with his mother, however frequently and fervently repeated, sprang from the very understandable desire to tell her what he had done before she heard it from the police and to hear her words of comfort. Those requests, based on all of the circumstances, did not at any time constitute defendant's invocation of his right to silence.

(Is a request to talk to his mother invoking the defendant's right to remain silent? No.)

In *Locust v. Ricci* (2011) the U.S. District Court, D. New Jersey, rejected the defendant's claim that the trial court erred in denying suppression of his inculpatory statements on the grounds that the police did not honor his request to invoke his right to counsel and his right to remain silent, and that the incriminating statements were the result of an overbearing of his will.

In their opinion the District Court stated that, "Defendant contends his request to speak with his mother was an invocation of the right to silence and that by continuing the questioning, the police "violated the bright-line rule" of *State v. Hartley,* 103 N.J. 252, 267 (1986), and his statement must be suppressed as unconstitutionally compelled.

However, not every request by a defendant or break in questioning is an invocation of the right to silence. Id. at 222. In order to invoke the bright-line rule and require scrupulous adherence to defendant's request to speak with a family member, the request must be made for the purpose of obtaining advice from a trusted family member... In other words, the request must be the equivalent of a direct statement that defendant does not wish to continue speaking with the police or wishes to obtain advice from the family member before any interrogation continues. Stated another way, the request must be the equivalent of a request to halt the questioning.

Here, the circumstances indicate that defendant was not, in fact, invoking his right to silence. Defendant expressly denied that he needed the assistance of counsel and thereby implied that his call to his mother would not be for obtaining advice but for some other purpose. Defendant also willingly agreed to postpone his call and appeared eager to bolster his claim of innocence. Indeed, according to the officers, defendant did not exhibit any unwillingness to speak with police at any time during the interrogation. Moreover, defendant signed several waiver forms, expressly waiving the assistance of an attorney and his right to silence. Consequently, we reject this argument.

In this same case, the court addressed the issue of overbearing the defendant's will by misrepresenting evidence

Locust also argues that his confession should have been suppressed because his free will was overborne and his statement was not given voluntarily, in violation of the Fifth Amendment. Locust raised this argument on direct appeal, insisting that the record shows that he was exhausted, hungry, impaired and frightened at the time he made his admissions. Furthermore, he claims that Captain George's misrepresentation about blood being found on petitioner's clothes was "flagrantly deceptive conduct" that had the capacity to overbear his will.

"The fact that the police lie to a suspect does not, by itself, render a confession involuntary." ... "[U]se of a psychologically-oriented technique during questioning is not inherently coercive[;] ... [t]he real issue is whether the person's decision to confess results from a change of mind rather than from an overbearing of the suspect's will ." ... In order to render a confession involuntary, the suspect must have been subjected to "very substantial" psychological pressure.

That is not what happened here. Defendant, who had normal intelligence, had prior experience with the police and fully comprehended his situation, as evidenced by his initial lies. Additionally, there was testimony on which the trial judge was fully entitled to rely, indicating that defendant was provided with food, drink, and cigarettes while at the station, that he appeared alert, that he was Mirandized at least three times, and that he was not mistreated in any way. The lie by Captain George did not have the capacity to overbear defendant's will. It seems more likely that defendant simply realized that he was not going to get away with the crime and decided to unburden himself. Therefore, we see

no basis to suppress defendant's inculpatory statement. Click here for the complete opinion.

(Is a student in custody when asked by school officials to accompany the police for questioning?)

In *Kalmakoff v. State* (2011) the Alaska Supreme Court outlined the criteria to determine custody for a student questioned by police. In this case a jury convicted Byron Kalmakoff of raping and murdering his cousin in the village of Pilot Point. Kalmakoff had just turned 15 when the crime was committed. On the day of his first interview the police told principal teacher, Jodi Mallonee, that she "needed to get Byron for the troopers so they could interview him." Mallonee called Kalmakoff out of class and Etuckmelra drove him and two other students to the city offices in the VPSO truck. All that the students were told was that the troopers needed to get some information from them. The trial court found on remand that Kalmakoff "was not told that he did or did not have to accompany the VPSO to the city offices, and that it is likely that he believed that he had to go." Kalmakoff was never told whether he had to answer the troopers' questions. Nobody contacted Kalmakoff's grandparents--who were also his adoptive parents--to inform them about the interview. The subject was not advise of his Miranda rights before making incriminating statements, which were not suppressed because the trial court determined that the defendant was not in custody during the initial interview.

The Alaska Supreme Court disagreed, finding that the totality of circumstances surrounding the first interview were such that the defendant should have been advised of his rights. The court stated the following:

Here, Kalmakoff was removed from school and transported to the interview by the VPSO in her official vehicle. The troopers had instructed the VPSO to bring Kalmakoff, along with two other students, to the city offices. Even if the use of the VPSO truck can be explained by convenience, Kalmakoff was still escorted to the interview by a law enforcement officer. Furthermore, the VPSO told Kalmakoff that the troopers needed to get some information from him, and neither the VPSO nor the principal teacher told Kalmakoff that he did not have to attend the interview or answer the troopers' questions. On remand, the superior court found that Kalmakoff likely believed that he had to go with the VPSO to the interview. Finally, the superior court found that neither the troopers nor school authorities informed Kalmakoff's grandparents about the interview and Kalmakoff was not given the opportunity to consult with or obtain the presence of a parent or guardian before the interview began. Even when Kalmakoff's grandmother came to the city offices, the troopers did not inform her that they were questioning Kalmakoff or invite her to join them in the interview.

The events before the interrogation thus weigh strongly in favor of a finding that Kalmakoff was in Miranda custody throughout the first interview. Facts intrinsic to the interrogation also support this conclusion. Kalmakoff had turned 15 only a few weeks before, and he had no previous history of delinquent acts or contact with law enforcement. Troopers Mlynarik and Stephenson were in uniform and visibly armed, and

they did not tell Kalmakoff that he was free to leave or that he did not have to answer their questions. Instead, Trooper Stephenson repeatedly emphasized that Kalmakoff needed to tell them the truth. Moreover, the troopers' questions became pointed and accusatory well before the break in the interview where the trial court found that the interview became custodial, including a series of questions that directly implicated Kalmakoff in the murder.

Kalmakoff was in custody for Miranda purposes throughout the first interview and was therefore entitled to Miranda warnings prior to questioning. Because the troopers failed to administer those warnings, all of Kalmakoff's statements made during the first interview were obtained illegally and must be suppressed.

(The statement that you are "not going to be under arrest" and that "[y]ou're gonna walk out of here one way or the other….you're not under arrest." was found to be coercive.)

In *In the Matter of M.E. Jr., Alleged Delinquent C**hild*** (2011) the Court of Appeals of Ohio found that the interrogator's statement "that M.E. would not be arrested was an improper promise of leniency. Clark told M.E. he was "not going to be under arrest" and that "[y]ou're gonna walk out of here one way or the other. * * * You're not under arrest." While Clark may have been attempting to represent to M.E. that he would not be taken into custody at the conclusion of the interview, his statement essentially conveyed that M.E. would not be under arrest at any time, regardless of any statements or confession he made. Such a statement could be objectively viewed as a promise that M.E. would not be criminally punished for his actions. "When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if * * * the defendant * * * might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible."

.....the weight of the other factors supports a conclusion that M.E.'s confession was involuntary. M.E. is a juvenile and was only sixteen at the time of the confession. The record shows that he did not have prior criminal experience. In addition, evidence presented at the suppression hearing showed M.E.'s mental capacity is limited. Thompson testified that M.E.'s IQ was in "the 70s" and that he was "borderline mentally retarded ." Although Clark testified that M.E. appeared intelligent and was responsive to the questions, the trial court found M.E. has "diminished cognitive capability."

When considering the coercive nature of Clark's statement that M.E. would not be under arrest in conjunction with other factors, the totality of the circumstances render M.E.'s confession invalid.

(The Supreme Court holds that a child's age properly informs the Miranda custody analysis)

In *J.D.B. v. North Carolina* (2011) the United States Supreme Court ruled that a juvenile's age must be a consideration in the determination of custody and the subsequent advisement of Miranda rights.

The Court stated that "Reviewing the question de novo today, we hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case." .

(Elements to consider in determining a juvenile's ability to make a knowing and intelligent waiver of his rights)

In *State v. Gutierrez* (2011) the Supreme Court of New Mexico considered whether or not a 16 year-old defendant suffering from " a mental impairment caused by attention deficit hyperactivity disorder (ADHD)" could make a knowing and intelligent waiver of his rights. In their opinion the court outlined the lements to consider in making this assessment:

"In determining whether [a child over the age of fifteen] knowingly, intelligently and voluntarily waived the child's rights, the court shall consider the following factors:

(1) the age and education of the respondent;

(2) whether the respondent is in custody;

(3) the manner in which the respondent was advised of the respondent's rights;

(4) the length of questioning and circumstances under which the respondent was questioned;

(5) the condition of the quarters where the respondent was being kept at the time of being questioned;

(6) the time of day and the treatment of the respondent at the time of being questioned;

(7) the mental and physical condition of the respondent at the time of being questioned; and

(8) whether the respondent had the counsel of an attorney, friends or relatives at the time of being questioned."

The court concluded "In this case, we similarly conclude that, notwithstanding Child's ADHD diagnosis, there is no evidence that he lacks sufficient intelligence to have understood his rights or the consequences of waiving them. Evidence in the record supports the district court's findings that Child was sixteen years and eleven months old

at the time of his interrogation, he had been advised of his rights on previous occasions, and he had, in fact, refused to speak to authorities without a lawyer present on at least one of these occasions. In addition, Child possessed a lengthy juvenile arrest record and had appeared in court several times. On these facts, we are not persuaded that Child's ADHD prevented him from sufficiently understanding his rights or the consequences of waiving them. One advantage of the totality-of-the-circumstances approach is that it allows courts "to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved." Fare, 442 U.S. at 725. Another advantage is that it "refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation."

(16 year-old's confession upheld – example of factors to consider in juvenile interrogation)

In *State v. LaCroix* (2011) the Court of Appeals of Washington, Division 1, upheld the admissibility of a 16 year-old's confession. On appeal the defendant had claimed that the length of the interrogation (5 hours) and the coercive police activity during the interrogation should have resulted in a suppressed confession. In their opinion the Appeals Court found that "As noted, the trial court's finding that he was interrogated for approximately five hours during normal waking hours is supported by the evidence. The five hours of interrogation were spread over a nine hour period. He was provided with food, beverages, bathroom breaks, and other periods without questioning. LaCroix cites no authority compelling a finding that such circumstances amount to coercion."

As to coercive police activity, the court stated that, "A police officer's psychological ploys, such as playing on the suspect's sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect's decision to confess, "but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary." ….."The question [is] whether [the interrogating officer's] statements were so manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess."

"LaCroix next points to the officers' repeated assertions both that it was in his best interest to be honest with them, and that they believed he was being dishonest. In this regard he also points to the officers' use of the CVSA in support of their statements to him that he was not believed by them and to the officers' claim that another suspect had implicated him.

"Moreover, the officers' references to the results of the CVSA in support of their contentions that LaCroix was being dishonest did not render LaCroix's subsequent statements involuntary…. the United States Supreme Court rejected the proposition that the use of a polygraph during interrogation is inherently coercive. In fact, " '[c]ourts have held confessions to be voluntary when police falsely told a suspect that his polygraph

examination showed gross deceptive patterns,'… and Washington courts have declined to suppress confessions merely because they were given after the administration of a polygraph test.

"LaCriox's age at the time of his interrogation similarly does not militate in favor of finding that his statements were involuntary. At the time of the interrogation, LaCroix was "one and a half months shy of his seventeenth birthday." While a suspect's age must be considered in evaluating the admissibility of a confession, it is well established that a 16–year–old can voluntarily confess, even in the absence of a friendly adult."

(Court up holds Miranda waiver of a 12 year old)

In *In re ANDREA V., a Person Coming Under the Juvenile Court Law. The People, Plaintiff and Respondent, v. Andrea V.* (2010) the Court of Appeal, Second District, California upheld the *Miranda* waiver of a 12 year old. In reaching their decision the court stated that, "Here, Officer Gonzalez's testimony, which the juvenile court clearly credited, supports the finding the minor knowingly and voluntarily waived her *Miranda* rights. Officer Gonzalez testified he and his partner questioned the minor while the three of them were seated at a table in an interview room. No guns were drawn. Officer Gonzalez testified he read the minor her rights, and she readily responded affirmatively when asked if she understood each right. He also asked if the minor wanted to relate what had happened, and she answered, "Yes," and then confessed to the robbery. The questions Officer Gonzalez posed were simple and straightforward. He made no threats to the minor. Nor was there any evidence he attempted to deceive or made promises to the minor during the interview. For her part, the minor actively participated in the interview, and answered appropriately; at no time did she express any confusion, or inability or unwillingness to respond. Apart from the minor's testimony at the Evidence Code section 402 hearing, which the juvenile court was free to disbelieve, there is nothing to suggest a violation of her *Miranda* rights. Thus, the totality of circumstances surrounding the interview establish the minor knowingly and voluntarily decided to forgo her rights to remain silent and to assistance of counsel. The juvenile court did not err in admitting the confession into evidence."

(What constitutes custody for an 11 year old?)

In *In the Matter of M.G., a Juvenile* (2010) the Court of Appeals of Texas overruled the trial court's decision to admit the confession of an 11 year old. The defendant had appealed on the basis that "the trial court erred in overruling his motion to suppress his videotaped statements because the statements were the result of custodial interrogation, yet he had not been advised of his rights, which violated the Fifth and Fourteenth Amendments to the United States Constitution; Article 1, Sections 9 and 10 of the Texas Constitution; and section 51.095 of the Texas Family Code."

In reaching their decision to reverse, the Court of Appeals pointed out that "The room was small. Detective Caldwell sat very close to M.G. while questioning him and appeared to be, at least in part, between M.G. and the door. Detective Caldwell never informed him

of any of his rights under the Texas Family Code, and she was not sure if she told him that he was free to leave. Instead, Detective Caldwell made it clear that M.G. was the focus of the investigation involving the sexual assault of his brother. Despite M.G.'s denials, Detective Caldwell repeatedly asked M.G. if he had sexually assaulted his brother. At some point, M.G. became teary-eyed. Nevertheless, Detective Caldwell continued to press him for truthful statements, telling him that she knew that he was not being completely honest during the Scotty's House interview. She also stressed to him several times that they had found a shirt in his bedroom with potential DNA evidence on it and brought his mother into the interview room, not for M.G.'s benefit, but only to allow Detective Caldwell to take DNA cheek swabs from him. After all this, M.G. finally gave a statement inculpating himself in the sexual assault.

Based on the circumstances outlined above, we conclude that a reasonable eleven-year-old child would have believed that his freedom of movement had been significantly restricted at some point after Detective Caldwell began to press M.G. for a truthful statement."

(Juvenile confession found inadmissible – "thirteen hours of relentless overnight questioning of a sleep-deprived teenager by a tag team of officers overbore the will of that teen, rendering his confession involuntary")

In *Doody v. Schriro* (2010) the United States Court of Appeals, Ninth Circuit found the defendant's confessions should have been found inadmissible. From the court's opinion:

"This case emerged from a horrendous crime-the murder of nine individuals, including six monks, inside a Buddhist temple. The ensuing investigation ensnared Petitioner Johnathan Doody, a seventeen-year old high school student. Although Doody eventually confessed to participating in the nine murders, he now challenges his confession, asserting that the *Miranda* advisements he was given were inadequate and that his confession was involuntary. We agree on both counts. Specifically, we conclude that the advisement provided to Doody, which consumed twelve pages of transcript and completely obfuscated the core precepts of *Miranda*, was inadequate. We also hold that nearly thirteen hours of relentless overnight questioning of a sleep-deprived teenager by a tag team of officers overbore the will of that teen, rendering his confession involuntary.

(Court upholds Miranda waiver by 15 year-old)

In *State v. Fardan* (2009) the Minnesota Court of Appeals found the Miranda waiver of a 15 year old to be valid and that the Appellant's single request for his father, which the district court noted was established only by appellant's own testimony, was simply not enough to indicate that he was invoking his right to remain silent. "The Supreme Court has repeatedly rejected a per se rule requiring parental presence at interrogations of juveniles."

(Court upholds Miranda waiver of 14 year old)

In *In re Jeffrey W.* (2009) the Court of Appeals of Arizona upheld the trial court's decision to admit the confession of a 14 year old who subsequently appealed on the basis that "his lack of prior police contact, young age, mental and cognitive deficits, [and] upbringing to respond to authority, all clearly manifested an inability to waive his Miranda rights," thus rendering his confession involuntary.

The Appeals court found that the State presented adequate evidence at the voluntariness hearing that Jeffrey understood and voluntarily waived his rights. Detective F. testified, and the video recording of the interview confirmed, Jeffrey told Detective F. he understood each right after it was read and explained to him, he did not ask for further clarification, and he signed a written waiver of his rights. Further, Jeffrey invoked his right to have a parent present during the interview when advised he could do so, and Detective F. waited until Jeffrey's mother arrived to begin formally questioning him. And, although there was evidence Jeffrey's cognitive abilities were below average for his age, "[l]ow intelligence, in itself, will not invalidate an otherwise knowing and intelligent waiver." Under these circumstances, we see no abuse of discretion.

(Appeals court reverses admissibility of a confession from an 11 year old because of the interrogator's behavior)

In *State in the interest of J.E.T.* (2009) the Court of Appeals of Louisiana reversed the trial court's decision to admit the confession from an 11 year old, stating that "Considering the entire sequence of events from the time the Juvenile was picked up to the time his interview was concluded, we conclude that the eleven-year-old Juvenile's waiver was improperly induced by threats, coercion, and intimidation. The Juvenile was alone with detectives during the drive to the sheriff's office, with one detective admittedly "joking" about harming the Juvenile. After the Juvenile arrived, he entered the building without his family, via the entrance for suspects. The Juvenile's mother did not stay by his side to protect him, but chose to stay behind while her son was interrogated for two hours with his stepfather, a man with whom he had a strained relationship and whose biological daughter was the victim.

During the interview, the Juvenile was threatened to tell the truth "or else," he was cursed at, and he possibly had objects thrown at him. The timing of the incident involving the lights is not entirely clear and may have occurred after the interview had concluded. The incident, nonetheless, is demonstrative of the Juvenile's fear and lends further support to the credibility of the Juvenile's claim that he was intimidated, threatened, and coerced to waive his rights and confess to the offense, as well as Detective Primeaux's willingness to intimidate, threaten, and coerce a suspect."

(Juvenile's confession ruled inadmissible because of several violations of the Texas Family Code)

In *In The Matter of D.J.C., Appellant* (2009) the Court of Appeals of Texas, Houston (1st

Dist.) reversed the trial court's decision to admit the confession of a 16 year old defendant, stating that when the interview moved from a non-custodial interview into a custodial environment the juvenile was not given the proper advisement of rights, and it was a violation of the Texas Family Code not to let the defendant's grandmother (his legal guardian) sit in on the questioning. .
(Court finds confession inadmissible because the Miranda rights were not properly explained to the defendant - a 15 year-old with "borderline intellectual functioning")

In *Etherly, Petitioner, v. Schwartz, Respondent* (2009) the U. S. District Court, N.D. Illinois, Eastern Division found that the trial court was in error in admitting the defendant's confession. The U.S. District Court said that "In this case, police officers and ASA Alesia advised Mr. Etherly of his Miranda rights in a formulaic fashion, then asked him to acknowledge that he understood those rights, but neither the detectives, nor the ASA, nor Youth Officer DiGrazia made any attempt to probe the boy's actual understanding of the rights recited or asked him to explain the meaning of the warnings in his own words. Compare Hardaway, 302 F.3d at 761 (after being advised of Miranda rights, juvenile defendant "explained his rights back to [the ASA] in his own words, stating that he did not have to speak with [her] if he didn't want to, that anything he told [her] she could tell a judge in a trial against him, that he could have an attorney there when he was questioned about the case, even if he or his family couldn't pay for one.") Indeed, the evidence is that the Miranda warnings Mr. Etherly received exemplified the kind of rote "recitals which merely formalize constitutional requirements" that the Court disregarded in Haley because of the defendant's youth. Accordingly, the appellate court arguably transgressed Haley, based on Mr. Etherly's age alone, by according any weight at all to the fact that he formally received Miranda warnings. This transgression reached the level of unreasonable error, however, when factors beyond Mr. Etherly's youth are taken into account.

At the time of his arrest, Mr. Etherly had no criminal history or experience with the criminal justice system.....

Moreover, Mr. Etherly was a learning disabled high school freshman FN9 with "borderline intellectual functioning" and a "very limited vocabulary," who was failing all of his classes and unable to read, write, or spell basic words. These factors underscore the unlikelihood that Mr. Etherly's acknowledgment of his Miranda rights indicated any meaningful understanding of-much less a knowing waiver of-those rights.

For the foregoing reasons, the Illinois Appellate Court's determination that Mr. Etherly's confession was voluntary amounted to a unreasonable application of the Supreme Court's "totality of the circumstances" test."

(Can a 12 year old make an intelligent and knowing waiver of their rights? Yes)

In *State v. F.G.H.* (2009) the Court of Appeals Washington Division 3 upheld the conviction of a 12 year old, who on appeal claimed that "he did not knowingly, voluntarily, and intelligently waive his *Miranda* rights before confessing to police."

The Appeals court stated that "Here, F.G.H. told the officer he understood his rights and wanted to make a statement. Officer Masters testified he had no problem communicating with F.G.H. and he believed F.G.H. had no difficulty understanding him. While F.G.H. was only 12-years-old, nothing in the record shows that he lacked the intelligence or capability to understand the right to remain silent. F.G.H. argues 12-year-olds are too young, in general, to understand the full consequence of the exercise or waiver of their constitutional rights. But, "the test is whether a person knew he had the right to remain silent, and that anything he said could be used against him in a court of law, not whether he understood the precise legal effect of his admissions." Dutil v. State, 93 Wn.2d 84, 90, 606 P.2d 269 (1980). Moreover, "If a juvenile understands that he has a right, after he is told that he has that right, and that his statements can be used against him in a court, the constitutional requirement is met." Id. Under the totality of the circumstances, we conclude F.G.H. was capable of waiving his right to remain silent. Substantial evidence supports this finding and this finding supports the court's conclusion that F.G.H.'s confession was voluntary. There was no error in admitting the confession at F.G.H.'s bench trial."

(Juvenile interrogation in school - was Miranda required? Does a deceptive offer to help render the confession inadmissible? Not in this case)

In *State V. J.S.* (2008) the Court of Appeals of Washington, a 13 year old student was questioned by a police detective in the office of a school counselor at J.S.' school. "The counselor and a Child Protective Services (CPS) investigator were also present. Detective McCarthy was not in uniform, his jacket was zipped so that his firearm and handcuffs were not visible, and he had arranged the chairs in the room so that J.S. would be seated next to the door. Detective McCarthy did not give *Miranda* warnings before the interview, but the detective told J.S. that he was not under arrest, was not required to answer any questions, was free to leave at any time, could not get in trouble for refusing to talk or walking out, and would be allowed to return to his classroom after the interview." "We agree with the trial court that the interrogation of J.S. was not custodial."

The defendant also claimed that the trial court erred by admitting his statement because the interrogator was not truthful and mad false promises during the interview.

J.S. contends that his statement was involuntary because Detective McCarthy deceived and threatened him. According to J.S., Detective McCarthy falsely told him the purpose of the interview was to get him help and threatened J.S. by saying that he could not receive help unless he confessed. That description, however, does not fairly represent what happened.

The detective stated that his goal for the interview was to find the truth and to offer help. He did not threaten J.S. Rather, he assured J.S. that it was common for boys his age to be curious about those things, but that T.B.'s brother was certain he saw sexual contact, and for the adults present to be able to help J.S., they needed to know the truth. When J.S. continued to deny the allegations, the detective reiterated that if J.S. was not truthful, the

detective could not help him: "But if your [sic] not willing to be honest about it, then you know it's, the help situation is over, right?"

Even if the detective's offer of help was deceptive, there is substantial evidence in the record to support the trial court's conclusion that J.S.'s statement was voluntary."

(15 year-old's confession should have been suppressed – Miranda violation [Siebert])

In *People v. Lopez* (2008) "The 15-year-old defendant was brought to the police station at approximately 1 p.m. and placed in an interrogation room. Detectives questioned him at that time and advised him that Leal had implicated him in Hector's murder. Defendant provided the detectives with information and was left alone in the same room, with the door closed, for four to five hours while detectives continued to investigate. Defendant was not handcuffed during this period and the door to the interview room remained unlocked. However, defendant's freedom of movement was restricted, as he was not allowed to leave the room without an escort and was never told that he was free to leave the police station."

"At 6 p.m., the detectives who initially brought defendant to the station, questioned him, and left him in the interview room returned to that same interview room and spoke to defendant again. They told defendant that Leal had admitted to participating in Hector's murder and that Leal had implicated him. At this time, defendant was aware that Leal had now implicated him twice in this crime, and that Leal had confessed. Without providing *Miranda* warnings, the detectives asked defendant "whether he was involved in this incident or not." Defendant answered by giving an incriminating oral statement. Detective Bautista testified that defendant was not questioned while he gave the statement, he "just kept talking." After defendant confessed, the detectives stopped questioning him, gave him his *Miranda* warnings, and terminated the interview."

"We recognize that defendant's handwritten statement was taken after defendant received *Miranda* warnings at least twice, that an assistant State's Attorney was doing the questioning rather than a detective, and that defendant's father was present. However, the unwarned and warned statements were taken close in time, in the same place, with Detective Keane present for both, and defendant was never advised that his oral statement would be inadmissible. Viewing all the relevant factors, we cannot conclude that a reasonable juvenile in defendant's position would have understood that he had a genuine choice about whether to continue talking to the police. We find that defendant's handwritten statement was involuntary for fifth amendment purposes pursuant to the United States Supreme Court's decision in Seibert. Defendant's handwritten statement should have been suppressed."

(Juvenile claims her confession was coerced because the detective repeatedly told her she had to tell him what happened, thus leading her to believe she did not have the right to remain silent – court rejects this argument)

In re J.S (2007) J.S. argues her confession was coerced and thus involuntary because the

detective who questioned her repeatedly told her she had to tell him what happened, thus leading her to believe she did not have the right to remain silent; her parents were not with her during the school interview; and she had made the functional equivalent of a request to end the interrogation."

"During the school interview, the detective repeatedly asked J.S. to tell him what happened with C.S. For example, the detective stated I need you to tell me what happened.

I need you to be honest with me. There's no telling a part of the truth here and not telling me the rest of it[.] I need to have the whole story....

But I need you to tell me the truth and not leave anything out and not hold things back or change the story. I need to know what happened.

Although J.S. argues these questions led her to believe she could not remain silent, we disagree.

There is nothing wrong with a police officer asking a juvenile to explain what occurred or to tell the truth."

(Does a 12 year-old juvenile have to be advised of their Miranda rights when questioned about a criminal matter by the police while in the school building? No)

In re J.H., Appellant (2007) the District of Columbia Court of Appeals stated:
Appellant, who was twelve years old at the time, was interrogated by a police officer at his school and confessed to a sexual offense involving his three-year-old sister. No Miranda warnings were given by the police officer. Concluding that appellant had not been in "custody," the trial court declined to suppress the confession, which constituted the primary evidence against the youth. Applying the proper standard of review to the record presented, "we cannot conclude as a matter of law that [appellant] was in custody when the police interrogated [him], i.e., that [his] freedom of action was curtailed to a degree associated with a formal arrest." Morales v. United States, 866 A.2d 67, 74 (D.C.2005). We therefore uphold the trial court's denial of the motion to suppress. We also conclude that the confession was adequately corroborated.

(Failure to allow 17 year old to call his mother nullifies confession)

In *People v. Westmorland* (2007)t he Illinois Appellate court upheld the suppression of a 17 year old's confession, stating that:

"There were, however, some quite unsettling aspects of the interrogation. The officers made no attempt to locate defendant's parents when they arrested him and also denied his two requests during the interview to speak to his mother. Defendant was "immature" for his age and "wide-eyed." With defendant already vulnerable from the complete denial of parental contact, Galason raised his voice during the interview and said, "I don't give a

shit if you go to jail or not." This was the conduct that, in the trial court's words, "terrified" defendant. Under the totality of the circumstances, which encompass both defendant's individual psychological makeup as well as the officers' conduct, we agree with the trial court that defendant's will was overborne."

(US District Court upholds confession of 16 year-old who was questioned without parent or guardian present)

In *Woodham v Wilson* (2006) the US District Court, S.D. Mississippi found that a 16 year-old's confession was admissible even though he was interrogated without a parent or guardian present. The court said that "Woodham contends the trial court should have excluded his two confessions because of his young age (sixteen) at the time they were made and because he had no guardian or attorney present. The state supreme court rejected this claim, holding that the proper analysis was of the "totality of the circumstances," and that in view of those circumstances, his confessions were admissible."

(Juvenile confession suppressed for failure to offer "concerned adult" protections)

In *State v. Westmorland* (2006) the Illinois Appellate Court, Second District, upheld the trial court's decision to suppress a 17 year-old defendant's condition, focusing on the officers failure to afford the defendant any "concerned adult" protections. Here is an excerpt from their decision:

"The aspect of the interrogation that we find most significant is the total failure by the police to afford defendant any of the "concerned adult" protections explained above. The detectives made no attempt to locate defendant's parents before or during the interview nor did they afford him the assistance of a juvenile officer. They also refused defendant's two requests during the interview to speak with his mother.

Here, the police refused defendant's two requests to contact his mother and made no effort themselves to contact defendant's parents before or during the interview. As in Knox, there was no juvenile officer present during the interview to offset the absence of a parent. We recognize that defendant was given Miranda warnings and did not receive any promises or threats. The same, however, was true of the respondent in V.L.T. and the defendant in Knox, but in neither case did this fact override the coercion that the court found in the remaining circumstances. Likewise, the provision of Miranda warnings and the absence of promises or overt threats did not ameliorate the pressure brought to bear on defendant, a 17-year-old who was "immature" for his age and became "terrified" while in custody when his two specific requests to contact a parent were refused and when Galason raised his voice to him and said, "I don't give a shit if you go to jail or not." If section 5-405(2) of the Act and the parallel common-law protections are to have real force, we cannot countenance the police action in this case but must find that defendant's confession was involuntary."

In *State v. Jerrell C.J. (*2005) the Wisconsin Supreme Court found that:

- juvenile's written confession to police was not voluntarily given;
- following the arrest of a juvenile, the failure of police to call the juvenile's parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel will be considered strong evidence that coercive tactics were used to elicit the juvenile's incriminating statements; and
- pursuant to Supreme Court's supervisory power to ensure fair administration of justice, all custodial interrogation of juveniles shall be electronically recorded where feasible, and without exception when questioning occurs at a place of detention.

Polygraph examination issues

(Telling a suspect he failed a polygraph test does not render the confession inadmissible)

In *People v. Hughes* (2013) the Supreme Court, Appellate Division, New York upheld the defendant's confession and rejected his claim that he gave the statement involuntarily.

"Defendant appeals from a judgment convicting him upon a jury verdict of one count each of attempted criminal sexual act in the first degree... and course of sexual conduct against a child in the second degree (S 130.80[1][b]), and three counts of sexual abuse in the first degree (S 130.65[3]). Defendant contends that County Court erred in refusing to suppress his statement to the police on the ground that he gave the statement involuntarily. We reject that contention. A statement "is 'involuntarily made' when it is obtained by [the police] by means of any promise or statement of fact which creates a substantial risk that the defendant might falsely incriminate himself" ... "To determine voluntariness, courts review all of the surrounding circumstances to see whether the defendant's will has been overborne" ...

Here, the evidence at the *Huntley* hearing, including the videotaped interrogations, establishes that defendant's statement was voluntarily made and that coercive police activity did not occur.... The fact that defendant was told that he failed a polygraph examination did not render the statement involuntary.... Defendant's claim that he was under duress and confused because of an illness is not supported by the evidence at the *Huntley* hearing."

(Court rules that polygraph examination is not a search)

In *US v. Davis* (2013) the US District Court, D. Montana, ruled that a polygraph examination was not a search within the meaning of the Fourth Amendment.

“Mr. Davis argues the a polygraph exam is a “search” within the meaning of the Fourth Amendment, as it detects and records personal physiological data not readily observable. …. Mr. Davis contends that his polygraph exam ran afoul of the Fourth Amendment

because it was conducted without a warrant and without Mr. Davis's informed, voluntary consent. Mr. Davis argues that his consent to take the polygraph was based on duplicity, and therefore not informed and voluntary. Because Mr. Davis's confession was derived from the polygraph, it is “fruit of the poisonous tree” and should be excluded, he argues.

“The recent District of Montana case *Unites States v. Alvarez,* CR–12–96, considered legal issues and facts almost identical to those presented here. *Alvarez* held in the clearest terms that “A polygraph examination is not a Fourth Amendment search.” (citing *Stehney,* along with unpublished opinions from courts in the Ninth Circuit). *Alvarez* also stated that even if the polygraph was a search, there was no constitutional violation because the defendant consented.

“In light of *Alvarez,* Mr. Davis's argument that a polygraph is a search fails. Therefore Mr. Davis's Fourth Amendment rights were not implicated. However, testimony at the suppression hearing made clear that Mr. Davis did not event take a polygraph examination, but only participated in an interview in anticipation of the exam…Even if a polygraph were a Fourth Amendment search and even if Mr. Davis had taken one, his consent would obviate a constitutional violation.

“Mr. Davis argues his confession should be excluded under the Fifth Amendment because it was involuntary. He argues that he was overborne by a “sophisticated, and at times repetitive” polygraph examination designed to elicit a confession, rather than merely to determine whether Mr. Davis was truthfully answering the questions. The examination process carefully and subtly manipulated Mr. Davis into confessing, he argues. The confession therefore was not voluntary and should be suppressed, according to Mr. Davis.

“In *Alvarez,* the defendant's confession was deemed voluntary because the defendant agreed to go to the FBI office and drove himself there, was not confined during the exam, confirmed verbally and in writing that his statements were voluntary, signed forms informing him of his rights, and was an adult with no indication of low intelligence.

“The same factors exist here. Mr. Davis agreed to the exam, had a friend drive him to it, signed waivers, and acknowledged on a recording that his confession was voluntary. He is an adult who graduated high school and attended some college. He testified that he was not physically restrained or punished. The entire process was half as long as the questioning in *Alvarez.* Under the totality of the circumstances, the confession was clearly voluntary.

(If properly done a polygraph examination does not have a coercive impact on a suspect's confession)

In *State v. Fisher* (2011) the Supreme Court of South Dakota found that a polygraph examination does not have a coercive impact on a suspect's confession. In this case Fisher argued that Detective Bakke improperly used the polygraph examination as a means to coerce Fisher into confessing. The Supreme Court stated, "However, we have recognized

the coercive impact of a polygraph examination may be mitigated or eliminated by advising the defendant of his or her constitutional rights prior to administering the examination. For example, in *State v. DuBois*, we held that incriminating statements made by the defendant after a polygraph examination were voluntary because the defendant had been advised of his Miranda rights. 286 N.W.2d 801, 805 (S.D.1979). Likewise, in *State v. Adkins*, we held that statements a defendant made during and after a polygraph examination were voluntarily because the defendant was advised of his Miranda rights and had signed a written consent form prior to taking the test. 225 N.W.2d 598, 573-74 (S.D.1975).

Fisher was read his Miranda rights before the interview began. He also signed a consent form prior to taking the polygraph examination. This consent form advised Fisher of his constitutional rights and informed him that taking the polygraph examination was not mandatory. Detective Walsh also verbally informed Fisher he was not obligated to take the polygraph examination. After reviewing the voluntariness of the confession based on a totality of the circumstances, we hold that the polygraph examination alone did not render Fisher's subsequent confession involuntary.

In the same case, misrepresenting evidence acceptable and the value of video recording

Fisher also contends Detective Bakke used deception to coerce Fisher into confessing. During the interview, Detective Bakke repeatedly told Fisher he spoke with the doctors who treated P.V. and these doctors told Detective Bakke falling or roughhousing could not cause P.V.'s injuries. Detective Bakke also told Fisher the doctors examined P.V.'s eyes and observed retinal detachment, which is a sign that P.V. was shaken. In fact, P.V.'s retinas were intact and Detective Bakke did not personally speak with P.V.'s treating doctors. Instead, Detective Webb spoke to the doctors who treated and examined P.V.

Although we have recognized that "[d]eception or misrepresentation by the officer receiving the statement may [ ] be factors for the trial court to consider," we have emphasized, "the police may use some psychological tactics in interrogating a suspect ." *State v. Darby*, 1996 S.D. 127, P 31, 556 N.W.2d 311, 320 (citing Jenner, 451 N.W.2d at 719). Psychological tactics such as deception or misrepresentation do not prevent a finding of voluntariness so long as the confession is " 'a product of the suspect's own balancing of competing considerations.' " Id. (quoting *State v. Dickey*, 459 N.W.2d 445, 447 (S.D.1990)).

We have reviewed the videotaped interview and find that the misrepresentations Detective Bakke made to Fisher did not deprive Fisher of his capacity to balance competing considerations and make " 'an unconstrained, autonomous decision to confess.' " Morato, 2000 S.D. 149, P 12, 619 N.W.2d at 660 (quoting Gesinger, 1997 S.D. 6, P 12, 559 N.W.2d at 550). Fisher earned a GED and was enrolled in college courses at the time of the interview. Fisher also had previous experience with law enforcement. He was informed of his constitutional rights on two separate occasions. Fisher indicated he understood his constitutional rights and elected to continue the interview. He never asked

to terminate the interview or speak with an attorney.

Although the misrepresentations of Detective Bakke likely factored into Fisher's decision to confess, we do not think his will was overcome so as to render the confession involuntary. Throughout the interview, Fisher demonstrated a capacity to resist the pressures imposed on him by law enforcement. Fisher was able to offer several alternative explanations for P.V.'s injuries and death. In addition, after Fisher admitted to shaking P.V., Detective Bakke told Fisher there were bruises on P.V.'s face. Detective Bakke asked Fisher if he ever hit or slapped P.V. Fisher denied ever hitting or slapping P.V., indicating that his will was not overborne by Detective Bakke's misrepresentations.

The totality of the circumstances surrounding the interrogation supports the trial court's conclusion that Fisher made an unconstrained and autonomous decision to confess after weighing competing considerations.

(Polygraph examiner's behavior did not render the suspect's confession involuntary)

In *Ortiz v. Uribe* (2011) the U.S. Court of Appeals, Ninth District, affirmed the decision by the Court of Appeals that:
(1) polygrapher's deceptive interrogation tactics did not render petitioner's confession involuntary;
(2) polygrapher's concealment of fact that she was a law enforcement officer did not render petitioner's confession involuntary;
(3) polygrapher's making of implicit promises of lenient treatment did not render petitioner's confession involuntary; and
(4) polygrapher's appeal to petitioner's moral obligation to his family did not render his confession involuntary.

In part the Court of Appeals stated that, "We agree with the Seventh Circuit that a polygrapher's empathic and parental questioning does not render a confession involuntary. We are persuaded that the undisputed evidence reflected in the record of the state trial court's proceedings demonstrates that Detective Cardwell's advice to Ortiz that he had to tell the truth to pass a polygraph examination, was not coercive. The California Court of Appeal's conclusion that Detective Cardwell's motherly or parental tone in preparing Ortiz for a polygraph examination did not violate Ortiz's Fifth Amendment rights was not contrary to, and did not involve an unreasonable application of, clearly established Supreme Court law, and was not based on an unreasonable determination of the facts in light of the evidence presented."

Mental capacity - affect on incriminating statement

(Court finds confession was result of coercive police interrogation - the importance of using extreme care when questioning an individual with limited mental capacity)

In *People v. Knapp* (November 2014) the Supreme Court, Appellate Division, Fourth Dept., New York, overturned the lower court's decision that the defendant's statements

were admissible, instead, finding that the defendant did not knowingly, voluntarily, and intelligently waive his *Miranda* rights because he lacked the capacity to do so, and statements involuntary. From the Appellate court's decision:

"At the *Huntley* hearing, the People presented the expert testimony of a forensic psychiatrist who interviewed defendant in jail and reviewed the videotape of his confession. The People's expert acknowledged that defendant was "intellectually handicapped," with a full-scale IQ of 68, but concluded that defendant was "not that retarded" and could understand his *Miranda* rights. The defense expert testified that defendant's IQ placed him in the "mentally retarded range of intellectual functioning." Defendant's verbal IQ was 63, which placed him in the first percentile, meaning that he performed worse than 99% of the test population. Based upon defendant's "very poor" level of verbal functioning, the defense expert opined that, although defendant was "able to understand the words of the *Miranda* rights," he was "not capable of intelligently waiving" those rights. He further opined that defendant was "a very suggestible and very compliant man as is not atypical of persons who are mentally retarded," which placed him at risk of falsely confessing.

The record establishes and, indeed, it is undisputed, that defendant has significant cognitive deficits. Defendant was classified as "mentally retarded" in school and graduated with an Individualized Education Program diploma. The defense expert testified at the *Huntley* hearing that defendant received a full-scale IQ score of 68 on the Wechsler Adult Intelligence Scale-IV (WAIS-IV), compared to an average score of 100, which placed him in the "[e]xtremely [l]ow range of intellectual functioning" and classified him as "[m]entally retarded" .... Defendant's IQ placed him in the second percentile, meaning that he "scored lower than did 98% of the people his age who were administered the WAIS-III during its development." Significantly, defendant received a verbal comprehension IQ score of 63, indicating a "very, very low, very poor" level of verbal functioning. The defense expert testified at the *Huntley* hearing that defendant read at a second- or third-grade level, which he described at trial as "what we know as Dick and Jane ran up the hill, that kind of stuff." He estimated that defendant's "comprehension of the words would be considerably lower than the third grade."

The defense expert also administered several tests that were specifically designed to assess defendant's understanding and appreciation of the *Miranda* warnings. The defense expert testified that defendant's performance on those tests indicated that he "would have difficulty intelligently assessing [and] weighing the circumstances that he's involved in at a particular time." Defendant scored "very poorly," i.e., in the second percentile, on the Function of Rights in Interrogation test. According to the defense expert, that meant that, although defendant understood the individual words used in the *Miranda* warnings, he was unable to comprehend the import of the warnings or to "intelligently weigh the consequences" of waiving his rights. The defense expert thus opined that, because of defendant's "cognitive and abstracting deficits," he "was not capable of intelligently waiving his *Miranda* rights".....

The People's expert, who admitted at trial that he had "limited experience in dealing with

people with mental retardation," did not dispute defendant's IQ score or take issue with the specific tests administered by the defense expert. Indeed, he characterized the defense expert's report as "well balanced." He concluded, however, that defendant was "not that retarded." The People's expert noted that defendant "knew that there were seven days in a week" and that, although defendant thought that there were six months in a year, he was able to name all of the months. The People's expert did not assess defendant's reading ability or comprehension. The People's expert concluded that, because the *Miranda* rights "are fairly simple [and] straightforward," defendant was "able to understand the rights when they were read to him." His conclusion was primarily based upon the belief that defendant was "able to function" in the activities of daily living, including personal hygiene, driving and handling his SSI funds. According to the People's expert, defendant "could live alone. He had a girlfriend. He's been deemed able to handle his own funds. He could buy a truck. He could buy insurance for the truck. So, from my point of view and in talking to him, it was my feeling that, that he could understand the rights."

There is no evidence in the record, however, that defendant was able to live alone or that he had lived alone at any point in his life. Indeed, the record reflects that defendant lived with his parents into adulthood and that, after their death, he lived with other relatives and friends. There is likewise no evidence that defendant "had a girlfriend." Defendant told the police that he had never had a girlfriend, and the record contains no evidence to the contrary. Finally, there is no evidence that defendant was "deemed" or "found" competent by the Social Security Administration to handle his own funds; in that respect, the record establishes only that defendant was the payee on his SSI checks.

Of equal importance was the manner in which the rights were administered to defendant. The defense expert, who reviewed the videotape of the interrogation, noted that the *Miranda* warnings "were read to [defendant] in a relatively rapid fashion which likely only further confused him given his mental retardation." Our review of the videotape confirms that characterization. In delivering the *Miranda* warnings, the detective recited each of the rights at a fairly rapid pace, particularly as compared to the pace of the remainder of the interview. The detective then handed defendant a waiver of rights form with defendant's responses already filled in and asked defendant to place his initials next to each of the rights. Significantly, the detective never asked defendant whether he could read or write, and did not inquire about defendant's level of education. The defense expert concluded that defendant "could not read his [*Miranda*] [r]ights on his own because of his 3rd grade reading level." Indeed, even the People's expert acknowledged that the detective "didn't spend a lot of time dwelling on the *Miranda* rights."

We therefore conclude, based upon the totality of the circumstances, that the People failed to meet their burden of establishing beyond a reasonable doubt that defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights, and thus that the court should have suppressed defendant's confession on that ground.

(Re voluntariness)

Here, the defense expert opined that defendant is "a suggestible and overly compliant

individual, which is not unusual in mentally retarded individuals who are frequently 'yea-saying,' in turn causing him to be easily intimidated by the interrogation process" .... The People's expert acknowledged that "people with an IQ of 68 certainly can be suggestible and can have a need to be compliant." According to the defense expert, individuals who are "yea-sayers" are more likely to agree with a statement if repeatedly asked; thus, prodding or intensive questioning will tend to elicit an affirmative response. In addition to noting his own clinical impressions, the defense expert administered tests specifically designed to measure interrogative susceptibility and compliance, i.e., the "Gudjonsson scales." On the suggestibility scale, defendant scored a 15, which is "higher than the normative data provided for adults, court referrals, and persons with intellectual disabilities, whose average 'total suggestibility' scores were 7.5, 10.9[and] 12.5 respectively." Defendant also scored a 15 on the compliance scale, much higher than the average score of 9 and higher than "the average score for false confessors," i.e., 14.4. According to the defense expert, a person with a score of 15 on the compliance scale would be particularly sensitive to threats and promises made during interrogation. He thus opined, based upon his interview and the test results, that defendant "falls within the parameters of a person who is in danger of false confessions."

We have reviewed the videotape of the interrogation and are therefore " 'not consigned to an evaluation of a cold record, or limited to reliance on the detectives' testimony' .... "review confirms the defense expert's observation that the detective "used techniques that are popularly used in convincing someone to answer questions in a particular way." Specifically, the detective "tried to appear to be a friendly soul, a good cop that might do something to help [defendant] if he gave the correct answer." The detective told defendant that he "knew he wasn't a bad guy"; asked defendant whether he was "an evil man" or "a guy that has a problem that we need to try and fix"; and told defendant "[y]ou don't want people to think that you're an evil person ... I might be able to help you" ... Most of the detective's questions were leading in nature, and he repeated a question when he was not satisfied with defendant's response, urging defendant to "be honest" with him and to tell the truth.... Notably, the People's expert testified at trial that, when interviewing a suggestible subject, it is important not to ask leading questions "[b]ecause they will think that's what [you] want to hear and people are liable to say yes or be agreeable, so forth."

As the defense expert testified at trial, "[w]hat became very clear in the video ... was that [defendant] changed his answers based on the kind of questioning that was done to him. In other words, he was asked the question, the same question over and over again. So it no doubt became clear to him that he was answering the wrong way. So he changed his answers to be what he believed the cop wanted to know." Many, although not all, of defendant's responses consisted of "mmm-hmm," yes, and a parroting back of the detective's statements. The detective also told defendant that he had spoken to the victim and her mother, that the victim was "not lying," and that the medical examination was going to show that "something happened" between defendant and the victim. The defense expert testified that such tactics "would lead [defendant] to question his own memory of the situation which isn't good to begin with. He's got deficits in memory. So if presented with memory that would counteract what he believed to be true, he would change his

answer."

We therefore conclude, based upon the totality of the circumstances, including defendant's intellectual limitations, his suggestibility and compliance tendencies, and the tactics employed by the interviewer in this case, that defendant's confession was not voluntary and thus that it should have been suppressed on that ground as well... Thus, we conclude that the judgment should be reversed, defendant's confession suppressed, and a new trial granted.

(Defendant who scored 53 on IQ test can give a knowing and intelligent waiver of his rights)

In *Turner v. Pollard* (October 2014) the US District Court, E.D. Wisconsin, upheld the lower court's opinion that the defendant, who scored 53 on an IQ test, could make a knowing and intelligent waiver. In this case the defendant had called Dr. Suzanne Lisowski, a clinical psychologist that Mr. Turner had hired, to provide a psychological evaluation. Form the District Court's opinion:

"The detectives testified that they had advised Mr. Turner of his *Miranda* rights before interviewing him.... They testified that Mr. Turner appeared to be typical of criminal suspects, provided appropriate answers, and did not appear confused.... However, Detective Hensley did appear to provide Mr. Turner with (what would later turn out to be incorrect) guidance: Detective Hensley explained that the police believed that the victim had died from a fall, and that Mr. Turner would not be charged with a homicide if he told the truth....

Dr. Lisowski explained that Mr. Turner was low-functioning. He scored a 53 on an IQ test, indicating mild to moderate retardation, and meaning that he would have difficulty understanding what sort of rights he was waiving in speaking with the detectives... She also testified that Mr. Turner told her that he had confessed because the detectives had a gun in the room.... After Dr. Lisowski asked whether Mr. Turner believed there was a deal, Mr. Turner indicated that he understood he could receive probation if he told the truth.

In spite of having found those limitations, Dr. Lisowski also pointed out a number of indicators that would weigh in favor of a finding that Mr. Turner understood his waiver. Specifically, she noted: that the recordings indicated that Mr. Turner understood the interview process; that Mr. Turner understood the potential for a criminal sentence and that DNA evidence may have been on his clothing; that the detectives were accommodating to Mr. Turner; and that Mr. Turner's apology to a victim's family appeared to genuinely come from Mr. Turner.

After receiving all of this testimony, the circuit court decided that the detectives had given Mr. Turner his *Miranda* warning and that Mr. Turner had knowingly waived his *Miranda* rights during the interviews... The circuit court determined that Turner "understood and gave appropriate responses to the questions that were being asked of

him," and that his statements were voluntary.

Here, there is conflicting evidence in the record. In favor of coercion is the potentially misleading statement from Detective Hensley explaining that the police believed that the victim had died from a fall, and that Mr. Turner would not be charged with a homicide if he told the truth; that turned out to be false--though the record does not indicate that the detectives were lying to coerce a confession. Likewise, Mr. Turner's low IQ score and (unverified) belief that there was a gun in the room both favor a finding of coercion.... On the other side of the ledger are: (1) the detectives' beliefs that Mr. Turner was a typical interviewee--a belief that was apparently corroborated by the recordings of the interview; (2) Mr. Turner's apology to the victim's family; (3) the expert's acknowledgment that Mr. Turner understood the interview process and other important information--again corroborated by the recordings; and (4) the officers' accommodations for Mr. Turner, including regular breaks and snacks... In the Court's opinion, the evidence weighs in favor of a finding that there was not coercion or overreaching; the totality of the circumstances establishes that the waiver and statements were taken in a legally proper manner."

(US Supreme Court finds Florida test to determine intellectual disability as factor for eligibility for execution unconstitutional)

In *Hall v. Florida* (May 2014) the United States Supreme Court held that Florida's law defining intellectual disability as an IQ score of 70 or better, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.

From their opinion: "After this Court held that the Eighth and Fourteenth Amendments forbid the execution of persons with intellectual disability,… Hall asked a Florida state court to vacate his sentence, presenting evidence that included an IQ test score of 71. The court denied his motion, determining that a Florida statute mandated that he show an IQ score of 70 or below before being permitted to present any additional intellectual disability evidence. The State Supreme Court rejected Hall's appeal, finding the State's 70–point threshold constitutional.

The State's threshold requirement, as interpreted by the Florida Supreme Court, is unconstitutional.

(a) The Eighth Amendment, which "reaffirms the duty of the government to respect the dignity of all persons," … prohibits the execution of persons with intellectual disability. No legitimate penological purpose is served by executing the intellectually disabled. ... Prohibiting such executions also protects the integrity of the trial process for individuals who face "a special risk of wrongful execution" because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel.…

(b) Florida's rule disregards established medical practice. On its face, Florida's statute could be consistent with the views of the medical community discussed in *Atkins* and

with the conclusions reached here. It defines intellectual disability as the existence of concurrent deficits in intellectual and adaptive functioning, long the defining characteristic of intellectual disability. See *Atkins, supra,* at 308. And nothing in the statute precludes Florida from considering an IQ test's standard error of measurement (SEM), a statistical fact reflecting the test's inherent imprecision and acknowledging that an individual score is best understood as a range, *e.g.,* five points on either side of the recorded score. As interpreted by the Florida Supreme Court, however, Florida's rule disregards established medical practice in two interrelated ways: It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts would consider other evidence; and it relies on a purportedly scientific measurement of a defendant's abilities, while refusing to recognize that measurement's inherent imprecision. While professionals have long agreed that IQ test scores should be read as a range, Florida uses the test score as a fixed number, thus barring further consideration of other relevant evidence, *e.g.,* deficits in adaptive functioning, including evidence of past performance, environment, and upbringing.

(c) The rejection of a strict 70–point cutoff in the vast majority of States and a "consistency in the trend," *Roper, supra,* at 567, toward recognizing the SEM provide strong evidence of consensus that society does not regard this strict cutoff as proper or humane. At most, nine States mandate a strict IQ score cutoff at 70. Thus, in 41 States, an individual in Hall's position would not be deemed automatically eligible for the death penalty. The direction of change has been consistent. Since *Atkins,* many States have passed legislation to comply with the constitutional requirement that persons with intellectual disability not be executed. Two of those States appear to set a strict cutoff at 70, but at least 11 others have either abolished the death penalty or passed legislation allowing defendants to present additional intellectual disability evidence when their IQ score is above 70. Every state legislature, save one, to have considered the issue after *Atkins* and whose law has been interpreted by its courts has taken a position contrary to Florida's.

(d) *Atkins* acknowledges the inherent error in IQ testing and provides substantial guidance on the definition of intellectual disability. The States play a critical role in advancing the protections of *Atkins* and providing this Court with an understanding of how intellectual disability should be measured and assessed, but *Atkins* did not give them unfettered discretion to define the full scope of the constitutional protection. Clinical definitions for intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70, and which have long included the SEM, were a fundamental premise of *Atkins.* See 536 U.S., at 309, nn. 3, 5. A fleeting mention of Florida in a citation listing States that had outlawed the execution of the intellectually disabled, *id.,* at 315, did not signal the *Atkins* Court's approval of the State's current understanding of its law, which had not yet been interpreted by the Florida Supreme Court to require a strict 70–point cutoff.

(e) When a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. This legal determination of

intellectual disability is distinct from a medical diagnosis but is informed by the medical community's diagnostic framework, which is of particular help here, where no alternative intellectual disability definition is presented, and where this Court and the States have placed substantial reliance on the medical profession's expertise."

(Low score on IQ tests does not mean the suspect is incapable of making a voluntary confession)

In *Winters v. State* (2013) the Supreme Court of Arkansas upheld the admissibility of the defendant's confessions, even though he had an IQ of 84, which is in the category of borderline intellectual functioning.

In this case the "Appellant contends that the circuit court erred in denying his motion to suppress certain custodial statements he made to police….that the officers made various promises to him, repeatedly preyed upon his concerns for his family and for giving the victims a proper burial, and then finally, due in part to his borderline intellectual functioning, coerced a confession.

In reaching their decision the Supreme Court stated the following:

"Finally, we consider Appellant's argument that his relatively low level of education and intellectual functioning contributed to the officers' ability to coerce a confession from him. The record reveals that Appellant was twenty-nine years old when he gave the statements, that his formal education ended at either the sixth or eighth grade, and that he obtained a G.E.D. while incarcerated. Appellant's expert witness, Dr. J. Michael Wood, testified that his full-scale IQ was 84, which is in the category of borderline intellectual functioning. Dr. Wood stated that this is in the low-average range and places him in the 14th percentile, meaning that 86 percent of the population has a higher IQ than Appellant. Dr. Wood explained that his full-scale IQ score was the result of fourteen tests in seven areas and that Appellant scored significantly lower in one of these seven areas—processing speed. Dr. Wood opined that processing speed is the ability to think efficiently and fluently, especially under pressure situations. The circuit court acknowledged Appellant's IQ score and even expressly deferred to the experts on this issue, despite the court's contrary observations of Appellant during the interviews. But, as noted by the circuit court, Appellant was no stranger to the criminal-justice system, having been interviewed, and giving voluntary statements perhaps as many as six times, concerning crimes unrelated to the Bishop murders. Three officers who previously interviewed Appellant testified at the suppression hearing, and although one of them noted Appellant could not read or write well, *all* agreed that Appellant understood and waived his rights and gave a statement voluntarily and knowingly. We note that this court has held that a low score on IQ tests does not mean the suspect is incapable of making a voluntary confession.

In summary, our review of the totality of the circumstances indicates that the circuit court's ruling to deny the motion to suppress was not clearly against the preponderance of the evidence."

(The value of recording: examining the issue of mental illness on the admissibility of a confession)

In *Keeling v. Commonwealth* (2012) the Supreme Court of Kentucky considered the issue of mental illness and its effect on the admissibility of a confession. In this case, the "Appellant next argues that the trial court committed reversible error by failing to suppress post-arrest statements he offered to the police. Specifically, he contends that, due to the fact that he suffered from a mental illness causing hallucinations and delusions, any statement he made would be unreliable. Thus, he contends that his mental illness rendered his statements "involuntary" for Fifth Amendment *Miranda* purposes."

.... "The U.S. Supreme Court has recognized that an accused's mental condition is a factor when determining the voluntariness of a confession.... However, "a defendant's mental condition, by itself and apart from its relation to official coercion," does not render a confession constitutionally involuntary.... Thus, although a defendant's mental illness can be considered in determining whether law enforcement coerced a confession... it is not, without some official coercion, sufficient for suppression purposes.

... "We note first that Appellant is a man of average intelligence, testing at an IQ of 95. He was read his *Miranda* rights before giving his statement to police. He acknowledged that he understood these rights and signed a waiver. We have thoroughly reviewed his audio-taped confession and conclude that there is absolutely no evidence of coercion, psychological or otherwise. While it may be true that, due to his mental illness and lack of medication, Appellant "was probably not able to make adequate judgment about what was going *on at the time of questioning," as Dr. Sively testified at trial, this is not enough to render his confession constitutionally involuntary.

... " '[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." ... Accordingly, a voluntary confession by a mentally ill defendant is admissible at trial absent some indicia of official coercion... However, without evidence that law enforcement officers exploited an accused's mental illness to obtain the confession, the exclusionary rule does not apply. .

(Court rules that a "mildly mentally retarded" individual can make a knowing and intelligent waiver)

In *Webster v. State* (2011) the Court of Criminal Appeals of Oklahoma upheld the lower court's ruling that a "mildly mentally retarded" individual can make a knowing and intelligent waiver. In their opinion they stated, "Regarding Webster's mental retardation, this Court recognizes that a defendant's level of intelligence is a factor in determining whether that defendant's waiver of Miranda rights was knowing and intelligent. Yet this Court rejects Webster's assertion that a person who has been deemed "mildly mentally

retarded" is incapable of a knowing and intelligent waiver. In Phillips v. State, this Court addressed this very issue and held that "unless an accused's degree of retardation is so great as to deprive him of the capacity to understand the meaning and effect of his confession, his deficient intelligence is but one factor to be considered within the totality of the circumstances in determining voluntariness and admissibility." Upon a review of the recorded interview, this Court agrees with the trial court and finds that Webster's retardation was far from obvious and that although he did not appear to be a person of great intelligence (or a proficient speller or have a particularly good memory), Webster's responses during the interview repeatedly demonstrated that he was fully aware of what was going on, the situation that he was in, and what was at stake.

(Can a person diagnosed as "schizoid paranoid affective schizophrenia" make a knowing and intelligent waiver of their Miranda rights?)

In *People v. Harris* (2010) the Court of Appeal, First District, Division 1, California, found that the defendant did make a knowing and intelligent waiver of her *Miranda* rights, even though she was diagnosed as schizoid paranoid affective schizophrenia. In this case the Court of Appeal ruled that, "First, the inspectors did an exemplary job of explaining defendant's *Miranda* rights to her. Inspector Everson first asked defendant to listen very carefully to what he was about to tell her. He stated each right individually in clear, concise language, and paused after each statement to ask defendant whether she understood each right. She answered in the affirmative each time. Everson then asked defendant whether she understood everything he had just said to her, and she responded, "Yes." He next said, "And having these rights in mind, having what I just told you in mind, would you like to speak with us about your day today?" As discussed above, defendant responded by asking whether she was required to speak to the inspectors, and Everson told her she did not have to, but could do so if she would like to. She said, "It's fine." The inspectors did not push, pressure, or trick defendant into speaking to them in any way. Defendant's demeanor and responses during the interview did not show any resistance, ambivalence, or regret about agreeing to cooperate.

Second, defendant's age, education, and I.Q. fail to show defendant lacked the capacity to understand or knowingly waive her *Miranda* rights..." .

(What IQ score precludes a defendant from making a knowing and intelligent waiver of their rights?)

In *People v. Daniels* (2009) the Appellate Court of Illinois, First District, Sixth Division overturned the trial court's decision to admit the defendant's incriminating statement. They found that the defendant, with a full-scale IQ between 55 and 64 could not make a knowing and intelligent waiver of her rights. In their decision they referenced several cases that dealt with the IQ issue:

Consequently, in light of the testimony of the court-appointed experts and after viewing the videotaped confession, we are compelled to disagree with the findings of the trial judge and the ruminations upon which these findings are premised. See, e.g., Turner,

(reversing the trial court's denial of defendant's motion to suppress his confession based on defendant's inability to intelligently and knowingly waive his Miranda rights where the totality of the evidence revealed that the 25-year-old defendant had an IQ of 70, which placed him in the lower 10% of the general population); see also Redmon, (reversing the circuit court's denial of defendant's motion to suppress his confession based on defendant's inability to comprehend Miranda warnings, where the totality of evidence established that the 17-year-old defendant had an IQ of 70 or 71 which placed him in the lower 10% of the general population, and a reading ability of a fifth grader); M.W., (affirming the decision of the circuit court to suppress defendant's confession where the totality of the circumstances revealed that defendant lacked the mental capacity to understand Miranda warnings because: (1) he was 13 years old, (2) had a full scale IQ between 52 and 54, which placed him in the borderline mentally retarded range of intellectual functioning, (3) had the reading and spelling level of a second grader, (4) had a history of being in special education classes, (5) in psychiatric evaluations exhibited concrete rather than an abstract thinking, and (6) could not explain the difference between "right" or "silent"); Braggs, (reversing the trial court's denial of defendant's motion to suppress based on defendant's inability to understand her Miranda warnings, where the circumstances revealed that the 29-year-old defendant had an IQ of 54, suffered from moderate mental retardation, had no prior contact with the criminal justice system, and had been initially found unfit to stand trial).

The court further stated that "Moreover, our courts have repeatedly held that "[t]he greatest care" must be exercised when evaluating the confessions of youthful or mentally deficient defendants, so as to assure that any incriminating statements made by such individuals were not "the product of ignorance of rights or of * * * fantasy, fright or despair. As the supreme court in Braggs explained:

"[I]t is generally recognized that the mentally retarded are considered more susceptible to police coercion or pressure than people of normal intellectual ability, they are predisposed to answer questions so as to please the questioner rather than to answer accurately, they are more likely to confess to crimes they did not commit, they tend to be submissive, and they are less likely to understand their rights." Braggs, 209 Ill.2d at 514, 284 Ill.Dec. 682, 810 N.E.2d at 486, citing M. McCloud, G. Shepard, A. Barkoff, & J. Sure, Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. Chi. L.Rev. 495, 503, 538 (2002), and P. Hourihan, Earl Washington's Confession: Mental Retardation and the Law of Confessions, 81 Va. L.Rev. 1471, 1473 (1995) ("Mentally retarded persons are more susceptible to coercion, more likely to confess falsely, and less likely to understand their rights than people of normal intellectual ability"). .

(Court rejects claims that there was an unambiguous request for an attorney; that the defendant's mental problems caused him to be more receptive to police coercion; and, that the fact the police lied about the evidence was coercive)

In *Guerrero v. State* (2009) the Texas Court of Appeals, San Antonio, upheld the admissibility of the defendant's confession - the defendant claimed he made an

unambiguous request for an attorney which the court rejected:

Guerrero argues that he invoked his right to counsel when he "unequivocally told Detective Angell that he might desire the presence of an attorney." When a person is in custody, interrogation must cease if the person invokes one of the rights mentioned in the warnings required by Miranda. Miranda, 384 U.S. at 473-74; *Dowthitt v. State*, 931 S.W.2d 244, 257 (Tex.Crim.App.1996). In questions of a violation of a defendant's right to counsel, we apply *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Edwards ' bright-line rule provides that once an accused has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Id. The defendant must, however, make "some statement that can reasonably be construed as an expression of a desire for counsel in dealing with custodial interrogation by the police." *McNeil v. Wisconsin,* 501 U.S. 171, 178, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) (emphasis removed). More specifically, an accused's invocation of his rights must be unambiguous to trigger this requirement, and officers are under no duty to clarify ambiguous remarks. *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994); Dowthitt, 931 S.W.2d at 257. Questions amounting to whether Guerrero's bond would be different if he was represented by counsel, or whether Det. Angell would take him back to the county jail if he asked for an attorney, are not unambiguous requests for counsel.

The defendant also claimed that Guerrero alleges that his mental problems and later determination of incompetency made him more receptive to police coercion. See *Penry v. State*, 903 S.W.2d 715, 744 (Tex.Crim.App.1995) (stating that a defendant's mental deficiency alone is not determinative of the voluntariness of the confession, but is only one factor to be considered). Absent evidence of police coercion related to the taking of the confession, a defendant's mental condition alone should not render the statement involuntary on constitutional grounds. See *Colorado v. Connelly*, 479 U.S. 157, 163-64, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). In considering the impact of a defendant's mental deficiency, "[t]he question is whether the accused's mental impairment is so severe that he is incapable of understanding the meaning and effect of his confession." *Cornealius v. State*, 870 S.W.2d 169, 175 (Tex.App.-Houston [14th Dist.] 1994), aff'd, 900 S.W.2d 731 (Tex.Crim.App.1995). In this case, there is no evidence in the record or on the video recording demonstrating that Guerrero's mental impairment, if any, was so severe that he was incapable of understanding the meaning and effect of his confession. See *Casias v. State*, 452 S.W.2d 483, 488 (Tex.Crim.App.1970). To the contrary, Guerrero was lucid and his answers to Det. Angell's questions were appropriate.

Guerrero next argues that Det. Angell intentionally lied to him regarding evidence in an effort to coerce his confession. Neither trickery nor deception "make a statement involuntary unless the method was calculated to produce an untruthful confession or was offensive to due process." Creager, 952 S.W.2d at 856. "Misrepresentations made by the police to a suspect during an interrogation [are] a relevant factor in assessing whether the suspect's confession was voluntary, but it is insufficient to render an otherwise voluntary

confession inadmissible." *Green v. State*, 934 S.W.2d 92, 99 (Tex.Crim.App.1996) (citing *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684, (1969)). "[T]he effect of a lie 'must be analyzed in the context of all the circumstances of the interrogation.' " *Mason v. State,* 116 S.W.3d 248, 257-58 (Tex.App.-Houston [14th Dist.] 2003, pet. ref'd) (quoting *Miller v. Fenton*, 796 F.2d 598, 607 (3d Cir.1986)). We focus on whether Det. Angell's behavior was such as to overbear Guerrero's will and bring about a confession not freely determined. Green, 934 S.W.2d at 99-100. "Of the numerous types of police deception, a misrepresentation relating to an accused's connection to the crime is the least likely to render a confession involuntary." Id. at 100. An officer's misrepresentations that witnesses, fingerprints, and cellular telephone records links appellant to the crime merely relates to appellant's connection to the crime and were not the type of deception that likely causes an involuntary confession. See id.; see also Weaver, 265 S.W.3d at 534 (deciding that officers' misrepresentations, during the accused's interrogation, that (1) witnesses saw him commit the crime, (2) his fingerprints were found, and (3) a videotape showed his involvement in the crime, did not make the accused's statement involuntary). Taken in context, we conclude that Det. Angell's statements were not calculated to lead Guerrero to make an untruthful confession. See Creager, 952 S.W.2d at 856; *Martinez v. State*, 131 S.W.3d 22, 34 n. 2 (Tex.App.-San Antonio 2003, no pet.)."

(Can a "mildly mentally retarded" individual make a knowing and intelligent waiver of their rights? Yes)

In *State v. Griffin* (2009) the Court of Criminal Appeals of Tennessee affirmed the trail court's decision to admit the defendant's confession. The Appeals court found that "The totality of the circumstances support that while the defendant was mildly mentally retarded, he had the ability to understand his *Miranda* rights as they were presented to him on November 12th, December 12th, and December 14th. The record shows that the defendant had the ability for analytical thought and further that he had the mental ability to understand the significance of the evaluation and to try to manipulate its outcome. We conclude that the record supports the trial court's findings that on November 12, December 12th, and December 14th, the defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights, that the police did not use coercive tactics in obtaining his statements, and that the statements were voluntarily given."

(Confession from defendant with mild retardation (I.Q. 65) upheld)

In *State v. Kenney* (2009) the Superior Court of New Jersey, Appellate Division, upheld the trial court's opinion to admit the confession of the defendant who had an I.Q. of 65. The court found that: "Judge Cleary then noted that defendant's I.Q. ranged from fifty-seven to eighty, and although that places him in the range of mild to moderately mentally retarded, defendant exhibited "street smarts" and had helped his younger brother get an apartment when he was just fifteen. The judge also agreed with Michals' opinion that, although defendant does have a personality disorder, it is not of the type that would cause an inability to understand his constitutional rights. The judge also relied on her colloquy with defendant at the commencement of the *Miranda* hearing, and his keen understanding

of legal concepts and impressive vocabulary. Finally, she relied on the tape of defendant in which he reviewed his statement and made changes.

Judge Cleary's factual findings are well supported by the record. She correctly applied the controlling legal principles in concluding that, based on the totality of the relevant circumstances, defendant's will was not overborne and that he knowingly, voluntarily and intelligently waived his *Miranda* rights before voluntarily making his statements to the police. There is no basis for reversal of her order denying defendant's motion to suppress his statements." *(Mental impairment and IQ re the waiver of Miranda rights)*

In *Bevel v. State* (2008) the question was, Did the subject make a knowing and intelligent waiver of the *Miranda* rights? The defendant had a "low full-scale IQ of 65, which placed him in the range of mild mental retardation." "In the instant case, two expert opinions were introduced indicating that Bevel's full-scale IQ falls somewhere between 65 and 75, within the mild range of mental retardation. However, Bevel's IQ is but one factor to be considered in determining the voluntariness of his confession. Despite his low IQ, the totality of the circumstances, based upon the testimony presented at the hearing as well as a review of the videotaped confessions, indicates that Bevel knowingly and voluntarily waived his *Miranda* rights." Click here for the complete opinion.

(Court rejects claim that borderline range of intellectual functioning caused an involuntary confession)

In *People v. Slater* (2008) the Supreme Court of Illinois reversed the appellate court's reversal of the defendant's conviction and remanded the cause for a new trial. "We granted the State's petition for leave to appeal (210 Ill.2d R. 315), and, for the reasons that follow, we reverse the judgment of the appellate court."

The court-appointed psychologist, Dr. Randi Zoot, found defendant to be "alert, oriented to person, place date and situation, and cooperative," and that she had a verbal IQ of 81, a performance IQ of 70, and a full-scale IQ of 74. Although defendant's "overall I.Q. places her in the borderline range of intellectual functioning and her verbal abilities are low average," Dr. Zoot concluded that defendant did "not suffer from a mental disorder that interferes with her ability to understand the court proceedings, the role of the court participants or from cooperating with her attorney in her defense." The parties stipulated that Dr. Zoot found defendant fit to stand trial.

"We first consider defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning. As discussed earlier in this opinion, the evidence is uncontroverted that defendant's intellectual limitations were not outwardly apparent to the detectives and did not interfere with her ability to communicate with them. This is confirmed by our own review of defendant's subsequent videotaped statement, wherein she speaks fluently with the officers in a conversational manner, engages-and often leads-the officers in conversation, freely offers details, and is very open and cooperative. There are no outward indications from our viewing of this

recorded statement that defendant has a disability."

"For the foregoing reasons, the judgment of the appellate court is reversed, and the judgment of the circuit court of Will County is affirmed."

(Mildly retarded individual can give voluntary confession)

In *People v. Hernandez* (2008) Francisco Gomez, a forensic clinical psychologist called by the defense, testified that the Defendant was mildly retarded with an IQ of between 60 and 70, which is the bottom one to two percent of intelligence. He also testified that he watched the part of the videotape interview where defendant was given his *Miranda* rights. In his opinion defendant's "cognitive ability" prevented him from "be[ing] able to process that information that rapidly and know ... what he was waiving."

The Court of Appeal found that "there is no evidence the police knew of defendant's mental condition. Borkowski testified she had no such information. And defendant acknowledges the officers' testimony that he understood them and had no difficulty speaking to them; he did not stutter nor did he seem confused. "The record does not convince us that the interrogating officers were aware of, or exploited, defendant's claimed psychological vulnerabilities in order to obtain statements from him."

"Further, the California Supreme Court "has noted that 'the Fifth Amendment is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion."

"Defendant's cases relying on police exploitation of low intelligence are also factually inapt. (E.g., People v. Neal (2003) 31 Cal.4th 63, 82, 84 [in addition to low I.Q., the defendant denied opportunity to speak with lawyer and was "confined incommunicado"].) That was not the case here."

(Defendant, who required special education classes and could only read at a third grade level, could still give a knowing and intelligent waiver of his Miranda rights)

In *Jackson v. Mckee* (2008) the court found that the defendant, who required special education classes and could only read at a third-grade level, could still give a knowing and intelligent waiver of his *Miranda* rights.

"... Because 'there is nothing cognitively complex about the advice that one has the right to remain silent and not to talk to the police,' Finley v. Rogers, 116 F. App'x 630, 638 (6th Cir. Nov. 18, 2004);...because Jackson had average problem-solving skills and intelligence and because his considerable prior experience with the criminal justice system gave him reason to know the consequences of waiving these rights, the state court

did not unreasonably apply Supreme Court precedent in holding that his waiver was knowing and intelligent."

(Does the totality of circumstances standard for assessing the voluntariness of a confession apply to individuals suffering from mental retardation and mental illness?)

In *Delao v. State* (2007) the Court of Criminal Appeals of Texas found that the totality of circumstances does apply to the assessment of the voluntariness of a confession from someone who is mentally retarded or impaired. The court stated:

We hold that the totality of the circumstances standard for assessing the voluntariness of a confession given by a person of normal mentality is also the appropriate standard to apply when a confession is made by someone suffering from mental retardation and mental illness. Because the court of appeals included Appellant's mental disabilities among the many factors it considered when analyzing the totality of the circumstances surrounding Appellant's confession, we cannot say that the court of appeals applied an inappropriate standard of review, nor that it erred in confirming that the confession was voluntarily made.

What constitutes mental retardation?

(What constitutes an intellectual disability? What is mental retardation?)

In *Chase v. State* (August 2015) the Supreme Court of Mississippi concluded the following: Ricky Chase filed a motion for post-conviction relief (PCR) in the Circuit Court of Copiah County arguing that he is intellectually disabled under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and exempt from execution. The circuit court denied relief, finding that Chase had failed to prove by a preponderance of the evidence that he is intellectually disabled. Chase appeals, arguing that the circuit court made legal errors and that its fact-findings were clearly erroneous. We affirm. We take the opportunity presented by this case to recognize the definitions of intellectual disability promulgated by the American Association on Intellectual and Developmental Disabilities in 2010 and the American Psychiatric Association in 2013. We hold that these definitions may be used in our courts in determining whether a criminal defendant is intellectually disabled for the purposes of the Eighth Amendment.

From the Supreme Court's opinion: "This case presents the Court with the opportunity to recognize developments in the field of assessing intellectual disability that have manifested since Atkins and Chase. Since Atkins, the American Association on Mental Retardation (AAMR), recently renamed the American Association on Intellectual and Developmental Disability (AAIDD), promulgated new definitions of intellectual disability that changed the terminology applicable to adaptive functioning. In 2002, the AAMR promulgated the following definition: "Mental Retardation is a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills." Mental Retardation: Definition, Classification, and Systems of Support 1 (10th ed.2002). In

2010, the AAIDD promulgated a definition that changed the term "mental retardation" to "intellectual disability." The 2010 definition states: "Intellectual Disability is characterized by significant limitations in both intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills." Intellectual Disability: Definition, Classification, and Systems of Support 1 (11th ed.2010). Intellectual disability must have originated prior to age eighteen..

The 2010 AAIDD manual defines each domain of adaptive functioning. The conceptual skills domain includes "language; reading and writing; and money, time, and number concepts." ... The social skills domain includes "interpersonal skills, social responsibility, self-esteem, gullibility, naivete (i.e., wariness), follows rules/obeys laws, avoids being victimized, and social problem solving." ...The practical skills domain includes "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone." ... For a diagnosis of intellectual disability, an individual must have significant deficits in one of the three adaptive functioning domains. ...

In 2013, after the hearing presently under review, the American Psychiatric Association also promulgated a new definition of intellectual disability: "Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed.2013). The APA's description of the adaptive functioning domains is similar to the AAIDD's description:
The conceptual (academic) domain involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problems solving, and judgment in novel situations, among others. The social domain involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The practical domain involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others...
The adaptive functioning prong is met when the individual has significant limitations in one of the three domains....

The new AAIDD and APA definitions are similar and require the same three basic elements of intellectual disability as the earlier definitions: significantly subaverage intellectual functioning, significant deficits in adaptive behavior, and manifestation before age eighteen. Although the new definitions changed the terminology applicable to adaptive functioning, other courts have recognized that "the exact wording of the various standards makes little substantive difference in this Atkins context."... This is because both the earlier and later standards promulgated by the AAIDD and the APA "direct clinicians to the same standardized measures of adaptive behavior, such as the Vineland Adaptive Behavior Scales-II (VABS-II) and the [AAIDD's] Adaptive Behavior Scale... And "[e]ven after release of the DSM-5, prong two still 'generally requires a more expansive investigation of a defendant's life history and skill levels than could be fully

evaluated through use of a normed instrument,' " and still involves "significantly more subjective clinical judgment."

(What constitutes mental retardation?)

In *US v. Wilson* (2013) the US District Court, E.D. New York examined the issue of what constitutes mental retardation. In this case, the defendant, "a convicted murderer of two undercover police officers, claims that he is mentally retarded and therefore ineligible to receive the death penalty. For the reasons that follow, he is incorrect."

In examining this issue the court stated that, "Two provisions of law forbid federal courts from imposing a death sentence upon a person who is mentally retarded. First, the Federal Death Penalty Act ("FDPA"), originally enacted by Congress in 1988 and amended in 1994, provides that a "sentence of death shall not be carried out upon a person who is mentally retarded." ….. Second, the execution of mentally retarded individuals violates the Eighth Amendment's ban on "cruel and unusual punishments."

However, "neither the FDPA nor *Atkins* mandates a particular definition of mentally retardation." …. For these reasons, the court relies largely on the clinical definitions of mental retardation promulgated by the AAIDD and the APA, the two leading authorities on the subject. These authorities were cited favorably in *Atkins,* and nothing in either the FDPA or New York law prevents the court from relying upon them. Most federal courts have taken the same approach when deciding *Atkins* cases.

In their opinion the curt stated that, "The definitions of mental retardation set forth by the AAIDD and the APA are "essentially identical." …….

According to the APA, a <u>diagnosis of mental retardation</u> requires:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test....

B. Concurrent deficits or impairments in present adaptive functioning (i.e., a person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.

C. The onset is before 18 years of age.

DSM–IV–TR at 49.

The AAIDD defines mental retardation (which it now calls "intellectual disability" or "ID") as follows: "Intellectual disability is characterized by significant limitations both in

intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before 18." AAIDD 2010 Manual at 1.

Putting these two clinical standards together, the definition of mental retardation has three "uniformly accepted" requirements, … which the court will at times refer to as "prongs one, two, and three." These requirements are: (1) significantly subaverage intellectual functioning; (2) significant deficits in adaptive behavioral skills; and (3) onset of the condition before age eighteen. *See* AAIDD 2010 Manual at 7, 27, 41; DSM–IV–TR at 49; …. The three prongs are each "indispensable" to a finding of mental retardation.

In sum, both the FDPA and the Eighth Amendment forbid the court from imposing a death sentence upon a person who is mentally retarded. A person is mentally retarded only if he satisfies three necessary requirements: (1) significantly subaverage intellectual functioning; (2) significant deficits in adaptive behavioral skills; and (3) onset of those limitations before the age of 18. In developing the nuances of these requirements, the court will rely heavily upon modern clinical definitions of mental retardation, particularly those of the APA and the AAIDD. At the same time, the definition of mental retardation is ultimately a legal matter, and so the court may—and will—exercise its own judgment as to the appropriate definition of mental retardation in the *Atkins* /FDPA context." .

Attorney negligence re not using false confession expert

(Failure to call expert witness to testify about false confessions was not basis for finding of ineffective counsel)

In *State v. Guzman* (March 2015) the US District Court, D. Massachusetts, upheld the finding that failure to call a false confession expert to testify at trail was not an indication of ineffective counsel. From the court's opinion:

"The petitioner argues that it was ineffective of trial counsel not to inform the jury that false confessions are common....stating that "trial counsel made no effort to introduce expert testimony about false confessions. Equally troubling, trial counsel also did not seek to have the district court inform the jury--through either voir dire or jury instructions--that false confessions are a real phenomenon."

The Government counters that there is no case law supporting a per se finding of ineffectiveness for failing to inform or instruct on the phenomenon of false confessions, and that petitioner has failed to show that the outcome of the trial would have been different if he had adopted such a strategy.

Petitioner is correct that trial counsel did not bring in an expert or request a jury instruction on false confessions. However, in his closing argument, trial counsel did argue:

You bring your common experience and your knowledge of the world. You can't pick up

the newspaper without reading about somebody who has confessed to something they haven't done and then they turn out to be cleared by DNA. Some people even come off of Death Row having confessed to a crime they didn't commit.

Despite the statement made during closing, petitioner argues that Guzman's November 2003 statement to the ATF agents was the "centerpiece" of the Government's case, and that it was ineffective not to offer expert testimony undermining the reliability of the confession or to request a jury instruction on the phenomenon of false confessions. Neither of these two failures, however, rise to the level of a Sixth Amendment claim. Although the petitioner cites to cases where courts have accepted the theory of false confessions, the petitioner neglects to offer evidence that an expert would have testified favorably in this instance. See generally, *Tash v. Roden*, 626 F.3d 15, 20 (1st Cir.2010) (court found that it was not ineffective for defense attorney to refrain from presenting testimony of expert given that proposed testimony about false confessions was based upon a theory that had not been established as reliable).

Furthermore, in the case cited by the petitioner, *United States v. Jacques*, 784 F.Supp.2d 59 (D.Mass.2011) the court affirmed the denial of expert testimony on the science of false confessions. The Jacques court did instruct the jury on the existence of false confessions, but the court excluded expert testimony because it did not meet Daubert standards. See also, *United States v. Redlightning*, 624 F.3d 1090, 1115 (9th Cir.2010) ("there was no reliable evidence in the record to support a theory of expert testimony that the interrogation techniques used raised a risk of false confession."), cert. denied, --- U.S. ----, 131 S.Ct. 2944, 180 L.Ed.2d 234 (2011); *Commonwealth v. Robinson*, 449 Mass. 1, 7, 864 N.E.2d 1186, 1190 (Mass.2007) (court properly excluded testimony of expert who would have testified on whether the police tactic used was likely to induce a false confession because the evidence fell "far" short of standards of admissibility); *Commonwealth v. Hoose*, 467 Mass. 395, 419-420, 5 N.E.3d 843, 863-64 (Mass.2014) (court's denial of expert testimony on false confession upheld, but Massachusetts Supreme Judicial Court acknowledged that phenomenon is a growing area of social science research and therefore didn't foreclose admission of such testimony in future cases).

While petitioner may have disagreed with trial counsel's strategy, it was not unreasonable or below the level of the profession to refrain from providing such evidence. Additionally, petitioner has failed to show that the outcome of the trial would have been different if an expert had testified or if a jury instruction had been given. He provides no evidence that an expert would have testified favorably on his behalf, or that such testimony would have even been allowed. Further, given the weight of the other evidence against the petitioner, it is inaccurate to say that the confession was the centerpiece of the Government's case. For the foregoing reasons I shall recommend that the petitioner's claim be denied.

(Defendant was not denied effective assistance due to trial counsel's failure to develop and present expert witness testimony concerning claimed involuntariness of his confession)

In *Lucas v Warden* (November 2014) the US Court of Appeals, Eleventh Circuit found that the petitioner's counsel was not ineffective for failing to investigate and present evidence about the effect of intoxication on his memory when Lucas sought to suppress his videotaped confession. From the Court of Appeals opinion:

"Lucas's trial counsel moved to suppress the confession as being involuntary and unreliable for at least five reasons, including because Lucas simply repeated what the officers and Rhode had told him since his drug and alcohol consumption kept him from having any memory of the events... After reviewing the videotaped confession and hearing testimony from the interrogating officers, the trial court denied Lucas's motion to suppress. On direct appeal the Georgia Supreme Court affirmed, finding the confession to have been voluntarily made after Lucas waived his *Miranda* rights.

Lucas later argued to the habeas state trial court that trial counsel were ineffective because they failed to develop and present expert testimony from Dr. Anthony Stringer, a neuropsychologist, and Dr. Randall Tackett, a pharmacology expert, to support their claim that Lucas's intoxication on the day of the murders rendered his confession unreliable.

Dr. Stringer testified at an evidentiary hearing that he was hired by trial counsel in March 1999 to conduct a neuropsychological examination of Lucas and to evaluate Lucas's "susceptibility to suggestion from others and his memory and behavior." Stringer testified about Lucas's "horrific family circumstances," his "extensive drug abuse," and "the fact that he had ... a number of incidents where he had suffered blows to the head." Stringer said Lucas tested with an IQ of 110, at the upper end of the average range, but that he suffers from "left hemisphere brain dysfunction," which can be associated with "remember [ing] information in less detail." Stringer added that Lucas, due to this disorder, may have gaps in his memory and might "take information that someone has provided him ... as being accurate."

Dr. Tackett ... testified that Lucas, because of his blackouts, was susceptible to suggestibility, which meant that when Lucas could not recall a detail about the events of the day, he accepted an explanation suggested by someone else. Tackett opined that the combination of drugs and alcohol that Lucas consumed on the day of the murders "made it impossible for Mr. Lucas to understand events as they occurred, much less remember any details later."

The state habeas trial court denied relief on both the performance and prejudice prongs of *Strickland*. The court observed that Lucas "has never denied involvement in the case, and has never told anyone, in the past or present, that his confession is untrue." To the contrary, the state habeas trial court found that Lucas's statements to law enforcement and others showed he had a particularized memory of the crimes and of shooting Bryan Moss. Indeed, Lucas had "made statements to his Uncle Brad Lucas and Derrick Jackson prior to talking to police saying that he 'messed up real bad' and 'killed somebody,' and told 'Robbie Hunnicutt' on the afternoon*795 of the murders ... that 'he was killing those

motherfuckers.' " The court concluded that, combined with the videotaped confession, the other confessions undermined Lucas's claim that police fed him information about the crime and also undermined his experts' opinions that Lucas was in a blackout and without any memory of the crimes. The state habeas trial court found Lucas's story was not likely to have been suggested by Rhode because Lucas viewed Rhode's videotaped statement just before saying "that's bullshit" and specifically recounting events that contradicted some of Rhode's version.

We hold that the Georgia Supreme Court had a reasonable basis for rejecting Lucas's claim because the petitioner failed to establish a reasonable probability that the result would have been different had the additional testimony been offered at the suppression hearing. The testimony that Lucas says should have been presented--suggesting the petitioner had no memory of the events of the murder due to drug use or brain damage--was directly refuted by a substantial body of evidence."

(Failure to develop and present expert testimony on false confession issues is does not indicate ineffective counsel (value of video taping interrogation))

In *Lucas v. Warden* (November 2014) the US Court of Appeals upheld the Georgia Supreme Court's decision that petitioner "was not denied effective assistance due to counsel's failure to develop and present expert witness testimony concerning claimed involuntariness of his confession was reasonable." From the court's opinion:

"Lucas later argued to the habeas state trial court that trial counsel were ineffective because they failed to develop and present expert testimony from Dr. Anthony Stringer, a neuropsychologist, and Dr. Randall Tackett, a pharmacology expert, to support their claim that Lucas's intoxication on the day of the murders rendered his confession unreliable. Dr. Stringer testified at an evidentiary hearing that he was hired by trial counsel in March 1999 to conduct a neuropsychological examination of Lucas and to evaluate Lucas's "susceptibility to suggestion from others and his memory and behavior." Stringer testified about Lucas's "horrific family circumstances," his "extensive drug abuse," and "the fact that he had ... a number of incidents where he had suffered blows to the head." Stringer said Lucas tested with an IQ of 110, at the upper end of the average range, but that he suffers from "left hemisphere brain dysfunction," which can be associated with "remember[ing] information in less detail." Stringer added that Lucas, due to this disorder, may have gaps in his memory and might "take information that someone has provided him ... as being accurate." He said he reviewed Lucas's videotaped confession in 2002 and, had he seen it in 1999, he could have testified that the statement contained "gaps with regards to any detail" and "it seemed to be very much responsive to the information that was being presented to him." Stringer said he was not called to testify at the suppression hearing or Lucas's trial.

Dr. Tackett also testified at the state habeas evidentiary hearing. He said that trial counsel contacted him in September 1998 and asked him to assess the effects of drugs and alcohol on Lucas. Tackett explained that Lucas had a family and personal history of drug abuse, which included "everything from cocaine, alcohol, mushrooms, LSD, [and]

prescription drugs." According to Tackett, Lucas could not remember much of what happened inside the Moss residence on the day of the murders. Tackett said he informed trial counsel that he "felt strongly that [Lucas] had experienced a blackout or blackouts during the day of the crime." He also testified that Lucas, because of his blackouts, was susceptible to suggestibility, which meant that when Lucas could not recall a detail about the events of the day, he accepted an explanation suggested by someone else. Tackett opined that the combination of drugs and alcohol that Lucas consumed on the day of the murders "made it impossible for Mr. Lucas to understand events as they occurred, much less remember any details later."

The state habeas trial court denied relief on both the performance and prejudice prongs of *Strickland*. The court observed that Lucas "has never denied involvement in the case, and has never told anyone, in the past or present, that his confession is untrue." To the contrary, the state habeas trial court found that Lucas's statements to law enforcement and others showed he had a particularized memory of the crimes and of shooting Bryan Moss. Indeed, Lucas had "made statements to his Uncle Brad Lucas and Derrick Jackson prior to talking to police saying that he 'messed up real bad' and 'killed somebody,' and told 'Robbie Hunnicutt' on the afternoon of the murders ... that 'he was killing those motherfuckers.' " The court concluded that, combined with the videotaped confession, the other confessions undermined Lucas's claim that police fed him information about the crime and also undermined his experts' opinions that Lucas was in a blackout and without any memory of the crimes. The state habeas trial court found Lucas's story was not likely to have been suggested by Rhode because Lucas viewed Rhode's videotaped statement just before saying "that's bullshit" and specifically recounting events that contradicted some of Rhode's version."

(Counsel's failure to retain expert witness on false confessions was matter of reasonable trial strategy)

In *Johnson v. State* (June 2014) the Supreme Court of Georgia did not find the defendant's attorney's decision not to call a false confession expert as a witness to be ineffective counsel. From the court's opinion: "At the new trial hearing, Johnson's trial counsel testified that the defense strategy going into trial was for Johnson to take the stand and testify that he had been at home when the crimes were committed, that he knew the details of the crimes only from having heard about them from friends, and that his confession was coerced out of fear. Counsel testified that he had numerous discussions with Johnson about this strategy and prepared him extensively for his trial testimony. At trial, however, once the prosecution had presented its case, Johnson was too shaken and nervous to testify, and thus, unexpectedly, elected not to testify." The court went on to say, "We find no deficient performance or prejudice in counsel's failure to retain an expert witness on false confessions, given counsel's intended strategy of calling Johnson himself to testify that he was coerced into confessing, and Johnson's failure to make any proffer as to what testimony such an expert might have given."

(Attorney not negligent for deciding not to use false confession expert at trial)

In *Wright v. Commissioner of Correction* (2013) the Appellate Court of Connecticut upheld the lower court's decision that the defense attorney's conduct was not deficient because he decided not to use a false confession expert (Dr. Richard Leo) at trial. From their opinion:

"The petitioner claims that the court improperly concluded… that Moniz had not rendered ineffective assistance at trial despite the fact that he failed to present testimony related to false confessions from Richard Leo, an expert witness retained by the defense at the time of trial. The petitioner alleged that had Moniz taken these steps at trial, they would have cast doubt on his confession and affected the outcome of the trial.

"Also, the petitioner presented testimony from Leo, a law professor with expertise in the areas of interrogation, psychological coercion, false confessions and wrongful convictions. In relevant part, Leo opined that people with cognitive impairments, mental illnesses or those who are highly compliant, highly suggestible, weak-willed or submissive, are vulnerable to making false confessions. Leo also opined that there is a risk that police, in coercing a suspect to confess to a crime, unintentionally may "contaminate" the suspect by providing him with facts about the crime that are not generally known by the public. Later, the suspect's reference to these facts, learned only during the course of interrogation, may make his confession appear to be based on his firsthand knowledge of the crime. Leo testified that police techniques are designed to be stressful,… manipulative and deceptive and that, in false confession scenarios, unintentional contamination of suspects occurs frequently.

"Leo testified that he reviewed information about the present case that he obtained from Moniz. Leo testified that there was evidence that the police used coercive techniques when they questioned the petitioner by promising him that he could go home if he provided a satisfactory statement, yelling at him, accusing him of committing the crime, confronting him with evidence concerning the crime and providing him with information about the crime. Leo opined that the petitioner learned all of the information about the crime from the police. Leo testified that he was hired by Moniz and that he testified at the suppression hearing prior to the underlying trial. He did not testify at the underlying trial, although he was available to do so.

"In denying the petition for a writ of habeas corpus, the court stated: "[T]he petitioner's claims [regarding Moniz' failure to pursue psychiatric or psychological testing or to call Leo as a false confession expert at trial] merely challenge trial counsel's strategy in contesting the confession. This is not a case in which trial counsel missed the key issue. Moniz filed and vigorously pressed a motion to suppress, even calling Dr. Leo as an expert on false confessions, which was unusual for that time, ten years ago, in our legal history.... Moniz then made his main theory of defense at trial to be that the confession was false. What the petitioner is doing now is launching highly technical attacks on the precise strategy that Moniz employed in raising this issue." .

(Counsel was not ineffective for failing to present testimony of false confession expert)

In *Johnson v. State* (2012) the Supreme Court of Florida found that "trial counsel was not ineffective for failing to present testimony of expert in coerced confessions." In their opinion the Supreme Court stated, "Moreover, attorney Hockett testified that the decision not to call Dr. Ofshe at trial was a strategic choice predicated on the fact that the defense had sufficiently preserved a challenge to the admission of Johnson's confession through Dr. Ofshe's testimony at the suppression hearing and that the defense felt that repeating a week's worth of detailed testimony on that issue would not be helpful at trial. Additionally, the record shows that Dr. Ofshe's testimony would have contained information detrimental to Johnson's defense, such as Johnson's admission to Dr. Ofshe that Johnson had manipulated other experts and doctors in an attempt to establish mental incapacity."

(Failure to call a false confession expert does not constitute ineffective counsel)

In *Kirschke v. Prelesnik* (2012) the U.S. District Court, E.D. Michigan rejected the defendant's claim "that his counsel should have hired an expert witness on false confessions. Petitioner has offered nothing other than speculation that an expert witness could have been obtained to provide such testimony on the issue of false confessions or that such a witness would testify favorably on his behalf. To present an ineffective assistance of counsel claim based on a failure to call a witness, a defendant must make an affirmative showing as to what the missing evidence would have been and prove that the witness' testimony would have produced a different result. *Malcum v. Burt*, 276 Supp.2d 664, 679 (E.D.Mich.2003) (internal citation omitted). Petitioner has failed to demonstrate that he was denied the effective assistance of counsel from his trial counsel's failure to use or call an expert witness concerning the issue of false confessions, because he has failed to present any testimony to establish that an expert witness could have been obtained to testify favorably for him on this issue." Click here for the complete opinion

(Two courts reject the claim of ineffective counsel because an expert witness on false confessions was not called)

State v. Spoerl (2012) the Court of Appeals, Wisconsin rejected the defendant's claim that his counsel was ineffective for failing to call an expert witness on the issue of false confessions, stating that, " Spoerl's claim of ineffective assistance of trial counsel fails for several reasons. First, the claim that counsel was ineffective for failing to call an expert witness or present a learned treatise on false confessions is precluded by *State v. VanBuren*, 2008 WI App 26, PP 17-19, 307 Wis.2d 447, 746 N.W.2d 545. Counsel's performance could not fall below the objective standard of reasonableness as measured against prevailing professional norms because there is no published Wisconsin case stating that expert testimony on false confessions is admissible and authorities elsewhere are split. Id.

Second, Spoerl did not present an expert witness at the postconviction hearing. Without evidence of what the expert would have said or how he would have been cross-examined, we cannot conclude that counsel was deficient or that the defense was prejudiced by the failure to call that witness.

Third, Spoerl failed to establish prejudice from his counsel's conduct. While the learned treatises speak generally of the phenomenon of false confessions and the effect of youth and mental disorders on interrogation, the treatises do not specifically address the significance of autism or Asperger's syndrome, and Spoerl offers no explanation for his ability to maintain his innocence regarding other crimes. Spoerl also fails to explain how the factors recited in the articles relate specifically to his confession. The evidence presented at the postconviction hearing does not undermine our confidence in the outcome."

In the second case, *Mulero v. Thompson* (2012) the U. S. Court of Appeals, Seventh Circuit, found that "Mulero's second claimed deficiency--that Lynch [Mulero's attorney] failed to obtain psychological evidence to support an argument that Mulero's confession was involuntary--fares no better. In his motion to suppress, Lynch argued that Mulero's confession was psychologically coerced, but the state court rejected this argument. Lynch also testified that he discussed making a coerced-confession argument with Mulero, but he doubted it would succeed given her boastful display to the television cameras following her confession. Moreover, the psychological evidence later obtained from Dr. [Michael] Kovar (defense expert) was rejected as not credible by the state trial court and the Illinois Supreme Court found that in light of the other evidence, the trial court had properly rejected Dr. Kovar's credibility. Additionally, the assistant state's attorney for Cook County to whom Mulero confessed testified at her sentencing hearing that during her confession Mulero was very calm and in control of herself and did not indicate any remorse for her actions. He added that it appeared that Mulero was very proud of what she had done. This testimony also would negate a coerced-confession argument. Under these circumstances, the state court did not act unreasonably in concluding that had Lynch obtained additional psychological evidence, it would not have changed his advice or convinced Mulero to change her mind about entering a blind plea of guilty."

(Failure to offer testimony of a false confession expert was insufficient reason to find trial counsel's performance deficient)

In *Royer v. State* (D2011) the Court of Appeals of Indiana rejected Royer's claim that because his trial counsel failed to consult with and offer testimony of a false confessions expert at Royer's trial, his trial counsel's performance was deficient..... "By failing to contact such experts, Royer alleges his trial counsel did not perform a reasonable investigation in preparing Royer's defense, and therefore could not have made a reasonable strategic decision on whether to offer expert testimony on false confessions at Royer's trial.... We find that Royer's trial counsel's testimony establishes that there was a reasonable, informed, and strategic choice to forego consulting with and offering testimony from false confession experts. Thus, we cannot say that Royer's trial counsel's performance was deficient in this regard."

(Court rejects claim that defense counsel was ineffective because they did not introduce an expert witness on the issue of false confessions)

In *Wiggins v. Ercole* (2011) the US District Court, S.D. New York, rejected the defendant's claim that the defense counsel was ineffective because they did not introduce an expert witness on the issue of false confessions. From the court's decision:

Wiggins argues that his trial counsel, Hammer, was ineffective for failing to consult with, and call, an expert on the psychology of confessions. In support of this proposition, Wiggins offers an affidavit from Dr. Solomon Fulero, a psychologist and attorney who has testified as an expert in the psychology of interrogations and confessions around the country, including in New York.

In response, the State alleges that expert testimony on the psychology of confessions was inadmissible in New York courts at the time of Wiggins's trial, such that Hammer could not have been ineffective for failing to call such an expert.... The S 440 court found that "every reported New York State case, [with one 2005 exception,] rejects false confession testimony." (440.10 Decision, at 13.) Accordingly, it ruled, it would make "little sense to fault trial counsel for failing to offer expert testimony concerning false confessions."

It cannot be said that expert testimony would have created a strong likelihood of a different result. Accordingly, Wiggins's Petition should be DENIED on this ground.

(No basis for ineffective counsel for failing to call expert witness to testify on false confessions - two cases)

In *Commonwealth v. Tash* (2008), the Appeals Court of Massachusetts found that there was no substantial risk of a miscarriage of justice by the defense failing to call as a witness a psychologist who would have testified as an expert that the defendant's confession was false. In analyzing the case the court found that:

"Dr. Mitchell Clionsky's affidavit, reflects that his conclusions regarding the falsity of the confession derive from research of G.L. Gudjonsson. He provides no information about the foundation for Gudjonsson's theories or other information from which it could be determined that the theories are reliable and generally accepted within the relevant scientific community. See *Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994); *Commonwealth v. Soares*, 51 Mass.App.Ct. 273, 280-281 (2001). Even assuming they meet these criteria, according to Dr. Clionsky, Gudjonsson's theory posits:

"[T]here are two main factors that continually emerge in what [Gudjonsson] calls the coerced-compliant type of confession: low intelligence and a factor of suggestibility, compliance, and acquiescence. Individuals who are high on both factors are likely easily to be led by interrogators and, in an attempt to appease the interviewers, to admit to criminal acts they did not commit."

However, based on his evaluation of the defendant, Dr. Clionsky concluded that the defendant is an intelligent man, as well as being an "exceedingly passive, acquiescent, compliant, and suggestible man who avoids anger and confrontation at almost any price."

Trial counsel would have had to consider that Dr. Clionsky's testimony was based on theories not established as reliable, and that in any case, he would have been vulnerable on cross-examination given that the defendant did not meet all of the Gudjonsson criteria supporting the falsity of the confession, both because Dr. Clionsky found the defendant to be intelligent and because other witnesses testified to having observed the defendant's anger and willingness to be confrontational. See *Commonwealth v. Frank*, 433 Mass. 185, 190-191 (2001). He also would have had to concede for the purpose of arguing that the confession was false, that it had been. This would have undermined his chosen tack, that he did not in fact make the inculpatory statements, but that he had only responded affirmatively to questions whether it would have been possible for him, despite his impotence, to partially insert his penis or to insert his tongue into a woman's vagina and that he signed the written statement without having read it. See *Commonwealth v. Rosado*, 434 Mass. 197, 200-201 (2001), cert. denied, 534 U.S. 963 (2001) (where counsel selected defense strategy that would have been weakened by impairment defense, it was not ineffective not to advance impairment defense). The defendant has not demonstrated "that counsel's tactical judgment was 'manifestly unreasonable.' "

In *State v. Napier* (2008) the Court of Appeals of Wisconsin found that the claim of ineffective counsel because an expert witness on false confessions was not called to testify was unfounded. The court stated that:

"Even if we assume that counsel's failure to call an expert constituted deficient performance, Napier is not entitled to relief because he is not able to show that he was prejudiced by the absence of the expert testimony. At the postconviction motion hearing, Dr. Larry White, an expert on coerced confessions, testified that he did not have an opinion as to whether Napier's interrogation was coercive. He also testified that he was not aware of Napier having any innate factors that made him vulnerable to police pressure, such as low intelligence or a mental disorder. While White testified that the fact that one of the officers may have yelled at Napier was potentially coercive, Napier testified during the suppression hearing that he had not felt threatened prior to making his confession, just confused. We thus conclude that failure to introduce the expert's testimony was not prejudicial because there is not a reasonable probability that, had it been introduced, the result of the proceeding would have been different. We reject this claim of ineffective assistance of counsel." .

Miranda issues

In general

(*The suspect does not have to know all of the possible issues they will be questioned about to make a knowing and intelligent waiver of rights*)

In *Coddington v. Royal*, *Warden* (September 2016) the US District Court, W.D. Oklahoma, upheld the lower court's decision that the defendant made a valid waiver of his *Miranda* rights, even though he did not know he was going to be questioned about a murder. From the District Court's opinion:

Petitioner's first contact with law enforcement came two days after the murder when some Oklahoma City Police Officers assigned to the robbery unit confronted petitioner at his apartment complex about his involvement in multiple robberies. While standing outside petitioner's apartment, petitioner told the officers, "You guys have caught me. I did all of those robberies. I should have pulled that knife and made you guys kill me. I'm not going back to prison." These incriminating statements prompted Oklahoma City Police Officer Roger Smart to give petitioner his Miranda rights. Using a standard form, Officer Smart read petitioner his rights. Petitioner acknowledged his understanding of these rights and he told Officer Smart that he desired to waive them. He then signed the waiver of rights portion of the form. Petitioner was questioned about the robberies as they stood outside his apartment.

Later, petitioner was taken downtown and interviewed by Oklahoma City Police Officer Glen DeSpain, who like Officer Smart was a part of the robbery unit, and Choctaw Police Officer Wes Weaver, who wanted to talk to petitioner about the murder. This interview was videotaped. Officer DeSpain testified that he did not read petitioner his Miranda rights because he had been told by Officer Smart that petitioner had already waived his Miranda rights. Officer DeSpain was in possession of the waiver petitioner had signed earlier that day, and at the start of the interview, Officer DeSpain asked petitioner if he remembered being advised of his rights. Petitioner responded affirmatively…. In the course of this interview, petitioner confessed to the murder…

In his first challenge to the admission of his confession, petitioner contends that his waiver was invalid because he was not advised that the police wanted to talk to him about the murder. Labeling this failure to advise as a misrepresentation, petitioner argues that his confession should not have been admitted.

In Spring, 479 U.S. at 577, the Supreme Court specifically held "that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." With reference to Spring, the OCCA rejected petitioner's argument …. Clearly, the OCCA's decision here was not unreasonable.

(Court upholds suppression of incriminating statements because Detective read Miranda rights in a "garbled' manner)

In *State v. Herring* (June 2012) the New Mexico Supreme Court upheld the lower court's decision to suppress the defendant's incriminating statements because the *Miranda* rights "were read so rapidly as to be garbled to such an extent that [Defendant] was not advised that she had the right to refuse to talk to [Detective] at any time and to stop talking at any time during the interrogation." From the court's opinion:

On the night of the incident, Detective interviewed Defendant in a standard interview room at the Hobbs police station. Defendant waited alone in the interrogation room for about thirty-eight minutes before Detective entered. When Detective entered the room, he

introduced himself, asked Defendant her name, and informed her that she was not under arrest. Detective then told Defendant that he needed to read Defendant statements from a card before asking her some questions. Defendant asked, "*My Miranda rights?*" Detective said "uh-huh" and told her she had probably seen *Miranda* rights given on television. Defendant responded, "Yeah."

Detective proceeded to read Defendant her *Miranda* rights from the *Miranda* warning card he kept in his pocket. At the end of the recitation, he asked Defendant if she understood "that." Defendant said, "I understand." Defendant then talked to Detective about the incident for almost five hours. During the interview, Defendant admitted that prior to her son's death, she had slapped him twice and punched him in the head with a closed fist.

The State charged Defendant with "knowingly, intentionally, and without justification, tortur[ing], cruelly confin[ing] or cruelly punish[ing] a child under 12 years of age, resulting in the death of [the child], contrary to Sections 30-6-1D(2), F, NMSA 1978." Julian Herring (Child), was Defendant's three-year-old son.

Before trial Defendant filed a motion to suppress her statement from the night of the incident, claiming that she had not knowingly and voluntarily waived her right to remain silent during the interview. Defendant claimed that the Detective "read the warnings to [her] from a card so quickly as to be almost unintelligible (entire reading approximately 17 seconds) and totally garbled the last advice to [her] that 'you do not have to talk to me, but if you do, you have the right to stop talking at any time.' "

In the Order Suppressing Statement, the district judge made the following findings:

[Detective] read the warning from a pocket sized card very rapidly, completing the reading in only a matter of seconds;
The stenographic court reporter who transcribed the DVD of the warning given to [Defendant] did not understand the language of the warnings on the DVD to match the language of the advice of rights card used by [Detective];
The [c]ourt had to listen to the DVD of the warning given to [Defendant] three times, the final time with the [c]ourt reading a copy [of Detective's] advice of rights card along with the DVD, before the actual warnings could be deciphered;
The warnings were read so rapidly as to be garbled to such an extent that [Defendant] was not advised that she had the right to refuse to talk to [Detective] at any time and to stop talking at any time during the interrogation.

As a result of these findings, the district judge concluded that Defendant "did not make a knowing, voluntary, and intelligent waiver of her rights pursuant to the requirements of the New Mexico Constitution and the United States Constitution, because she was not advised of such rights in a manner in which she could [have understood] them," and therefore ordered that Defendant's statement to Detective be suppressed.

Because we indulge in every presumption against waiver, we agree with the district judge

that Detective read Defendant her rights in a garbled manner. It appears as if Detective merely wanted to get the "legal technicality" out of the way, rather than ensuring that Defendant understood her rights.... We affirm the district judge's order suppressing Defendant's statement and remand for further proceedings.

(Investigator's pre-Miranda statement rendered the subsequent waiver coerced and involuntary)

In the case *In re S.W., Appellant* (September 2015) the District of Columbia Court of Appeals found that the investigator's pre-*Miranda* statement rendered the defendant's subsequent waiver coerced and involuntary. From the court's opinion:

Before issuing a *Miranda* warning, Detective Howland introduced himself and asked appellant (a fifteen-year-old juvenile) if he knew why he was under arrest. When appellant did not respond, Detective Howland explained:

"I know you know why you're up here, so I ain't gonna play the 'I don't know' crap, all right? I'm gonna give you an opportunity to give your version of what happened today, because ... *I stand between you and the lions out there* .... [W]e have a lot of things going on out there, and *they're gonna try and say that you did it all*. Okay? And I think what happened today was just a one-time thing. But before I came out here *everybody said ... you did a whole bunch of stuff*, but in order for us to have a conversation, I have to read you your rights and you have to waive your rights. If you answer no to any of the questions I ask you after I read you your rights, that's all, I mean, I can't have the interview, okay?" (Emphasis added).

Detective Howland read appellant his *Miranda* rights from a waiver card, and appellant, who had not spoken until this point, waived these rights verbally and in writing. Appellant's demeanor and tone remained calm as he subsequently confessed to entering Ms. Dougall's car with the intention of taking it.

Considering the totality of the circumstances, with particular emphasis on Detective Howland's references to unspecified charges that a juvenile appellant would face and his offer to stand between appellant and the "lions out there," we cannot conclude that Detective Howland's pre-*Miranda* remarks left appellant with a "real choice about giving an admissible statement." ... From appellant's perspective, Detective Howland's statements "ma[de] the situation appear hopeless" and thereby constituted coercion... Accordingly, while we conclude that appellant received an effective *Miranda* warning and that Detective Howland's pre-*Miranda* remarks did not render the warning ineffective per se, we also conclude that appellant did not voluntarily waive his *Miranda* rights.

(The defendant's Miranda rights were not rendered fatally defective by fact that he was not specifically advised that he had the right to have an attorney present "before and during questioning")

In *People v. Macias* (June 2015) Appellate Court of Illinois First District, Fifth Division

found that the defendant's *Miranda* rights were not rendered fatally defective by fact that he was not specifically advised that he had the right to have an attorney present "before and during questioning" and that the defendant's confession was made voluntarily. From the court's opinion:

Defendant first contends that his motion to suppress should have been granted because he received incomplete and defective *Miranda* warnings. The State maintains that defendant received proper warnings.

When defendant was placed in the interrogation room, Detective Swiderek informed defendant that he was arrested and detained for questioning in the shooting death of Casillas. Detective Swiderek then gave defendant his *Miranda* rights as follows.
"DETECTIVE: All right, these are your rights. You have the right to remain silent. Do you understand that? I need a yes or a no.
DEFENDANT: Yes sir. I'm ready right here.
DETECTIVE: You have the right to have an attorney. You understand that?
DEFENDANT: Yes sir.
DETECTIVE: Okay. Anything you say can and will be used against you in the court of law. You understand that?
DEFENDANT: Yes sir.
DETECTIVE: Okay. If you can't afford an attorney, they give you one for free. You understand that?
DEFENDANT: Hmm-mmm.
DETECTIVE: Is that a yes?
DEFENDANT: [Indicating.]"

Defendant asserts that his *Miranda* rights were defective because he was not informed of his right to have an attorney present prior to or during questioning.

"In *Miranda* v. *Arizona,* 384 U.S. 436, 444 [86 S.Ct. 1602, 16 L.Ed.2d 694] (1966), the Supreme Court held that before conducting a custodial interrogation, law enforcement officers must administer warnings to the defendant sufficient to inform him of his privilege against self-incrimination. The four essential elements of the warning that is required to be given to a defendant in custody before questioning are: (1) the defendant must be told of his right to remain silent; (2) that anything he says may be used against him; (3) that he has the right to have counsel present before and during questioning; and (4) that he is entitled to have counsel appointed if he cannot afford one." ...
However, the Supreme Court has "never insisted that *Miranda* warnings be given in the exact form described in that decision... Rather, the Court has "stated that 'the "rigidity" of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant,' and that 'no talismanic incantation [is] required to satisfy its strictures.' " ....
"Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.
At the suppression hearing, the police officer testified that he gave the defendant his *Miranda* rights " 'conversationally.' " ... The prosecutor then asked the officer if he gave

each of the individual rights, and the officer answered that he had. The exception was that when asked if he advised the defendant he could have a lawyer present during questioning, the officer responded, " 'I don't know if I said that.' " ... The trial court denied the defendant's motion to suppress. At trial, the defendant testified that he did not receive any of his *Miranda* rights.

The Fourth District found:
"[T]he *Miranda* warnings given to defendant in this case, in their totality, were sufficient in that they 'reasonably conveyed' to defendant his rights as required by *Miranda*. In so holding, we note that defendant was specifically informed that he 'had a right to consult with a lawyer.' While the better practice would be for the police to make explicit that defendant's right to consult with a lawyer may be both before and during any police interrogation, we hold that the language used in this case was sufficient to imply the right to counsel's presence during questioning."

Further, we point out that defendant was later advised of his *Miranda* rights by the police officer that administered his lie detector test at approximately 3:50 p.m. on June 3, 2007, and prior to defendant making any inculpatory statements. These rights were also video recorded and the recording shows that defendant was advised that he had the right to have an attorney present before and during questioning and that he could stop questioning to consult an attorney. Defendant fails to acknowledge in his brief the administration of his *Miranda* rights in this instance. Even if Detective Swiderek's failure to advise defendant of his right to have an attorney present before and during questioning were error, which we do not find, any error was cured when defendant subsequently received his complete *Miranda* rights, which defendant then waived. Accordingly, we hold that the trial court properly denied defendant's motion to suppress under *Miranda*.

(Court rejects claim that as a foreign student defendant did not understand the Miranda rights)

In *State v. Jallah* (May 2015) the Court of Appeals of Ohio was asked by Jallah to suppress his oral custodial statements that he made to Cleveland State University police before he had counsel. He argued that his statements should be suppressed because he did not knowingly, intelligently, and voluntarily waive his Fifth Amendment rights. He did not claim that he was not given the *Miranda* warnings. Rather, he asserted that because he was a foreign student at Cleveland State University, and his country of origin is Liberia, he "was not in a position to fully comprehend the constitutional protections provided in this country." From the court's opinion:

"We note at the outset that the issue of whether Jallah was in custody is not in dispute as the state never disputed that Jallah was not in custody. Moreover, the issue of whether the officers gave Jallah *Miranda* warnings is also not in dispute as Jallah did not assert in his motion to suppress or at the oral hearing on his motion that he was not given his *Miranda* rights.

In his written motion to suppress, Jallah argued that "as a foreign student at the

university, whose country of origin is Liberia, [he] was not in a position to fully comprehend the constitutional protections provided in this country that are not provided in his own homeland." Thus, he maintained that "[h]is ability to fully grasp his rights calls into question whether [his] waiver was in fact a knowing, intelligent and voluntary act[.]" At the hearing on Jallah's motion to suppress, defense counsel argued at the outset that "the crux of our argument pertains not necessarily to whether or not the officers in this case properly read the *Miranda* warnings to my client prior to him making a statement[.]" Defense explained that "[i]t has more to do, Your Honor, with my client's understanding of the *Miranda* warnings that were read to him in the context of his personal situation."

The trial court found that based on the totality of the circumstances, Jallah knowingly, voluntarily, and intelligently waived his rights to counsel and chose to speak to police. The court found that English is the official language of Liberia, and that Jallah had spoken English his entire life. The court further found that Jallah had been educated in the United States since he was nine years old. The court considered the fact that Jallah had a prior incident with police, where he was not arrested. The court found that the officers did not act "inappropriately or particularly aggressive." The court noted that the officers even allowed Jallah to go back in his dorm room, uncuffed, to look for his identification. The court found that Jallah spoke English well, based on the court's observations. The court found that Jallah was college educated. The court found that "the officer went over his rights, then broke it down in the most simple and straightforward language," and that Jallah "nodded yes" that he understood his rights and then chose to speak to police. The court concluded that on both occasions, first to Officer Stats and then "even more so" to Detective Secor, that Jallah knowingly, voluntarily, and intelligently waived his rights after the officers read him his *Miranda* rights.

(Court rules that a minimal understanding of Miranda rights is sufficient to make a knowing and intelligent waiver)

In *People v. Thames* (March 2015) the Supreme Court of Colorado ruled that the defendant "need only have had a minimal understanding of his *Miranda* rights in order to have knowingly and intelligently waived them." And furthermore, "a suspect's awareness of all possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege."

In this case the "investigators gave Thames an oral *Miranda* advisement, Thames confirmed that he understood his *Miranda* rights, and he signed a written waiver form before making statements the prosecution wishes to use in its case-in-chief. Relying on the defense's expert witness who testified that Thames had difficulty understanding spoken paragraphs concerning abstract ideas, the trial court concluded that he did not knowingly and intelligently waive his *Miranda* rights. Under the totality of the circumstances, we conclude that Thames knowingly and intelligently waived his *Miranda* rights. Therefore, we reverse the trial court's order."

In their decision the Supreme Court pointed out the value of recording the questioning - "The existence of the video recording "enables us to undertake this review not just from the 'cold record,' but--at least in part--in precisely the same manner as the trial court."....Applying the totality of the circumstances test, we conclude that Thames knowingly and intelligently waived his *Miranda* rights."

Preamble to the advisement of rights undermined the subsequent Miranda advisement

In *People v Dunbar* (October 2014) the Court of Appeals of New York held that a preamble to *Miranda* warnings undermined subsequently communicated *Miranda* warnings to extent that defendants were not adequately and effectively advised of their choice against self-incrimination. From the court's opinion:

"The Assistant District Attorney described for Dunbar the charges he would be facing when he went to court, including the date, time and place of the crimes alleged. The DI then informed Dunbar that "in a few minutes I am going to read you your rights. After that, you will be given an opportunity to explain what you did and what happened at that date, time and place." She then delivered the preamble, advising Dunbar as follows:

"If you have an alibi, give me as much information as you can, including the names of any people you were with.

"If your version of what happened is different from what we've been told, this is your opportunity to tell us your story.

"If there is something you need us to investigate about this case you have to tell us now so we can look into it.

"Even if you have already spoken to someone else you do not have to talk to us.

"This will be your only opportunity to speak with us before you go to court on these charges."

The DI continued without a break, following a script, next informing Dunbar that "[t]his entire interview is being recorded with both video and sound"; and "I'm going to read you your rights now, and then you can decide if you want to speak with us, O.K.?" She then advised "You have the right to be arraigned without undue delay; that is, to be brought before a judge, to be advised of the charges against you, to have an attorney assigned to or appointed for you, and to have the question of bail decided by the court"; gave the *Miranda* warnings; and, finally, asked "Now that I have advised you of your rights, are you willing to answer questions?" Dunbar indicated his understanding of each warning as it was given, and his willingness to continue the interview.

The Appellate Division unanimously reversed, concluding that the preamble "add[ed] information and suggestion ... which prevent[ed] [the *Miranda* warnings] from effectively conveying to suspects their rights," creating a "muddled and ambiguous"

message... In this regard, the court rejected the argument, advanced by the People, that the effect of the preamble had to be assessed on a case-by-case basis, taking into account the individual experience and circumstances of each suspect. In the Appellate Division's view, such case-by-case determination, while relevant to the voluntariness of a waiver, was irrelevant to the question of whether *Miranda* warnings were properly administered in the first place... The court further determined that the error in admitting the videotaped statement was not harmless beyond a reasonable doubt in light of the facts and circumstances of the case, and so ordered a new trial."

(Defendant should have been advised on his rights before questioning in the pat-down room)

In *US v Carr* (November 2014) the US District Court, E.D. New York, found that the defendant's incriminating statements made in the pat-down room should be suppressed because he was not advised of his rights in a custodial situation. From the court's opinion:

"According to the facts alleged in the Complaint filed on July 5, 2013, on or about July 3, 2013, Defendant Carr arrived at John F. Kennedy International Airport in Queens, New York ("JFK Airport") from Georgetown, Guyana... Upon his arrival at customs, Carr was selected for a United States Customs and Border Protection ("CBP") examination... He presented one large purple suitcase and one smaller purple suitcase to CBP and answered standard CBP examination questions: he stated that he owned both suitcases, that he had packed the bags himself, and that he owned all of the contents therein.

During the luggage inspection, CBP officers noted that the bottom of the smaller suitcase was "unusually thick and heavy." ... An X-Ray of both suitcases revealed a mass on the bottom of each suitcase... CBP officers then escorted Carr to a private examination area, where the luggage was probed to reveal a white powdery substance, which field-tested positive for cocaine... Carr was placed under arrest.

Carr was physically removed from the public screening area and escorted by four armed officers to a separate, private pat-down room. He was directed to sit on a bench with his back to the wall and three of the four officers who escorted him into the room surrounded him. While no handguns were drawn, and even assuming that Carr was not immediately handcuffed when he was brought into the pat-down room, the totality of the circumstances, including Carr's removal from the public area to the private pat-down room, the manner in which he was escorted by two officers, each with both hands on Carr, and the CB P-dominated atmosphere in the room, strongly suggest a degree of restraint associated with formal arrest.

In addition, the nature of the questions asked by the CBP officers support a finding that Carr was in custody at the time he was placed in the pat-down room... Carr was repeatedly asked where he obtained his bags, and with whom he was traveling. Carr was told there was a "lot of weight" for him to be traveling alone. By his own account, Carr was directly asked about the ownership of the drugs and whether he had smuggled drugs into the United States before, and Officer Finn conceded that it was his typical practice to

ask such questions. While a reasonable individual may expect a brief detention at the border and some questions about his or her personal information and travel, a reasonable person in Carr's position would not see this encounter as attendant to a routine screening at an international border. A reasonable person in Carr's position, given the manner in which he was escorted to the pat-down room, the atmosphere in the room and the nature of the questioning, would likely believe that he was subject to restraints on his freedom of the degree associated with formal arrest, and thus in custody for the purposes of *Miranda*.

Under these circumstances, the First, Second, and Third Statements made in the pat-down room prior to arrest--including any statements made during that time which repeated substantially similar incriminating information in response to the officers' questioning--were the product of a custodial interrogation without adequate warnings as required by *Miranda*, and are therefore suppressed.

(Police are not required to give Miranda advisement of persons they suspect or question, even in a police station, absent custody)

In *State v. Davis* (October 2014) the Court of Appeals of North Carolina upheld the lower court's ruling that defendant was not subject to custodial interrogation, and that defendant's confession was freely and voluntarily given. From the court's decision:

Defendant first argues that the trial court failed to address whether a reasonable person in defendant's position would have believed she was under arrest or restrained to a significant degree, and therefore erred by concluding that defendant was not subject to custodial interrogation during the fourth interview. We disagree.

The Fifth Amendment to the United States Constitution guarantees that "no person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The United States Supreme Court has held that the Fifth Amendment bars statements resulting from custodial interrogation from being used against a defendant unless the defendant was administered certain procedural safeguards before responding, specifically being advised of the "right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney [.]"

However, the Court has emphasized that... Police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."

First, the trial court's finding of fact that defendant was not threatened is supported by competent evidence. Although defendant was told by Detective Bowman in the third interview that lying to a federal officer was punishable by up to five years in prison, neither Detective Pollard nor Sgt. Corcione threatened her with arrest or imprisonment

during the fourth interview. Rather, Detective Pollard and Sgt. Corcione told defendant that they were unconcerned with the potential consequences of her previous lies and wanted to get to the truth of what happened so that they could find S.D. Because the only interview subject to defendant's motion to dismiss was the fourth interview, Detective Bowman's prior statements to defendant do not render the trial court's finding of fact that defendant was not threatened erroneous.

Second, competent evidence supports the trial court's finding of fact that defendant was not restrained during the fourth interview. Defendant concedes that she was not handcuffed or physically restrained in any way. However, defendant contends that her freedom of movement was restricted to the degree associated with a formal arrest because she was seated in the corner of the interview room and was "crowded" by Detective Pollard and Sgt. Corcione, who were seated on either side of defendant, between her and the door. Although we do not dispute defendant's characterization of the seating arrangement inside the interview room, we do not find that these circumstances amounted to a "restraint" on her mobility. Defendant requested and was allowed to take multiple bathroom and cigarette breaks throughout each of the four interviews. Although she was escorted by an officer for each of these breaks, our Supreme Court has noted that it is "unlikely that any civilian would be allowed to stray through a police station," indicating an unwillingness to consider a police escort for a bathroom break as weighing in favor of a contention that a defendant was in custody.... During the fourth interview, Detective Pollard even suggested that defendant leave and go to a medical center when defendant indicated that she felt pain and stomach illness due to her pregnancy. Defendant declined to leave; she elected to continue speaking to the officers with the hope that they would help her find S.D. Thus, because the record demonstrates that defendant could have left the fourth interview had she desired to do so and generally had the freedom to take breaks whenever she requested them, competent evidence supports the trial court's finding of fact that defendant's freedom of movement was not restrained.

Given that competent evidence supports the trial court's factual findings that defendant was neither threatened nor restrained during the fourth interview, we find no error in its legal conclusion that defendant was not in custody for the purposes of *Miranda*. In addition to the above, we find competent evidence to support the trial court's findings of fact that: (1) defendant voluntarily went to the police station for each of the four interviews; (2) she was allowed to leave at the end of the first three interviews; (3) the interview room door was closed but unlocked; (4) defendant was allowed to take multiple bathroom and cigarette breaks; (5) defendant was given food and drink; and (6) defendant was offered the opportunity to leave the fourth interview but refused.

We conclude that under the totality of the circumstances, a reasonable person in defendant's position would not have believed that she was formally arrested or restrained to the degree associated with a formal arrest at the time defendant gave incriminating statements during the fourth interview. Therefore, we affirm the trial court's conclusion that defendant was not subject to custodial interrogation.

(Standard questions that solicit from the custodial suspect basic identifying information do not require an advisement of rights)

In *US v Hitselberger* (2014) the US District Court, District of Columbia, found that asking standard questions that ask a custodial subject basic identifying questions "are unlikely to elicit incriminating responses and are thus not coercive enough to establish an 'interrogation.' In their opinion they stated the following:

"Mr. Hitselberger seeks to suppress the statements made on April 11, 2012 during the 35 minute interview prior to reading and signing a *Miranda* waiver…. Defendant argues that Special Agent Kesici questioned Mr. Hitselberger directly during this time period, which thus constituted an "interrogation" for purposes of *Miranda*.... Because Mr. Hitselberger experienced custodial interrogation without any *Miranda* warnings, he seeks to suppress these statements as a violation of his Fifth Amendment right against self-incrimination.

The Court thus analyzes Mr. Hitselberger's reasonable perceptions during the direct questioning. The record does not reflect exactly what questions were asked, how those questions were framed, and how much information was volunteered by Mr. Hitselberger himself.... It is clear that Mr. Hitselberger was at least generally asked: 1) how he was doing, 2) basic identifying information, such as his name, age and address, 3) how long he had been on the base, 4) his educational background and, 5) the languages he spoke.…I t is further clear that the conversation between the agents and Mr. Hitselberger was conversational, and that Mr. Hitselberger was overly forthcoming with information, especially regarding his relationship with his co-workers and his educational background.

The Court finds that there was no "interrogation" during the 35 minute pre–*Miranda* interview because: 1) the agents asked only standard questions which were unlikely to elicit incriminating responses, and 2) the agents had no additional knowledge that Mr. Hitselberger was unusually susceptible to their standard questions.

Given this record, and the generic nature of the questions asked, the Court does not believe that the Agents could reasonably have known that the questions would elicit incriminating responses. Because the questioning did not rise to the level of an "interrogation," the Court finds no *Miranda* violation and thus no justification to suppress these statements."

(Faulty District Attorney strategy re the advisement of rights)

In *People v. Dunbar* (2013) the Supreme Court, Appellate Division, Second Department, NY, ruled the following:

"The office of the Queens County District Attorney (hereinafter the District Attorney's office) instituted a program (hereinafter the Program) under which arrested individuals are systematically interviewed just prior to arraignment, or, in other words, immediately before those individuals' indelible right to counsel would attach. As part of the Program, the District Attorney's office formulated a script, containing a number of statements,

which is read to suspects before they are advised of their constitutional rights as required under *Miranda v. Arizona* (384 U.S. 436). The principal issue presented on this appeal is whether this procedure is effective to secure those individuals' fundamental constitutional privilege against self-incrimination and right to counsel. We hold that it is not, and, therefore, that the defendant's videotaped statement, made to members of the District Attorney's office pursuant to the Program, should have been suppressed."

The court went on to say, "More specifically, suspects interviewed pursuant to the Program are advised of their Fifth Amendment privilege against self-incrimination, but only after being told that this is their "opportunity," and then "only opportunity," to, essentially, refute what the prosecutor has been told by other individuals, to correct any misperceptions or falsehoods, and to try to help themselves.

In essence, although suspects interviewed pursuant to the Program are told, through the *Miranda* warnings, that they have the right to remain silent, the preamble suggests that invoking that right will bear adverse, and irrevocable, consequences. Such a suggestion conveys that suspects have a right to remain silent only in the most technical sense. While the *Miranda* warnings also advise suspects interviewed pursuant to the Program that anything they say can and will be used against them in court, the preamble essentially suggests that anything they say will also be used to help them. Therefore, the procedure followed under the Program is not "effective to secure the privilege against self-incrimination".

(Confession inadmissible when police tell the suspect (in custody) that he has to hire an attorney in order to have representation during the interrogation)

In *People v. Records* (2012) the Court of Appeal, Fourth District, California found that the defendant's confession should have been suppressed because the police told the defendant he had to hire an attorney in order to have one during the interrogation. In their opinion the Court of Appeal stated the following:

"During the police interview, Detective Neagu effectively told defendant that he could not have a lawyer representing him unless he paid for it. The interview began with some innocuous conversation. Then Detective Neagu read defendant his rights and asked if he understood them. Defendant asked, "how long would it take for me to get a lawyer in the room with us?" Neagu responded he did not know. Defendant repeated the question, "how long do you think a lawyer would take to get here?" Neagu answered, "I couldn't tell you. I mean, do you have a lawyer in mind?" Defendant explained he did not have any money and would need a public defender. Neagu then said, "I can tell you right now, public defender's not gonna show up here and talk to you..... Public defender would be, when you go to court. ..... And represent you there." Defendant sought additional clarification in the following exchange:

"RECORDS: But to, for someone to, to help me out with questions here I mean, who ...
"NEAGU: Right. You'd have to hire an attorney.
"RECORDS: Okay. So I would, there wouldn't be any, uh, if it says, 'cause in the

Miranda rights it says, if one, if you can't afford one, one can be ...
"NEAGU: Well, represent you, but at the time when you're at court.
"RECORDS: Okay. Gotcha."

Defendant asked for an attorney at least four times. Detective Neagu answered that a public defender would not attend the interrogation and defendant would have to hire a lawyer. The detective may have spoken correctly but he also spoke incompletely. Although a public defender may not have been available immediately, defendant was still entitled to have a lawyer during all stages of the criminal proceedings, even during interrogation. It was misleading and wrong for the detective to tell defendant he had to hire an attorney in order to have one during the interrogation. As the Alvarez court directed, when defendant made the requisite expression of a desire for the help of a lawyer, the police should have discontinued the interview and not subjected defendant to any further questioning until after he had had an opportunity to consult with a lawyer or until he, on his own initiative, resumed the conversation. Following defendant's invocation of *Miranda* rights, his subsequent execution of the written *Miranda* waiver was ineffective and his statements should have been suppressed.

(The "underwear bomber" did not have to be advised of his Miranda rights due to the public safety exception)

In *US v. Abdulmutallab* (2011) the US District Court, E.D. Michigan, ruled that the public safety exception allowed the interrogators to question the defendant without advising him of his Miranda rights. Here are the details from the court's opinion:

Before the 3:35 interview began, Special Agent Waters had learned from U.S. Customs and Border Protection Officer Steigerwald that Defendant had admitted that he had detonated an explosive device hidden in his underwear while on Flight 253 and that he was acting on behalf of al-Qaeda. He had also learned from other federal agents that an explosive device similar to the one used by Defendant had been used previously, although not on a plane. He also knew that the explosive device had no mechanical devices associated with it and was thus problematic because it could defeat airport security and, indeed, had done so in this instance. Mindful of Defendant's self-proclaimed association with al-Qaeda and knowing the group's past history of large, coordinated plots and attacks, the agents feared that there could be additional, imminent aircraft attacks in the United States and elsewhere in the world. For these reasons, Agent Waters questioned Defendant for about 50 minutes without first advising him of his Miranda rights.

Special Agent Waters reiterated that, before he interviewed Defendant, he was aware that Defendant claimed to be acting on behalf of al-Qaeda. The agents were also well aware that on September 11, 2001, al-Qaeda operatives hijacked four airplanes in an attack on the United States that killed almost 3,000 people. Mindful of Defendant's self-proclaimed association with al-Qaeda and knowing the group's past history of large, coordinated plots and attacks, the agents logically feared that there could be additional, imminent aircraft attacks in the United States and elsewhere in the world.

Defendant was asked questions that sought to identify any other attackers or other potentially imminent attacks--information that could be used in conjunction with other U.S. government information to identify and disrupt such imminent attacks before they could occur. The agents limited their questioning to approximately 50 minutes, at which time they had sufficient information to address the threat to public safety. The agents then concluded their interview and immediately passed that information on to other law enforcement and intelligence agencies worldwide, further underscoring that it was obtained for purposes of public safety, to deal with other possible threats.

The circumstances present at the time of Defendant's questioning fall within the pubic safety exception to Miranda recognized in Quarles. Accordingly, the fact that he was questioned by federal agents at U of M Hospital on December 25, 2009 before receiving Miranda warnings does not warrant suppression of his challenged statements. Doing so here was fully justified.

(Does the suspect's invocation of their right to remain silent when not in custody preclude the police from attempting to obtain incriminating information from them? The Oregon Supreme Court said no.)

In *State v. Davis* (2011) the Supreme Court of Oregon evaluated whether or not a suspect's invocation of their right to remain silent when they were not in custody, prevented the police from trying to obtain incriminating evidence against him in light of the state constitution. The court decided that the "Police informed defendant that they had received a report alleging that he had sexually abused his step-daughter. There is no suggestion that, at that time, he was in custody or otherwise in compelling circumstances; to the contrary, defendant concedes that he was not. A month later, defendant attempted to invoke his right against self-incrimination under Article I, section 12. Again, however, there is no suggestion that, at that time, he was in custody or otherwise in compelling circumstances; defendant concedes he was not. Some eight months after that, Detective Kaney employed a measure of subterfuge in obtaining, through pretextual instant messaging and telephone communications with the victim, self-incriminating statements from defendant. Yet again, however, there is no suggestion that, at that time, defendant was in custody or in compelling circumstances; he concedes again that he was not. There is no suggestion in this case that defendant's incriminating statements were induced by threats or promises or that in any other way defendant's self-incriminating statements were not voluntarily made. In short, there is no basis for concluding that defendant's self-incriminating statements were obtained in violation of Article I, section 12.

(A social worker's interview of juvenile at youth home, during which he confessed to crimes, was not custodial interrogation)

In *State v. Pearson* (2011) the Supreme Court of Iowa ruled that even though the defendant had invoked his rights not to speak to the police, his confession to a social worker who interviewed him for a "status assessment" was admissible even though there was no advisement of rights. From the court's opinion:

"[C]ustodial arrest thrusts an individual into "an unfamiliar atmosphere" or "an interrogation environment ... created for no purpose other than to subjugate the individual to the will of his examiner." Many of the psychological ploys discussed in Miranda capitalize on the suspect's unfamiliarity with the officers and the environment. Murphy's regular meetings with his probation officer should have served to familiarize him with her and her office and to insulate him from psychological intimidation that might overbear his desire to claim the privilege.

Mahler [the social worker] and Officer Michael had different roles that did not intersect until days after Pearson's confession. Michael was the Waterloo police officer investigating criminal charges against Pearson in the Weiss incident. Mahler's purpose for interviewing Pearson was to perform a status assessment for his pending CINA and juvenile proceedings in Buchanan County. There is nothing in the record indicating Mahler was an agent for law enforcement. Michael did not ask Mahler to interview Pearson; they spoke for the first time days after Pearson's July 15 confession. She refused to give Michael her statement until authorized to do so by her DHS supervisor.

We therefore conclude Mahler was not an agent or stalking horse for the Waterloo police; she had her own reasons, as Pearson's caseworker, to interview him. "When a state-agency employee is working on a path parallel to, yet separate from, the police, Miranda warnings are not required." Mahler's status as a DHS caseworker operating independently from the Waterloo police reinforces our conclusion that her interview of Pearson was not a custodial interrogation.

(Suspect asks for an attorney – the interrogation stops – suspect says shortly thereafter he wants to talk without an attorney)

In *Murphy v. State* (2011) the Court of Appeals of Indiana held that the trial court did not abuse its discretion by admitting Murphy's statement to the police even though Murphy alleged that the police officers continued the questioning after he requested an attorney.

In their decision the Court of Appeals related the following: "The record reflects that prior to questioning, the officers advised Murphy of his Miranda rights and verified that he understood these rights. Murphy signed a waiver of his rights. After some questions about his personal information, the officers started asking him questions about Stafford, whereupon Murphy stated "[c]an I get an attorney because this is about to get real deep?" (State's Exh. 87, p. 13). The interrogating officers stopped the questions. When they asked Murphy to provide them with the name of his attorney, Murphy could not give the officers a name. Nonetheless, Officer Williams told Murphy "[w]e'll go ahead and stop." (State's Exh. 87, p. 14). At that point, the officers ended the interview and placed Murphy back in the holding cell.

The record next indicates that as the officers started the paperwork to arrest Murphy, Murphy started knocking on the wall between the holding cell and the officers' office. The officers returned to the holding cell, and Murphy asked them what he was going to

be charged with. Officer Williams explained that he was going to be charged with murder. After Murphy replied, “I don't think that's right[,]” Officer Williams responded that they could not talk to him as he had requested an attorney. (Tr. p. 163). Murphy replied that he wanted to continue talking. Officer Williams testified about what transpired next as follows:

I again told him his rights still applied, and he had asked for an attorney, and we could not talk to him at this time again. He then said he wanted to talk to us without an attorney. I said, “Well, that will be fine. It's up to you. You have requested an attorney but we will talk to you again if you want to.” He said he did. (Tr. p. 91). This entire episode took approximately fifteen minutes.

Based on the circumstances before us, it is clear that the officers ceased interrogating Murphy as soon as he requested counsel. After he was placed in the holding cell, Murphy initiated further conversation with the officers. Because the officers had elaborately informed Murphy about his Miranda rights prior to the interview and verified that he understood these, Officer Williams' caution that Murphy's rights still applied when Murphy restarted the interrogation is sufficient to establish that Murphy waived his right to counsel upon resumption of the police interview.

(The meaning of interrogation – can you tell a suspect he has been implicated in the crime after he has asked for an attorney?)

In *People v. Frett* (2011) the Superior Court of the Virgin Islands upheld the suppression of an incriminating statement made after the suspect had terminated the interrogation by asking for an attorney.

“On October 28, 2008. at about 6:42 p.m., Frett was interviewed by either Detective Jason Marsh (hereinafter “Detective Marsh”) or Detective Mario Stout (hereainfter “Detective Stout”). Frett signed his name on the Warning As to Rights and Waiver Form, acknowledging that he was read his constitutional rights and consented that he wished to waive his rights. Frett began to give a statement, about two pages, and at approximately 7:01 p.m. Frett told Detective Marsh he wanted an attorney. At that point, Detective Marsh stopped the questioning and left the room to go talk to Southwell in the Investigation room, who was simultaneously being questioned regarding Lerner's murder. Frett remained in the room with Detective Stout.

Several hours later. Detective Stout went by the door and someone told him that Southwell was cooperating and gave a statement indicating that Frett was responsible for the killing. Detective Stout, without prompting or solicitation from Frett, proceeded to share that information with Frett. Upon being told about that he was implicated in the murder, Frett told Detective Stout he wanted to make a statement. Frett was again advised of his constitutional rights and signed the Warnings As to Rights form at 10:05 p.m. on the 28th of October 2008. Frett gave Detective Stout a five-page written statement (hereinafter, the “Second Statement”).

The Court finds that Detective Stout interrogated and violated Frett's Miranda rights when Detective Stout, without prompting or solicitation from Frett and after Frett had already requested an attorney a few hours earlier, told Frett about Southwell's cooperation with the police and Southwell's statement accusing him (Frett) of committing the murder because Detective Stout reasonably should have known or knew that Frett would give an incriminating response. Accordingly, the Court shall suppress Frett's Second Statement given in response to Detective Stout's unsolicited statements regarding Southwell."

(Court rejects confession obtained after a deliberate two-step interrogation approach - 2 cases)

In *US v. Capers* (2010) the US Court of Appeals, Second District, had to determine "whether the officers employed a "deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview," Seibert, 542 U.S. at 621, 124 S.Ct. 2601, and if so, whether "specific, curative steps," were taken to obviate the violation that occurred." The defendant had been arrested, confessed and then advised of his rights, after which he repeated his incriminating statements.

In their opinion the Court of Appeals ruled that "There is no exception to *Miranda* that allows a delay in giving *Miranda* warnings in order to preserve evanescent evidence. Neither is there an exception to *Miranda* that permits delaying the warnings in order to ascertain whether a suspected co-conspirator may be entitled to release. Indeed, we agree with the Williams Court in its observation that

[o]nce a law enforcement officer has detained a suspect and subjects him to interrogation ... there is rarely, if ever, a legitimate reason to delay giving a *Miranda* warning until after the suspect has confessed. Instead, the most plausible reason ... is an illegitimate one, which is the interrogator's desire to weaken the warning's effectiveness.

The only legitimate reason to delay intentionally a *Miranda* warning until after a custodial interrogation has begun is to protect the safety of the arresting officers or the public-neither of which was an issue here. See, e.g., *United States v. Newton*, 369 F.3d 659, 677 (2d Cir.2004) (recognizing this "narrow exception" to the *Miranda* rule)."

Another case in which the courts found a confession inadmissible as a result of this two step process is *Dixon v. Houk* (2010) US Court of Appeals, Sixth District.

(Faulty Miranda Warnings - the custodial subject enjoys a right to the presence of counsel during, not merely before, a custodial interrogation)

In *Rigterink v. State* (2009) the Florida Supreme court ruled that "With regard to the *Miranda* claim, we hold: (i) that Rigterink was in custody for purposes of *Miranda*; (ii) that the right-to-counsel warning he received was constitutionally deficient; and (iii) that the admission and publication of his videotaped confession was harmful error. As a result of this holding, we reverse Rigterink's convictions and sentences and remand for a new capital trial."

The deficient *Miranda* warning was that "the PCSO detectives provided Rigterink with a defective right-to-counsel warning both verbally and in writing. Specifically, the relevant portion of the warning stated that Rigterink had "the right to have an attorney present prior to questioning." (Emphasis supplied.) Therefore, Powell directly controls this issue. The right-to-counsel warning was materially deficient because it did not accurately and clearly convey one of the central components of *Miranda*: The custodial subject enjoys a right to the presence of counsel during, not merely before, a custodial interrogation." .

(Does a suspect have to be told he is a suspect when he is advised of his Miranda rights? No)

In *State v. Nyhammer* (2009) the Supreme Court of New Jersey addressed the issue of whether federal and state law requires that, in addition to being advised of his *Miranda* rights, a person under police interrogation be informed that he is a suspect or that he be re-read his rights when the subject of the questioning may incriminate him.

"The trial court ruled that, based on the totality of the circumstances, defendant John Nyhammer knowingly, voluntarily, and intelligently waived his *Miranda* rights, even though the police did not give him advance notice that the questioning would touch on his own involvement in a sexual crime against his young niece. The Appellate Division reversed, finding that the police deprived defendant of essential information, his status as a suspect, necessary for the exercise of an informed waiver of his rights.

"We now hold that the trial court properly applied the totality-of-the-circumstances test in deciding whether defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights-a test that we recently reaffirmed in *State v. O'Neill*, 193 N.J. 148, 936 A.2d 438 (2007), and State v. Dispoto, 189 N.J. 108, 913 A.2d 791 (2007). In applying that test, the trial court did not err in admitting defendant's confession. Here, defendant knew that he was a suspect as soon as the police asked him the first question about his involvement in the sexual abuse of the child-victim in this case. Moreover, one hour earlier, before defendant made his first incriminating statement, the police told him that he had a right to remain silent and that anything he said could be used against him in a court of law. Nevertheless, despite having been given his *Miranda* warnings, he knowingly and voluntarily chose to speak."

(US Supreme Court decision references our text and firm as teaching the proper way to comply with Miranda)

A basic tenet of the Reid Technique, as taught by John E. Reid and Associates, is that a custodial suspect must be advised of his rights prior to any questioning about a criminal act. If a custodial suspect invokes his right to an attorney, no further questioning can take place without the suspect,s attorney being present.

In *Missouri v Seibert*, (2004) the US Supreme Court further clarifies the Miranda issue and cites Reid and Associates as a "law enforcement educator" that offers proper

guidance regarding Miranda.

From the Court's decision: "It is not the case, of course, that law enforcement educators en masse are urging that Miranda be honored only in the breach. See, ... F. Inbau, J. Reid, & J. Buckley, Criminal Interrogation and Confessions 221 (3d ed. 1986) (hereinafter Inbau, Reid, & Buckley) (same); John Reid & Associates, Interviewing & Interrogation: The Reid Technique 61 (1991) (same). Most police manuals do not advocate the question-first tactic, because they understand that Oregon v. Elstad, 470 U. S. 298 (1985), involved an officer's good-faith failure to warn. See, e.g., Inbau, Reid, & Buckley 241 (Elstad's "facts as well as [its] specific holding" instruct that "where an interrogator has failed to administer the Miranda warnings in the mistaken belief that, under the circumstances of the particular case, the warnings were not required, ... corrective measures ... salvage an interrogation opportunity")."

Referring to Miranda rights as a formality

(Referring to Miranda rights as a formality does not jeopardize the waiver)

In *Chaffin v. State* (2013) the District Court of Appeal of Florida, Fourth District, ruled that minimizing the advisement of the *Miranda* rights by referring to them as formality did not render the defendant's waiver of his rights involuntary.

"We agree with Chaffin that the interviewing detectives tried to minimize the significance of his *Miranda* rights by referring to them as a "formality." ... However, this in itself is not dispositive. The key inquiry when reviewing the admissibility of a post-*Miranda* statement is whether "the waiver of the *Miranda* rights was voluntary, knowing, and intelligent and whether the statements made after the waiver were voluntary."

In Ross, the Florida Supreme court set forth a comprehensive review of the law surrounding *Miranda* rights. It explained that not all statements given post- *Miranda* are voluntary, depending on the circumstances. One factor which may negate the voluntariness of a statement is if the police downplayed the significance of the *Miranda* rights. ... However, this is only a factor if the *Miranda* rights were tardily administered.

Here, there was no delay in the administration of Chaffin's *Miranda* rights. Further, despite the detective's comments, the videotape reflects that Chaffin understood and voluntarily waived his rights. He was read his rights in a normal cadence, acknowledged that he understood his rights several times, and appeared to have read over his rights before signing a form acknowledging his waiver.... Thus, we hold that Chaffin voluntarily waived his rights and the trial court correctly denied Chaffin's motion to suppress on the minimization of *Miranda* issue.

Miranda on a roadside stop

(Fish and Game officers did not have to make an advisement of rights on a roadside stop)

In *Hall v. Idaho Dept of Fish and Game* (2013) the U.S. District Court, D. Idaho, ruled that Fish and Game officers did not have to make an advisement of rights on a roadside stop. From the court's opinion:

"The Ninth Circuit has identified five factors to consider in making the custody determination: (1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual." ... These considerations are not exhaustive.

"After applying all of these factors to the facts of this case, the Court concludes that Soumas' interrogation of Hall was not custodial. The interview took place on the side of a public road, 100 yards from a campground where a family camped. Only two officers were present—only one of whom asked questions. There is no evidence that the two officers surrounded Hall. They did not display their weapons, raise their weapons, or threaten Hall, other than to suggest that Hall had the option to be questioned at the station, rather than on the road. Hall was never physically restrained—he was not surrounded by Soumas and Bogar or handcuffed or forced to sit in the back of Department vehicle. Soumas never pressured Hall with the threat of arrest, and he never placed Hall under arrest. At the close of the approximately hour interview, Hall drove away without hindrance—leaving before Soumas and Bogar moved their vehicles. All of these factors point toward a non-custodial interrogation.

"Here, Soumas had a reasonable suspicion that criminal activity was afoot. Two eyewitnesses reported seeing a bow hunter they identified as Liermann shoot two elk, and they saw a second man come into view after Liermann shot the second elk. When Soumas went to investigate the report, he came across a truck registered to Hall. Soumas spoke to a man at a camp across from the parked truck registered to Hall. The man reported that he had seen two men exit the truck and these men were bow hunting. According to the man at the camp, the two men had gone toward Trapper Creek, where the two elk had been shot with a bow. Thus, Soumas had "a particularized and objective basis" for suspecting that the truck belonged to the two men involved in killing the two elk and for initiating the stop.

"Soumas and Bogar also acted appropriately in the course of the stop. When Hall and Liermann returned to the truck, Soumas approached without his weapon drawn. Soumas saw that the men were wearing camouflage and had blood on their clothes. Soumas asked the men to identify themselves and tell him what they were doing. Given that it was reasonable to suspect Hall and Liermann of shooting two elk out of season, Soumas' inquiry was clearly related in scope to the justification for its initiation."

Request for attorney when not in custody

(When a suspect is not in custody no need to stop questioning when they request an attorney)

In *State v. Lonkoski* (2013) the Wisconsin Supreme Court ruled that when a defendant is not in custody the interrogation does not have to be terminated when he asks for an attorney. The court stated the following:

"No one disputes that Lonkoski was interrogated, so the issue is whether he was in custody. If he was not in custody, then Lonkoski is not entitled to have his subsequent statements suppressed under the *Miranda* rule….

Lonkoski argues that because the interrogation had gotten to the point that the officers knew and could prove he was responsible for his child's death, no one would believe he was free to leave, and therefore, he was in custody. He further argues that even if he was not actually in custody, a person may invoke rights under *Miranda* "when custodial interrogation is imminent or impending."

The parties agree that Lonkoski was not in custody at the beginning of the interview. Because we are determining whether Lonkoski was in custody at the point when he stated he wanted an attorney, we look at the circumstances surrounding the interview to determine if he was in custody when he made that statement.

We will begin by looking at the totality of the circumstances, examining the facts surrounding the defendant's freedom to leave. The circuit court found that the area that Lonkoski was in was a "typical interrogation setting." The court stated that the area was "locked to ingress by individuals, but there [was] no indication that it was locked for egress. That is, that the defendant could simply walk out." The circuit court also found that although the door was closed during most the interview, "there were clearly times when the door was opened and he could in fact have walked out." Finally, the officers stated that Lonkoski was not under arrest and that they were not accusing him.

The purpose, place, and length of the interrogation also support the conclusion that Lonkoski was not in custody. Lonkoski came to the sheriff's department on his own volition, providing transportation for the child's mother, Bodoh. The location of the interview being the sheriff's department weighs toward a custodial situation, but that fact is not dispositive…. An officer went to the waiting room where Lonkoski waited for Bodoh, and Lonkoski went to an interview room. The circuit court found that the officers asked Lonkoski "open ended questions" that "called for a narrative by him. They were not accusatory. They were not leading questions." The circuit court found that the length of the interrogation was "relatively short" before he asked for an attorney, after about 30 minutes. These facts indicate that Lonkoski was not in custody.

Like the other factors, the degree of restraint Lonkoski experienced also does not indicate a custodial situation. Two officers questioned Lonkoski. The door to the interview room was repeatedly used by the officers throughout the interview without a key. At one point when both officers were leaving the room, Gardner asked Lonkoski if he preferred the door open or closed to which Lonkoski responded, "Don't bother me." During the relevant portion of the interview, Lonkoski was not handcuffed, no weapons were drawn

by the officers, and no frisk was performed…. The circuit court found that Lonkoski was not physically restrained in any way. These factors indicate a lack of custody.

Lonkoski argues that once the officers zeroed in on him as a suspect, there was no way any reasonable person would have felt free to leave. He cites several cases from other jurisdictions that he believes support the proposition that a person's knowledge that officers suspect the person of a serious crime is a significant factor that weighs in favor of finding that the person was in custody.

Statements officers make to a suspect can be an indication of the presence or absence of custody…. However, a suspect's belief that he or she is the main focus of an investigation is not determinative of custody…. The United States Supreme Court has rejected this theory. For example, the United States Supreme Court… dismissed a similar argument about the circumstances of a non-custodial interrogation transforming into custodial interrogation after the investigation focused on the suspect, stating, "[W]e are not impressed with this argument."

In addition, we note that Lonkoski's standard would necessarily focus on the subjective beliefs of both police and the suspect. This is inconsistent with the objective test created for custody…. The totality of the circumstances test applied in our opinion today provides the appropriate framework to protect suspects in interrogations and to determine whether a suspect is in custody for purposes of *Miranda.* Lonkoski's argument to the contrary is unsupported by the controlling case law and the purpose behind *Miranda* protections.

We conclude that Lonkoski was not in custody when he asked for an attorney. Because his statement about wanting an attorney was not made during a custodial interrogation, *Miranda's* rule requiring that the interrogation cease upon a request for an attorney does not apply, and there is no constitutional violation and no bar to using his subsequent statements."

Request for a lawyer before advisement of rights

(The effectiveness of an anticipatory invocation of the Miranda-based right to counsel)

In *Commonwealth v. Bland* (May 2015) the Supreme Court of Pennsylvania found that, "to require a suspension of questioning by law enforcement officials on pain of an exclusionary remedy, an invocation of the *Miranda*-based right to counsel must be made upon or after actual or imminent commencement of in-custody interrogation." From the Supreme Court's opinion:

"This appeal centers on the nature of a valid invocation of the *Miranda*-based right to counsel, specifically, in terms of whether the right must be asserted in close temporal proximity to custodial interrogation or may be effectively invoked remotely from such questioning.

Appellee, Dennis Bland, Jr., allegedly shot and killed Keron Remberan in Philadelphia, then fled to his mother's house in Florida. After learning of Appellee's whereabouts, police obtained an arrest warrant and notified Florida law enforcement. Federal authorities in Florida detained Appellee, who was seventeen years old at the time, and he was placed in a juvenile facility to await extradition to Pennsylvania.

The day after Appellee's arrest, his father contacted the Defender Association of Philadelphia and apprised an attorney of his son's circumstances. The lawyer sent a form letter via facsimile to Florida counsel representing Appellee in connection with the extradition proceedings, asking that Appellee sign and return the document. The letter reflected a very clear putative invocation of the *Miranda*-based right to counsel, as follows:

PLEASE BE ADVISED THAT I ... DO NOT WISH TO SPEAK WITHOUT AN ATTORNEY PRESENT.
I WISH TO BE REPRESENTED BY A LAWYER. UNTIL SUCH TIME AS I HAVE AN OPPORTUNITY TO FULLY DISCUSS THE DETAILS OF MY CASE WITH MY LAWYER ..., I STATE THE FOLLOWING TO YOU:
I DO NOT WISH TO BE QUESTIONED OR HAVE ANY DISCUSSION WITH THE POLICE.
I DO NOT WISH TO SPEAK TO YOU WITHOUT MY ATTORNEY PRESENT.
* * *
I WILL NOT WAIVE OR GIVE UP ANY OF MY RIGHTS UNDER *Miranda V. ARIZONA,* NOR WILL I GIVE UP ANY OF MY PENNSYLVANIA OR FEDERAL CONSTITUTIONAL RIGHTS EITHER ORALLY OR IN WRITING WITHOUT THE PRESENCE OF MY LAWYER.

Appellee signed the letter, and it was returned to the Defender Association, which forwarded copies to the Philadelphia Police Department's homicide unit and the Office of the District Attorney.

Subsequently, Appellee waived extradition and was escorted to Philadelphia, where he remained in police custody. Six days after Appellee had signed the form sent by the Defender Association while he was in Florida, a detective provided him with *Miranda* warnings. During ensuing questioning, Appellee ultimately confessed to perpetration of the killing, and, after later consultation with his father, he also provided a written confession.

Appellee filed a pre-trial motion to suppress his written statement, claiming that police violated his rights under *Miranda*, as well as under Article 1, Section 9 of the Pennsylvania Constitution, which, like the Fifth Amendment, protects against self-incrimination..... Thus, Appellee sought an exclusionary remedy..... After a hearing, the suppression court awarded relief and foreclosed the admission of Appellee's confessions into evidence at his forthcoming trial, without any independent treatment of state constitutional considerations.

In terms of the timing of Appellee's invocation, the suppression court relied on broad language from *Miranda* specifying that, if an individual "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking[,] there can be no questioning." ... Applying this principle to Appellee's circumstances, the court determined that--because he had personally asserted his rights by signing the non-waiver letter--Appellee had made an effective invocation, and uncounseled interrogation was proscribed even six days later.

In response to Appellee's claim for approval of anticipatory invocations of a right to counsel under Article 1, Section 9 of the Pennsylvania Constitution, on the arguments presented, we find that the textual similarity between the United States and Pennsylvania Constitutions, the history of our abiding by the United States Supreme Court's *Miranda* regime as it has evolved, and the approach of other jurisdictions and salient policy considerations as reflected in our discussion above, favor continued alignment of our jurisprudence with that of its federal counterpart on the relevant point.

In summary, we hold that, to require a suspension of questioning by law enforcement officials on pain of an exclusionary remedy, an invocation of the *Miranda*-based right to counsel must be made upon or after actual or imminent commencement of in-custody interrogation.

(Does a request for a lawyer before Miranda warnings are given require the investigators to stop questioning the suspect?)

In *Sessoms v. Runnels* (2012) U.S. Court of Appeals, Ninth Circuit found that it did.

In their opinion the court stated that, "Here, any reasonable police officer (as indeed did these officers) would understand that Sessoms expressed his desire to have a lawyer present at his interrogation. Forty seconds into the conversation, before any meaningful exchange took place, Sessoms requested counsel twice in rapid succession. First, Sessoms said "There wouldn't be any possible way that I could have a--a lawyer present while we do this?" Although it was couched in a polite and diffident manner, the meaning of Sessoms's request was clear: he wanted a lawyer then and there.

If there were any doubt (which there should not have been), Sessoms immediately made a second statement: "Yeah, that's what my dad asked me to ask you guys ... uh, give me a lawyer." Simply put, the words "give me a lawyer" mean just that: "give me a lawyer."

Each of Sessoms's statements, taken on its own, clearly expresses his desire for an attorney. But when the two statements are taken together, that conclusion is indisputable.

Of course, the best test of how a reasonable police officer would understand Sessoms's request is how the actual police officer in this case responded. That reaction is telling. Detective Woods's response to Sessoms's statements--informing Sessoms that a lawyer would only prevent him from giving his side of the story and that, in any event, invocation was futile because the police already knew what happened--shows that he

knew Sessoms was requesting a lawyer, and he wanted to do his best to talk Sessoms out of it.

Upon hearing Sessoms's request for an attorney, Detectives Woods and Keller were required to immediately terminate all questioning.

Telling suspect his attorney is at the station

(Investigators did not have to tell defendant an attorney was at the police station to see him)

In *Commonwealth v. Rushing* (2013) the Superior Court of Pennsylvania found that the investigators did not have to advise the defendant that an attorney was present a the police station to see him. From the court's opinion:

"Next, Appellant argues that the suppression court erred in failing to find his waiver of his *Miranda* rights was invalid because Attorney Paul Walker of the Lackawanna County Public Defender's Office presented himself at the Scranton Police Department and asked to speak with Appellant, but was prohibited. Attorney Walker also had contacted the district attorney and requested that police not interview Appellant without him being present. The desk officer at the Scranton police station relayed Attorney Walker's presence to the assistant district attorney at the police station. Attorney Walker was informed that the assistant district attorney... would talk to him soon. However, after remaining at the station for an extended period without gaining access to Appellant, Attorney Walker left. He later received a telephone call from the assistant district attorney indicating that Appellant already had been interviewed. Police did not inform Appellant of Attorney Walker's presence or attempts to speak with him.

In regards to Appellant's argument pertaining to Attorney Walker's appearance at the police station, the Commonwealth contends that because Appellant never requested an attorney and Attorney Walker was not retained by Appellant, no constitutional violation occurred. The Commonwealth argues, "the presence or absence of an attorney in the police station is irrelevant to [Appellant's] waiver of his *Miranda* rights."

We also observe that the Fifth Amendment right to counsel is a personal right which can only be invoked by the person holding that right. Accordingly, whether an attorney physically appears in an attempt to represent the accused does not alter the fact that it is the accused who must invoke his Fifth Amendment right to counsel. Certainly, the presence of an attorney, coupled with any misstatements made by police regarding the ability to speak with a lawyer, could affect a defendant's voluntary, intelligent, and knowing waiver of his *Miranda* rights. Nonetheless, there is nothing in the present record that indicates in any manner that Appellant's *Miranda* waiver was anything less than knowing, intelligent, and voluntary. Police did not inform Appellant that he could not speak with a lawyer or that an attorney did not want to speak with him. Simply put, Appellant was aware of his constitutional right to consult with a lawyer and exercised his right to speak to police without an attorney. Since Appellant never invoked his right to

counsel, the fact that an attorney appeared at the police station and that his interview took place while counsel attempted to speak with him does not establish a *Miranda* violation.

(Police do not have to tell suspect defense counsel is present if suspect waived his rights)

In *State v. Stevens* (2012) Supreme Court of Wisconsin held that "police had no duty to inform defendant that defense counsel from prior pending case was trying to see him, after defendant waived his *Miranda* rights by initiating conversation with police officer after custodial interrogation had been ceased due to defendant's invocation of his right to an attorney."

(Police must tell suspect undergoing custodial interrogation when his attorney arrives)

In *State v. Mitchell* (2011) the Superior Court of Connecticut (Waterbury) ruled that, "In State v. Stoddard, 206 Conn. 157, 163, 537 A.2d 446 (1988), the Connecticut Supreme Court held that the Connecticut constitution imposes "a duty upon police officers who are holding a suspect for custodial interrogation to act reasonably, diligently and promptly to apprise the suspect of efforts by counsel to provide pertinent and timely legal assistance." The motion to suppress in the case currently before this court raises the important question of whether the Stoddard duty requires the police to inform the suspect of the name of the attorney attempting to provide legal assistance and the fact that the attorney is present at the police station at the time of the interrogation. For the reasons set forth below, the court concludes that the police must provide such information to a suspect undergoing custodial interrogation."

Fifth warning not required

(Fifth Miranda warning not required)

In *Commonwealth v. Ashley* (2012) Appeals Court of Massachusetts, Bristol, upheld the lower court decision that the fifth *Miranda* right - that the suspect can stop answering questions at anytime - is not required.

"The motion judge concluded that since the fifth so-called "right" was not required, the form's misstatement was harmless, deeming the claim of error forestalled by the holding in Novo. There the court observed that the giving of a fifth "right" by police, namely, the right to stop answering questions at any time even if an accused has answered some questions, is not a core *Miranda* right of which the police must apprise the defendant. Novo, 442 Mass. at 271, 812 N.E.2d 1169, citing *Commonwealth v. Silanskas*, 433 Mass. 678, 688 n. 11, 746 N.E.2d 445 (2001)." .

Ambiguous/unambiguous invocation of rights

(*"I think I need a lawyer, I don't know, but I want to cooperate and talk" was not an unequivocal request for a lawyer*)

In *US v. Thousand* (June 2016) the US District Court, W.D. Wisconsin found that the defendant's statement, "I think I need a lawyer, I don't know, but I want to cooperate and talk" was not an unequivocal request for an attorney. From the District Court's opinion:

A statement is sufficient to invoke the right to counsel if it indicates "a certain and present desire to consult with counsel."… The Seventh Circuit looks for the use of definite words like "can," which reflect a suspect's inquiry into their present ability to be able to obtain counsel, rather than "should" or "might," which suggest indecision about whether the defendant wants a lawyer.

In addition to the specific language used by the suspect, the prior context of her interaction with the police may be relevant in determining whether she unambiguously invoked her right to counsel...

In the present case, defendant stated: "I think I need a lawyer, I don't know, but I want to cooperate and talk." This statement does not reflect a certain and present desire to consult with counsel. Courts have found that use of the word "think" in this context fails to convey the certainty required by Davis….

Moreover, to the extent that the first clause of defendant's statement ("I think I need a lawyer") suggested a desire for counsel, the second clause ("I don't know") conveyed "indecision," … and the third clause ("but I want to cooperate and talk") a "hedge."…. Defendant cites no case finding a similar statement to constitute an unequivocal request for counsel.

Finally, while clarification wasn't required, it is worth noting that… after defendant made the equivocal statement the agents took a short break, then re-advised defendant of her rights; she again waived her rights and continued answering questions. For these reasons and those stated by the magistrate judge, I find that defendant did not invoke her right to counsel.

(*Failure to acknowledge unambiguous request to talk to a lawyer renders confession inadmissible*)

In *US v. Groce* (July 2016) the US District Court, M.D. Alabama, Northern Division, found that the defendant's request to talk to a lawyer was unambiguous and that the investigators should have terminated the questioning. From the court's opinion:

Once in custody, officers transported Groce to the ACSO to interview him… ACSO Captain Jim Steele conducted the interview, which was video-recorded and began at 1:17:48 P.M. Captain Steele advised Groce of his rights…. He initially denied responsibility for the robberies, and his discussion with Captain Steele included the following exchanges:

Steele: What would you say if maybe some of the stuff with your initials on it were collected also, your DNA was collected, your fingerprints were collected?
Groce: Mmm, hmm.
Steele: Mr. Groce, you want to sit there and tell me you weren't there?
Groce: I wasn't there. I need ... I need to talk to a lawyer ‘cause ...
Steele: Then ... then ... then who might have been there?
Groce: I don't know ‘cause I need to get me a lawyer ASAP because I don't know what y'all talking about. I was sleeping at the time.
Steele: Okay. Who has access to your car keys?

And then a few minutes later:

Steele: ... are going to get their money. Because they were right. When it comes time for Mr. Groce to go to court do you think they are going to believe the videos, the fingerprints, the witnesses, the whole night? Do you think they are going to believe that or do you think they are going to believe, “well he said he was asleep”? I'm just being for real, Mr. Groce, okay? Now don't you think it's time to be honest with me?
Groce: I'm being honest, but umm ... like this right here, I do need to talk to a lawyer about that.
Steele: Well, do you want to talk to a lawyer...
Groce: Yeah ...
Steele: ... or do you want to help me with the other people involved?
Groce: Umm ...
Steele: ‘Cause see here's how I feel about it: you know something.

Captain Steele did not stop the interview during this exchange, and he did not take any steps to provide Groce with counsel.

Ultimately, the court finds that Groce's statements, when placed in the context of the circumstances surrounding them, constituted an unequivocal invocation of his right to counsel—if not upon his first two mentions of an attorney, then at least by his third and final request for one. Within an eight-minute period of uninterrupted questioning, Groce stated “I need to talk to a lawyer,” “I need to get me a lawyer ASAP,” and “I do need to talk to a lawyer about that.”…. . Rather than ask questions designed to clarify whether Groce truly intended to invoke his right to counsel after the first two references to an attorney, Captain Steele continued on his line of questioning about the robberies. …. On the third instance, however, Captain Steele did acknowledge the request, asking Groce, “Well, do you want to talk to a lawyer ... or do you want to help me with the other people involved?” …. The court will make two observations regarding this conversation, as depicted on the interrogation video, that are not readily observable from the transcription. First, Groce emphasized the word “do” in the statement “I *do* need to talk to a lawyer.”; ... Second, not only did Groce interrupt Captain Steele with the word, “yeah,” after Steele said “Well, do you want to talk to a lawyer ...,” but Groce also nodded his head affirmatively when he answered.

Ultimately, “[t]he law in this area is clear: once an accused requests counsel, the officer cannot ask questions, discuss the case, or present the accused with possible sentences and the benefits of cooperation.” …. This rigid rule is “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights….

Under *Edwards*, Groce should not have been “subject to further interrogation by the authorities until counsel ha[d] been made available to him, unless [he] himself initiate[d] further communication.”

(Defendant's statement that he had a personal lawyer and that "[C]an we get him down here now, or ...?" was not an unambiguous request for a lawyer)

In *People v. Kutlak* (January 2016) the Supreme Court of Colorado found that the statement from the defendant (who was in custody) that he had a personal lawyer and that "[C]an we get him down here now, or ...?" was not an unambiguous request for a lawyer. From the court's opinion:

Westminster police arrested Levent Ray Kutlak after he had a physical altercation with members of his wife's family. Detective Russ Johnson interviewed Kutlak at the police station. After he was read his *Miranda* rights, Kutlak stated that he had a personal lawyer and asked, "[C]an we get him down here now, or ...?" Detective Johnson responded that "it may be difficult" to get in touch with the attorney and that "[i]t may be something we have to do later. It's entirely up to you." Moments later, Kutlak stated that he was going to "take a dice roll" and talk with the detective. Kutlak signed a *Miranda* waiver and proceeded to make incriminating statements regarding the incident.

Kutlak later moved to suppress the statements he made in the interview with Detective Johnson. The trial court denied Kutlak's motion and a jury subsequently convicted him of child abuse, first degree criminal trespass, and two counts of third degree assault. The court of appeals reversed the judgment of conviction and remanded for a new trial, concluding that the trial court erred in denying Kutlak's motion to suppress his statements. The court reasoned that Kutlak unambiguously invoked his right to counsel during the interview and that, because the initial interview never stopped, Kutlak could not have reinitiated further communication with Detective Johnson. The court declined to reach Kutlak's remaining contentions on appeal.

We granted the People's petition for writ of certiorari and now reverse the court of appeals. We first clarify that, in determining whether a suspect in custody has made an unambiguous request for counsel, the proper standard under *Davis v. United States,* 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), is whether "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Applying this standard, we hold, based on our independent review of the video-recorded interrogation, that Kutlak did not unambiguously and unequivocally invoke his right to counsel. Because Kutlak did not actually invoke his right to counsel, and because he otherwise validly waived his *Miranda* rights before making incriminating statements to the detective, his statements should not have been suppressed. Accordingly,

we reverse the judgment of the court of appeals and remand with instructions to address Kutlak's remaining contentions on appeal.

(The statement "[i]f I am under arrest, take me to my bunk; all these questions, we can just skip them because I want to go to court" was an unambiguous invocation of his right to remain silent)

In *US v. Womble* (November 2015) the US District Court, S.D. West Virginia ruled that the defendant's statement to the police after he was informed that he was under arrest, "[i]f I am under arrest, take me to my bunk; all these questions, we can just skip them because I want to go to court" was an unambiguous invocation of his right to remain silent. From the court's opinion:

In this case, Womble unambiguously and unequivocally invoked his Fifth Amendment right to remain silent when, after being informed he was under arrest and during interrogation, he said, "[i]f I am under arrest, take me to my bunk; all these questions, we can just skip them because I want to go to court." ... Womble's statement was an unambiguous and unequivocal invocation of his right to remain silent for at least two reasons.

First, Womble did not use equivocal or ambiguous words, instead his statement indicated a certain and present desire to cease questioning. Womble did not use the words "should," "might," or "maybe," words which create ambiguity and indicate equivocation about whether one desires to invoke the right to remain silent... He did not say "I think" we can skip these questions... Rather, Womble said "all these questions, we can just skip them because I want to go to court." Womble's statement is unequivocal and unambiguous--he did not want to talk to police, ... and he had a certain and present desire to cease questioning and go to his bunk.

Second, a reasonable officer under the circumstances would have understood both parts of Womble's statement to mean that he wished to halt questioning. Judging from the video this Court viewed during the pre-trial motions hearing on November 16, 2015, Womble's statement was not interrogatory.... Instead, the first part of his statement was a directive within the consequent of a conditional that had a true antecedent: "If I am under arrest," an antecedent the truth of which was known both to Womble and the detectives, "take me to my bunk," a directive. The next part of Womble's statement, "all these questions, we can just skip them because I want to go to court," was declarative, informing detectives of Womble's intent to go to court in light of his being under arrest. A reasonable officer under the circumstances could only understand these statements to mean: Because I am under arrest, I do not wish to speak to you, I wish to sit in my bunk and await my trial. In saying these things, Womble did not hedge, hem, or haw with the detectives about his intent to invoke his right to remain silent; he told the detectives he wanted to go to his bunk and await a court appearance. That Womble did not want to talk to police is necessarily derived from what Womble said to the detectives. The detectives in this case should have understood Womble's statement as an indication that he desired to cease questioning.

For the two previously stated reasons, the Court holds Womble unambiguously and unequivocally invoked his right to remain silent when he said, "[i]f I am under arrest, take me to my bunk; all these questions, we can just skip them because I want to go to court." After Womble's invocation of the right, detectives did not scrupulously honor Womble's right to cut off questioning,... instead they continued the interrogation and were able to gain incriminating statements. As such, Womble's statements made after he invoked his right to remain silent are inadmissible under the rule from *Miranda*. *Miranda*, 384 U.S. at 479.

(Ambiguous invocation of right to remain silent; and, police officer's implication that defendant might see the outside again if he confessed to a robbery gone bad instead of a premeditated murder was not an inducement rendering his confession involuntary)

In *Williams v. State* (December 2015) the Court of Appeals of Maryland held that the defendant's statement, "I don't want to say nothing. I don't know" was an ambiguous invocation of right remain silent, and that the police officer's implication that defendant might see the outside again if he confessed to a robbery gone bad instead of a premeditated murder was not an inducement rendering his confession involuntary. From the court's opinion:

After reviewing the DVD and the transcript, Judge Cathy H. Serrette of the Circuit Court for Prince George's County denied Williams's motion to suppress, after finding Williams's invocation of "I don't want to say nothing. I don't know" to be "ambiguous and equivocal."

This Court finds the I don't know, as the State indicated, to render what would have otherwise been a clear statement at which time the questions would have to stop an ambiguous and equivocal statement. Thereafter, Sergeant McDonald says, but you don't have to say nothing.

Mr. Williams again says, yeah. Then Sergeant McDonald again says, you don't have to say nothing. That, you know, that's your right. And they continue to talk about it, and again, in more or less a lay manner after which Mr. Williams says, hold on, I'd like to know what's going on. So if you all got to read me my rights, then go ahead. Where after, the Advice of Rights were presented to the Defendant.

Detective Harris went over the Advice of Rights with the Defendant. He asked at this point, would you like to make a statement or would you like to talk about why we are here without a lawyer, and the defendant nodded his head yes. He went on to say, have you been promised anything, have you been offered anything, any kind of reward or benefit or have you been threatened in any way in order to get you to make a statement, have I threatened you, has he threatened you, and Mr. Williams, the Defendant shook his head no. The Advice of Rights went on.

In observing the DVD, one notes that Mr. Williams did not just take the form and sign it

as one often does when one gets a contract, but rather actually took his time and read over the Advice of Rights which he did then sign. Accordingly, this Court does not find the claim, vis-a-vis the *Miranda* Rights, to be a valid claim and finds the State has met its burden as regards to that claim.

The second issue is the issue of whether or not the actual confessions were coerced or whether they were truly, voluntarily and intelligently made. A review of the DVD indicated that the interrogation was certainly not a long prolonged interrogation. The Defendant was not cuffed. There was no allegations of any physical coercion, and the interaction between the Defendant, Sergeant McDonald and Detective Harris was indeed cordial. To be sure, the detectives distinguished premeditated murder and a robbery gone bad. However, Defendant's refusal to acknowledge on the stand that the gone bad part of the robbery gone bad was a shooting of the victim flies in the face of the DVD and the transcript and is simply not credible.

The officers in this matter clearly employed trickery regarding the DNA and fingerprinting, yet such trickery is permissible. The question is whether the Defendant's statements were coerced or compelled or whether they were freely, voluntarily made. The Court agrees with the State that the Defendant was well aware that not only did he have an option not to speak, but that he had repeatedly been advised that he could stop speaking at any time even if he had started to speak. The Court further finds that the Defendant's statements during the interrogation, ... "no matter what you all find out, they're going to smoke my boots anyway," and "I mean, am I ever going to see the street again, do you all know?" indicate that he did not have the misunderstanding that he now alleges.

Considering the totality of the circumstances, this Court does not find that the Defendant's decision to give a statement was the product of physical or psychological coercion, nor that the officer's conduct in this case overbore his will to resist or otherwise brought about a statement not freely self-determined by the Defendant. Accordingly, the Court finds that the State met its burden of proof, and the motion to suppress will be denied.

(Defendant's statement that he wanted to speak with his uncle, whom he considered "better than a freaking attorney," before answering any further questions was a clear invocation of his right to remain silent)

In *State v. Maltese* (August 2015) the Supreme Court of New Jersey found that a defendant's request to talk to his uncle before answering police questions was a clear invocation of his right to remain silent. From the court's opinion:

In the context of custodial interrogation, once a defendant clearly and unambiguously invokes his right to remain silent, interrogation must cease... Because a police officer must "scrupulously honor[ ]" that right, even when the suspect's invocation is "ambiguous," officers are "required to stop the interrogation completely, or to ask only questions narrowly directed to determining whether defendant [is] willing to continue."

Whether a suspect has invoked his right to remain silent requires analysis of the totality of the circumstances, including consideration of the suspect's words and conduct... The defendant's statement is evaluated in the full context in which the statement is made, including whether the suspect wished to speak to another person in order to seek advice or as a condition before speaking with police... Of particular relevance to this matter, this Court in *State v. Harvey,* 121 N.J. 407, 581 A.2d 483 (1990), addressed a situation where a defendant requested to speak to someone other than an attorney. In Harvey, we held that the defendant's statement that "he would tell [the officers] about the murder" after he spoke with his father was sufficient to invoke his right to remain silent, and therefore required the interrogation to cease...

The facts presented here clearly indicate that defendant invoked his right to remain silent. Defendant voluntarily went to the police station and initially appeared willing to answer Sergeant Vallas's questions. However, once Sergeant Vallas informed defendant that he had failed the polygraph test and demanded that defendant tell him where his parents were, defendant repeatedly stated that he wanted to speak with his uncle, whom he considered "better than a freaking attorney," before answering any further questions. As in Harvey, defendant here indicated that he wanted to speak with a family member to obtain advice before proceeding with questioning... defendant here unequivocally asserted more than ten times that he wanted to speak to his uncle before answering any further questions... defendant specifically stated that he wanted to consult with his uncle about "what to do."

Considering all the circumstances, we conclude that defendant affirmatively asserted his right to remain silent.... Under those circumstances, defendant's *Miranda* rights were not scrupulously honored. Therefore, defendant's statement made to his uncle was obtained in violation of defendant's Fifth Amendment right to remain silent and was properly suppressed by the trial court.

(An 'implicit waiver' of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence)

In *US v. Chambers* (July 2015) the US District Court, W.D. Kentucky, rejected the defendant's claim that his incriminating statements should have been found inadmissible because he did not make an implicit waiver his rights, and that his statements were the result of coercive tactics. From the court's opinion:
"At the commencement of the interview between Defendant and police, an officer provided the following *Miranda* warning:

So like everything else, you've probably heard this before watching TV or whatever, but it's procedure and we always go through it. So, before we ask you any questions you have to understand your rights, you have the right to remain silent, anything you say can be used against you at court, you have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during any questioning. If you can't afford a lawyer one will be appointed for you before any questioning if you wish. If you decide to

answer questions now without a lawyer present you still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer. Do you understand what I just read to you sir?

Miranda... Defendant acknowledged that he understood his rights after the officer explained them to him by responding with "yes, sir" to the officer. ... He concedes this point in his brief. ... Defendant argues that the problem is that he "never expressed consent to waiving his rights: the investigator simply began questioning him, and he obediently answered." .... However, " 'waiver may be clearly inferred ... when a defendant, after being properly informed of his rights and indicating that he understands them, nevertheless does nothing to invoke those rights' and speaks." ... Defendant's suggestion that obediently answering questions is somehow demonstrative of a lack of a waiver on his part is unsupported by case law. To the contrary, the United States Supreme Court observed that [*Miranda*] does not impose a formalistic waiver procedure that a suspect must follow to relinquish those rights. As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.... Defendant's continual participation in the interview is indicative of his decision to waive his rights.

Defendant identifies three points in the conversation that he believes demonstrate coercion on the part of the police. The first occurred early in the conversation between the officers and Chambers.

Det. Odier: Obviously we're here for a specific reason. Okay?
Chambers: Okay.
Odier: So obviously we have some information that we already know.
Chambers: Okay, yeah.
Odier: And so as we go through this, it's important to remember, of course we want you to be truthful with us.
Chambers: Sure, yeah.
Odier: And, and we're not gonna bullshit you ... excuse me, but we're, we're just not. Okay, it's important for you to understand there are things that we know.
Chambers: Okay, sure.
Odier: Okay. And ... what we always like to tell people is, it's really hard for you to know what we know and I'm not saying you have, because I think you've been very truthful with me, okay, but when people start lying, it's really hard to keep that lie going ...
Chambers: Sure.
Odier: ... especially not knowing what we know. Chambers: Ok, sure.

... Defendant describes Detective Odier's questions and statements in this section as veiled threats. Threats, both physical and psychological, can be unconstitutionally coercive.... Generally, these types of threats involve suggested physical harm to the suspect or unlawful arrest of members of the suspect's family.... Clearly, neither of these situations is present here. In fact, it is difficult to even determine what exactly Defendant believes Detective Odier actually threatened. At most, Detective Odier sought to convey

to Chambers that it was important for him to be truthful with the officers. These statements seem innocuous. Therefore, the Court finds that this alleged threat is not objectively coercive.

Next, Defendant identifies two instances during the interview where he indicated to the officers that he was experiencing "intense discomfort."

Chambers: Well, then honestly you know, he, he, he, uh, I--I--I'm just as nervous as can be, I--I--I'm almost shaking like I am now--and then uh, he, he pulled my pants down and said "here," you know....
Det. Odier: And, did anything happen between you and his daughter then?
Chambers: Yeah and, and, and, I'm, I'm, I'm not gonna lie to you here okay uh, uh, and I hope you'll understand that I'm coming at this from uh, from just scared.....

Of those two excerpts, the only indication of nervousness on Defendant's part during the actual interview was his statement, "I'm almost shaking like I am now...." ... Otherwise, the other statements identified by Defendant about being "scared" or nervous relate to his first encounter with Kosicki and the child, not the interview itself. Despite one small indication of nervousness by Defendant, the recorded interview shows that police acted in both a polite and cordial manner towards Chambers. As an example of the atmosphere, just prior to the second dialogue where Defendant explains he is "scared," one of the officers joked about how he was a dog person when Defendant's dog was around the officer. When considering the tone of the officers and the comfort of Defendant's surroundings during questioning (e.g., officers allowing Defendant to have his dog around him), the Court finds the lack of an unconstitutionally coercive environment.

Finally, Defendant asserts that police coerced his statement by exploiting his religious beliefs.

Det. Odier: I want to go back and I want to talk about things in a general sense. You have by your profession, devoted your life in service of God.
Chambers: Yes.
Odier: And I too am but a humble servant of the Lord.
Chambers: Yeah.
Odier: And we know that the path to forgiveness begins with the truth.
Chambers: Yes.
Odier: Sometimes we have to realize what that truth is within ourselves. And I don't think you're lying to me. I don't think you're lying to Brian. Okay, but I don't think you're being completely truthful with yourself or with us.
Chambers: Okay.

Particularly, Defendant argues that the officer's use of his religious beliefs caused him "to 'realize' not only that he intended to commit sexual offenses, but that he affirmatively enjoyed doing them." .... However, an officer's reference to a suspect's religious beliefs does not constitute unconstitutional coercion.... Therefore, the Court also finds this argument unpersuasive.

In addition to the cordial manner in which police conducted the interview, Chambers was sixty-two years old at the time of the interview with a work history that included ten years in the banking industry and thirty years in the ministry of Baptist churches. Although officers questioned Defendant after waking him in the morning, the interview did not last long and it was conducted in a comfortable environment. Considering the totality of the circumstances, the Court finds that the United States proved by a preponderance of the evidence that Defendant's confession was voluntary.

("I just as soon wait until I get a public defendant or whatever" ruled an unequivocal invocation of request for an attorney)

In *McKinney v. Hoffner* (March 2015) the US District Court, E.D. Michigan, ruled that the defendant's statement to the investigator, ""I just as soon wait until I get a public defendant or whatever." was an unequivocal invocation of his right to an attorney and all subsequent questioning should have stopped. From the court's opinion:

"The Court grants petitioner a writ of habeas corpus, because the police violated his constitutional rights by obtaining his confession from him after he had clearly and unequivocally invoked his right to counsel.

A prosecutor may not use a defendant's statements which stem from custodial interrogation unless the prosecutor can demonstrate the use of procedural safeguards which are effective to secure a defendant's privilege against self-incrimination....

When an accused invokes his right to counsel during custodial interrogation, that interrogation must cease until counsel is made available, unless the accused initiates further conversation with the police.....

However, the "[i]nvocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'... The suspect's statement "must unambiguously request counsel." ... A criminal suspect therefore must "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."

Petitioner clearly and unequivocally invoked his right to counsel when he stated "I just as soon wait until I get a public defendant or whatever."... the Sixth Circuit held that a habeas petitioner's statement "I'd just soon as have a attorney" amounted to an unequivocal and unambiguous request for counsel and that any further police questioning should have stopped.

The Michigan Supreme Court unreasonably concluded that petitioner's request for counsel was equivocal because after indicating that he'd "just as soon wait" until he had an attorney before talking to the police, petitioner immediately stated that he was willing to discuss the "circumstances" with the police. The Michigan Supreme Court, however,

unreasonably ignored the fact that petitioner made this second statement only after the detective responded to his unequivocal request for counsel by stating "Well that's fine, but like I said ...". "Under *Miranda* and Edwards ... an accused's postrequest responses to further interrogation may not be used to cast doubt on the clarity of his [or her] initial request for counsel."... The fact that petitioner continued to answer questions after unambiguously and unequivocally requesting the assistance of counsel "may not be used to cast retrospective doubt on the clarity of the initial request itself."

Petitioner clearly and unambiguously invoked his right to counsel when he stated that "I just as soon wait until I get a public defendant or whatever." At that point, the officer should have ceased questioning petitioner. Detective Hodshire's subsequent remarks to petitioner were an inappropriate effort at pressuring petitioner to make an incriminating statement, rather than an appropriate attempt to get petitioner to clarify whether he wished to invoke his right to counsel.... The detective's continued interrogation of petitioner after he unequivocally asked for counsel amounted to an inappropriate attempt to pressure him and thus violated his *Miranda* rights."

(*Investigators failed to honor the defendant's invocation of his right to silence*)

In *People v Flores* (November 2014) the Appellate Court of Illinois, First District, Fifth Division, found that the "defendant's invocation of his right to remain silent was not scrupulously honored." From the court's opinion:

"At approximately 6:15 p.m. on July 14, 2007, defendant was again placed in an interrogation room at Area 4. One of the detectives, who also participated in defendant's initial interrogation, gave defendant his *Miranda* rights and questioned defendant as follows.

"DETECTIVE: You're here for the same shooting death of Victor Casillas, March 19th, 30th and Karlov, right? I got to tell you what your rights are. You understand you have the right to remain silent. Do you understand that? You got to say it out loud.

DEFENDANT: Yes.

DETECTIVE: You understand that anything you say can and will be used against you in a court of law. You understand that?

DEFENDANT: Yes.

DETECTIVE: Okay. You understand that you have the right to have an attorney with you when I talk to you? Do you understand that?

DEFENDANT: Yes.

DETECTIVE: You understand that if you can't afford an attorney, the state will give you one free of charge. Do you understand that?

DEFENDANT: Yes.

DETECTIVE: Okay. You've been here before, right?

DEFENDANT: Yeah.

DETECTIVE: Okay, Uh-Robert Macias has been in here. Robert has been saying some things about you--

DEFENDANT: Um-huh.

DETECTIVE: --and we wanted to talk to you about them. You want to talk to us about that?

DEFENDANT: Not really. No.

DETECTIVE: Well, I mean, he's, you know, he's saying thing that aren't good about you. That's why we < inaudible > And basically he's saying that you were the one who produced the gun for that shooting.

DEFENDANT: Um--"

The detective continued to ask questions, and when he asked defendant if he had anything to say about the gun, defendant shook his head indicating no. The detective followed that and asked, "you don't know something about the gun?" Defendant answered no. A few minutes later, the detective said that he wanted to hear what defendant has "to say about it." Defendant responded that he "ain't gonna say nothing about nothing."

The detectives left defendant alone for about 15 minutes and returned around 6:35 p.m. Shortly after they begin questioning defendant again, the following dialogue took place.

"DEFENDANT: When is the attorney going to come?

DETECTIVE: The [S]tate's [A]ttorney?

DEFENDANT: Yeah.

DETECTIVE: I got to call them. < Inaudible > talk to you.

DEFENDANT: You gotta call them again?

DETECTIVE: Yup.

DEFENDANT: I thought you said that if I said if I wanted a lawyer, that--that, uh, I don't

have to talk to you or something like that.

DETECTIVE: Well, that's one of your rights that I read, yeah. Is that what--I mean--

DEFENDANT: No, I'm saying that the other thing you said that--or when she told me < inaudible > keep me here for how many hours?

DETECTIVE: We can hold you for up to 48 hours.

DEFENDANT: And that's already another 48 hours already you < inaudible > huh?

DETECTIVE: It's the same as any time. It's not up to me. Last time you walked out of here a free man. We wanted to talk to you again, because, you know, he says you're the one who gets the gun."

The detectives then continued to question defendant, but defendant's responses were minimal. Eventually the detectives asked defendant if he wanted to see Macias's statement, and defendant stated that he did. The detectives and defendant then left the room to view the statement. They returned approximately 10 minutes later. Over the next 30 minutes, defendant participated in the interrogation and answered the detectives' questions. During this interrogation, defendant admitted to being the shooter on March 19, 2007. A few hours later, defendant spoke with an ASA and gave a videotaped statement in which he confessed to shooting the victims.

After viewing the videotaped interrogation and reviewing the transcript of the interrogation, we find that defendant invoked his right to remain silent and the detectives should have ceased all questioning after asking defendant if he wanted to talk to them and defendant responded, "Not really. No." This response was a clear and unequivocal response that defendant did not wish to waive his right to remain silent."

(Equivocal invocation of rights: "[t]he context of the recorded statement clearly indicates that [Piatnitsky] was willing to speak with the detectives, just not on tape.")

In *State v. Piatnitsky* (2014) the Court of Appeals of Washington, Division 1 found that the defendant's statements did not constitute an unequivocal invocation of his right to remain silent. Piatnitsky contends that he unequivocally invoked his right to remain silent during the audio-recorded interview with detectives, thus rendering his subsequent written statement inadmissible at trial. As the trial court found, the context of Piatnitsky's statements to police indicates that he wished to convey his version of events to the detectives, although he did not want to do so on audiotape. Such is inconsistent with an unequivocal assertion of the right to remain silent. Thus, the trial court properly admitted Piatnitsky's written statement.

Moreover, the audiotape and the transcript of the audio-recorded interview, both of which the trial court considered at the CrR 3.5 hearing, demonstrate that Piatnitsky at no time during that interview stated that he did not want to convey information to the detectives.

Piatnitsky stated, “I'm not ready to do this, man.... I just write it down, man. I can't do this. I, I, I just write, man. I don't, I don't want ... I don't want to talk right now, man.” Then, Piatnitsky conveyed agreement with Detective Keller's statement, “Okay, but let's go over the rights on tape, and then you can write it down, okay”—Piatnitsky replied, “All right, man.” Later, Detective Allen asked Piatnitsky, “Are you sure you don't want to do it on tape like you said you did; you want to get [it] in your own words?” Piatnitsky replied, “Yes, sir.” Detective Keller then said, “So you'd rather take a written statement, do a written one.” Piatnitsky's reply—transcribed as “Yes. I don't know (unintelligible)”—was muffled. Detective Keller then stated, “Okay, it's too hard to talk about; you'd rather write it.” Piatnitsky did not reply.

An accused's statements constitute an unequivocal assertion of the right to remain silent only where they are sufficiently clear such that “a reasonable police officer in the circumstances” would understand the statements to be an assertion of that right…. Here, the detectives believed that Piatnitsky wished to give a statement (albeit not on audiotape), thus indicating that Piatnitsky's statements were not sufficiently clear to constitute an unequivocal assertion of his right to remain silent. The trial court determined that Piatnitsky's statements were not an invocation of his right to remain silent but, rather, were intended to convey that he no longer wished to give an audio-recorded statement. The trial court was not required to “ignore the tenor or sense” of Piatnitsky's statements in determining whether he had invoked that right; nor are we.

Considering the circumstances surrounding Piatnitsky's statements—as the trial court properly did and as we must—it is apparent that the facts support the trial court's conclusion that “[t]he context of the recorded statement clearly indicates that [Piatnitsky] was willing to speak with the detectives, just not on tape.” .

("I've given you what I'm gonna give you." "[I] "ain't saying nothing no more." Do these statements represent unequivocal invocations of the right to remain silent? Yes.)

In *State v. Bauldwin* (2012) the Supreme Court of Nebraska held that the statement "I've given you what I'm gonna give you" was, in fact, a clear invocation of the subject's right to remain silent, and that the police failed to honor this invocation. In their opinion the Nebraska Supreme Court stated,

"Recently, in *State v. Rogers*, we explained that although a determination of whether an invocation was clear and unequivocal is dependent on the circumstances of each particular case, patterns have emerged from the case law that provide context to our application of these rules. None of these patterns are seen here. Bauldwin's statement that "I've given you what I'm gonna give you" was not prefaced with "words of equivocation such as 'I think,' 'maybe,' or 'I believe." ' Nor can Bauldwin's statement reasonably be interpreted to show only that he had finished his colloquy of events; instead, Bauldwin's statement was made in response to Kozelichki's offer to give his take on what happened that weekend. When viewed in context, Bauldwin's statement showed a desire to stop the interrogation altogether. And Bauldwin's refusal to talk was not limited to a specific

topic, qualified by temporal words, or immediately followed by a statement that was inconsistent with a desire to remain silent." Click here for the complete opinion

(Unambiguous request for an attorney: "I mean, but can I call one now? That's what I'm saying.")

In *US v Wysinger* (2012), the US Court of Appeals, Seventh Circuit,
vacted the lower court's decision, finding that the suspect did, in fact, make an unambiguous request for an attorney. From the Court of Appeals opinion:

"Wysinger contends that he first invoked his right to counsel in the opening moments of the interrogation, when he asked "Do I need a lawyer before we start talking?".... Wysinger argues that this question indicated an intention to have a lawyer present at that moment, before the interrogation began. In context, Wysinger asked this question before receiving a Miranda warning. Agent Rehg responded, "Well, we're going to talk about that." He then gave a Miranda warning that we will discuss below and engaged Wysinger in a conversation that meets the definition of interrogation. In this context, a reasonable officer might not understand Wysinger's initial reference to an attorney as an unequivocal request for a lawyer. True, Wysinger's question mentioned the present moment, i.e., "before we start talking." But asking "Do I need a lawyer?" is a substantively different question than "Can I have a lawyer?"

"...That first, ambiguous question by Wysinger came at time index 12:54 in the video. Wysinger's next reference to a lawyer occurred at time index 13:03, after approximately nine minutes of interrogation. At that point, Agent Rehg opened his notebook, pulled out his pen, and asked Wysinger to "tell us what has been going on." Wysinger then made his second reference to counsel, saying, "I mean, do you think I should have a lawyer? At this point?" .... Agent Rehg responded that it was up to him, that if he wanted an attorney, he should get one. Wysinger's second question was virtually identical to his initial, ambiguous inquiry. In and of itself, it does not constitute an unequivocal request for counsel. As is apparent from Agent Rehg's response, he heard Wysinger's question as just that, a question seeking the agent's opinion.

But Wysinger's very next sentence clarified the request and removed all doubt as to his meaning. After Agent Rehg told him, "If you want an attorney, by all means, get one," Wysinger responded, "I mean, but can I call one now? That's what I'm saying ."..... That response to Agent Rehg's statement, in context, was an unequivocal request for counsel that no reasonable officer could interpret otherwise.

The interrogation should have immediately ceased at that point."

(Defendant does not have to actually speak to invoke the right to remain silent)

In *Commonwealth v. Clarke* (2012) the Supreme Court of Massachusetts upheld the trial court's decision that a defendant can invoke his right to remain silent by shaking his head "back and forth in a negative fashion." In this case in a custodial interrogation the

investigator said to the defendant, "You just want to go home? So you don't want to speak?" In response the defendant "shook his head back and forth in a negative fashion." One of the investigators continued to talk to the defendant, who subsequently made incriminating statements. The court suppressed these statements because the police "did not immediately cease questioning in the face of the defendant's unambiguous invocation of his right not to speak with them." .

(Is this statement an unambiguous invocation of the suspect's right to counsel - "I'd like an attorney present. I mean but I can't afford one. So I guess I'll just speak to you now. I don't have an attorney.")

In *Commonwealth v. Hoyt* (2011) the Supreme Court of Massachusetts found that the defendant unambiguously invoked his right to counsel and that questioning should have ceased until counsel was made available, when, during custodial interrogation, after being given *Miranda* warnings, the defendant told police, "I'd like an attorney present. I mean but I can't afford one. So I guess I'll speak to you now. I don't have an attorney."

("I don't want to say anything more" is an unambiguous exercise of the defendant's right to silence)

In *State v. Wiegand* (2012) the Wisconsin Court of Appeals found that "During the course of a custodial interrogation, Knopps asked Wiegand a question meant to elicit an incriminating response. Wiegand responded, "I don't want to say anything more." We discern no ambiguity in the meaning of that statement." .

(Does the statement, "You mind if I not say no more and just talk to an attorney about this." represent an unequivocal request for an attorney?)

In *Ballard v. State* (2011) the Court of Appeals of Maryland overturned the trial court's opinion that the statement "You mind if I not say no more and just talk to an attorney about this." represented an ambiguous and equivocal statement that did not sufficiently invoke the defendant's right to counsel. In their opinion the Court of Appeals stated that, "The question boils down to whether Petitioner's statement, "You mind if I not say no more and just talk to an attorney about this," was a sufficiently clear articulation of his desire to have counsel present during the remainder of the interrogation, such that a reasonable police officer in the circumstances of Detective Kaiser "would understand the statement to be a request for an attorney." Id. at 459. We conclude that the answer to that question is "yes"; Petitioner's words were an unambiguous and unequivocal assertion of the right to counsel."

"Petitioner's words, by contrast, even if understood to be phrased as a question, as the suppression court evidently found them to be, transmit the unambiguous and unequivocal message that he wanted an attorney. A speaker who begins a statement with the phrase, "you mind if ..." suggests to his or her audience that the speaker is about to express a desire, whether to do something or have something occur. The phrase "you mind if ..." in

this context is a colloquialism; it is reasonably assumed that the speaker is not actually seeking permission to do the thing desired or to have the desired thing occur.

But even if viewed not as a colloquialism but rather as having literal meaning, the import of the words is no different. Viewed from the perspective of a reasonable police officer in the position of Detective Kaiser, the most that could be said about Petitioner's words, "You mind if I not say no more and just talk to an attorney about this," is that Petitioner, though undoubtedly asking for an attorney, sought to couch the request in polite or (more likely, given the context) deferential terms. In other words, to the extent that the phrase "you mind if ..." is understood as Petitioner genuinely posing a question, the only question he reasonably posed was whether Detective Kaiser "mind[ed]" if Petitioner stopped talking and got an attorney."

(Confession inadmissible when police ignore request for an attorney)

In *Carr v. State* (2010) the Indiana Supreme Court ruled that the lower court was in error when they admitted the defendant's incriminating statements because he had effectively made a request for a lawyer that was not honored by the interrogator.

Here is the relevant information and dialogue to be considered:

"Following his arrest on the evening of the crime, the defendant was questioned at the police station by Detective Daniel Pryor of the Fulton County Sheriff's Department. The following excerpts pertinent to the claimed violation of his right to counsel are taken from the interview:

[After a quick exchange of pleasantries between the defendant and Detective Pryor, the defendant stated]: Mr. Pryor I want to be cooperative ... but at the same point I'm in a situation where I feel like ... I really need an attorney to ... talk with, and for me. [Emphasis added.]

[Detective]: Well, and you're absolutely entitled to that sir.... I'm not going to violate your rights (inaudible) that way. The only reason I was in here, we know what happened, that's not why I was in here, I just wanted to know why. It might not be as bad as it appears, but only you know those circumstances, but you're entitled to an attorney and I'm not going to.

[Defendant]: Yeah, OK. Well I mean ask me, ask me what you want to ask me. [Emphasis added.]

[Detective]: Well I mean that's up to you.... I have to read you your rights because you're in custody (inaudible) ... I want to do things by the book.... Like I said, things look bad but they're not always as they look.

***

[Defendant]: Well, believe me it's bad, you know what I mean? It's bad.

[Detective]: Well, ... I won't lie to you Jim, it doesn't look good. But like I say, it may look worse than what it actually is. That's why I'm here in fairness.

* * *

[Shortly thereafter, the detective advised the defendant of his rights to remain silent and to counsel before making any statement or answering any questions, including his right to appointed counsel, and the defendant acknowledged understanding them.]

[Detective]: Like I said Jim things looks bad I won't lie to you based on what it looks like it looks like murder. Ok? It may not be that. There's different degrees of things. Ok? Like I say only person that knows the circumstances as to why things happened would be yourself.

* * *

[Detective]: ... I'm straight with you, I'm straight with anybody I talk to. What good does bs-ing people do, nothing. This isn't a game.

[Defendant]: And I know it's not a game I mean I understand what's happened and that's why, that's why I feel as though, you now, I need to have an attorney to deal with because this is a serious thing, you know, it's a very serious thing, I know it's a very serious thing. [Emphasis added.]

[Detective]: Yes sir I understand. And I won't question you.-I'm just throwing this out here and you've asked for an attorney and you're entitled to it.

[The defendant then asks for a cigarette, and the detective provides one.]

[Detective]: Those aren't meant to get you to talk to me.... I'm a smoker. My point, my point is this-there's a difference between murder, something that murder kind of embodies, someone planned something and then there's lesser degrees of that so.

The defendant's right to counsel was first violated at the beginning of the interview when the defendant stated, "I'm in a situation where I feel like ... I really need an attorney to ... talk with, and for me." This was an unequivocal and unambiguous invocation of his right to counsel. The detective understood this and acknowledged, "you're absolutely entitled to that sir.... I'm not going to violate your rights (inaudible) that way." But the detective did not cease further interrogation but nevertheless continued by inviting the defendant to talk more, adding, "The only reason I was in here, we know what happened, that's not why I was in here, I just wanted to know why. It might not be as bad as it appears, but only you know those circumstances, but you're entitled to an attorney." This precipitated the defendant to respond, "Yeah, OK. Well I mean ask me, ask me what you want to ask me." This statement does not constitute a valid waiver of the defendant's right to counsel for two reasons. First, the detective's failure to immediately cease all questioning until the

defendant's attorney was present was in violation of Edwards, 451 U.S. at 482, 101 S.Ct. at 1883, 68 L.Ed.2d at 384. Once the defendant stated, "I really need an attorney," Appellant's App'x at 389, the defendant's right to counsel should have been "scrupulously honored." *Miranda*, 384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726. Instead, the detective's ongoing conversation initiated further custodial interrogation, and the defendant's subsequent disclosures were not a product of his own initiation of communication. Pursuant to Shatzer, Roberson, and Edwards, the defendant did not voluntarily waive his right to counsel. Second, when this exchange occurred, the detective had not yet informed the defendant of his *Miranda* rights. "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." *Miranda*, 384 U.S. at 470, 86 S.Ct. at 1626, 16 L.Ed.2d at 721.

The defendant's next invocation of his right to counsel was similarly disregarded. When he declared, "I need to have an attorney to deal with because this is a serious thing," the detective immediately acknowledged that the defendant had "asked for an attorney and you're entitled to it," id., but nevertheless continued the interview by telling the defendant while a planned killing may be a murder, there are "lesser degrees." This statement, in the nature of an open-ended invitation encouraging further communication from the defendant notwithstanding his second unambiguous and unequivocal invocation of his right to counsel, succeeded in persuading the defendant to admit that "there was no plan," and he was angry at the victim, and that "the weapon that was used is my gun."

(Is the statement "Hey man. I don't want to give nothing about nothing." an unambiguous request to remain silent?)

In *Paredes v. State* (2010) the Court of Appeals of Texas, Houston, upheld the lower court's opinion that the defendants request to remain silent was ambiguous and that the subsequent confession was admissible. Here is the relevant commentary from the decision:

"Appellant contends he attempted to cut off questioning at the beginning of the interview, thereby making unlawful the entirety of his custodial interrogation..... In his brief, appellant argues that he invoked his right to remain silent by telling Sergeant Belk, the interrogating officer, "Hey man. I don't want to give nothing about nothing." Appellant misstates what was actually communicated. Upon our review of the recording, the interrogation started more precisely as follows:

Sgt. Belk: Well, let's, uh, start from the beginning and we'll talk about what happened and see who all these people are.

Appellant: Hey man .... (sigh) I don't want to give nothing involved in that [expletive]. You know, I didn't do nothing.

Sergeant Belk then advised appellant that (l)he had the right to remain silent; (2) anything he said could be used as evidence against him at trial; (3) he had a right to counsel during

questioning; (4) the State would appoint counsel if he were unable to employ one himself; and (5) he could terminate the interview at any time. Sergeant Belk asked appellant five times if he understood his rights, once after each warning. In each instance, appellant responded in the affirmative.
An interrogating officer has no obligation to end his questioning unless the suspect unambiguously invokes his Fifth Amendment rights. Moreover, the officer is not required to clarify any ambiguous remarks." .

("What if I want my lawyer present first?" Does this statement constitute a request for an attorney?)

In *Cornelison v. Motley* (2010) the US Court of Appeals, Sixth Circuit, upheld the lower court's ruling that the question (and subsequent conversation) "What if I want my lawyer present first" did not constitute an unambiguous request for an attorney.

From the court's decision: "A review of [Cornelison's] statement reflects that after [he] was read his *Miranda* rights, he inquired, "What if I want my lawyer present first?" The detective informed [Cornelison] that the decision was up to him and that he had the right to stop the questioning at any point if he wanted an attorney present. The conversation continued with the detective explaining to [Cornelison] the waiver of rights form. After a short period of time, [Cornelison] appears to sign the form while stating, "I would like to have a lawyer, though, I want that on the record." The detective thereafter asked, "Do you want your lawyer present or do you want to talk to us?" [Cornelison] then completed the form and laid down the pen. The detective stated, "Does that mean you want to talk to us?" [Cornelison] nodded his head affirmatively and then responded "yes."

(Ambiguous request to stop the interrogation - "this conversation is over")

In *People v. Platt* (2009) the Court of Appeals of Michigan found that the defendant's statement to his interrogator that "this conversation is over" was not an unambiguous request to stop the interrogation. The court stated "A review of the context of the comment indicates that defendant did not indicate to the detectives that he no longer wished to speak with them. Rather, defendant's comment was an equivocal statement that he was not going to change his story, and there was no point in any further questioning on that subject matter. Because the statement did not unequivocally indicated that defendant wanted to remain silent, the police were not required to cease the interview. Additionally, defendant continued to speak to the detectives after he made the statement, which is especially notable in light of defendant's testimony that he has had multiple contacts with police, was read his Miranda rights on several previous occasions and was aware of how to invoke those rights. Because the statement was equivocal and not intended to terminate the interview, the trial court properly denied defendant's motion to suppress the statement on that ground. .
(Ambiguous request for an attorney - "I don't know if I need an attorney or not")

In *Blakeney v. State* (2009) the Court of Appeals of Mississippi ruled that the defendant's statement - "I need to talk to somebody[.] I don't know if I need a lawyer or not" was not

an unambiguous request for a lawyer. The court stated "After reviewing the testimony from the suppression hearing, we find that Blakeney's statements-"I need to talk to somebody."; "I don't know if I need a lawyer or not."; and "Do I have the right to stop talking?"-were at best ambiguous requests for an attorney. We also find that the investigators did not overstep constitutional parameters in following up on these statements with further questions regarding this statement.

In *Holland v. State*, the Supreme Court determined that the defendant's question-"Don't you think I need a lawyer?"-was an ambiguous invocation of his right to counsel and the police detective's follow-up questions were within constitutional parameters. The officers reminded the defendant of his right to counsel and that if he did not want to talk to them he did not have to continue with the interview. Id. at 858. The defendant responded, "Ok," that "he would talk to them." Id. The officers again advised the defendant of his rights, which he again waived before confessing.

When Blakeney made the statement, "I don't know if I need an attorney or not," Officer Perkins reminded him that he could ask for an attorney and the interview would be terminated. Blakeney responded, "We'll talk." The investigators repeatedly told Blakeney throughout both interviews that he could stop talking and call an attorney. The investigators also told Blakeney several times that they could not advise him whether or not he needed an attorney. As for Blakeney's assertion that Officer Perkins told him he could not have an attorney until after he was indicted, we find that even if taken as true, this was clarified at the beginning of the first interview when Blakeney signed the waiver of rights. Therefore, we find that the trial court did not err in finding that Blakeney did not invoke his right to counsel. This issue is without merit." .

(Ambiguous Attorney Request)

In *State v. Turner, II* (2009) the Court of Criminal Appeals of Tennessee reversed the trial court's decision to suppress the confession, indicating that the defendant did not make an unequivocal request for an attorney. In their decision the Appeals Court stated:

"The video of the interview corroborates the above testimony and shows the officers advising Turner of his Miranda rights. Turner then requested his cell phone to call his lawyer. The officers declined to provide Turner with his cell phone but offered to allow Turner to use their telephone. Turner then told the officers he had prepaid legal services and did not actually have an attorney. In response, the officers told Turner they believed he was "telling [him] that [Turner] really [didn't] want to talk to [them] right now and [that Turner] would rather speak to an attorney ." Turner replied, "I mean, I can talk 'cause I can tell you-." Following this exchange, Turner initialed and signed the admonition and waiver form and then explained his involvement in the robbery and murder for the next hour and twenty minutes without asking about an attorney again."

("I probably need to talk to a lawyer" was not an unambiguous request for a lawyer, but rather "an admission that he was in substantial legal difficulty.")

In *Scott v. Epps, et al*., (2008) the U. S. District Court, N.D. Mississippi, upheld the decision that the defendant's statement "I probably need to talk to a lawyer" was not an unambiguous request for a lawyer, but rather "an admission that he was in substantial legal difficulty." In this same the case the court rejected the defendant's arguments that his confession was not voluntary because "he had been abusing methamphetamines and had not slept in the six days prior to his arrest." The court also rejected his claim that he was coerced into confessing. .

(Was the defendant's statement, "do I have to say," an invocation of his Fifth Amendment right to remain silent – No)

In *Baez v. State* (2008) the Texas Court of Appeals, Houston, the appellant asserted that in the video of his interrogation, in response to Officer Mosqueda's questions about the murder, when appellant asked the officer, "do I have to say," appellant invoked his Fifth Amendment right to remain silent and indicated his intention to terminate the interview. The Court of Appeals rejected this claim, stating that "the totality of circumstances in this case supports the conclusion that appellant, knowingly, intelligently, and voluntarily waived his rights by acknowledging his understanding of his rights at least three times and discussing many incriminating facts for forty minutes with Officer Mosqueda..... Appellant's inquiry, "do I have to say," is one question in the context of the entire interview throughout which appellant answered Officer Mosqueda's questions without hesitation and described many incriminating details after thrice acknowledging his understanding of his rights..... By inquiring, "do I have to say," appellant, at best, expressed ambivalence toward waiving his rights, but appellant did not unambiguously or clearly express a definite desire to invoke his right to remain silent."

("That's all I have to say" or "I got nothing else to say." did not constitute an invocation of his right to silence)

In *People v. Telea* (2008) the Court of Appeal, First District, California upheld the trial court's conclusion that the defendant's statements during his interrogation that "That's all I have to say" or "I got nothing else to say." Did not constitute an invocation of his right to silence. The Court of Appeal stated, "We have reviewed the transcript and videotape of the November 9 Burlingame interrogation and reach the same conclusion as the trial judge. It is certainly true that defendant's repeated comment that he had nothing else to say could have signaled his desire to end the interrogation; viewed in isolation, the words he chose might have been intended to invoke his right to remain silent. More was required, however, before the officers were required to cease their questioning." .
(Confession suppressed because interrogators ignored request to stop the questioning)

In *State v. Rogers* (2009) the Supreme Court of Nebraska found that the police did not scrupulously honor the defendant's effort to invoke her right to remain silent. The court stated that: "In this case, we conclude that Rogers unambiguously invoked her right to remain silent. When Wheeler kept insisting that they were going to "get to the bottom of this" and "get the whole truth," Rogers responded: "No, I'm not. I'm done. I won't." But Wheeler pressed on at length about how guilt would "eat" at Rogers "forever and ever" if

she did not confess. While working these themes, Wheeler tried to reengage Rogers with direct questions, but Rogers answered only with simple "no's." When Wheeler then tried the accusation, "and it wasn't a fall down the stairs. Something else happened," Rogers responded in no uncertain terms: "Yes, it was. I didn't-I- I'm not talking no more." (Emphasis supplied.)

Nothing before or after Rogers' statements marred their clarity. Rogers said that she was "done," she would no longer be helping Wheeler to "get to the bottom of this," and she was "not talking no more." Furthermore, we observe that Rogers' demeanor and tone when making these statements conveyed the finality with which she intended them. Rogers did not seek to reengage in conversation, but sat silent immediately after making the statements.

Not only should a reasonable police officer in Wheeler's position have understood those statements to be an invocation of the right to remain silent, it appears that Wheeler actually understood the statements in this way, because Wheeler responded: "Well, just listen then." Wheeler's instruction to "just listen" implicitly acknowledged that Rogers intended to stop talking. But Wheeler's training, by her own admission, had apparently not informed her that a suspect's statements, such as "I'm done" and "I'm not talking no more," should be scrupulously honored. So, Wheeler pressed on, and was eventually able to extract a confession.

We therefore conclude that it was error for the trial court to deny Rogers' motion to suppress and to admit the confession that was taken in violation of Rogers' *Miranda* right."

(Unambiguous request for lawyer)

From the Court of Appeals decision in *State v. Effler* (2008):

"James Carson Effler appeals his conviction for first-degree kidnapping. He contends the district court erred in denying his motion to suppress, arguing his incriminating responses to police questions were made after he had made an unequivocal request for counsel. We reverse and remand."

"The officer then began to read Effler information from a *Miranda* waiver form. Seconds after the officer read the phrase "I do not want a lawyer at this time," Effler interrupted and said, "I do want a court-appointed lawyer." The detective said, "Okay" and then Effler said, "If I go to jail." The detective responded by saying, "let me finish this and then we'll talk." The questioning continued and the Defendant confessed.

"In the present case, it is indisputable Effler's first statement-"I do want a court-appointed lawyer"-was an unambiguous and unequivocal request for counsel. The State argues Effler's next statement-"If I go to jail"-made this request conditional and that the temporal aspect of Effler's request made it ambiguous because, arguably, Effler did not want counsel until he had actually arrived in jail. We disagree."

(Ambiguous request to end the questioning)

In *Bruno v. US (*2008) the defendant's "main argument on appeal is that the trial court erred in not suppressing his videotaped confession, because police detectives (a) ignored what he contends was an unambiguous assertion of his right to end the custodial interrogation, or (b) failed to clarify whether he was asserting that right before questioning him further. Burno, however, did not unequivocally assert his right to end the interrogation, and under Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), the police were not obliged to clarify his ambiguous responses before questioning him further about the crime. As we find no reversible error otherwise, we affirm the convictions.

"None of Burno's videotaped statements met this "requisite level of clarity." Id. In arguing to the contrary, he asserts essentially three things: first, his statement almost at the beginning that he would "rather not say" EZ's last name signalled to reasonable interrogators that he was no longer willing to submit to questioning; second, even if that is not so, when he re-expressed his unwillingness to talk in response to the critical question of whether he had fired his gun at the officer, the police assuredly knew he did not want to incriminate himself and so answer further questions; and third, the sheer number of instances-eight in all-when he declined to answer particular questions evinced a pattern of unwillingness to speak that should have been clear to the police before he significantly inculpated himself. These arguments are unpersuasive."

(Confession found involuntary in custodial situation – "No, I don't even want to talk about it because it'll-it'll really tell.")

In *Simpson v. State* (2007) the Court of Appeals (Houston) said the trial court erred in admitting the videotaped statement of the defendant after the following exchange took place during the interrogation:

[Anderson]: I-I don't know. You're not telling me anything and I'm telling you what I'm reading. Then tell me your side of it, tell me what happened, why-what happened?

[Appellant]: It's-it's a bunch of witnesses there so, you know, it'll-it will tell, it will.

[Anderson]: But you don't want to tell me your side?

[Appellant]: No, I don't even want to talk about it because it'll-it'll really tell.

[Anderson]: Okay.

[Appellant]: Yeah.

The Appeals Court stated:

In response to Anderson's question asking appellant if he wanted to tell his side, appellant answered "No, I don't even want to talk about it ..." "No" is an unambiguous answer-the custodial interrogation should have ceased immediately. Thus, the trial court erred in admitting into evidence the videotape from the point appellant invoked his right to terminate questioning until the end of the tape. .

(Confession found inadmissible because defendant's request for a lawyer was not honored and his request to talk to a family member was denied)

In *State v. Harris* (2007) the Iowa Supreme Court stated the following:

What does a suspect in custody need to do to invoke his right to an attorney? He just needs to ask for one. In the present case, the suspect repeatedly requested to speak with an attorney. Instead of ending the interrogation, the detective responded "You don't trust us enough to do it without a lawyer?" We find Kevin Harris's Fifth Amendment right to the presence of an attorney was violated when the detective continued to interrogate him after he invoked this right. Moreover, the detective violated Harris's statutory right to contact a family member by refusing to allow Harris to call his brother. Both violations require suppression of Harris's subsequent statements.

Determining custody

(*Questioning by law enforcement officers is less likely to rise to the level of a custodial interrogation when it occurs in a defendant's home*)

In *State v. Martinez* (August 2016) the Court of Appeals of Ohio, Eight District, upheld the lower court's decision that when the defendant was questioned in his home by law enforcement, the advisement of the *Miranda* rights was not required. From the Court of Appeals opinion:

On the morning of November 7, 2014, Parma Police Detective David Sheridan and Parma Police Sergeant David Zarzeczny went to Martinez's home to question him regarding an incident that had allegedly occurred two days earlier at Parma High School. Detective Sheridan was investigating a complaint by a 15–year–old female student that Martinez, age 66, a hall monitor at Parma High School, had placed his arm around her shoulder and made several inappropriate sexual comments to her while escorting her to class. The student alleged that Martinez had asked when she would let "an old man like him have sex with [her]" and whether he could "lick her p* * * *." Martinez was placed on administrative leave following the incident. Sergeant Zarzeczny, who worked part-time at the high school, completed the incident report.

Given his familiarity with Martinez and the fact that he had a "rapport" with him, Sergeant Zarzeczny thought Martinez would be more "comfortable" discussing the allegations if he were present and offered to accompany Detective Sheridan to question Martinez regarding the allegations…. Detective Sheridan accepted the offer and the two officers drove to Martinez's residence in an unmarked police car.

When the officers arrived at Martinez's residence, Martinez answered the door and invited them inside….. Once inside, Detective Sheridan introduced himself and asked Martinez whether he would prefer to talk at home or somewhere else. Martinez replied that they could talk there, offered the officers coffee and led them to the kitchen where the officers sat down at the kitchen table with Martinez and his wife, Diane Martinez ("Diane").

Approximately 15 minutes into the interrogation, Martinez admitted to putting his arm around the student and making the alleged inappropriate sexual comments to her. At no point, either prior to or during the interrogation, did Detective Sheridan inform Martinez of his Miranda rights.

In his assignment of error, Martinez argues that the officers' failure to advise him of his Miranda rights prior to questioning rendered the confession he made to the officers during his at-home interrogation inadmissable. Martinez contends that the interrogation was "custodial" because he was "ambushed in his own home" by the two police officers, "intent on secretly recording him [and] persistently questioning him" until they secured a confession. He claims that Sergeant Zarzeczny's presence was designed to "lull" Martinez—who, by that time, was clearly a suspect—"into a false sense of security" and that his presence, combined with the secret recording of his interrogation, created a "police-dominated atmosphere" that deprived Martinez of his freedom in a significant way. We disagree. Although it may have been the better practice for the law enforcement officers to have informed Martinez of his Miranda rights prior to questioning him, we cannot say that their failure to do so rendered Martinez's statements inadmissible.

Miranda warnings are not required simply because someone is a suspect…. Likewise, Miranda warnings are not required simply because the questioning takes place in an allegedly coercive atmosphere... As the United States Supreme Court explained… "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question."

In general, questioning by law enforcement officers is less likely to rise to the level of a custodial interrogation when it occurs in a defendant's home…. This is because "a person's home is a place 'a reasonable person would have felt free to terminate the interview.' In this case, following a careful review of the record and consideration of the totality of the circumstances surrounding the interrogation, we find that Martinez was not in custody during the interrogation at his home.

(*Is a hospitalized defendant necessarily in custody?*)

In *State v. Portillo* (June 2016) the Court of Appeals of North Carolina upheld the lower court's ruling that the fact that the defendant was hospitalized at the time of questioning did not create a custodial environment. From the Court of Appeals opinion:

Defendant first contends that his statement was inadmissible at trial because it was elicited during a custodial interrogation and because he was not *Mirandized* prior to making it. For these reasons, defendant argues the trial court committed reversible error by admitting his statement into evidence. We disagree.

… Police officers, however, "are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because ... the questioned person is one whom the police suspect." … Non-custodial interrogations do not require *Miranda* warnings…. Rather, "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited."

This Court has previously addressed whether a defendant is considered to be in custody while being treated at a hospital…. The fact that a suspect is hospitalized at the time he is questioned by police does not, by itself, make an interview custodial…. Instead, all relevant factors must be balanced, including: "(1) whether the defendant was free to go at his pleasure; (2) whether the defendant was coherent in thought and speech, and not under the influence of drugs or alcohol; and (3) whether officers intended to arrest the defendant."

In the instant case, defendant's argument tracks the three factors articulated in *Allen.* Defendant first contends that "neither [his] grave medical condition nor the police presence would have allowed [him] to *freely leave* the ICU at the time Detectives Bell and Flynn arrived to question him." (Emphasis added). However, as noted above, this is not the proper inquiry. The dispositive issue is whether defendant's freedom of movement was restrained to the extent associated with a formal arrest… Nothing in the record establishes defendant knew that a guard was present when the challenged interview was conducted. Defendant, who was interrogated in an open area of the ICU where other patients, nurses, and doctors were situated, had no legitimate reason to believe he was in police custody…. Even though the interrogating officers stood around defendant as he lay in a hospital bed, there is no evidence that defendant's movements were restricted by anything other than the injuries he had sustained and the medical equipment that was connected to him. Consequently, "[a]ny restraint in movement defendant may have experienced at the hospital was due to his medical treatment and not the actions of the police officers."

Second, defendant argues that the interrogation was custodial because he "was undoubtedly under the influence of the previous night's anesthesia and of pain medication" and "the detectives ... [did not] consult the attending physician as to the actual effect the drugs might be having on his comprehension." Yet nothing in the record indicates that defendant was incapable of understanding the questions he was asked.

Third, and finally, defendant argues that he was in custody because "the detectives arrived at the hospital with the intention of arresting him." This contention has no legal

force here. Although the officers may have arrived at the hospital with the intention of arresting him, officers' plans, when not made known to a defendant, have no bearing on whether an interview is custodial.

Reviewing the totality of the circumstances, we conclude that the evidence supports the trial court's findings, which in turn support its conclusion that defendant was not in custody when his statement was given.

(*Questioning the defendant at the scene of a stabbing was not custodial interrogation*)

In *People v. Cornelius* (March 2016) the Supreme Court, Appellate Division, New York ruled that questions asked at the scene of a stabbing did not constitute custodial interrogation which required *Miranda* warnings. From the court's opinion:

On November 7, 2011, police responded to West 137th Street in New York County and learned from EMS workers at the scene that defendant's companion, Christopher Joseph, had been stabbed. After she came downstairs from the apartment, defendant spoke to a uniformed police officer who asked her what had happened; defendant ultimately gave two different accounts of the stabbing. During the time that the officer was speaking with defendant, police did not search or handcuff her or tell her that she was under arrest. At the request of police, defendant went to the precinct to discuss the incident with detectives.

[at the precinct] Defendant then gave detectives another account of the incident. She first repeated that Joseph had been injured when he fell to the floor, but after the detective opined that her story made no sense, she changed the account. In the second account, defendant stated that Joseph had physically tried to prevent her from leaving the room after the two had had an argument. According to defendant, she fell to the floor, hoping Joseph would let her go. When Joseph continued to hold defendant down, she picked up a kitchen knife and began to swing it, stabbing Joseph.

The court properly denied defendant's motion to suppress the statements that she made both before and after she received her *Miranda* warnings. The People established that the pre-*Miranda* statements were not the product of custodial interrogation, because a reasonable innocent person in defendant's position would not have thought she was in custody… Although the officer at the scene asked defendant some questions about what had happened, questions posed in an attempt to gather information about the circumstances surrounding a possible crime do not constitute custodial interrogation for the purposes of *Miranda*… Further, there is no evidence that, during the pre-warnings period, any officer compelled defendant to go or remain anywhere, or created the impression that she was not free to leave.

(*Defendant not under arrest in his home even though his movements are monitored*)

In *US v. Herron* (February 2015) the US District Court, M.D. Florida, upheld the admissibility of the defendant's incriminating statements even though he had not been

advised of his *Miranda* rights while being questioned in his home. From the court's opinion:

"Herron argues he was in custody when the police questioned him at his residence. Herron specifically asserts the police questioned him in an accusatory and sarcastic manner and in a police dominated atmosphere. Herron also asserts he was not freely permitted to walk throughout his home during the interview. After reviewing the arguments and evidence, however, the Magistrate Judge concluded Herron was not in custody at the time he made his statements.

Herron objects to this finding. Herron asserts the Magistrate Judge discounts the significance of the number of police officers that were at Herron's residence because only two or three officers interviewed him. Moreover, Herron asserts he was accompanied by police when he re-entered his residence and was restricted to certain areas. Herron also asserts the Magistrate Judge gave undue weight to the fact that Herron was not arrested at the end of the interview.

Upon consideration, the Court agrees with the Magistrate Judge's reasoning. The officer's accusation that Herron was lying to them, the presence of numerous officers at the scene of the search warrant, and the fact that Herron was unable to walk freely throughout his home while police executed the search warrant did not alter the voluntary interview so that it became a custodial interrogation. Brown, 441 F.3d at 1348-49 (finding even though officer accompanied defendant throughout home, since defendant was permitted to eat, smoke and the like, this weighed in favor of finding his interview was non-custodial); see generally *United States v. Maldonado*, 562 Fed.Appx. 859, 861 (11th Cir.2014) (encounter with several U.S. postal inspectors did not make the interview a custodial interrogation). Herron was in a familiar environment. Herron was able to smoke and drink during his interview. Brown, 441 F.3d at 1348-49. In addition, the police started the interview by advising Herron he could voluntarily participate in the interview. Herron was told that he was free to leave and that he was not under arrest. Id. at 1347 (noting defendant's understanding that he was not under arrest and was free to leave weighed in favor of finding a defendant was not in custody) (citing *United States v. Brave Heart*, 397 F.3d 1035, 1039 (8th Cir.2005)); see also *United States v. Matcovich*, 522 Fed.Appx. 850, 852 (11th Cir.2013) (finding similar facts as here did not render defendant's interview as a custodial arrest). Under the totality of the circumstances, the Court finds Herron participated freely and voluntarily in the interview, and that the circumstances did not rise to the level of creating a custodial interrogation."

(Does interrogating a suspect in a police car create a custodial environment?)

In *Gardner v. State* (March 2014) the Court of Appeals of Texas, Houston found that the mere fact of questioning a suspect in a police car did not automatically create a custodial environment. The court stated in their opinion that “The officers escorted Gardner to avoid any interference with the officers executing the search warrant. The record supports the trial court's finding that the officers did not use handcuffs. Gardner willingly accompanied the officers to the patrol car for both interviews. During the first interview,

Gardner did not unequivocally state that he wanted to consult an attorney. The officers reiterated during the interview that Gardner was free to end the interview and leave the patrol car at any time. Consistent with the trial court's finding, the video recording shows that when Gardner finally stated that he did not want to continue the interview without an attorney present, the officers ended the interview. Gardner did not ask the officers for a telephone at any time during the interviews, and the officers did not refuse to allow Gardner to use the telephone. And, while it may have been inconvenient for Gardner to leave the house due to the number of patrol cars blocking the exit, nothing in the record shows that the officers intended to continue to detain Gardner after they had finished executing the warrant."

(When does questioning become custodial?)

In *Ross v. State* (2010) the Florida Supreme Court overturned a lower court's decision based on their faulty application of the law as to when questioning became custodial requiring an advisement of rights.

"In this case, the trial court concluded that Ross was not in custody on January 9 prior to the reading of the *Miranda* warnings, that Ross voluntarily waived his rights, and that the statements were made voluntarily.
Ultimately, as we have stated, the factors enunciated provide the basis for the twofold inquiry: (1) the "circumstances surrounding the interrogation"; and (2) "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." In considering these factors in conjunction with each other, we conclude that the January 9 interview became a custodial interrogation. Although Ross initially went to the sheriff's office voluntarily, this is the only factor that weighs in favor of finding that the January 9 questioning was not an in-custody interrogation. The January 9 interview was held in a small room with multiple officers, and Ross was placed in a corner with Detective Waldron sitting in front of him. The manner and purpose of the interview was not merely to interview a witness and obtain his story. Detective Waldron was attempting to obtain incriminating statements or a change in Ross's story by confronting him with significant evidence that allegedly placed him at the crime scene and insisting that the police already knew he committed the crime.

Once the police informed Ross that they had his bloody pants that matched the crime scene, a reasonable person would not have felt at liberty to terminate the interrogation and leave. At this point the officer should have advised Ross as to his *Miranda* rights."

("Custody does not occur merely because the suspect submits to and fails a polygraph test")

In *Shaw v. State* (2009) the Texas Court of Appeals upheld the defendant's confession which was made after taking a polygraph examination. The defendant had claimed that once the polygraph was completed, "the tone, demeanor, and purpose of the interview changed dramatically" and the interview became custodial." The defendant also claimed that "continued questioning after a polygraph examination in an attempt to garner a

confession makes the interview custodial, citing to *Bailey v. State*. However, "custody does not occur merely because the suspect submits to and fails a polygraph test," Dowthitt, 931 S.W.2d at 255, nor does custody occur merely because the interviewee is the focus of the investigation."

(Confession suppressed when suspect questioned in his home without Miranda advisement)

In *State v. Schultz* (2009) the Supreme Court of Kansas upheld the suppression of the defendant's confession because he was not advised of his rights when questioned in his home. The Supreme Court stated that : "The record before us contains ample substantial competent evidence to support the district judge's legal conclusion that Schultz was subjected to a custodial interrogation, even though the questioning took place in Schultz' apartment. The two uniformed officers kept Schultz and his girlfriend under constant observation as soon as they entered the apartment and saw them. Rhodd told Schultz to sit down at the dining room table; later he would tell Schultz to stay in the living room while he completed his search. Rhodd also asked Kinnett to watch Schultz and his girlfriend while Rhodd obtained the consent form. The officers also denied the girlfriend's request to leave the apartment. There can be little question, based on Rhodd's testimony, that Schultz was a felony suspect, not a mere witness, at least as soon as the marijuana in the spare bedroom was found. The site of the interrogation and Schultz' mode of arrival there are not persuasive in either direction. Although Schultz might ordinarily be expected to feel and exercise a certain amount of control over events in his apartment, he and any other reasonable person would be unlikely to leave once police officers were standing inside. On the last factor, the interrogation and search led to Schultz' arrest and trip to the police station, not to his release. Moreover, although we view the situation from the perspective of a reasonable person in Schultz' circumstances rather than from the officers' subjective viewpoints, it is noteworthy that Rhodd and Kinnett acknowledged Schultz would not have been free to leave at any point after they smelled marijuana. This occurred immediately upon their entry into the apartment.

The wisest course for the officers would have been to give Schultz his Miranda warnings as soon as they restricted his free movement from their presence and before they began to ask him questions. Their failure to do so at least theoretically imperiled the admissibility of any evidence they gathered after Schultz was instructed to sit down at the dining room table."

(What constitutes custody? Two cases)

In *People v. Colon* (2008), the Supreme Court, Appellate Division, First Department, New York, ruled that the defendant was not in custody for *Miranda* purposes when he confessed. The court found that: "The People established that the statements defendant made prior to *Miranda* warnings were not the product of custodial interrogation, because a reasonable innocent person in defendant's position would not have thought he was in custody. Defendant voluntarily accompanied the police to the precinct, where he was expressly told he was not under arrest and was free to leave. Although he remained there

over an extended period of time and was questioned with increasing intensity, he was never handcuffed or otherwise restrained, he was left alone and unguarded in an unlocked interview room for significant periods of time, and he was permitted to go to the bathroom unescorted. The fact that the police expressed skepticism about defendant's story did not render the questioning custodial. "Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest". Furthermore, it was defendant who initiated the conversation with a detective, whom he knew from the neighborhood, in which he first admitted having had sex with the elderly victim on the day of the murder. The detective immediately stopped the conversation and, after *Miranda* warnings were administered, defendant waived his rights and gave a written statement implicating himself in the murder."

In *People v. Dillion* (2008) the Court of Appeal, Third District, California found that the defendant was not in custody for *Miranda* purpose at the time of his confession. The court stated that: "The single most important circumstance in this case is the fact defendant was told at least six times that he was free to leave and did not have to answer their questions. There is nothing in the record to undermine the clarity of what defendant was explicitly told. In other words, there were no subtle indicia of an arrest. He was not handcuffed. He was not locked in a room. He was not restrained. The officers did not ignore a request to leave. Rather, he was offered refreshments and given unsupervised breaks. Objectively, defendant remained free to terminate the interrogation and simply did not avail himself of the opportunity.

It is true that the interrogation became intense and uncomfortable. The interrogators suspected defendant was the perpetrator of multiple fires and truthfully told him so. And it took nearly two hours of skilled interrogation to convince defendant to tell the truth. But effective interrogation is not, by definition, custodial. " .

(When does questioning of a "witness" becomes questioning of a "suspect" requiring that Miranda rights be given)

In *State v. Nyhammer* (2007) the Superior Court of New Jersey Appellate Division found that the defendant's confession should have been suppressed because he was not advised of his Miranda rights when he was questioned as a suspect as opposed to at the outset of the interrogation when he was being questioned as a witness. Here is what the Appellate Court said:

Here, the warnings were given when defendant perceived that he was merely a witness against Green. His decision to speak to Sperry without an attorney did not include knowledge that he himself was a suspect. Although the contents of Miranda warning itself inherently may suggest that the recipient of the warning could be a criminal suspect, in this case Sperry deflected such a perception by initially leading defendant to think that his interview was about Green's culpability, not his own. Therefore, at the point when he acquired such knowledge, and that his personal liberty would be affected by his

conversation with Sperry, the Miranda warnings should have been given again. Failure to do so requires that the confession be suppressed, as a matter of law. It is at this point that the impact of the words of the warnings: you have the right to remain silent; anything that you say can be used against you in a court of law; you have the right to the presence of an attorney, and if you cannot afford an attorney one will be appointed for you prior to any questioning if you so desire; becomes apparent and meaningful to a layperson. In short, defendant did not make a knowing and intelligent waiver of his rights when he gave the confession.

(If the interrogator lies to the suspect about the existence of incriminating evidence does the deception create a custodial situation?)

In *State v. Doyle* (2007) the Appellate Court of Connecticut found that considering the circumstances in this case ("the defendant drove to the police station. There, the detectives told him several times during the approximately one hour interview that he was not under arrest and could leave when he wanted to do so. The interview took place in an interior, closed room in the police station with the door unlocked, and the defendant was never physically restrained in any way. At the end of the interview, the defendant left the police station by himself. We conclude that a reasonable person would not have believed he was not free to leave because he did, in fact, leave.") the fact that the police falsely told the defendant that there was DNA evidence against him did not create a custodial situation.

(Does house arrest constitute custody for Miranda purposes?)

In *U.S. v Cano* (2007) the United States District Court, North Carolina ruled that house arrest with electronic monitoring is not per se "custody" in the context of Miranda. In their opinion they placed a great deal of reliance on United States v Conley "the seminal case in this Circuit" which had rejected the notion that an incarcerated person is "automatically always in 'custody' within the meaning of Miranda.

When is re-advisement necessary

(*13 hours between waiver and incriminating statements)*

In *Cooper v. Graham* (2011) the U.S. District Court, W.D. New York, ruled that, "The state courts were correct in determining that Cooper's waiver of his Miranda rights was not rendered invalid by virtue of the approximately 13 hours which elapsed between the waiver and his making the statements. *People v. Cooper*, 59 A.D.3d at 1054, 872 N.Y.S.2d 793 (" '[W]here a person in police custody has been issued Miranda warnings and voluntarily and intelligently waives those rights, it is not necessary to repeat the warnings prior to subsequent questioning within a reasonable time thereafter, so long as the custody has remained continuous[.]' ") (quotation and citation omitted). The New York rule is consistent with Supreme Court precedent."

(Two and one-half hours between initial interview and advisement of rights and the second interview without a re-advisement did not cause the rights to "grow stale.")

In *State v. Cleland* (2011) the Court of Appeals of Ohio, Ninth District rejected the defendant's claim that the trial court should have suppressed the statements that he made to police officers after his first interview because his statements were not voluntarily made and because the investigating officer did not provide Miranda warnings before interviewing him again.

From their opinion, the Court of Appeal found that, "As the trial court found, Detective Dean Weinhardt orally informed Cleland of his Miranda rights at the beginning of his first interview and, at approximately 6:00 a.m., Cleland executed a waiver of rights form that contained the same information in written form. At 6:48 a.m., Cleland executed another acknowledgement of his Miranda rights contained on the form onto which he reduced a confession to writing. Detective Weinhardt interviewed Cleland again at 9:12 a.m. He did not re- Mirandize Cleland then, but did ask whether he still understood his rights as they were explained earlier.... it was not error for the trial court to deny the motion to suppress. The second interview was conducted in the same location by the same investigating officer only two and one-half hours later.... Our consideration of the Roberts factors, therefore, leads to the conclusion that the initial Miranda warnings had not grown stale before the second interview."

(Does a suspect have to be advised of his Miranda rights after a 15 hour interlude between interrogation sessions?)

In *Bridges v. Valley* (2011) the US District Court, E.D. New York, upheld the trial court's decision that Miranda warnings did not have to be given at the out set of an interrogation that began 15 hours after the suspect's initial interrogation and waiver of rights.

Here is the case background: Upon his arrest, at 9:45 p.m. on June 24, petitioner was read his Miranda rights and signed a written advice and waiver. After just over two hours of questioning, he made an exculpatory statement at 11:45 p.m., admitting that he was in the area of the shooting at the time but denying any knowledge of it. He remained in custody overnight. The next day, at noon, he was questioned again, without additional Miranda warnings, and essentially gave the same statement.

Just over three hours later, at 3:25 p.m., he was interrogated again; the detectives, who had his signed Miranda waiver form from the previous night, did not re-administer the warnings. Petitioner then broke down and admitted that he was the shooter. The detectives wrote down petitioner's statement, and he signed it. At 8:25 p.m., an Assistant District Attorney interviewed petitioner on videotape. Petitioner acknowledged that he had received and waived his Miranda rights the preceding evening, and the ADA again advised him of those rights and petitioner again agreed to waive them. He then repeated his confession.

In their opinion, the District Court stated, "The controlling Supreme Court authority is Wyrick v. Fields, 459 U.S. 42, 47, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982). There, the Court rejected the contention that the mere passage of time could require the re-administration of Miranda warnings. Rather, the Court held that renewed warnings were not required "unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a 'knowing and intelligent relinquishment or abandonment' of his rights." To make that determination, the Court required a review of "the totality of the circumstances" to determine if the confession was voluntary.

In the instant case, petitioner's arguments before the Appellate Division relied solely on the passage of time between his waiver and his confession. The record contains no other facts upon which he could have relied. While in custody, he was fed or offered food several times, he slept overnight, and there is no evidence that he was denied the use of a bathroom or subjected to coercive measures. His location did not change; he remained at the police precinct, either in a holding cell or interview room, throughout. Moreover, when he gave his videotaped confession, he acknowledged that he had previously been given and waived his rights, thus foreclosing any possible claim that he had forgotten them. Finally, as the hearing court noted, petitioner was "not a novice to the criminal justice system," further suggesting that he knew and voluntarily waived his rights."

Do inmates need to be advised of their Miranda rights?

(*Court upholds incriminating statements made during a police interview while defendant was incarcerated for an unrelated crime even though no Miranda warnings were issued*)

In *State v. Nelson* (September 2016) the Court of Appeals of Ohio, Sixth District, found that an interview of the defendant in the jail facility were he was incarcerated for a different crime did not require an advisement of *Miranda* rights. From the court's opinion:

While in prison on the aggravated robbery charge, appellant was caught with a knife on his person. As a result, appellant was charged with possession of a deadly weapon under detention, a second degree felony. In an effort to reduce the potential time he was facing on this charge or to reduce the time he was currently serving for his aggravated robbery conviction, appellant informed state troopers that he had information concerning the murder of Markiese Chandler and was willing to testify against Jimmy Henry and Byron Mitchell, the alleged perpetrators, in exchange for a deal.

In an effort to ascertain the usefulness of appellant's information, Toledo police detectives Elizabeth Kantura, Robert Schroeder, and Deb Hahn traveled to the prison to meet with appellant on August 6, 2012. According to Kantura, the meeting took place in a small administrative room inside the prison. Appellant was handcuffed during the interview, which lasted less than 30 minutes.

At the interview, appellant informed authorities that he was present at the scene of the murder. He went on to explain that he drove to the scene with Henry and Mitchell, parked the car, and approached the three victims who were walking along the side of the street. Appellant insisted that Henry was the first to fire shots. Appellant also admitted to firing shots, but stated that he was not aiming toward the victims and therefore was not the one responsible for the gunshot injuries. When pressed for further details, appellant was able to describe what he and the others were wearing, the type of vehicle they were driving, how they chased down one of the victims, and how they fled the scene. Up to this point, Kantura had not informed appellant of his *Miranda* rights. Kantura reasoned that she was not required to provide *Miranda* warnings because appellant voluntarily asked her to speak with him and she was skeptical as to the utility of the information appellant would provide. Further, Kantura stated that her purpose for interviewing appellant was merely to get his statement as a witness to the murder.

Here, appellant argues that his statements should be suppressed because they were the product of a custodial interrogation that took place without a waiver of his *Miranda* rights.

The determination of whether police questioning of a prison inmate amounts to custodial interrogation was addressed by the United States Supreme Court in *Howes v. Fields*, ___ U.S. ____, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012). In *Howes,* the defendant was escorted from his prison cell by a corrections officer to a conference room where he was questioned by two sheriff's deputies about criminal activity that he had allegedly engaged in before he entered prison. At no time during the questioning was the defendant given *Miranda* warnings or advised that he did not have to speak with the deputies. However, defendant was told more than once that he was free to leave the interview and return to his cell. The questioning lasted between five and seven hours, during which time the defendant was free of restraints and the door to the conference room was occasionally open. While the defendant stated that he no longer wished to speak to the deputies several times during the interview, he never stated that he wished to return to his cell. According to the defendant, one of the deputies used a "very sharp tone" during the interview. At some point during the interview, the defendant confessed and the interview concluded. The defendant was escorted back to his cell 20 minutes later, after his normal bedtime.

In examining whether the defendant was in custody and entitled to be apprised of his *Miranda* rights prior to questioning, the court stated: " 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." … "In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." … In evaluating whether an inmate would have felt free to leave, a court must consider the totality of the circumstances. In so doing, the court should be mindful of the following relevant factors: (1) the location of the questioning, (2) its duration, (3) statements made during the interview, (4) the presence or absence of physical restraints during the questioning, and (5) the release of the interviewee at the end of the questioning. Freedom of movement, standing alone, is not a determinative factor.

Indeed, the *Howes* court cautioned courts to consider "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda.*"

After articulating the foregoing principles, the court in *Howes* found that "imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda.*" … In so finding, the court reasoned that interrogation of a prison inmate is different from the type of interrogation that was at issue in *Miranda* for at least three reasons: (1) "questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest," (2) "a prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release," and (3) "a prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence."

In summarizing the test to be applied in cases in which a prison is questioned, the court stated that "the determination of custody should focus on all of the features of the interrogation includ[ing] the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted."

…. we find that appellant was not in custody for purposes of *Miranda* in this case. Notably, appellant in this case actually *invited* Kantura to the prison to speak with him regarding his involvement in this case. He was transferred to an administrative room within the prison, where the initial questioning lasted less than 30 minutes. While it is true that appellant was handcuffed during the interview, this fact would not have alarmed appellant, who was accustomed to life as a prison inmate and the restraints that are routinely employed within prisons…. Moreover, there is no evidence that appellant attempted to stop the interview or resist questioning at any point during the process. Rather, appellant freely volunteered the information he provided to Kantura with the hope that providing such information would allow him to receive a reduction in his prison sentence.

In that regard, we agree with the trial court's statement that "there are no facts or even argument to indicate any coercion by police." Thus, we conclude that appellant was not in custody within the meaning of *Miranda,* and was therefore not entitled to *Miranda* warnings prior to police questioning.

(Supreme Court says prison inmates don't have to be read rights in different investigations: Howes, Warden v. Fields (2011))

WASHINGTON -- The Supreme Court said Tuesday investigators don't have to read Miranda rights to inmates during jailhouse interrogations about crimes unrelated to their current incarceration.

The high court, on a 6-3 vote, overturned a federal appeals court decision throwing out prison inmate Randall Lee Fields' conviction, saying Fields was not in "custody" as

defined by Miranda and therefore did not have to have his rights read to him.
Click here for full decision

At our training seminars we are often asked if an inmate has to be advised of their *Miranda* rights if they are being questions about a commission of a crime. Several years ago the court **in *Commonwealth v. Larkin*** 429 Mass. 426, 708 N.E. 2d 674 (1999) found that when certain conditions are met prisoners are not required to be advised of their *Miranda* rights. In upholding the incriminating statements, the court found that the inmate was "not in control of the troopers who were interrogating him." Some of the factors the court considered in reaching this conclusion were: The interview addressed an issue unrelated to the one for which the inmate was incarcerated; the interview was conducted in a room normally used for attorney conferences an not in the inmate's cell; the inmate was told that the interview was voluntary and signed a statement consenting to be voluntarily interviewed; and, the inmate was clearly told that he could end the interview at any time by simply signaling the guard outside the door. Most recently in a case decided November 30, 2006 the District of Columbia Court of Appeals reached the same conclusion. In the case of Lindsey v. US Nos. 99-CF-1295, 99-CF-1670, 03-CO-1283 and 03-CO-1286 the court that "as a matter of first impression, first defendant, who was a prisoner when he confessed to killing the victim, was not in custody for *Miranda* purposes at time of confession.

In their opinion the court said:

"When a suspect is incarcerated on other charges at the time of interrogation, the *Miranda* "in custody" analysis is somewhat different from the classic interrogation of the suspect at the police station. Although we have recognized that there is a question about whether an inmate is " 'in custody' for *Miranda* purposes merely because of his status as a prisoner," Smith v. United States, 586 A.2d 684, 685 (D.C.1991), we have never decided this issue.

Lindsey argues that Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), established that prisoners are always considered in custody under *Miranda*, and that Mathis thus controls the outcome of this appeal. We do not agree. In Mathis, the Supreme Court rejected the government's argument that *Miranda* applies "only to questioning one who is 'in custody' in connection with the very case under investigation." Id. at 4 (emphasis added). The Court found "nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given [to] persons under interrogation by officers based on the reason why the person is in custody." Id. at 4-5. This holding falls short of establishing that *Miranda* warnings must be given every time a prisoner is questioned regarding an ongoing criminal investigation or that a prisoner is per se in custody for *Miranda* purposes.

In fact, the interpretation of Mathis espoused by Lindsey in this case has been repeatedly rejected by other state and federal courts. For example, in Cervantes v. Walker, 589 F.2d

424 (9th Cir.1978), the Ninth Circuit held:

In the prison situation, [custody] necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement. Thus, restriction is a relative concept, one not determined exclusively by lack of freedom to leave. Rather, we look to some act which places further limitations on the prisoner.

…. In so holding, Cervantes identified four factors that are relevant to the determination of whether a prisoner is "in custody" for *Miranda* purposes: "[1] the language used to summon the individual, [2] the physical surroundings of the interrogation, [3] the extent to which he is confronted with evidence of his guilt, and [4] the additional pressure exerted to detain him." Id. at 428. Most jurisdictions that have considered this issue have adopted standards similar to the one established in Cervantes. FN3 Because we find the rationale of Cervantes and its progeny to be persuasive and the factors considered by those courts to be significant in determining whether an inmate being questioned is in custody for *Miranda* purposes, we now apply them to the facts of this case.

Application of the Cervantes factors to this case leads us to conclude that Lindsey was not in custody at the time of his prison confession. With respect to the first factor-the words used to summon him-Lindsey was paged to the administration building, told that he had visitors and was led by a prison employee to the conference room where Heara and Brigidini were waiting. The prison employee then left the area. Thus, the record shows that Lindsey was summoned to the meeting in the same way that all inmates are called to meet with visitors, and, therefore, there was nothing unusual that occurred in this case from which we could conclude that he was subjected to any greater restraint on his movement than any other inmate.

With respect to the second factor, the physical surroundings of the interrogation, the interview took place in a minimum security prison where Lindsey was free to move around with almost no restrictions. He was permitted to leave the facility daily for a work release program. The conference room where the interview took place had a window that faced outside, a long table with several chairs and the door to the room was left unlocked. Importantly, the agents instructed Lindsey that he was not under arrest, and that he did not have to speak with them. And the trial court made a specific factual finding that he was free to leave the interrogation at any time.

The third factor is the extent to which Lindsey was confronted with evidence of his guilt. The agents explained that they were visiting him regarding Johnson's murder and provided him with a detailed recounting of the events before, during and after the murder, including Gayles' involvement and the motive for the murder. While they told him that it would be better if he cooperated, there was no discussion about his having an obligation to cooperate.

The fourth factor we consider is whether there was any additional pressure used to detain Lindsey or whether more restrictions were put upon him. The record shows there was no such effort, nor any "change in the surroundings ⋯ which result[ed] in an added

imposition on his freedom of movement." Cervantes, supra, 589 F.2d at 428. Not only was he not shackled or restrained in any way, no physical force whatsoever was used to get him to speak with the agents, nor to prevent him from terminating the interview and leaving the conference room. Thus, there is no reason to conclude that he perceived that he was in custody or that he was not free to leave if he wished, nor that any reasonable person in his position would have perceived that he was not free to leave.

Based on these factors, we are satisfied that there was no greater restriction placed on Lindsey's freedom of movement as a result of his interview than was normal under the circumstances of his incarceration and therefore, for purposes of *Miranda*, he was not in custody. Thus, the officers were not required to give him the *Miranda* warnings, and the trial court did not err in finding that his statement was admissible on these grounds."

Incriminating statements to undercover police

(Undercover agents do not have to advise a suspect of their Miranda rights)

In *US v. Pazder* (2014) the US District Court, E.D. Tennessee found that undercover OIG agents posing as USPS quality assurance contractors did not have to advise the defendant of her rights when they spoke to her, even though she was suspected of defrauding the USPS. From their opinion the court stated the following:

"On December 7, 2010, the Defendant participated in an interview conducted at the Marriott hotel in Knoxville, Tennessee, by undercover OIG agents posing as USPS quality assurance contractors. The Defendant allegedly gave false statements about the extent of her physical limitations during this interview. The Defendant contends that the information she gave at the December 7, 2010 interview must be suppressed because she gave the information involuntarily and pursuant to coercion and duress. She states that although the true purpose of the interview was to obtain incriminating information, she was not aware that she was speaking to federal agents, she was not advised of her rights under *Miranda* or *Garrity,* and she did not waive those rights.

First, the Court readily finds that the interviewing agents did not have to advise the Defendant of her rights pursuant to *Miranda* during the December 7, 2010 interview. The Supreme Court has definitively held that *"Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement." *Illinois v. Perkins,* 496 U.S. 292, 294, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990). The policy behind providing the Miranda warnings is the belief that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda,* 384 U.S. at 467. On the other hand, when an individual voluntarily speaks with someone, whom they believe is not a law enforcement agent, then those "inherently compelling pressures" stemming from custodial interrogation are not present, even if the interviewer is actually an undercover agent. *Perkins,* 496 U.S. at 296; *see also Hoffa v. United States,* 385 U.S. 293, 304, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966)

(declining to entertain a Fifth Amendment challenge to the defendant's statements about bribing jurors made to an undercover government informant whom the defendant had invited into his hotel room). “There is no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess.” *Perkins,* 496 U.S. at 296–97. “Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda'* s concerns.” *Id.*

In the instant case, Defendant Pazder did not know that the persons interviewing her during the December 7, 2010 meeting were OIG agents, nor that they suspected her of fraud. In other words, the Defendant had no reason to believe that the undercover agents “had any legal authority to force [her] to answer questions or that [they] could affect [her] future treatment” with regard to criminal prosecution. *Id.* The Court finds that the *Miranda* warnings were not required for the December 7, 2010 interview. Similarly, the *Garrity* warnings were not required because the Defendant had no reason to believe that her job was in jeopardy if she refused to talk to the quality assurance contractors.

In the instant case, the ruse—that the agents were USPS quality assurance contractors—did not involve any threats or promises to the Defendant or others. Moreover, the Defendant was familiar with the subject of Worker's Compensation benefits, having sought them for prior injuries, and she was not alone during the meeting. Instead, her husband attended the interview with her, commented on the discussion, and assisted her in completing a form. The mere fact that the agents were undercover was not coercive.

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(Defendant's confession to two "inmates" who were undercover detectives held admissible – Miranda not required)

In *People v. Robles* (2012) the Court of Appeal, Second District, California, upheld the admissibility of the defendant's incriminating statements that he made to two "inmates" who were actually undercover detectives. From the Appeal's court opinion:

"Appellant moved to suppress evidence of his July 16, 2009 jail cell conversation with the two detectives posing as inmates. He maintained that admission of his statements at trial would violate his constitutional rights against self-incrimination and to counsel during police questioning. The prosecutor responded that appellant was not entitled to be advised of his rights in this setting, because (1) appellant was unaware that he was in a cell with officers so there was no coercive police interrogation, and (2) he was not charged with a crime at the time he made his admissions of guilt. The court denied appellant's motion to suppress.

A criminal suspect who makes incriminating statements is not entitled to Miranda warnings "when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement." (*Illinois v. Perkins* (1990) 496 U.S. 292, 294 (Perkins).) In Perkins, an undercover officer posing as an inmate was placed in the same cellblock

as the defendant, who was suspected of murder. The officer proposed that he and Perkins escape from jail. While refining the escape plan, Perkins described at length the murder he committed, after the officer asked Perkins whether he had ever "done" anybody. The officer did not give Miranda warnings before having the incriminating conversation with Perkins. (Perkins, at pp. 294-295.)

Contrary to appellant's contention, the police subterfuge did not create an unreliable result that rendered his trial fundamentally unfair. The circumstances in this case were not coercive. Appellant spoke openly to his "fellow inmates," with only slight encouragement from them. No threats were uttered during the exchange. Appellant's will was not overborne by the deception." Click here for the complete opinion

Courts and The Reid Technique

(Court admonishes investigator for not following Reid guidelines)

In *People v. Elias* (June 2015) the Court of Appeal, First District, Division 2, California pointed out several prescribed Reid procedures that were not followed by the investigator, resulting in a confession that was found to be involuntary:

1. A non-accusatory interview was not conducted before initiating an interrogation
2. The investigator misrepresented the case evidence when questioning a 13 year old
3. There was no corroboration of the incriminating statement
4. There was contamination - disclosing details of the crime

In this case the court concluded that "the prosecution failed to prove by a preponderance of the evidence that Elias's inculpatory statements were voluntary, and the trial court therefore erred in receiving the statements in evidence." In this case a 13 year old had made incriminating statements about sexually touching a child under the age of 14. The interrogation of the defendant took place in an office in the elementary school building; lasted about 20 to 30 minutes; and, concluded when the investigator "suggested Elias might have touched A.T.'s vagina because he found it exciting or just because he was curious," Elias rejected the first suggestion and, to [the investigator's] comment, "[b]ut you did it," said, "[f]or curiosity." Elias thus accepted [the investigator's] alternative theory that he touched the bare skin of A.T.'s vagina for three to four seconds, in the midst of playing a video game with her brother, merely "out of curiosity."

In reviewing the questioning of the defendant the Appeals Court pointed out several times that the investigator did not follow the guidelines for proper interview and interrogation procedures outlined our book, Criminal Interrogations and Confessions. In their opinion, the Appeals Court stated that "no evidence corroborated his incriminating statements." In their discussion of the issue of corroboration the court stated:

"The best form of corroboration is the suspect's revelation of information only a guilty

suspect would know. (Inbau et al., Criminal Interrogation, supra, at pp. 354-356.) Thus "[t]he admissions, 'I shot and killed Mr. Johnson' or 'I forced Susie Adams to have sex with me' may be elicited from a juvenile (or adult) suspect. These admissions become useful as evidence if they are corroborated by (1) information about the crime the suspect provides which was purposefully withheld from the suspect, and/or, (2) information not known by the police until after the confession which is subsequently verified." (Id. at p. 255.) Corroboration is "[t]he ultimate test of the trustworthiness of a confession." (Ibid.)"

The court went on to state later in their opinion that "One of the ways police facilitate false confessions is by disclosing specific facts regarding the crime during the interrogation process, inducing the suspect to adopt these facts and thus accurately "confirm[ ] the preconceived story the police seek to have him describe."... The use of this suggestive technique--referred to as "contamination" has been found to be coercive and to have overcome the will of subjects, particularly those who are young or otherwise vulnerable. From the court's opinion:

"As one of the authors of Criminal Interrogation has said, "[I]t is imperative that interrogators do not reveal details of the crime so that they can use the disclosure of such information by the suspect as verification of the confession's authenticity. In each case there should be documented 'hold back' information about the details of how the crime was committed; details from the crime scene; details about specific activities perpetrated by the offender; etc. The goal is to match the suspect's confession against these details to establish the veracity of the statement." (Combating Contamination, at pp. 847-848, quoting Joseph P. Buckley, The Reid Technique of Interviewing and Interrogation, in Tom Williamson ed., Investigative Interviewing: Rights, Research, Regulation 190, 204-05 (Willan 2005).)"

In discussing the investigator's use of deception during the interrogation (misrepresenting the evidence) and the fact that such a practice is inappropriate for this juvenile, the court quotes from Criminal Interrogation and Confessions:

*"The authors of the text expounding the Reid Technique candidly admit that "[m]any of the interrogation techniques presented in this text involve duplicity and pretense. To persuade a guilty suspect to offer an admission against self-interest, the investigator may have to falsely exaggerate confidence in the suspect's guilt, sympathize with the suspect's situation, and display feelings toward the suspect or his crime that are far from genuine. The investigator may suggest a face-saving motive for the commission of the crime, knowing it is not true. In some cases an investigator may falsely imply, or outright state, that evidence exists that links the suspect to the crime." (Inbau et al., Criminal Interrogation, supra, at p. 351.) But, as we have said, the text makes it eminently clear that such deceptive techniques "**should be avoided when interrogating a youthful suspect with low social maturity** " because such suspects "may not have the fortitude or confidence to challenge such evidence" and "may become confused as to their own possible involvement, if the police tell them evidence clearly indicates they committed the crime." (Id. at p. 352, italics [emphasis] added.)*

Later in their opinion the court points out that the investigator violated "*a basic tenet of the Reid Technique meant to reduce the likelihood of inducing false confessions"* - conducting a non-accusatory interview of the defendant before engaging in an interrogation. The court further stated:

"As underscored in the opening pages of the current edition of the text expounding the Reid Technique, an "interview" is "nonaccusatory," its purpose "is to gather information," "it may be conducted early in an investigation," "it may be conducted in a variety of environments," the conversation should be "free flowing and relatively unstructured," and "the investigator should take written notes." (Inbau et al., Criminal Interrogation, supra, at pp. 3-4.) On the other hand, an "interrogation" is "accusatory" and "involves active persuasion," it "is conducted in a controlled environment" and "only when the investigator is reasonably certain of the suspect's guilt," and the investigator "should not take any notes until after the suspect has told the truth and is fully committed to that position." (Id. at pp. 5-6, italics [emphasis] added.)

"Proponents of the Reid Technique, and virtually all interrogation manuals, counsel that interrogation should almost never be undertaken without the benefit of a previous interview: "*Absent a life-saving circumstance the investigator should conduct a non-accusatory interview before engaging in any interrogation. During the interview the investigator can establish rapport with the suspect, assess their credibility, develop investigative information and establish a behavioral baseline. Also, during the interview the suspect is more likely to reveal information that can be used to develop an interrogation strategy."* (quoting from the Reid Position Paper at www.reid.com).

(Court confirms that The Reid Technique consists of proper interrogation procedures)

In *US v. Jacques* (March 2014) the US Court of Appeals, First Circuit, upheld the lower court's opinion that a confession obtained by interrogators using elements of the Reid technique was voluntary and admissible. (We reported on the lower court's opinion in the Legal Updates Fall 2011.) In this opinion the US Court of Appeals stated the following:

"Finally, Jacques claims that Mazza and Smythe overbore his will through their use of the "Reid technique," including exaggerating their evidence and minimizing the gravity of his suspected offense, in obtaining a confession.

Extreme forms of deception or chicanery by the police may be sufficient to render a confession involuntary.... Nevertheless, "the use of chicanery does not automatically undermine the voluntariness of a confession." Id. This court has consistently recognized that "some degree of deception ... during the questioning of a suspect is permissible."

Specifically, "a confession is not considered coerced merely because the police misrepresented to a suspect the strength of the evidence against him." .... As the Seventh Circuit has noted, "[o]f the numerous varieties of police trickery, ... a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary."

In this case, the agents' statements exaggerating the quality of their evidence, minimizing the gravity of Jacques's offense, and emphasizing the negative media attention that would attend Jacques's trial all fall safely within the realm of the permissible "chicanery" sanctioned by this and other courts. Jacques points to no federal authority supporting a finding of an involuntary confession under similar circumstances.... Considered in the full circumstances of this case, Mazza and Smythe's interrogative tactics did not amount to coercion in violation of Jacques's Fifth Amendment rights."

(Investigators did not follow suggested guidelines when interrogating mentally deficient individual as detailed in Reid training manual and text, Criminal Interrogation and Confessions)

In *US v. Preston* (May 2014) the US Court of Appeals the court stated, "Today we consider the voluntariness of a confession given by Tymond Preston, an intellectually disabled eighteen-year-old. To elicit this confession, the police, among other tactics, repeatedly presented Preston with the choice of confessing to a heinous crime or to a less heinous crime; rejected his denials of guilt; instructed him on the responses they would accept; and fed him the details of the crime to which they wanted him to confess. Under the totality of the circumstances, including Preston's intellectual disability, we conclude that the confession that resulted from this questioning was involuntarily given and should not have been admitted at trial."

From their opinion the court stated:

Preston was eighteen, with an IQ of sixty-five. The two officers realized early in the interrogation that Preston suffered some sort of intellectual disability, as his initial responses gave them cause to believe that he had an impairment. They therefore inquired directly if he was "disabled." Preston did not understand the word "disabled," and so asked its meaning. That he had to ask for an explanation of a common word itself suggests the extent of his cognitive impairment. After the officers explained the word's meaning, Preston agreed that he was disabled, elaborating that he was not able to complete his schooling as a result.

Summarizing the evidence regarding how the intellectually impaired respond to contemporary police interrogation methods, several scholars have listed "seven common characteristics" of such people, including (1) "unusual[ ] susceptib [ility] to the perceived wishes of authority figures"; (2) "a generalized desire to please"; (3) difficulty "discern[ing] when they are in an adversarial situation, especially with police officers," who they generally are taught exist to provide help; (4) "incomplete or immature concepts of blameworthiness and culpability"; (5) "[d]eficits in attention or impulse control"; (6) "inaccurate views of their own capacities"; and (7) "a tendency not to identify themselves as disabled" and to "mask[ ] their limitations ."

"[A]s interrogators have turned to more subtle forms of psychological persuasion," and away from physical coercion, "courts have found the mental condition of the defendant a

more significant factor in the 'voluntariness' calculus." … It simply "takes less" in terms of sophisticated police interrogation techniques "to interfere with the deliberative processes of one whose capacity for rational choice is limited than it takes to affect the deliberative processes of one whose capacity is not so limited."

Among the police tactics used here were several recommended by a manual on police interrogation, *see* Fred E. Inbau, John E. Reid, Joseph P. Buckley & Brian C. Jayne, *Criminal Interrogation and Confessions* (5th ed. 2013) ("Reid manual"), from which both the officers who interrogated Preston were trained. The officers, however, sometimes disregarded the manual's cautions about the tactics they used.

For example, using one of the recommended approaches, the two officers asked Preston a number of questions that presented him with two alternatives as to how the crime was committed. *See id.* at 293–303. "Both alternatives are highly incriminating, but they are worded in such a way that one alternative acts as a face-saving device whilst the other implies some repulsive motivation." Gudjonsson, *supra,* at 19. In this instance, Preston was asked to choose, for example, whether he was a monster—a sexual predator who repeatedly preys on children—or if the abuse of the child was a one-time occurrence.

These questions were derived from similar exemplars in the Reid manual. Reid manual, *supra,* at 296–97, 298. The manual, however, suggests that the inculpatory alternatives technique recommended may be unduly coercive when used for suspects of seriously impaired mental ability: it trains agents in the alternative questioning method with the understanding that "no innocent suspect, *with normal intelligence and mental capacity,* would acknowledge committing a crime merely because the investigation contrasted a less desirable circumstance to a more desirable one and encouraged the suspect to accept it." Reid manual, *supra,* at 303 (emphasis added). The psychological evidence regarding Preston's intellectual disabilities confirms this assessment by indicating that he is confused by complexity, abstraction, and multiplicity, and likely to acquiesce in suggestions made by the questioner. As a result, recognizing that where one is asked "a or b," one can answer "neither one," rather than acquiescing in one or the other, could well have exceeded his intellectual abilities.

The agents coupled the techniques of alternative questioning, providing suggestive details, and repetitious and insistent questions with other techniques that the Reid manual specifically cautions *against.* The Reid manual specifically warns that the questioning "should not be, *in any way,* based on leniency if the more understanding alternative question is accepted." Reid manual, *supra,* at 300 (emphasis added). It also cautions that when questioning people of low intelligence, investigators should avoid offering promises of leniency or using deceptive interrogation techniques due to the vulnerability of this group. *Id.* at 332–33, 352, 429.

Assuredly, interrogating officers can make false representations concerning the crime or the investigation during questioning without always rendering an ensuing confession coerced. ..... But false promises stand on a different footing. In particular, the Supreme Court has observed that "the test of voluntariness" is "whether the confession was

extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence."

The types of deception used here, which primarily related to considerations extrinsic to the suspect's guilt or innocence, are particularly problematic when used on a person with an intellectual disability. Intrinsic falsehoods, which relate to the facts of the crime itself or of the investigation—such as falsely informing a suspect that the victim had survived and identified the suspect—do "not lead [the suspect] to consider anything beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime." …. But here, the police did not simply inflate the amount of incriminating evidence against Preston. Instead, they suggested falsely that if he confessed, his admissions would not be used against him—he could "move on" after apologizing to the child, rather than being punished. This approach "interject[ed] the type of extrinsic considerations" more likely to "distort[ ] an otherwise rational choice of whether to confess or remain silent." …. The intellectually disabled are more susceptible to such extrinsic deception tactics.

Accordingly, we conclude that the district court erred in admitting Preston's confession. Click here or the complete decision.

In *US v. Jacques* (May 2011) the United States District Court, D. Massachusetts, upheld the lower court's opinion to reject the testimony from Professor Alan Hirsch on the issue of false confession. In their opinion the court found that Professor Hirsch's credentials did not qualify him as an expert; that the proffered expert testimony to the effect that Defendant's confession was unreliable was both improper under the law and unnecessary in the specific factual context; and, that the proffered expert testimony to the effect that the Reid technique enhanced the risk of an unreliable confession lacked any objective basis for support whatever. Although Professor Hirsch insisted that "there is a wealth of information about the risks of the Reid technique," he could point to none.

(Court rejects the claim that the "Reid technique" caused an involuntary confession; jury rejects Dr. Leo testimony)

In *Shelby v. State* (2013) the Court of Appeals of Indiana rejected the defendant's claim that his confession was involuntary, in part, because the police used the "Reid technique" to question him. The court stated, "Considering the evidence favorable to the trial court's decision and the reasonable inferences to be drawn therefrom, the trial court did not err in concluding that the totality of the circumstances show that Shelby's statement to the police was given voluntarily."

In this case, "Dr. [Richard] Leo was allowed to testify at length about police interrogation tactics that can increase the risk of a false or coerced confession. The jury was also presented with extensive evidence regarding the police interrogations of Shelby in written, video, and audio formats, and could observe whether his interrogation included the tactics and techniques that Dr. Leo testified could lead to a false or coerced

confession. Thus, the jury was able to apply the concepts about which Dr. Leo testified to the facts and circumstances of Shelby's interrogation and subsequent confession." The jury rejected the suggestion that the confession was false or coerced. .

(Supreme Court of New Jersey finds no evidence to suggest that using the Reid Technique when questioning juvenile "deprived A.W. of any of his rights or overbore his will")

In *State of New Jersey in the Interest of A.W*. (2012) the Supreme Court of New Jersey upheld the admissibility of a confession from a juvenile who was interrogated by investigators using the Reid Technique. In this case the defendant challenged the interrogation techniques that were used by the detective, "asserting that they failed to comport with "the highest standards of due process" as required by this Court..... Placing great reliance on recent social science research relating to juveniles, he maintains that juveniles are "uniquely vulnerable to coercive interrogation methods." He argues that the techniques the detective used in questioning him, known as the "Reid method," overbore his will, rendering his confession involuntary, and he urges this Court to direct the State to refrain from using such techniques when questioning juveniles."

In their opinion the Supreme Court stated that, "although it is certainly true that juveniles are more susceptible to having their wills overborne by adult authority figures, there is no evidence in this record that the interview techniques deprived A.W. of any of his rights or overbore his will."

(Military Court supports Reid Technique)

In *United States v. Senior Airman John S. Freeman, United States Air Force*, (2003) the U.S. Air Force Court of Criminal Appeals affirmed the conviction of Freeman for "one specification of false official statement and one specification of assault with a means or force likely to cause death or grievous bodily harm." In reviewing the investigator's interrogation techniques (which he had identified as The Reid Technique) which elicited an incriminating statement from Freeman, the Court found that "We find no basis to conclude that the AFOSI overbore the appellant's will in eliciting the incriminating statement. Despite the fact that the interrogation was relatively lengthy, we conclude the circumstances do not evidence coercion within the meaning of Mil. R. Evid. 304. Additionally, none of the trickery which the agents employed appears to have been calculated to produce a false confession; rather, it is generally consistent with standard police practices."

(Reid Technique)

In *State v. Myers* (2004) the Supreme Court of South Carolina upheld the admissibility of a confession by investigators utilizing The Reid Technique, and also found that there was

no error when the trial court limited the testimony of Dr. Saul Kassin.

The totality of circumstances

(Colorado Supreme Court examines 13 factors that should be considered in evaluating whether a confession was coerced)

In *People v. McIntyre* (May 2014) the Colorado Supreme Court found that, contrary to the trial court's opinion, the investigator did not improperly coerced McIntyre into making inculpatory statements so as to render those statements involuntary. In their opinion the Supreme Court stated the following:

"In evaluating whether the police's conduct was coercive, we examine "both the defendant's ability to resist coercive pressures and the nature of the police conduct."… Specifically, we consider the following non-exhaustive set of factors:

1. whether the defendant was in custody;

2. whether the defendant was free to leave;

3. whether the defendant was aware of the situation;

4. whether the police read *Miranda* rights to the defendant;

5. whether the defendant understood and waived *Miranda* rights;

6. whether the defendant had an opportunity to confer with counsel or anyone else prior to or during the interrogation;

7. whether the statement was made during the interrogation or volunteered later;

8. whether the police threatened [the] defendant or promised anything directly or impliedly;

9. the method [or style] of the interrogation;

10. the defendant's mental and physical condition just prior to the interrogation;

11. the length of the interrogation;

12. the location of the interrogation; and

13. the physical conditions of the location where the interrogation occurred.

In its suppression order, the trial court focused almost exclusively on just 2 of the 13 factors announced in *Medina*: "whether the police threatened [the] defendant or promised anything directly or impliedly," and "the method or style of the interrogation." … In so doing, the trial court neglected to apply a totality-of-the-circumstances analysis, which our jurisprudence requires…. Our analysis of the 13 *Medina* factors reveals that Deputy Porter did not overbear McIntyre's will…. Admittedly, the interview took place in a law enforcement environment, and McIntyre proffered the challenged statements during the interview. But it is undisputed that McIntyre was not in custody, that he received *Miranda* warnings, and that he waived his *Miranda* rights. Additionally, while the trial court found that McIntyre "appeared disheveled and dirty," the interview was relatively short, and the door to the interview room was unlocked. Moreover, the record demonstrates that McIntyre received the opportunity to confer with counsel both prior to and during the interview; not only did McIntyre's interview with Deputy Porter take place a full week after his meeting with Detective Otto (allowing him ample time to consult a lawyer), but Deputy Porter explicitly told McIntyre, "You actually have a right to an attorney before you're being questioned, while you're being questioned, after you're being questioned, whenever ... you want."

As to the method and style of the interrogation, we note that Deputy Porter did not exploit any unique vulnerability of McIntyre's…. Deputy Porter spoke calmly and cordially throughout, and McIntyre had no difficulty understanding him. Moreover, none of Deputy Porter's comments preyed on any weaknesses of nor induced any fear in McIntyre.

Although the trial court did not address the issue of exploitation explicitly, several of its findings suggest that it believed that Deputy Porter took advantage of McIntyre's relatively low education level and poor reading ability. For example, in assessing McIntyre's educational background, the trial court found that he is "functionally illiterate." It further found that the apology letter McIntyre wrote after Deputy Porter left the room was "unintelligible." These findings, however, are unsupported by competent evidence. McIntyre did indicate that he is dyslexic, but he never suggested that he is illiterate. On the contrary, the record establishes that McIntyre can read, albeit with some difficulty. Before having McIntyre sign the consent form for the lie detector test, Deputy Porter made certain that he could understand it, asking, "Do you feel like you can read the words on here, or do you have to take my word for it?" McIntyre responded unequivocally that he could read the form before he initialed and signed it. As to the apology letter, that letter itself was never introduced into evidence, and although Deputy Porter testified that it was "not ... exceedingly well-written," he also testified as to its general contents and never suggested that it was unintelligible.

Finally, in assessing whether the police made any implied promises, the trial court highlighted six separate comments from Deputy Porter that combined to "vitiate the voluntariness" of McIntyre's statements. We examine each of these comments in turn and ultimately conclude that, when viewed in light of the totality of the circumstances, they

were not implied promises that cumulatively rose to the level of coercion so as to overbear McIntyre's will."

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(Value of recording to demonstrate the totality of circumstances and voluntary nature of incriminating statements)

In *Hernandez v. State* (January 2014) the Court of Appeals of Texas, Amarillo relied on the recording and transcript of the questioning of the defendant to determine the totality of circumstances as they applied to her contention that the trial court erred by denying the motion to suppress the March 9 statement because: (1) the statement was rendered involuntary by detective Smith's repeated references during questioning to appellant's separation from her children, which violated her due process rights; (2) the statement was rendered involuntary by the detective's promises of leniency for cooperation and threats for lack of cooperation in violation of due process; and, (3) the statement was prompted by a promise of benefit in violation of article 38.21 of the Code of Criminal Procedure. From the Court of Appeals opinion:

"Appellant's contentions supporting her argument for exclusion of her March 9 statement arise from statements made by Detective Smith…. Early in his questioning, Smith confronted appellant with autopsy results showing Espinosa did not die from alcohol or drugs. Smith pressed appellant to "get past" the "I'm going to cover for [Kenneth], he's going to cover for [me]" posture, and made vague references to other evidence recently discovered that "brought us back to you." Smith also invoked other interrogation techniques. Appellant contends that two of them had such effect as to render her subsequent admissions involuntary. By her first issue, she points to Smith's statements emphasizing the separation from her children that would result from her failure to cooperate. By her second, she argues Smith promised she would gain leniency by cooperation and threatened that failure to cooperate would precipitate a report to the judge and district attorney and punishment. In these ways, appellant contends, Smith coerced her incriminating statements.

… Before considering the effect of Smith's statements, we emphasize again that our analysis must consider the totality of the circumstances under which appellant's statements were given. Under that analysis, the assertedly coercive police activity is not considered alone, but as a factor in the determination of voluntariness.

In support of her argument that Detective Smith used improper references during interrogation to separation from her children, appellant points to the detective's following statements.

That's why we've got to make this right. I know that you know that. You've got kids of your own.

I know that you are a good mom. I know that you are trying everything you can to take care of your kids, to take care of yourself so that you can take care of your kids. But right

now your kids are who you need to be thinking about, because if you're not thinking about your kids, and you continue to not tell the truth, you're never going to see those kids again. Do you understand that? Going to prison for the rest of your life is not watching your kids grow up, it's not putting your kids through school, it's not giving you're (sic) their ... (sic) their first girlfriend and boyfriend, and their first wife and husband, and their first kids, and being a grandma.

You do what you do as far as taking care of it, and then you go back to your kids, and you get to spend some of your life with your kids. Because without telling the truth, you are never going to see your children again. I don't have any kids, and I can't imagine when I do the thought of something keeping me away from my kids for the rest of my life. And if I make a mistake, and I've got to fess up to it, and I'm not around my kids for whatever amount of time, at least I'll know I'm coming back to them at some point.

But right now, the track that you're on, you're on the track that's getting further and further and further away from those kids.

And the path you're on right now is the worst path it is, because it's you going to prison for the rest of your life, and you get to see your kids through the little glass wall. I guess I would say you won't get to see them, because you will get to see them through a little glass wall and talk to them on a telephone. You'll never get to touch them. You'll never get to tuck them in at night. You'll never get to feed them breakfast again....

…. Considered as a whole and in the context of the entirety of the interrogation, we find Smith's statements emphasizing to appellant that she faced separation from her children were not threats of governmental action to punish a failure to cooperate but were accurate representations of her predicament. Moreover, considering the entirety of the circumstances facing her, we could not say these particular statements overcame her free will and caused her to further implicate herself in the murder.

Appellant next contends Detective Smith promised she would gain leniency by cooperation and threatened that failing to cooperate would precipitate a report to the judge and district attorney and punishment. She directs us to the following statements by Detective Smith.

[W]e're hoping in turn you're going to turn around and you're going to tell us the truth about everything that happened so that we can get everything figured out because Christy being dead, something has to happen about that, okay? And either we go the long way about finding it, finding out that happens, and we then go to the judge and we say, okay, here's the final product. Here's what we learned. And we either got cooperation along the way. Or we go and we say, okay, it took a little while, but we put this case together, and… we finally got some cooperation, and we think that we've got all of the truth and the people involved were cooperative in this, and realize it was a mistake. Some things got screwed up and now I'm needing to talk about it because it's the right thing to do.

I have to present something to the judge and I have to present something to the DA's office and right now, right now the DA's office has already told us, “Murder. Put them in

jail and just be done. You have her ID at the scene. You have them together. Just be done. Be done with your paperwork." But what's happened is we have decided that we need to try to talk and give you an opportunity to try and make this right. And the way to make it right is to say, "okay, this is exactly what happened and I need to be cooperative so that hopefully I can get a little bit of leniency through this whole thing," alright?

[W]e're trying to give you the opportunity to show that you have some type of compassion and that it's eating you up inside to not tell us the truth and that you need to tell the truth so that you can show that you have some type of feeling left in you.

[T]hat's the kind of stuff that I have to hear from you so that I can say, "Judge, she did the right thing." Martha, I need you to dig yourself out of here.

Appellant argues the coercive aspect of Detective Smith's comments derives from the threat that cooperation is rewarded while failure to cooperate is punished.

But, again, resolution of the voluntariness question does not turn on the mere existence of some promise or threat, but on the totality of the circumstances of the interrogation….

Here appellant gave two lengthy statements before the one she now challenges. Before each statement, she received the ***Miranda*** warnings and expressed her understanding. As noted, aspects of the ***Miranda*** warnings were reiterated at least once during the March 9 interrogation. At no time during the March 9 interrogation did appellant request an attorney or termination of the interview. She neither complained of the circumstances of her questioning nor asserted a request that was denied. Detective Smith did not offer a *quid pro quo* of leniency for a confession nor did he expressly threaten added or heightened punishment for failure to confess. Appellant had prior arrests, and was familiar with police procedure. Nothing indicates she was of any level less than average intelligence. By the time she gave her March 9 statement, over twenty-four hours had elapsed since appellant had given her unchallenged second statement, in which she acknowledged her presence in the car during all the events leading to Espinosa's death and told of her role in the burning of the body. Neither appellant's characteristics nor the details of her interrogation on March 9 suggest that her will was overborne and her capacity for self-determination critically impaired by Smith's vague references to presenting "something to the judge."

By her third issue, appellant contends Detective Smith improperly induced her to make a statement by promising to report to the judge if she "did the right thing." The questioned statements are apparently the following:

"And the way to make it right is to say, 'Okay, this is exactly what happened, and I need to be cooperative so that hopefully I can get a little bit of leniency through this whole thing,' all right."

"[T]hat's the kind of stuff that I have to hear from you so that I can say, 'Judge, she did the right thing.' Martha, I need you to dig yourself out of here."

Under Texas statutory law, the statement of an accused may be used against her "if it appears that the same was freely and voluntarily made without compulsion or persuasion."… Voluntariness of a statement under article 38.21 is determined by examining the totality of the circumstances.

We see no error in the trial court's refusal to suppress appellant's March 9 statement. It is unnecessary for us to restate why under the totality-of-circumstances analysis appellant's statement was not involuntary. Moreover, Detective Smith offered appellant no positive promise of leniency or beneficial outcome. ***Appellant's requested cooperation carried the hope of "get[ing] a little bit of leniency through this whole thing." And nothing here demonstrates any actual or apparent authority in Detective Smith to negotiate a lesser charge or reduced sentence for appellant*** (emphasis added).We think it unreasonable to believe a person would speak untruthfully, confessing to acts she did not commit, on the strength of the vague statements challenged under this issue. .

(Can a suspect who claims he was in the "midst of a psychotic break from reality" during the interrogation give a voluntary statement?)

In *People v. Kooyman* (2012) Court of Appeal, Fourth District, Division 2, California, the "Defendant contends that he suffers from a mental illness and that, after he was arrested, he was deprived of the proper medication to treat his mental illness. "Defendant further contends that the officers who interrogated him took advantage of his impaired mental state to coerce a confession. Thus, defendant argues that the trial court erred in allowing the prosecution to introduce the evidence of defendant's statements to police, because they were not voluntary.

"Defendant contends that the circumstances of the interviews show that defendant "appear[ed] to be in the midst of a psychotic break from reality, [that he was] without psychiatric medication for two days, [that he was] on suicide watch, and [he] believe[d] that police [were] angels from God or 'from another universe.' " Defendant urges that any interrogation in such circumstances is coercive. "Pretending to actually be an angel from God who means [defendant] no harm, is deceptive and constitutes police overreaching."

"We must look, however, to the totality of--i.e., all --the circumstances. Police tactics of using deception is not necessarily coercive. The question is whether the deception is reasonably likely to produce an untrue statement... 'The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' " ... Here, there was no deception of a character likely to induce defendant to make an untrue statement. The officers' "deception"--their acceptance of defendant's suggestion that they had been brought into defendant's life for a reason--was part and parcel of their general encouragement to defendant to tell the truth.

"Throughout the interviews here, defendant carried on a conversation and responded rationally to many questions. He described how he was living in his truck, explained where he had gone, how he had spent his time, and what he did. The officers did not threaten defendant or shout at him, but rather soothed him and encouraged him to relieve

his conscience by telling them what he had done. There was nothing coercive in the officers' demeanor. Their tactics were simply to encourage defendant to open up, ... We conclude, based on those factual findings and the reasonable inferences therefrom, that the officers did not act coercively, and defendant's admissions were voluntary."

(Juvenile confessions - the need to consider the totality of circumstances)

In *Gray v. Norman* (2012) the U.S. District Court, E.D. Missouri, upheld the admissibility of the defendant's confession. Gray asserted that his confession was erroneously admitted for numerous reasons (detailed below).

In their opinion the U.S. District Court emphasized the need to consider these cases in light of the totality of circumstances: "The totality of the circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved." *Fare v. Michael*, 442 U.S. 707, 725 (1979). "The totality approach permits-indeed, it mandates inquiry into all the circumstances surrounding interrogation." Id. "This includes evaluation of the juvenile's age, experience, education, background, and intelligence and whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights ." Id. "The question of whether a defendant understood the *Miranda* warnings is a question of fact, but the ultimate question of whether a waiver was valid is a question of law..." The U.S. District Court addressed each of Gray's claims:

First, Gray claims his confession should be suppressed, because he was only sixteen years old. The state court correctly noted that age is only one of the factors considered when voluntariness of a juvenile confession is challenged.

Second, Gray claims that his confession should not have been admitted because he was taking medications for depression, anxiety, and attention deficit disorder. The state court found that the evidentiary record refuted Gray's claims that his medications affected the voluntariness of his confession. The court noted that the evidence showed that the medications aided Gray in making an "intelligent, understanding, and voluntary waiver of his constitutional rights."..... This is supported in the record by statements made by Gray and Gray's mother. At the time of his confession, Gray was taking Klonopin and Prozac. Gray told his doctor that the Klonopin helped his nerves and his mother testified that the Prozac helped Gray with panic attacks, sleep problems, and anxiety.... The state court noted that Gray did not present any evidence that he was experiencing any negative side effects from any medication while he was being interrogated. As a result, the state court found that Gray's medication use could not support suppression of his confession.

Third, Gray argues his confession should not have been admitted due to his IQ score of 73. The state court acknowledged that Gray's aptitude tests demonstrated low scores. The state court, however, also found that low IQ scores "do not necessarily render a confession inadmissible." The court noted that the medical evidence showed that Gray's verbal IQ tests were higher than his overall borderline IQ score and that a consulting doctor found that Gray's "reading ability and overt presentation would suggest that his

actual intellectual potential is higher."

Fourth, Gray argues his confession should be suppressed, because he was not informed that his mother was willing to help him. The state court found that based on the circumstances, Gray's claim "rings hollow."... The state court noted that prior to and between each Mirandized interrogation, Gray had ample time to confer with his mother, including when he requested that she join him the interrogation room during his first visit to the police station on October 28, 1999 and during the nine hour period after Gray returned home prior to service of the search warrant... The state court noted that Gray's mother knew each time that officers spoke with Gray and she was present when he requested her presence.

Fifth, Gray alleges his confession should not have been admitted, because although he was not physically threatened, he perceived himself as being assaulted. The state court found that the evidence as stated previously, refutes Gray's argument that his intellect, psychological problems, or mediation prevented his knowing and intelligent waiver of his *Miranda* rights... The state court also found that Gray's assault argument is fundamentally flawed because

[i]f an intentional and truthful statement must be deemed to be involuntary, merely by reason of imaginary dangers conjured up by an apprehensive suspect, a greater burden would be placed on law enforcement than any which judicial solicitude for persons charged with crimes has hitherto created. There would be no objective standards for determining voluntariness, and no limit but the ingenuity of the defendant to the grounds for invalidity of confessions.

Next, Gray argues his confession should have been suppressed, because he was subjected to a lengthy interrogation, that he was not free to leave, and had sleeping difficulties. The state court found that at his suppression hearing, Gray did not claim that the length of the interrogation or procedure used caused him to be tired, sleepy, or to succumb to the interrogator's pressure... The state court noted that Gray only stated that he was scared, nervous, and panicked during the questioning. Moreover, the state court found that the interrogations by the officers were one-on-one with only the juvenile officer being present.

Finally, Gray claims his confession should be suppressed because the juvenile officers merely recited Gray's rights without ensuring that he knew them. The state court found that Gray's claim was directly contradicted by the record...The state court noted that juvenile officers were present during the interrogations, gave Gray *Miranda* warnings, asked if he understood his rights, and Gray always answered affirmatively. The state court found that the juvenile officers' conduct supports the finding that Gray's statements were given voluntarily and knowingly. .

(Confession voluntariness - the "totality of circumstances" and the value of recording interrogations)

In *People v. Thomas* (2012) the Supreme Court, Appellate Division, Third Dept., New York, examined a number of issues that can affect the voluntariness of a suspect's confession, including the length of the interrogation and the tactics employed by the interrogators (including misrepresenting evidence), as well as the lower court's denial of expert testimony from a social psychologist on the issue of false confessions.
From the court's opinion: Initially, defendant argues that his oral and written statements to police should have been suppressed on the grounds that they were involuntarily obtained and the product of coercive custodial interrogation methods, which included false promises, misrepresentations and threats. After a hearing, County Court denied defendant's suppression motion finding that the statements had been voluntarily made in a noncustodial setting in which police did not employ impermissible coercive tactics.

"Mason's [the interrogator] nonthreatening, non-hostile strategy focused on gaining defendant's trust and assuring him that he believed that whatever had caused Matthew's injuries had been accidental; Mason encouraged defendant to disclose the truth about what had occurred in order to assist the doctors in saving Matthew's life, although Mason had been advised at that point that Matthew would not survive.

Defendant then admitted in increasing detail having thrown the child in frustration onto the bed forcefully, three times, in the four days preceding the 911 call, after he had arguments with Hicks over his lack of a job; defendant demonstrated how he had done so using Mason's briefcase binder, which he ultimately raised above his shoulders and slammed to the ground with considerable force. After a break during which he was left alone, defendant confirmed that this account of repeatedly throwing the infant on the bed was accurate; four pages were added to the second statement summarizing these admissions, and he reviewed it by himself and signed it.

.....The circumstances and atmosphere of the interviews fail to demonstrate involuntariness. While the interviews were lengthy, two hours and seven hours, a factor on which defendant places great emphasis, they were separated by a 15-hour break in questioning during which defendant had a bed and food and ample opportunities to rest, sleep, make phone calls, eat, contemplate and consult help.

Also contrary to defendant's vehement claims, the strategies and tactics employed by the officers during these interviews were not of the character as to induce a false confession and were not so deceptive that they were fundamentally unfair and deprived him of due process (see id. at 11, 427 N.Y.S.2d 944, 405 N.E.2d 188). The officers' repeated misrepresentation that defendant's truthfulness might enable doctors to effectively treat Matthew did not render his statements involuntary, because appealing to his parental concerns did not create a substantial risk that he might falsely incriminate himself (see id. at 11, 427 N.Y.S.2d 944, 405 N.E.2d 188; *People v. Dishaw,* 30 A.D.3d at 690-691, 816 N.Y.S.2d 235; *People v. Henderson,* 4 A.D.3d 616, 617, 772 N.Y.S.2d 120 [2004], lv. denied 2 N.Y.3d 800, 781 N.Y.S.2d 299, 814 N.E.2d 471 [2004]). Indeed, common sense dictates the opposite conclusion, i.e., that parents, aware of their child's life threatening predicament, would accurately disclose any information that might enable doctors to save their child.

Likewise, Mason's persistent assurances, including that he believed that it had been an accident and that defendant would not be arrested or go to jail at that time (based upon information then available to police that did not yet connect defendant to this crime), were not improper promises of leniency that would induce a false confession (see *People v. Lyons,* 4 A.D.3d 549, 552, 771 N.Y.S.2d 585 [2004]; *People v. Richardson,* 202 A.D.2d 958, 958-959, 609 N.Y.S.2d 981 [1994], lv. denied 83 N.Y.2d 914, 614 N.Y.S.2d 396, 637 N.E.2d 287 [1994]). Indeed, defendant had been advised that any admission to criminal conduct could be used against him in court; when defendant asked if he would be criminally prosecuted, Mason told him that he did not know and no promises could be made, but it would not happen "right now," which was true as he had not yet confessed.

Next, we find no error in County Court's ruling, after a Frye hearing, denying defendant's request to permit expert testimony from a social psychologist on police interrogation tactics and false confessions. "The admissibility and bounds of expert testimony are addressed primarily to the sound discretion of the trial court, ... [which] in the first instance [must] determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness"

.....The court determined that current research fails to establish either a consensus connecting specific interrogation techniques to the occurrence of false confessions or a reliable basis for distinguishing false confessions from truthful ones. We agree with the court that the jury--having watched the videotaped interviews and defendant's trial testimony explaining why he had confessed falsely, as well as the defense's vigorous cross-examination of the interviewing officers, which fully exposed the tactics employed--was "perfectly capable of assessing whether it believes that the [d]efendant's statements were true and accurate, or whether they were falsely made as a result of police tactics and coercion." Indeed, the court noted that the jury would be charged on voluntariness and the factors to evaluate in determining whether the confession was the result of undue pressure or improper conduct (see CJI2d[NY] Confessions; CPL 60.45, 710.70[3]), and the court in fact provided an expanded charge on this matter. Given the foregoing, we discern no abuse of discretion or error in the court's ruling.

('If you work with me, we can make these [charges] go away.' Does this statement constitute a promise of leniency? Not when totality of circumstances were reviewed)

In *State v. Jenkins* (2012) the Court of Appeals of Kansas found that once the totality of circumstances were reviewed, as documented by the video taped recording of the interrogation, the statement made by the interrogator, "If you work with me, we can make these [charges] go away." was not a promise of leniency. From their opinion:

"On appeal, Jenkins contends that he made incriminating statements only after "Detective Schnabel told Mr. Jenkins that, 'If you work with me, we can make these [charges] go away.' " Jenkins contends that these words extended a promise to make all potential charges go away if Jenkins cooperated, and that a confession obtained through false

promises should be deemed involuntary and excluded from evidence..... But a careful review of the record shows that Jenkins substantially exaggerates what took place: in context, the officer made no promise to make sure that Jenkins wouldn't face criminal charges if he cooperated with police."

(Confession voluntariness: factors to consider)

In *Blunt v. Clark* (2012) the U.S. District Court, N.D.. California, upheld the Court of Appeal's decision to reject the Petitioner's claim that his confession was coerced. From the District Court's opinion:

"To determine the voluntariness of a confession, the court must consider the effect that the totality of the circumstances had upon the will of the defendant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). "The test is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *United States v. Leon Guerrero,* 847 F.2d 1363, 1366 (9th Cir.1988) (citing *Haynes v. Washington*, 373 U.S. 503, 513-14, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963)); see, e.g., *Ortiz v. Uribe,* No. 09-55264 slip op. 20219, 20234 (9th Cir. Nov. 18, 2011) (reminding suspect of his obligation to tell the truth and that his children were counting on him to do the right thing were permissible psychological appeals to his conscience, even if they possibly made him more emotional during the interview); *Cunningham v. Perez,* 345 F.3d 802, 810-11 (9th Cir.2003) (officer did not undermine plaintiff's free will where interrogation lasted for eight hours and officer did not refuse to give break for food and water); *Clark v. Murphy*, 331 F.3d 1062, 1073 (9th Cir.2003) (interrogation was non-coercive where suspect was interrogated over a 5-hour period in a 6 by 8 foot room without water or toilet, but never requested water or use of toilet); *Ashcraft v. State of Tenn.*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944) (if defendant had confessed after being taken into custody by police officers and interrogated for 36 hours following a seizure, during which period he was held incommunicado, without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite, that confession would have been involuntary).

While Petitioner was questioned for over fifteen hours, the Court of Appeal found little evidence that fatigue was a factor in Petitioner's later statements:

Defendant was given several extended breaks, lessening the impact of the long duration. Although defendant stated at the outset of the first taped interview that he was tired, he never repeated that complaint during the recorded sessions. On the tapes, he speaks quietly, but, as the trial court noted, his voice is alert and responsive. Throughout the four recorded sessions, he answered questions promptly, spoke fairly quickly, and gave narrative, not monosyllabic, answers, without showing signs of fatigue. When defendant fell asleep after the third recorded interview, the officers allowed him to nap.

Defendant was also given food and water during the interrogation. We agree with the trial court that there is no reason to believe, as defendant implies, that he was not given

bathroom breaks. The officers permitted repeated breaks during which defendant could have been escorted to the bathroom. Had he been deprived of bathroom opportunities, one would expect him to have commented on that fact during the interviews.

Second, at the time of arrest, Petitioner was twenty years old, about a month away from his next birthday. The suspect's age may be taken into account in determining whether a confession was voluntary..... However, in the instant case, Petitioner was not a juvenile at the time of his arrest, and he does not adequately show, beyond merely stating how old he was at the time, how his age rendered his confession involuntary.

Third, the Court of Appeal reasonably determined that Petitioner "was not wholly isolated, despite being held in a small room." ..... Petitioner was permitted to leave the interrogation room to speak on the phone with his mother. Id. Following that break, Petitioner requested the next discussion be led by Sergeant Longmire, an officer Petitioner met when he was on the phone. Id. at 9. Thus, while Petitioner spent long periods of time in Room 202, he was not held incommunicado or in isolation.

Lastly, the Court of Appeal concluded there was no misconduct in the officers' behavior:

The officers were persistent, continuing to question defendant for an extended period of time, they were not insistent. This was not a situation in which the officers refused to accept a defendant's denials and badgered him or her until a confession emerged. Rather, defendant's story evolved as the night progressed, suggesting both that he had not given a full and accurate account and that he would reveal more of the truth under further questioning. The officers were therefore justified in persisting in questioning defendant until a fixed story emerged, and they did so without browbeating or otherwise attempting to intimidate him.

The officers' questioning reflected a need to ascertain the truth about the events of that night, especially given that Plaintiff's account changed and expanded over the course of the interviews. The record does not reflect, and Petitioner does not claim, that the officers threatened him, tricked him, or tortured him. Upon invoking his right to silence, Sergeant Brock ended the interview by stating, "the fact that [Petitioner doesn't] want us to talk to [us] anymore ... [means] we're gonna have to stop." Click here for the complete opinion

(The determination of whether custody exists "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.")

In *US v. Hughes* (2011) the US Court of Appeals, First Circuit, upheld the lower court's opinion that the defendant was not in custody at the time that he made incriminating statements. In considering this issue, the Court of Appeals stated that, "the determination of whether custody exists "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury, 511 U.S. at 323, 114 S.Ct. 1526. Thus, the interrogating officer's intent, not communicated to the individual being questioned, is irrelevant to the

inquiry. See Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

This court has identified four factors that, among others, may inform a determination of whether, short of actual arrest, an individual is in custody. These factors include "whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation."

The court also added, "Last—but far from least—the record amply supports the district court's finding that the ambiance was relaxed and non-confrontational throughout the interview. The troopers' demeanor remained calm, the time of day (late morning) was not menacing, and the defendant was appropriately dressed. The troopers were polite and never hectored the defendant or raised their voices. Details such as these are entitled to some weight in determining whether a particular interrogation was custodial."

(Criteria to determine custody – totality of circumstances)

In the case of *State v. Campfield* (2011) the Superior Court of New Jersey, Appellate Division addresses the issue of the criteria to determine custody. In their opinion the court noted the following:

"The test employed to determine whether a custodial interrogation has taken place is an objective one…. We consider the totality of the objective circumstances surrounding the police questioning, such as "the length of the interrogation, the place and time of the interrogation, the nature of the questions, the conduct of the police and all other relevant circumstances." ….The analysis looks to whether objective evidence of the surrounding circumstances would lead a reasonable person to believe that he or she was free to leave.

The fact that an interrogation took place at police headquarters is not determinative, …but neither is the fact that the defendant was told he was free to leave at any time…. The fact that a defendant was a prime suspect at the time of the interrogation is also not definitive, as the Supreme Court held in Nyhammer, supra, 197 N.J. at 406, 963 A.2d 316.

In Nyhammer, the Court emphasized the import of the custodial aspect of the interrogation to determination of the Miranda issue.

Significantly, we are not aware of any case in any jurisdiction that commands that a person be informed of his suspect status in addition to his Miranda warnings or that requires automatic suppression of a statement in the absence of a suspect warning. The essential purpose of Miranda is to empower a person—subject to custodial interrogation within a police-dominated atmosphere—with knowledge of his basic constitutional rights so that he can exercise, according to his free will, the right against self-incrimination or waive that right and answer questions. …The defining event triggering the need to give Miranda warnings is custody, not police suspicions concerning an individual's possible

role in a crime. See Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L. Ed.2d 714, 719 (1977) ("[P]olice officers are not required to administer Miranda warnings ... because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' "); Beckwith v. United States, 425 U.S. 341, 346–47, 96 S.Ct. 1612, 1616, 48 L. Ed.2d 1, 7–8 (1976) ("It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the Miranda requirements with regard to custodial questioning." (citation and internal quotation marks omitted)).

We are satisfied, after according the required deference to the judge's findings of fact, that the judge's legal conclusions are fully supported by the record and the law. Even if the police viewed Campfield as a suspect, or even the prime suspect, those suspicions need not have been disclosed to Campfield and they did not automatically convert any contact with Campfield into a custodial interrogation…. As the judge aptly observed, the inquiry turns not on what the police knew or suspected, but on whether objective evidence of the surrounding circumstances would lead a reasonable person to believe that he or she was free to leave.

("The critical question is "whether, considering all the circumstances, a reasonable person in the defendant's position would have believed that [she] was in custody.")

In *Commonwealth v. Truong* (2011) the Superior Court of Massachusetts, Worcester County, ruled that the defendant was in custody at the time she made incriminating statements and should have been advised of her rights. In their opinion the court stated that "[C]ustodial interrogation [is] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [her] freedom in any significant way." …In determining if a person is deprived of freedom in a significant way, the Supreme Judicial Court has recognized four factors to be considered: "(1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that the person is a suspect; (3) the nature of the interrogation, i.e. whether the interview was aggressive or, instead, informal; and (4) whether, at the time the incriminating statement or statements were made, the suspect was free to end the interview by leaving the place of the interrogation or by asking the interrogator to leave, or, alternatively, whether the interview terminated with the defendant's arrest."

"The test is an objective one: whether a reasonable person in the suspect's shoes would experience the environment in which the interrogation took place as coercive." ….The critical question is "whether, considering all the circumstances, a reasonable person in the defendant's position would have believed that [she] was in custody."

Taking into consideration the four factors and applying them to the totality of the circumstances in this case, the court finds that the defendant has met her burden of proving that she was in custody. Nga had been transported to the police station by a

police officer and brought to an interrogation room, equipped with audio and video recording, where she was questioned by two police officers for over two hours. Here, the officers did not just convey to Nga that she was a suspect, but, as found by this court, they spent most of the two hours telling Nga she had killed Khyle, and that she had also killed Hein eight years earlier. The nature of Nga's interrogation was not conversational or informal. To the contrary, the questioning was exceedingly formal and particularly aggressive. Finally, when Nga attempted to end the interview she was not free to leave, and at the end she was arrested. There is no question that a reasonable person in Nga's position would understand that she was not free to leave at the time she made the statement.

(Does "hope of benefit" nullify a confession?)

In the case of *State v. Brown* (March 2011) the Court of Appeals of Georgia found that a statement to the suspect by the interrogator that "no matter what you tell me or say… you're going home" did not create such a "hope of benefit" when viewed in light of the totality of circumstances.

" The reward of a lighter sentence is generally what is meant by the phrase "hope of benefit," as used in OCGA § 24-3-50. When an accused is made a promise concerning a collateral benefit, however, his subsequent confession is not excludable. Indeed, we have previously held that statements referring to an accused going home after an interview are collateral promises that in no way relate to the sentence or charges facing the suspect. Additionally, we have held that a hope of benefit may be dispelled by a statement that an officer has no influence over an accused's possible punishment.

And here, the videotaped confession shows that Brown inquired as to what would happen to him, hypothetically, if he had done what the child alleged. One of the investigators responded, "First of all, ... I'm not gonna sit here and tell you what a judge is going to do ... I can't tell you what the penalties are because I'm not the judge. And I'm not even going to go out on that limb." The second investigator then said, "I mean, we can't sit here and promise you anything or tell you anything.... What I can tell you is ... when you leave here, no matter what you tell me or say ... you're going home." The second investigator continued to tell Brown that "if you tell me it happened, I'm not going to snatch you up, place you in handcuffs and drag you back there in the back ... I'm not going to ruin that relationship by snatching you up." The first investigator then said, "Unless you killed somebody. Now if you killed somebody, you ain't going home."

The statement that Brown would not be arrested on the spot was collateral and clearly not the type of "hope of benefit" contemplated by OCGA § 24-3-50. But even assuming that this statement was not collateral, any hope of benefit was clearly dispelled by the officers' assertions that they had no control over what would ultimately happen to Brown. Furthermore, throughout the interview-before, during, and after his confession-Brown expressed an understanding that there would be consequences for his actions. Indeed, shortly after the investigating officers made the allegedly confession-inducing statements, Brown continued to deny that he had done anything to the child. The investigators then

asked Brown what he thought should happen to somebody who did what was alleged, and Brown speculated that such a perpetrator would face jail time, probation, and rehabilitation. Additionally, when investigators said "[i]t's not going away," Brown said that he understood that was the case and that there would be consequences for his actions. One investigator even said that he would not tell Brown that there would not be consequences for his actions.

And when Brown eventually confessed to placing the child's penis in his mouth, the investigator immediately responded, "You know I can't let you get up and walk out of here with what you just told me," and then proceeded to recite to Brown his Miranda rights. Brown acknowledged his understanding of the investigator's statements and at no point attempted to retract his confession, instead repeatedly saying, "I'm screwed." Brown also repeatedly attempted to continue speaking with the officer who maintained that he could not speak to Brown any further unless and until Brown first signed the Miranda waiver form. Moreover, throughout the significant amount of time between his first confession and his signing of the Miranda waiver, Brown indicated several times that he knew he was going to jail. Brown also asked the investigator what would happen after the interview, and the investigator responded that Brown would be charged, booked, and go to court; but the investigator also advised that he could not tell Brown whether he would ultimately go to prison. Brown also inquired as to the possibility of posting a bond, and the investigator advised him that he would have no say as to whether Brown received a bond or would instead go to jail. Finally, Brown stated that he knew he would be required to register with the State as a sex offender. After this conversation transpired and Brown signed the Miranda waiver, he again confessed to molesting the child.

Given the foregoing, we cannot agree with the trial court that the investigators' statements that Brown would go home after the interview offered him a "hope of benefit" that would otherwise render his confession inadmissible. Here, immediately before telling Brown that he would go home after the interview, the officers said that they could not promise him what a judge would do if he confessed to molesting the child. Morever, Brown repeatedly expressed a keen understanding that there would indeed be serious consequences for his actions. Accordingly, as indicated by his own statements in the interview, Brown could not have reasonably understood the investigators' statements to mean that he would never be charged or arrested for his crimes." .

(Learning disability does not preclude a knowing waiver of the Miranda rights)

In *State v. Moses* (2010) the Court of Appeals of South Carolina upheld the trial court's decision not to suppress the defendant's confession. Moses had argued that under the totality of the circumstances, the statement, taken from a learning-disabled student, unaccompanied by his parents, was improperly admitted into evidence.
In their opinion the Court of Appeals found that "Here, Smith testified during the hearing that only he and Moses were present during his interview, although he acknowledged that several officers walked in and out of the room. The record does not indicate Moses was threatened by Smith. Rather, Smith, aware that Moses was seventeen years old and enrolled in special education classes, took the time to write Moses' statement himself

after reading each line of the "Waiver of Rights" form to Moses, who then signed the form. Additionally, Moses testified on two separate occasions that he understood his *Miranda* rights. He further testified that Smith did not tell him what to say during his statement. The record does not indicate that Moses was detained for an extended period of time. Finally, although Moses could only read and write at a third grade level, he was able to earn an occupational diploma. Although the trial court failed to specifically mention his mother's alleged request to be present during questioning, we find that factor standing alone is not dispositive. Ultimately, upon review of the totality of the circumstances in this case, the record supports the trial court's conclusion that Moses' statement was freely, knowingly, and voluntarily made, regardless of his age, learning disability, and separation from his mother. Thus, we find no abuse of discretion by the trial court.

(The importance of considering the totality of circumstances in deciding the voluntariness of a confession)

In *People v. Linares* (2010) the Court of Appeal, Second District, California, found that even though the interrogator made statements that were inappropriate, when the totality of circumstances were considered the court upheld the trial court's decision to admit the incriminating statements.

As the Court of Appeal pointed out, "To be sure, several statements made by the officers during the interview were inappropriate. Threatening references to Linares's and his wife's immigration status and to putting him in jail and "throw[ing] away the key" if he did not tell the truth should not have been made. Similarly, offers to help Linares and to talk to the district attorney on his behalf could have been interpreted as promises of leniency. These isolated threats and implied promises, however, were not the motivating cause of Linares's incriminating statements, which were made long after the questionable comments by Detective Ramirez and Sergeant Katz. In fact, Linares responded to the officers' inappropriate statements by maintaining his innocence, and he continued to deny any involvement in Padilla's death throughout most of the interview. A review of the full transcript makes clear it was not these threats or implied promises of leniency that finally prompted Linares to confess, but rather the repeated appeals to his conscience, to his concern for Padilla's children and his own, and, ultimately, to his recognition that his denials of involvement were not credible and that his arrest for Padilla's murder was inevitable whether he admitted his role or not. (See generally *People v. Carrington*, supra, 47 Cal.4th at p. 176 [detective's comments seeking "to evoke defendant's better nature by persuading her that 'purg[ing] it all' was morally the right thing to do and would provide her with psychological relief" was not an impermissible coercive tactic absent evidence defendant was "in a particularly fragile mental state that would render her vulnerable to manipulation by reference to religion"].)

The Court further stated that, "An innocent man told there are videotapes implicating him in a crime he did not commit knows that statement cannot be true and should not be improperly influenced to make a false confession. Indeed, when Detective Ramirez initially told Linares the police had incriminating videotapes, Linares once again insisted

he had not gone anywhere with Padilla the night of the murder and responded to Ramirez's question, "[D]o you want to see the video?" by saying, "Let's see. Show me the video." In short, even though false, these deceptive statements were not likely to induce an innocent man to implicate himself in the crime and, in fact, did not prompt Linares's confession in this case.

Under all these circumstances there is no basis to conclude Linares's statements were either coerced or untruthful. (*Cf. Mincey v. Arizona* (1978) 437 U.S. 385, 398-399 [98 S.Ct. 2408, 57 L.Ed.2d 290].) The trial court did not err in admitting the statements into evidence.

(Can an interrogator's repeated invocations of offers to help the suspect render a confession inadmissible? Yes.)

In *Day v. State* (2010) the District Court of Appeal, Fourth District, overturned the trial court's decision to admit the defendant's confession. In their opinion the court pointed out that, "In the statement introduced at trial, appellant confessed to illegal acts after the investigator's many invocations of offers to help him. Initially, the investigator stated, "Um, if-if something happened and its accidental-then we can work something out. But if it's something that-cause I don't see you as a predator, okay. I don't see you as a guy to go out there and start doing some crazy things." A little while later, the investigator stated,

Okay. And-if I just want to know what happened. If there's something that we can fix and we can work with, then that's what I want to know, okay. I don't want to sit here and start saying, well you-I'm not accusing you of anything. *1180 I'm trying to ask you what happened that night because I know, I know that something happened....

Then the investigator stated, "That's why I'm telling you, I wasn't there and this-I'm trying to give you the opportunity for you to help yourself so that I can work something out for you." A few pages later in the statement, the investigator stated, "That's what I want to know. At least give me something. Tell me that this is what I did, you know." A brief time later, the investigator stated,

Well this is why you're here, to help yourself. Because you know what, if you were-if you were to get arrested on a charge of sexual battery, right, and you go before a judge or a jury and they actually get my version of-that you cooperated in the investigation, it does look a hell of a lot better for you than for you to sit there and fabricate story after story after story....

Then the investigator told appellant, But you know what, it doesn't matter, it helps you-it helps you when I talk to the State Attorney and I tell them what type of person you were and how honest you were as to what happened, okay. It doesn't look good for you when you sit there and start trying to not say what happened....

Briefly later appellant stated that "I just don't want to go to jail. I don't like it there." The investigator responded that "you may be able to bond out like right in a couple of hours.

You just got to get booked. What happened, James?" Whereupon, appellant asked, "You gonna help me?" The investigator answered, "I can do my best and talk to the State Attorney. That's what I can tell you." A page later in the transcript the investigator stated the following, "I'm gonna tell the State Attorney exactly what you're telling me. You are cooperating with me. You are telling me what happened. As long as you are honest with me, and I have a lot more than just putting lotion on her, okay. And this is why I-I need you to-to help yourself."

Finally, the investigator told appellant to "[t]rust me. Trust me," and what I'm trying to do is I'm trying to figure out everything that happened here. I'm gonna-I'm gonna present this case to the State, okay. They're gonna go based on what I tell them, alright. You've put lotion on her in the bathroom, correct? Is that why you went to the bathroom?

"In the present case, based on the totality of circumstances, the many offers of help and the statements implying authority to influence the process rendered appellant's confession inadmissible as improper "fruits of hope." .

(Confession ruled inadmissible because of faulty advisement of rights)

In *State v. Mumley* (2009) the Vermont Supreme Court ruled that the trial court erred by admitting defendant's custodial statements without conducting the required totality-of-the-circumstances inquiry into the validity of defendant's waiver.

In this case the following occurred during the defendant's video-taped interrogation:

Prior to questioning defendant, the detective warned defendant of his privilege against self-incrimination and his right to counsel as required by *Miranda v. Arizona*. He read defendant his warnings one-by-one, from a Miranda-waiver form. The form listed each of the Miranda rights followed by the question "Do you understand?" and a blank space for a reply. After reciting each warning to defendant, the detective asked defendant whether he understood. Defendant replied "yes" to each of these questions. The detective recorded defendant's replies on the form.

Underneath the Miranda-rights portion of the form was the title "Waiver," and the following paragraph:

I have been advised of my rights and I understand them. No threats or promises have been made to me. Knowing my rights, I agree to waive them and talk with you now. I understand that I am waiving my right to be represented by an attorney, to talk with an attorney before questioning and to have an attorney present during questioning.

Under this paragraph was a space for the date and time and a space for a signature or "time of taping."
The detective did not read the entire waiver paragraph to defendant. Rather, the detective read only the following: "I have been advised of my rights and I understand them. No threats or promises have been made to me. Knowing my rights, I agree to waive ...." The

detective did not provide defendant with the opportunity to read the balance of the form nor did he have defendant sign the form. The following exchange then occurred:

Detective: Do you want to talk to me?

Defendant: What about?

Detective: Ah, what, ah ... you can talk to me, you can tell me to pound sand. You know, those are your rights, okay? Now, it doesn't affect them one way or the other. What I'm concerned about is that, I want to make sure, you know, what happened tonight, you be given an opportunity to, you know, explain your actions which will happen in a court of law. But this is also an opportunity for you, if you want it, you can write down a sworn statement and apologize for what happened tonight. That's something. It's your choice you know.

Defendant: Which is what?

Detective: Do you understand what is going on here at all?

Defendant: No, no, I don't.

Detective: Well, as I stated over at your apartment, you're under arrest for attempted kidnapping.

Defendant: Okay.

The detective made no more attempts to secure a waiver of defendant's rights to silence and to an attorney. Eventually, defendant answered some of the detective's questions. The Vermont Supreme Court ruled that "Here, the trial court's decision and order denying defendant's motion to suppress contains no consideration of factors indicating a knowing and intelligent waiver of Miranda rights as required by Fare and Malinowski, and no consideration of factors indicating his awareness of his S 5234 rights and the consequences of waiving them as required by S 5237. Instead, as far as we can tell from its order, the court reached its conclusion that defendant made a valid waiver of his rights by "assuming ... that defendant possessed the requisite experience, education, background, and intelligence to understand the nature of his ... rights and the consequences of waiving them." The trial court erred under Malinowski and S 5237 by failing to make the required inquiry." .

(The value of video recording the interrogation)

In *People v. Miner* (2009) the Court of Appeal, Second District, Division 8 "Miner contends that the court should have granted his motion to suppress his statements to the police, made on the ground that the statements were involuntary-coerced by express and implied promises and threats.

When reviewing the totality of the circumstances on appeal, we accept the trial court's resolution of disputed facts, if supported by substantial evidence, and we independently determine whether the confession was voluntary. Here, the only evidence presented in support of his motion to suppress the statements consisted of the recordings, and there are no factual conflicts relating to Miner's statements to the police.

Miner has selected isolated remarks from the many hours of recorded statements, and he has provided his own interpretation of the remarks by the officers, without regard to the context of the entire interrogation. Our review of the tapes leads us to conclude that the totality of the circumstances demonstrates that the confession was voluntary. We discuss below the selected remarks, and endeavor to do so in the context in which they were made."

(When all the circumstances are considered "deceptive and stress-inducing" practices not coercive)

In *Minnesota v. Mahony* (2009) the Court of Appeals examined the issue of a police interrogator utilizing "deceptive and stress-inducing" interrogation practices and points out that when considering the totality of circumstances such tactics do not necessarily require that the defendant's confession be suppressed. The court stated:

"Again, relying on the totality of the circumstances, the court can suppress statements made in response to deceptive and stress-inducing interrogation practices. *State v. Jones*, 566 N.W.2d 317, 326 (Minn.1997). But suppression is not required, even when police have used promises of leniency or lied about the existence of evidence, if, under the totality of the circumstances, the defendant's will was not overborne and the defendant was not induced by the deception or promises to confess. See, e.g., *State v. Farnsworth*, 738 N.W.2d 364, 374 (Minn.2007) (concluding that use of empathic approach does not alone make confession involuntary); Jones, 566 N.W.2d at 326; (refusing to suppress despite officer's lie about existence of incriminating videotape); *State v. Williams*, 535 N.W.2d 277, 288 (Minn.1995) (refusing to suppress statements despite officers' discussion theorizing and speculating about evidence); Thaggard, 527 N.W.2d at 810 (stating that use of trickery and deception is to be considered along with other factors and refusing to suppress statements after police falsely asserted that they had evidence implicating defendant); S*tate v. Slowinski*, 450 N.W.2d 107, 112 (Minn.1990) (refusing to suppress statements despite police offer to argue for psychiatric help in lieu of prison)." .

(Does the totality of circumstances standard for assessing the voluntariness of a confession apply to individuals suffering from mental retardation and mental illness?)

In *Delao v. State* (2007) the Court of Criminal Appeals of Texas found that the totality of circumstances does apply to the assessment of the voluntariness of a confession from someone who is mentally retarded or impaired. The court stated:

We hold that the totality of the circumstances standard for assessing the voluntariness of

a confession given by a person of normal mentality is also the appropriate standard to apply when a confession is made by someone suffering from mental retardation and mental illness. Because the court of appeals included Appellant's mental disabilities among the many factors it considered when analyzing the totality of the circumstances surrounding Appellant's confession, we cannot say that the court of appeals applied an inappropriate standard of review, nor that it erred in confirming that the confession was voluntarily made.

False confessions – defendant characteristics

(Characteristics of a defendant who gave a false confession)

In *Floyd v. Cain* (2011) the Supreme Court of Louisiana ruled that "Considering all of the evidence, including Floyd's false confession to the murder of Robinson, Floyd's low IQ and susceptibility to suggestion, the missing police records, the lack of evidence linking Floyd to the murder of Hines, the exculpatory value of the fingerprint evidence, defendant is entitled to a new trial." As part of their decision making process the court examined the information that the defense offered re the characteristics of the defendant, including the following:

"The defense suggests that Floyd has an IQ of 59 (well below the threshold for mental retardation). Dr. Gregory DeClue, a forensic psychologist, who testified at Floyd's post-conviction hearing, administered the WAIS IV IQ test to Floyd at the Louisiana State Penitentiary in Angola in June 2009, and that test indicated Floyd has a full scale IQ of 59. The generally accepted cut off for mental retardation is 70. According to DeClue, 99% of all adults in the United States score higher on the test than Floyd.

Additionally, DeClue administered the Woodcock Johnson test to Floyd to assess his language and reading comprehension skills. DeClue testified that, based on the test results, Floyd can read at a second or third grade level. DeClue stressed that these results indicate Floyd cannot communicate at the complex level an average adult can.

DeClue also administered the Gudjonsson Suggestibility Scale to determine Floyd's levels of suggestibility and compliance. DeClue found that relator displayed a high level of suggestibility, and that Floyd's "self-reported description was that he's more compliant than the average person." DeClue testified that people classified as mentally retarded are 10 times more likely to give a false confession, that in many false confession cases, the confessor included details of the crime scene presumed to be known only by the police and the perpetrator.

Although mental retardation or illiteracy, alone, do not prevent a person from being able to knowingly and intelligently waive his rights, this Court has held that a mentally retarded 17–year–old with an IQ between 50 and 69 was not able to understand his rights and was incapable of knowingly and intelligently waiving his Miranda rights, and thus his confession should have been suppressed.

Gudjonsson suggestibility test

(Gudjonsson Suggestibility Scale found not to meet Frye test – there is not acceptance of the GSS in the forensic psychology community)

In *People v. Shanklin* (Jan. 2014) the Appellate Court of Illinois, First District, Sixth Division, affirmed the trial court's opinion that that trial court could hold *Frye* hearing on admissibility of expert testimony on defendant's suggestibility to interrogation; that measure of suggestibility was not generally accepted in determining voluntariness of confessions; and, that defendant's confession was voluntary. Here is a very detailed selection from the Appeals court decision as they reviewed the discussion and testimony regarding the Gudjonsson Suggestibility Scale (GSS).

In his amended motion to suppress, defendant alleged that at the time of his police interrogation, he was suffering from heroin withdrawal, possessed significantly impaired cognitive functioning, and was highly suggestible, thereby making his resulting statements involuntary. Defendant tendered a psychological report wherein Dr. James P. Sullivan opined on defendant's suggestibility based in part on the Gudjonsson Suggestibility Scale (GSS). The State then filed a motion for a *Frye* hearing. The State claimed that the GSS is unreliable and does not meet the *Frye* standard, and that testimony regarding suggestibility invades upon the province of the trier of fact. Defendant filed a motion to strike the State's motion for a *Frye* hearing. After hearing argument and taking the matter under advisement, the trial court granted the State's motion and ordered the *Frye* hearing to be conducted in conjunction with the hearing on the amended motion to suppress statements.

The *Frye* Hearing

Dr. James Sullivan testified for the defense as an expert in forensic neuropsychology. Dr. Sullivan testified that the GSS is "specifically designed to identify individuals who may demonstrate decreased resistance to subtle pressure or interrogative techniques. Oftentimes individuals who are identified as being more suggestible by virtue of the results of the GSS have been shown through research to have provided more erroneous information during statements they provide to the police." Dr. Sullivan testified that the GSS provides information about psychological factors relevant to the issue of coercion but that he would "never include [GSS results] for the purpose of being dispositive or offering a final conclusion about whether an individual's statement is voluntary or not."

Dr. Sullivan testified that the GSS has been around since the mid–1980s and has been the subject of all sorts of research and has undergone a whole process of validation. Dr. Sullivan stated that the GSS is widely accepted "in forensic clinical psychology regarding *Miranda* issues" because it is widely described in the literature. He pointed to references to the GSS in the *Handbook of Psychology, Volume 11: Forensic Psychology* (2003), by

Allen **215 *292 M. Goldstein, and *Psychological Evaluations for the Courts,* by Gary B. Melton *et al.* (3d ed. 2007), which is a handbook for mental health professionals and lawyers and is "pretty widely acknowledged as the authoritative text for psychological involvement in the legal system." Both books identify the GSS as a measure to assess suggestibility in *Miranda* evaluations.

Dr. Sullivan opined: "There is no question that [the GSS] is accepted in the field in which I am an expert [forensic neuropsychology]. I would like to say, though, * * * that the field in which I am an expert is a relatively small field." Dr. Sullivan explained that the GSS provides a story and then asks the subject questions about the story, many of the questions being leading. The GSS gives a yield measure of how many of the leading questions the subject gave into. After answering the questions the subject is told he did not do a very good job and is told to try harder, and he is asked the same questions again. The frequency with which the subject changes his answers is called shift and is thought to be an indication of interrogative pressure.

In the instant case, Dr. Sullivan administered the GSS to defendant. Defendant's yield score was 11, which places him at the 95th percentile of the normative sample. His shift score was 7, which places him at the 90th percentile, so that his total suggestibility score was 18. Looking at the normative data, this places him in the high end of the continuum (*i.e.,* defendant is highly suggestible).

Dr. Sullivan testified that a person with a criminal record who has had multiple "contacts with the justice system" is generally less suggestible than a person who has not had such contacts. When administering the GSS to defendant, Dr. Sullivan was not aware of defendant's extensive criminal history, *i.e.,* of his prior "contacts with the justice system" consisting of seven felony convictions.

Dr. Sullivan conceded there has been a lot of criticism of the GSS because Mr. Gudjonsson's normative data comes from Iceland and the United Kingdom and there are cultural and vocabulary differences between the United States and those countries. Dr. Sullivan stated, though, that the fact the GSS has been criticized does not mean it has not been widely accepted.

Dr. Sullivan admitted that Bruce Frumkin, a psychologist who wrote a chapter in a book he edited, stated in 2003 that "although Gudjonsson's work is well known in the area of suggestibility research, it has not been widely used by forensic clinicians in the United States." In 2008, Frumkin stated that the GSS is a specialized forensic assessment instrument "unknown to many psychologists."

Dr. Sullivan was also aware of a survey in the publication *Professional Psychology Research and Practice* in 2003 regarding tests used in forensic psychological evaluations, and that the GSS was not mentioned therein. The same was true for a survey in the *Journal of Personality Assessment.*

Dr. Joan Leska testified for the defense as an expert in forensic psychology. She testified that the GSS is not a new or novel test; the first version came out in 1987 and the second version came out in 1997. Dr. Leska opined that the GSS is generally accepted in the forensic psychological community. The GSS is referenced in: *Psychological Evaluations for the Court,* by Melton; the *Handbook of Psychology,* by Goldstein; and *Interrogation and Disputed Confessions: A Manual for Forensic Practice* (2005), by Gregory Declue, Ph.D. The GSS has been referenced in workshops that Dr. Leska **216 *293 has attended at the American Academy for Forensic Psychologists and she has used it herself over 20 times.

Dr. Leska testified that the GSS "provides information to the trier of fact in terms of whether this person has certain characteristics that would make him or her more vulnerable to suggestion or to influence or to providing erroneous material." Dr. Leska agreed that the GSS is not a measure of someone's ability to understand *Miranda* and that the GSS has been criticized because it was normed on a British sample. However, Dr. Leska did not agree that the culture of America is different than the culture of the United Kingdom.

Dr. Leska was asked about a statement by Mr. Gudjonsson that the validity of the GSS in predicting suggestibility during an actual police interrogation was not known. Dr. Leska replied, "I would agree with that. There [have] been other studies that say in the actual situation we don't know." Dr. Leska further testified in pertinent part:

"Q. Would you agree that there are different types of memory?

A. Yes, I do.

Q. And semantic memory is memory for concepts, words and objects, right?

A. Correct.

Q. And then there's episodic or event memory, correct?

A. Episodic or autobiographical, correct.

Q. Correct. And that's the individual's unique store of autobiographical memory, correct?

A. Correct.

Q. Police interrogations are concerned with the autobiographical memory, correct?

A. It could be, if * * * the person is involved in crime.

Q. But the GSS is testing semantic memory, correct?

A. Correct."

Dr. Leska also testified that a person with a criminal history who has had contacts with the criminal justice system is less suggestible than a person without such a criminal history.

Dr. Sharon Coleman testified for the State as an expert in forensic psychology. Dr. Coleman is a clinical psychologist with the Forensic Clinical Services of Cook County, which provides the court-ordered examinations for the circuit court of Cook County. Dr. Coleman testified she is familiar with the GSS but she does not use it because she does not "believe the GSS measures anything clinically relevant to the evaluations [she] performed at Forensic Clinical Services." She testified in pertinent part:

"Q. Are there problems with the way the GSS was standardized or normed?

A. I believe so, yes.

Q. What are the problems?

A. Typically, this test was normed on a population of British and some Icelandic citizens which those are the norms that are currently used with this test with American populations. * * * Typically, standardized instruments use a population that's going to be representative of the population where the test is going to be used in. So one of the criticisms or problems that there is with the GSS is that the norms aren't necessarily representative of the American population in which its [*sic*] been used.

* * *

Q. To your knowledge, has there ever been any United States validation of the GSS?

A. There has been an attempt to look at how some American samples score on the GSS. * * *

Q. Do you know what the results of the attempt were?

A. The results showed there were some distinct differences between how American samples score * * * on certain measures of this test compared to the British counterparts.

Q. Would that affect where they would be placed if there were a scale suggestibility, would that affect where they would be placed relative to subjects from the United Kingdom?

A. Well, some of the percentile rankings for the British norm versus the American subjects don't—aren't necessarily * * * consistent. So that if you have a percentile ranking at 75 percentile, it doesn't necessarily mean the same thing if you are testing somebody from an American population. * * *

Q. How about cutoffs as it relates to assessing somebody's suggestibility?

* * *

A. Yes. There is a problem.

Q. What is the problem?

A. There is not operationalized diagnostic cutoff for what's considered high and low or high suggestibility or really high suggestible versus low suggestible.

Q. * * * The subjects in the initial validation of the GSS, do you know what that status was in general?

A. I think that again one of the difficulties or problems with the normative samples of the GSS is that the normative sample did not just contain pretrial detainees but it also contained some individuals who * * * were victims of crimes, some individuals who were witnesses of crimes, and some individuals who may have been already convicted of crimes. * * * [T]he inclusion of that part of the population is problematic for the normative group.

* * *

Q. The fact that the GSS is based on a story that's told to somebody versus a custodial interrogation which involves * * * a real life scenario, does that affect this test in any way?

* * *

A. Again, I think one of the criticisms and problems with the GSS is that it is a test that's administered verbally, a story that's relatively benign to the examinee * * *. A custodial situation or an interrogation situation is not just experienced verbally and by hearing but rather it's something that a person has some experience with. * * * When they are relaying information about a custodial situation, again, they are calling on not just what they hear, they are calling on what they have seen, what they have smelled, what they have touched and so a multiple sensory modality to relate information back as opposed to a testing situation which does not involve all those sensory modalities.

Q. No personal relevance in the story of the GSS?

A. Exactly."

Dr. Coleman testified she has conducted thousands of *Miranda* evaluations and reviewed the reports of other professionals and the GSS is not generally accepted within the office of Forensic Clinical Services. Dr. Coleman keeps up on surveys of what doctors in the

psychological field are using for testing, and she stated that in the recent surveys “the GSS has not been mentioned as an instrument used prominently or by forensic psychologists.” Dr. Coleman noted that Thomas Grisso, who is “well-known in the area of *Miranda* evaluations,” had referenced the GSS in a 1986 book when discussing “ the **218 *295 evaluation of *Miranda* abilities,” but that by 2003, he had “reevaluated his view of the GSS as a useful tool in light of assessing *Miranda* abilities”; Grisso's 2003 edition of the book no longer contained a recommendation of the GSS. Dr. Coleman testified that “[t]he GSS has not gained general acceptance in the field of psychology.”

Dr. Peter Lourgos, staff forensic psychiatrist and assistant director of Forensic Clinical Services, testified he never asks psychologists to test for suggestibility as it “is not a useful assessment in these types of evaluations.” He stated that suggestibility is not a psychiatric diagnosis, it is not listed in the Diagnostic and Statistical Manual of Mental Disorders, and “there is no formalized definition of what it is to be suggestible.”

At the conclusion of the *Frye* hearing, the trial court concluded “there is not general acceptance of the GSS in the forensic psychology community.” Accordingly, the trial court found that the GSS did not meet the *Frye* standard and barred consideration of such evidence at the hearing on the amended motion to suppress and at trial.

(What is the Gudjonsson Suggestibility Scale (GSS)?)

In *State v. Wright* (2012) Dr. Daniel Martel, a forensic neuro-psychologist, testified about his use of the Gudjonsson Suggestibility Scale, and from the court opinion, described GSS as follows:

"In this case, Dr. Martell was asked to evaluate Defendant's vulnerability to change his answers, his suggestibility, and malleability as applied to a police interrogation. Dr. Martell testified that he evaluated Defendant for about three hours focusing on the Gudjonsson Suggestibility Scale ("GSS"), memory testing, tests for malingering, and a neuropsychological interview. After evaluating Defendant, Dr. Martell opined that Defendant had difficulties in school, a verbal comprehension deficiency, and likely has a learning disability in reading and math.

Dr. Martell described the GSS suggestibility scale as a test of the degree of vulnerability a person has to suggestions that may contaminate or influence that person's ability to recall an event. According to his testimony, a person's degree of suggestibility is permanent, but being high on heroin or other factors could temporarily make someone more suggestible. The test is administered by telling the subject a story, asking the subject to recall the story from memory, asking the subject to recall it again after thirty minutes, and then asking the subject a series of suggestive questions that may or may not be answerable from the story. After the questions, the test administrator determines a score based on how many mistakes the subject made and then asks the subject to answer the questions again and to try to be more accurate. The administrator uses this process to develop a yield score, i.e. a measure of how much the subject yields to suggestion. For example, after initially being asked "Did the assailant in the story use knives or guns?"

and answering "guns," the subject is again asked the same question. If the subject responds by saying "knives" the second time, then the yield score is greater, showing an increased propensity to yield to suggestion. The GSS provides, among other things, a "shift score" which measures the subject's susceptibility to change (shift) his answers after being admonished by the test administrator."

(Court finds test on suggestibility was "not a valid and reliable test to determine a person's suggestibility to admit to a crime")

In *People v. Nelson* (2009) the Illinois Supreme Court upheld the trial court's decision to refuse to allow Dr. Bruce Frumkin to testify concerning his use of the Gudjonsson Suggestibility Scale (GSS) in evaluating defendant's susceptibility to giving a false confession. The trial court found "that the test was not a valid and reliable test to determine a person's suggestibility to admit to a crime. The court found it difficult to accept that a test taken nearly three years after the murders regarding a subject that was not autobiographical in nature could be presented as evidence. The court further stated that it was unaware of any court in Illinois that had allowed the GSS to be presented to a jury on the issue of the defendant's interrogative suggestibility. Thus, the court concluded that the GSS did not meet the standard for admissibility under Frye."

Pragmatic implication

(Confession voluntariness - court rejects the concept of pragmatic implication)

Pragmatic implication is a theory proposed by Professor Saul Kassin which posits that a subject of an interrogation may cognitively perceive threats or promises even though the investigator never threatened the suspect or offered the suspect a promise of leniency. In the case of *People v. Benson* (2010) the Court of Appeal, Third District, California the premise of this theory was rejected. In this case the court found the following:

"Here, Detective Rodriguez did tell defendant there was "a big difference between ... someone getting hurt and trying to shoot someone." However, the detectives made no promises or representations that defendant's cooperation would garner more lenient treatment or lesser charges. "No specific benefit in terms of lesser charges was promised or even discussed, and [the detective's] general assertion that the circumstances of a killing could 'make[ ] a lot of difference' to the punishment, while perhaps optimistic, was not materially deceptive." (People v. Holloway (2004) 33 Cal.4th 96, 117.) The general assertion that the circumstances of a killing could make a difference was not materially deceptive. It is not deceptive to state that an accomplice to murder may be better off than the shooter. (People v. Garcia (1984) 36 Cal.3d 539, 546-547.)

In addition the court addressed the issue of giving the suspect false information:

"Nor does the detectives' use of false information render defendant's admissions involuntary. Lies told by officers to a suspect during questioning may well affect the voluntariness of a confession, but they are not per se sufficient to render a confession

involuntary. Where the deception by the officer is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted. (People v. Farnam (2002) 28 Cal.4th 107, 182 (Farnam).) Courts prohibit only those psychological ploys that, under the totality of circumstances, are so coercive they tend to produce a statement that is both involuntary and unreliable. (Ray, supra, 13 Cal.4th at p. 340.)

In Farnam, supra, 28 Cal.4th 107, the court found the defendant's confession to an assault and robbery was voluntary. The officers falsely told the defendant that his fingerprints had been found on the victim's wallet. (Id. at pp. 182-183.) Nor did the court find a confession coerced when an officer made false statements regarding evidence the officer said tied the defendant to a murder. (People v. Thompson (1990) 50 Cal.3d 134, 167.)

Here, while the officers made several false representations while questioning defendant, those representations were not of a sort likely to produce an unreliable statement. Nor did the officers make any offers of leniency or threaten defendant with dire consequences for failing to confess. We do not find defendant's admissions involuntary. .

Confession corroboration

(How much corroboration is needed to support the trustworthiness of a confession?)

In *In re K.A., Appellant* (2013) the District of Columbia Court of Appeals addressed the issue of corroboration, stating, in part, the following:

In confession cases, this jurisdiction has long followed the United States Supreme Court's corroboration rule, explained in decisions issued on the same day…… The rule, which "is intended 'to forestall convictions based on extrajudicial confessions the reliability of which is a matter of suspicion,' …. "requires 'the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement' before a confession can be submitted to the jury and can sustain a conviction…."

It is hard to say precisely what quantum of independent evidence is "substantial" enough to support a conviction, as "the amount and kind of evidence needed to corroborate a confession will depend upon the facts of each case." … That case and others… make clear that the amount of independent evidence required to satisfy the corroboration rule depends in part on the circumstances under which the confession was made and any indication that the confession might be false.

In examining "the degree of corroboration required," the court…. found it useful to examine, as a "threshold matter," the voluntariness and coherence of the confession, whether it was made under trustworthy circumstances, and whether there were "signs that the confession was false."

Turning to K.A.'s case, we apply the threshold analysis… and examine the circumstances of K.A.'s statements for signs of trustworthiness. While we assume K.A.'s statements were voluntary, his admission to possessing the guns bears hallmarks of a less than

trustworthy confession. K.A. confessed after persistent questioning by a number of officers in a small apartment that, while a familiar environment, had been filled with police officers for nearly an hour and a half. The officers repeatedly made clear that they were willing to arrest K.A.'s grandfather, despite his illness and even though they did not believe the guns were his. K.A.'s confession came in a conclusory statement—"Man, they my guns. Take those things off him"—that explicitly revealed an ulterior motivation to keep his ailing grandfather from being arrested.

That motivation is the most conspicuous sign of unreliability in the circumstances surrounding K.A.'s confession. K.A.'s admission of guilt came only when his grandfather, with whom he lived and for whom he performed at least some caretaking, "wasn't looking in the best of shape," and was receiving emergency medical treatment while handcuffed. Terrell's testimony about his own thoughts while watching his grandfather go through this ordeal suggests a similar inclination: "I was thinking of some way how to stop this for real.... Maybe confess." By keeping I.A. handcuffed during his treatment, the police demonstrated that they had every intention to take him to jail, not to the hospital.

While the corroboration rule does not require that the government prove all of the elements of the crime through independent evidence,... it does require that the independent evidence be sufficient to make the confession worthy of an inference of truth." .

(How much corroboration is needed in a confession?)

In *State v. Fairconatue, Jr.* (2009) the Wisconsin Court of Appeals upheld the defendant's confession to an armed robbery. The defendant had appealed the conviction claiming that "his confession was not corroborated by a significant fact, thereby resulting in insufficient evidence to convict him of the armed robbery charge." In their opinion the Appeals court pointed out that in his brief Fairconatue comments "that there is "no co-defendant testimony, no hairs, no fibers, no D.N.A., no testimony by any of the victims that they believed any of the robbers to be black men." In other words, Fairconatue views the confession corroboration rule as requiring a specific link between Fairconatue and the crime. This is not a correct reading of the law."

The Appeals court points out that "Under the confession corroboration rule set forth in Holt:

All the elements of the crime do not have to be proved independent of an accused's confession; however, there must be some corroboration of the confession in order to support a conviction. Such corroboration is required in order to produce a confidence in the truth of the confession. The corroboration, however, can be far less than is necessary to establish the crime independent of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test." .

(Corroborating elements in an arson case)

In *Thomas v. State* (2008) The Defendant appealed his conviction for first-degree arson on the basis that his confession was not sufficiently corroborated to support conviction.

From the Court of Appeals opinion:

"Corpus delicti prohibits the conviction of a criminal defendant based upon nothing more than the defendant's own confession to prove that the crime occurred. The purpose of corpus delicti is to prevent errors in convictions based on false confessions, to act as a safeguard against the defendant's act of confessing but being mistaken that a crime occurred, and to force the prosecution to use its best evidence."

"Much like the testimony of the pathologist in Tiffany, in this case the fire investigator testified that, although his report concluded that the cause of the fire was undetermined, he noticed various red flags that the case had raised for him, such as Thomas's recent purchase of renter's insurance and inconsistencies between Thomas's description of his actions on the evening of the fire and the physical evidence. The fire investigator testified that Thomas's videotaped confession to the escort and description of how he started the fire was consistent with the information that the fire investigator received from the scene. Similar to the evidence in Tiffany, in this case there was evidence of a fire, there was evidence that the fire occurred in a period where Thomas was the sole occupant of the home, and the fire investigator testified that Thomas's confession about how he started the fire was consistent with the physical evidence. As the Supreme Court stated in Tiffany, Idaho law has never required the fact that a crime occurred be proven independently of a defendant's confession."

"In addition to the testimony of the fire investigator that Thomas's confession regarding how he started the fire was consistent with the physical evidence, there was also testimony from the escort that Thomas told her about his plan to burn his home before the fire occurred. Furthermore, there was Thomas's purchase of renter's insurance approximately one month before the fire occurred, even though Thomas lived in the home three months prior to purchasing insurance. Regardless of whether we apply Idaho's current law of corpus delicti requiring slight corroboration or apply the standard from these other jurisdictions as Thomas suggests his attorneys should have argued, we conclude that neither Thomas's motion for dismissal nor his appeal would have been successful. There was sufficient evidence to corroborate Thomas's confession in this case under either standard. Therefore, we conclude that the district court properly dismissed Thomas's post-conviction claim of ineffective assistance of trial and appellate counsel for his attorney's failure to file his motion to dismiss and failure to appeal the sufficiency of the evidence."