Is offering a suspect a moral or psychological excuse for committing the crime the same as offering them a promise of leniency if they confess?

Social psychologists and other law enforcement critics suggest that during interrogation if the investigator offers the subject a moral or psychological excuse for committing the crime, it is tantamount to making a promise of leniency…. suggesting, at least indirectly, that if the subject had a "good reason" it would minimize their punishment. The courts reject this premise.

Before detailing several of these court decisions, it is important to understand the reason for offering the subject some type of moral or psychological justification for committing the crime during an interrogation….some type of rationalization or projection….such as blaming an accomplice for suggesting the crime; the influence of alcohol or drugs on the subject's judgment; the financial pressures that they were experiencing; that it was an accident, etc.

According to criminal psychologist Shadd Marunahttps://pure.qub.ac.uk/en/persons/shadd-maruna studies indicate that the majority of criminals either make excuses for or attempt to justify their actions. According to Maruna, "there is little evidence that these justifications are made prior to committing the crimes, so it's possible—and somewhat likely—that they're thought up afterwards as a way to mitigate the guilt."

"Criminologists have interviewed every imaginable sample of individuals who break laws and found remarkable consistency in the use of what we call 'techniques of neutralization,'" Maruna explained. "There have been studies of deer poachers, terrorists, rapists, shoplifters, cyber hackers, murderers—you name it. And yet the individuals involved tend to use a very consistent and discernible number of post-hoc rationalizations to account for what they did."

These "techniques of neutralization" form the basis of a concept known as "neutralization theory," which was posited by sociologists David Matza and Gresham Sykes in the 1950s. The theory holds that criminals are able to neutralize values that would otherwise prohibit them from carrying out certain acts by using one or up to five methods of justification: "denial of responsibility," "denial of injury," "denial of the victim," "condemnation of the condemners," and "appealing to higher loyalties.

"Denial of responsibility" is when an offender proposes that he or she was forced by the circumstances they were in to commit a crime; "denial of injury" means insisting that the crime was harmless; "denial of the victim" involves the belief that the person on the receiving end was asking for it; and "condemnation of the condemners" is when the criminal claims that those criticizing or dishing out punishment are doing so out of spite or to shift the blame from themselves. The final method, "appealing to higher loyalties," involves the perpetrator believing that the law needs to be broken for the good of a smaller section of society—for example, a gang or a group of friends.

Given the use of rationalizations by criminal offenders, the suggestion by an investigator that an accomplice talked them into committing the act under investigation; suggesting that the victim was accidentally shot; suggesting that the subject's financial pressures caused him to act out of

character, or blaming the victim for doing or saying something that provoked the incident are oftentimes simply justifications that the subject has already adopted.

Dr. Richard Leo (and other social psychologists and false confession "experts") refer to this approach of offering the subject a "good reason" for committing the crime as essentially a suggestion that such an explanation would minimize their punishment:

Dr. Leo: *"So minimization is a recognized interrogation technique that -- whereby the interrogator tries to minimize the -- or downplay the seriousness or consequences of the alleged act to make it easier for the suspect to admit to it because it's less serious or perhaps portrayed as not even criminal at all. So, by minimizing the consequences or the outcome or the punishment, sometimes minimization communicates also, implicitly, a suggestion or promise of either leniency or reduced punishment in exchange for cooperation."*

Two types of acceptable minimization can occur during an interrogation:
• minimizing the moral seriousness of the behavior
• minimizing the psychological consequences of the behavior

The third type of minimization is to minimize the legal consequences of the subject's behavior, which we teach never to do.

In their White Paper prepared for the American Psychological Association (entitled "Police-Induced Confessions: Risk Factors and Recommendations" by Saul Kassin, Steven Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard Leo and Allison Redlich [Law Hum Behavior 2010 Feb; 34(1):3-38] the authors agree with our position, stating that minimizing the moral seriousness and the psychological consequences should be allowed, but that minimizing the legal consequences should not be allowed.

The emphasis of the Reid Technique is to create an environment that makes it easier for a subject to tell the truth. An essential part of this is to suggest face-saving excuses for the subject's crime which may include projecting blame away from the subject onto such elements as financial pressure, the victim's behavior, an accomplice, emotions, or alcohol, without minimizing the legal consequences of the subject's behavior.

Consider the following excerpts from Criminal Interrogation and Confessions (5th edition,2013):

• "During the presentation of any theme based upon the morality factor, caution must be taken to avoid any indication that the minimization of the moral blame will relieve the suspect of criminal responsibility." (p. 205)
• "As earlier stated, the interrogator must avoid any expressed or intentionally implied statement to the effect that because of the minimized seriousness of the offense, the suspect is to receive a lighter punishment." (p. 213)
• "In applying this technique of condemning the accomplice, the interrogator must proceed cautiously and must refrain from making any comments to the effect that the blame cast on an accomplice thereby relieves the suspect of legal responsibility for his part in the commission of the offense." (p. 227)

The purpose of an interrogation is to learn the truth. In most instances, this consists of the guilty suspect telling the investigator what he did regarding the commission of the crime under investigation. The obvious reason for this outcome is that interrogation should only occur when the investigative information indicates the suspect's probable involvement in the commission of the crime.

However, there can be several other successful outcomes:

• the subject discloses to the investigator that he did not commit the crime but that he knows (and has been concealing) who did
• the suspect may reveal that while he did not commit the crime he was lying about some important element of the investigation (such as his alibi – not wanting to acknowledge where he really was at the time of the crime), or
• the investigator determines that the suspect should be eliminated from further investigation

The courts do not accept the premise that minimizing the moral seriousness or psychological consequences of the subject's behavior is tantamount to a promise of leniency.

The Supreme Court of Canada stated: *"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. Oick*le, [2000] 2 S.C.R. 3, 2000 SCC 38)

In another case (*R. v. Rennie)* the court stated that:

"Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if promoted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases, the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession."

In *Commonwealth v. Cartright,* the Massachusetts Supreme Court stated that "....Nor have we concluded that an interviewing officer's efforts to minimize a suspect's moral culpability, by, for example, suggesting theories of accident or provocation, are inappropriate, or sought to preclude suggestions by the interviewers "broadly that it would be better for a suspect to tell the truth, [and] ... that the person's cooperation would be brought to the attention of [those] involved." (*Commonwealth v. Cartright*, 2017 WL 4980376)

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

In *People v. Wroten* 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."

In *Gomez v. State* the US District Court stated the following: “Relevant considerations concerning whether an interrogation is coercive include the length of the interrogation, its location, and its continuity, as well as the defendant's maturity, education, physical condition, and mental health. In assessing police tactics that are allegedly coercive, courts have only prohibited those psychological ploys which are so coercive they tend to produce a statement that is both involuntary and unreliable under all of the circumstances. Investigators are permitted to ask tough questions, exchange information, summarize evidence, outline theories, confront, contradict, and even debate with a suspect... They may accuse the suspect of lying ... and urge him or her to tell the truth. Investigators can suggest the defendant may not have been the actual perpetrator or may not have intended a murder victim to die. They can suggest possible explanations of events and offer a defendant the opportunity to provide details of the crime.....Suggestions by investigators that killings may have been accidental or resulted from a fit of rage during a drunken blackout fall far short of promises of lenient treatment in exchange for cooperation.” (*Gomez v. State*, 2019 WL 358631)

(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* 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.

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

In *People v. Flores* 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"].)

(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* 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.

(Defendant claims confession was coerced because interrogator was sympathetic, understanding and tried 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.")."

(What constitutes a promise of leniency?)

In *U.S. v Kasey* 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."

(*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* 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."

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

In *Fundaro v Curtin* 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* 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* 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* 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* 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* 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* 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* 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* 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*, 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*, 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 upholds admissibility of confession in which detectives focused on difference between accidental and intentional killing)

In *Bramley v. State* 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.

Comments from the Courts About False Confession Issues

A recent federal court decision summarizes many of the issues related to false confession experts. In *United States v. Begay* the court found "there is no scientifically reliable means of determining whether a given confession is false." The court also stated that "crucially, there does not appear to be a reliable estimate of how many confessions are false confessions, regardless of the interrogation tactic employed." Also, "false confession theory cannot reliably determine whether a given confession is false. Additionally, the court found that a further limitation on false confession science "is that false confession theory does not appear to be based on significant empirical data," and "instead appears to be based primarily on anecdotal evidence, small-sample-size studies, or extrapolations from inapposite situations." Further, "the empirical data limitations similarly produce a high error rate. (497 F.Supp.3d 1025, 1068-69 (D. N. Mex 2020) See also, United States v. Phillipos, 849 F.3d 464, 471-72 (1st Cir. 2017) (affirming district court decision to exclude false confession testimony from Richard Leo because the district court's finding was reasonable that it would "introduce the jury… to a kind of faux science."). 892 F.Supp.2d 881

UNITED STATES of America, Plaintiff, v. Steven William DEUMAN, Jr., Defendant. Case No. 1:11:CR:266. United States District Court, W.D. Michigan, Southern Division.

In this Court's judgment, however, Dr. Leo's research on false confessions and his theories based on that research are not sufficiently reliable to be of assistance to the jury in understanding the evidence or determining a fact in issue in a particular case…… Dr. Leo's research method essentially involves reviewing false confession cases, determining whether they can be classified as "proven false confessions"…….. and comparing the interrogation techniques the police used in such cases in order to find common variables that may have induced the proven false confession. 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). Moreover, as Dr. Leo testified at the Daubert hearing, there is no way of knowing how frequently false confessions occur in the real world.……. While the problem of false confessions is indeed real, false confession testimony of the type Dr. Leo can offer is nothing more than guesswork: coercive interrogation techniques may lead to false confessions but also produce true confessions, and such techniques were used in this case, so the confession or incriminating statements may or may not be false. The danger of allowing such testimony, then, is that the jury may conclude that Defendant's incriminating statements were false not because there is a sound evidentiary basis for doing so, but because Dr. Leo, an impressively credentialed expert, says "it is so."
UNITED STATES of America, Plaintiff-Appellee, v. Henry Keeler REDLIGHTNING, Defendant-Appellant.
No. 09-30122.
United States Court of Appeals, Ninth Circuit.

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.

……. Dr. Leo testified that Redlightning's attorneys told Dr. Leo that Redlightning had said that he was given an implied promise of leniency for admitting his guilt, a technique that may lead to a false confession. The district court concluded, however, that, although Federal Rule of Evidence 703 allows an expert to form opinions on the basis of inadmissible evidence, this particular third- party information learned from defense counsel would not support a reasonable opinion on the veracity of Defendant's confession. We agree it could not be reasonable to rest an expert opinion on advice of counsel rather than facts provided by a party or a witness.
Dr. Leo himself testified that his expertise is "driven by empirical research" and that "interviewing subjects, if you're a social science [expert], is a form of empirical data gathering." But Dr. Leo never interviewed Redlightning and never indicated his views were based on Redlightning's statements given to Dr. Leo in interview, which would have raised the question whether such an interview was reasonably relied on by experts in Dr. Leo's field. Instead, Dr. Leo relied on statements made to him by counsel, which was not reasonable in these circumstances. Because Dr. Leo did not reasonably point to any evidence in the record or other factors or data reasonably relied on by experts in his field showing that the FBI gave

Redlightning an implied promise of leniency in exchange for his confession or used any other coercive interrogation method that may have lead to a false confession, Dr. Leo could not provide any relevant testimony to assist the jury…... We do not go so far as to say expert evidence about false confessions can only be offered in a case where a defendant has recanted a confession. There may well be cases where absent a recanted confession, there is still an ample foundation for false confession expert testimony, as, for example, if there is physical evidence that the perpetrator of the crime was someone other than the confessor, or if the nature of the interrogation leading to confession is such that it likely could induce a false confession. However, it is unsound as a general matter to permit such expert testimony in every case of a confession of a murder, even where there is no evidence like DNA suggesting another culprit, and no evidence of any interrogation technique used that is likely to extract a false confession, and where, as here, the confession came very close to the start of the interview.

Also, in one of our previous Investigator Tips, *The Truth About the Research Social Psychologists Use as the Basis for Testimony Regarding False and/or Coerced Confessions* we point out the misleading studies social psychologists use to "demonstrate" that a subject will believe that they will receive a lesser punishment if they offer some type of psychological justification for their criminal behavior. Here is the relevant text from that Inv Tip:

"Social psychologists claim that offering the suspect the excuse that he committed the crime due to the suggestion of an accomplice, for example, is the same as telling him that if he confesses that he committed the crime because his accomplice talked him into doing it, he will face less punishment.

The research that they typically use to support this claim is a study conducted by Kassin and McNall in which the effects of different interrogation techniques on levels of perceived guilt or responsibility were investigated. College students read five different interrogation transcripts of a murder suspect:

In the first, the investigator made an explicit promise of leniency;

In the second, the suspect was threatened with a harsh sentence;

In the third, the victim was blamed;

In the fourth, the suspect was falsely told that his fingerprints were found on the murder weapon; and

The fifth transcript contained none of these variables.

After reading each transcript the students rendered opinions as to how long they thought the suspect would be sentenced.

The researchers found it significant that the students believed the sentence would be less severe in the condition in which the victim was blamed for the homicide.

The authors of this study argue that the perceived leniency attributed to such a theme could cause false confessions through "pragmatic implication" – even though the investigator did not promise leniency, there is an implicit implication that the subject would face less punishment if his accomplice talked him into committing the crime.

However, the authors do point out that, "*because our findings are based on inferences drawn by college students, relatively uninvolved but highly educated observers, it remains to be seen whether similar inferences are drawn by real crime suspects*."

[Saul Kassin and Karlyn McNall "Police Interrogations and Confession: Communicating Promises and Threats by Pragmatic Implication," Law and Human Behavior (1991)]

The courts reject this principle of pragmatic implication:

"The most important decision in all cases is to look for a quid pro quo offer by interrogators, regardless of whether it comes in the form of a threat or a promise." *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38

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