

Preparing to Testify in Confession Cases

Preparing to Testify in Confession Cases (Parts One and Two)

In Part One of this Investigator Tip, we will highlight the content of an article written by Attorney Deja Vishny * entitled, *Cross-Examining Police in False Confession Cases* (WISCONSIN DEFENDER Winter/Spring 2008, Volume 16, Issue 1) in which she outlines how a defense attorney should prepare for the cross-examination of the interrogating officers, detailing what questions should be asked and what issues should be raised.

In Part Two we will discuss several strategies that she offers for attorneys to get potential evidence, including confessions, against their client suppressed. Her book, **Suppressing Criminal Evidence**, takes the reader through the suppression litigation process, step by step, from the initial client interview to drafting the motion and the hearing, including the procedures to follow to get their client's confession suppressed.

Part One

Preparing for Cross

In preparing to cross-examine the interrogating officers, it is important to marshal all of the data gathered in the recording, motion hearing, interrogation training records, records of police discipline, your client's version, and whatever other sources you have to prepare the cross-examination. Having an accurate transcript of the entire interrogation process is an absolute must! It can take an outstanding secretary about eight hours to transcribe one hour of a recording. You cannot rely on simply having your secretary or a court reporter transcribe the tape and plan to review it a few days before trial. You must carefully review the recording and transcript together to make sure the transcript is as complete and accurate as possible. Since sound quality may be very poor, this may require multiple listening sessions in order to point out corrections to the transcriber, who must then re-listen to the tape with the corrections in order to certify its accuracy.

Once you have the transcript you can use it to prepare your cross examination. Count up the number of times your client denied committing the offense. Police can no longer get away with testifying that they don't know, or just a few, when there are in fact many denials. Other details of the interrogation should also be analyzed in their totality: the number of times the police cut off or interrupted the client's denials by telling the client they didn't believe them, how many times they told the client they had a strong case, the false evidence ploys, explicit and implicit

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claims that confessing would be helpful, number of references to what the DA or court will do and how the client could only help himself by making admissions. Be sure you are prepared to exactly document what facts the police revealed to the client about the case that became the foundation of the false confession. Familiarize yourself with the exact questions asked: how many times did the police ask leading questions that implied or suggested the “correct” answer or gave the client a few options to select from.

You will want to get these points across smoothly in your presentation before the jury. As you prepare your cross, be ready to impeach the detective on every point you wish to make. You must know the exact start and end time of each portion of impeachment. It is best to prepare individual sound files of each bit of impeachment that can be replayed in court for a seamless cross examination. Because the recordings are difficult to understand for the uninitiated ear, each of these sound bites should be accompanied by a separate transcript with enough copies available for the jury to read along.

Cross-examination occurs in chapters. Here you want to create chapters to show tell the story of the interrogation and how it elicited a false confession.

The cross-examination must be done in pinpoint fashion, asking only precise leading questions that will not leave room for the detectives to maneuver in. Of course, most detectives will try to wiggle out of direct answers, but you will have the tape to impeach them (as well as the transcript of the pretrial motion hearing).

The goal of the trial cross-examination is to persuade the jurors that the police interrogation techniques were able to overcome an innocent’s person resolve and make them think it was in their best interest to give a confession to a crime they didn’t commit. The prosecutor will have presented the interrogation as an “interview” where the police politely asked questions and the client came forward with the true story of his guilt in the case. You must remove the sparkle from this story and establish that this is a fictional version of what occurred in the interrogation room.

Active listening during cross is crucial to success. Police are trained witnesses and are used to giving general, vague and evasive answers to lawyers’ questions. Many times lawyers are too busy sticking to a pre-planned agenda and are ready to move on, only to later realize they haven’t really pinned down the detective or achieved their goal. Listen carefully, be prepared to depart from your agenda and ask follow- up questions to enforce the point you are trying to make.

Crossing the Detectives

It is best to begin with generalities. A few general questions about the detective’s training will pin down that he adheres to what he as taught. Only after getting agreement that they heed and utilize training in all aspects of police matters (e.g. specifics such as crime scene investigation, use of service weapons and witness interviewing) should you obtain agreement that they are trained in the interrogation of suspects. While this seems like a very boring way to begin a cross examination, it can become useful at a later point for impeachment. Many detectives deny using the Reid technique or other methods as a means to induce a confession, claiming that they “learned interrogation through on-the-job experience” or have “developed their own style”.

Jurors will be skeptical of the detective who claims to pay close attention and make use of training in every subject but claims to ignore or neglect his training during the interrogation of a suspect he wrongfully concludes is guilty. At the same time, it can open an opportunity to argue that the detective is a rogue cop, failing to follow safeguards that the training has put into place to avoid obtaining a false confession.

Trial counsel should know exactly what role the detective played in the overall case investigation. You must establish that the detective had knowledge about the case and thus would have been able to inform the innocent suspect of enough facts to get a false confession. The best way to do this is review in detail exactly what the detective knew about the case and what his or her source of information was. Later, when questioning the detective about overcoming your client's denials, you can talk about how the police told the client that they had a "strong" case, and use the details of their knowledge.

You may want to then get the detective to state that prior to beginning the interrogation, he or she had an opinion that your client was guilty. You must be careful with this question; if there is any suppressed or inadmissible evidence in the case, you will not want to ask this because it can and undoubtedly will open the door to the admission of such evidence. If all of the known facts are going to be admitted, then the detective will probably deny having this opinion and answer the question by stating that they wanted to "find out the truth". This is a good opportunity to launch into your questions detailing how the truth couldn't be that the client was elsewhere, a victim of mistaken identity, framed by a lying snitch, or whatever your defense may be. When the detective agrees that he thought none of these possibilities were true he will look less believable to the jury because he refused to answer your question in a straightforward manner.

Create chapters on the overall picture of the criminal investigation as it existed before the interrogation. Point out what the "perfect" case would look like and contrast it with the case that the police actually had at the time. For example, if there is an eyewitness to the crime who was not able to identify your client in a photograph, question the detective about this. Question them about the discrepancy between what the witness' original description of the perpetrator and your client's physical appearance, or the different descriptions of the perpetrator or the event by the various witnesses. Discuss the lack of physical or documentary evidence, how a gun wasn't recovered, there was no DNA or fingerprints, etc. Ask about the credibility deficiencies of witnesses who were on drugs, have criminal records or motives to falsely accuse your client of the crime. Try to get the detective to agree that the pre-interrogation case against your client was weak; even if the officer won't agree with you, the jury will get the point.

Question the detective about the difference between an interview and an interrogation. Since these are terms of art in police training and practice, the witness can acknowledge that at some point he conducted an interrogation, not an interview of the client. This will make the prosecutor's repeated references to what happened when the detective "interviewed" the client seem disingenuous.

Paint a word picture of the interrogation room, using the exhibits you have prepared so the jury can visualize it. This is a good time to break out a roll of masking tape and recreate the exact measurements of the room in front of the jury.

After setting the scene, question the detective about the total control the police maintained over this environment: only they could lock and unlock the door, provide food and water to your client, let him use the bathroom, let him take medication, let him communicate with the outside world (which they of course did not permit), leave the room or go to sleep. Detail how the police physically positioned themselves vis-à-vis the client, their movements during the interrogation, and how and why they touched the client. Ask about their tone of voice and how it varied during the interrogation. Be sure to elicit a description of the extent to which the client was held incommunicado from the outside world; if the recording reveals that the client wanted to make a phone call, point out how the police deferred the request until after the interrogation was over.

Make the amount of time come alive by figuring out the total interrogation time of your client in seconds. Have the detective take a watch with a second hand and wait in silence until a minute has passed. A minute of dead time in the courtroom will seem to go on forever and you can use this to vividly illustrate how much time was spent interrogating your client.

You can point out that the police have been trained in the legal elements of crimes and defenses and are able to tailor their questions to obtain details that can match a crime or a particular lesser offense.

If the detective ever did undercover work during the course of his or her career, you may also want to cross examine them about how successful their work was in that area. This can be used to later point out that they were successful in deceiving your client when they adopted a phony empathetic persona or presented false information to him in the interrogation.

Detail each phase of the Reid or whatever technique was used in the interrogation. Point out how many times the client denied the crime and how did they handle the denials. What evidence did the detectives tell the client they had against him? Describe any specific evidence ploys such as bringing in a thick folder claiming it was the evidence in the case or state that they had eyewitnesses? Note any claims of DNA or other “foolproof” scientific evidence and whether the police engaged in puffery or outright deceit. The recording may reveal that the detectives posed the existence of such evidence in hypothetical terms, such as “what would you say if I told you that your DNA and blood from the scene is being tested at the crime lab right now”. This is a move right from the Reid playbook; it should be pointed out that this method is used so detectives can deny in court that they lied to the client about non-existing evidence.

Explore the interrogation themes. If the detective claims he doesn't know what you mean by this, briefly explain what a theme is and ask if he or she used it. There are specific themes recommended for various crimes that can be found in interrogation training materials or are published by Reid & Associates and other trainers. Go through these themes and give an accounting of how the detective used these in the interrogation process. Point out that these themes are designed to make the client believe that if they confess they will be prosecuted on a less serious charge than what the evidence looked like without the confession. The detectives may deny this was the purpose of the utilized themes. Use specifics from the recordings to show the disingenuousness of this response.

If the detectives deny deliberately using bait questions or themes in the interrogation, this is a good place to use their training materials as an exhibit. Point out the detective earlier told the jury that training was important. Show how the training they received correlates to the exact techniques they used in the interrogation room. Demonstrate to the jury that the entire interrogation was manipulated to obtain a confession from your client

What you are essentially trying to get the interrogators to tell the jury is how they deliberately moved your client from a denial to an admission of involvement in the crime. Often the recording will reveal that detectives told the suspect to “tell the truth” or they just wanted to get the truth. Point out in cross that they had already decided that the truth could not be that your client wasn’t involved, had an alibi, was an innocent bystander, or whatever facts point to innocence in your case.

Breaks during interrogation are almost always for the benefit of the interrogators, not the client. Discuss what particular strategies going into the interrogation and what the detectives did during breaks to strategize the interrogation because the client was not making any admissions up to that point.

If your client has particular vulnerabilities such as mental or physical health issues or developmental disabilities or is a juvenile, you should explore what the police knew of these. Point out their lack of special education or training in this area and how they failed to alter their standard interrogation operating procedures to take the problem into account.

After completing the cross chapters on how the police obtained your client’s admission of involvement, explore how they developed the post-admission narrative. Use specifics from the recording to show about how they led the questioning of the client. If there are points in the tape where the client claimed one version and they informed him that things occurred differently or that this explanation was “not the truth” point this out. You must show the jury in blow-by-blow detail how the police shaped the statement.

If the police obtained a written summary confession after developing the post-admission narrative be sure to take this on in the cross examination. The written summary will undoubtedly fail to document the many twists and turns that occurred during the questioning. You must show the jury that the statement is a product of what the police chose to write; they decided to write out the statement at a point they felt would suit their needs and failed to truthfully reflect the actual conversation that took place in the interrogation room. Most written statements have cross-outs which are then “corrected” and initialed by the client. This is another technique straight from the Reid training. The detectives will probably claim this was not manipulated by a genuine error on their part. Show the jury that the cross outs are not true errors, but deliberate errors on the part of the detectives to get the client to initial various pages. If the crossed out words are correctly used or spelled and the substitute language is erroneous; this can also be used to impeach this claim.

Often police investigations come to a halt once a confession is obtained from the suspect. Point out the lack of investigation to corroborate the confession and that good police work would entail

verification of a confession. You may want to reinforce this by questioning other detectives in the case who were not involved in obtaining the confession.

All good cross-examinations should end on an important point you want to drive home to the jury; in the case of a false confession, the statement usually deviates significantly from the true facts or physical evidence in the case. This is a key fact you must emphasize that to the jury. Contrast each false detail with the known evidence to show that the client did not commit the crime but was manipulated during the interrogation process. Reinforce this by playing the recor

In addition to the above in her book, **Suppressing Criminal Evidence**, she includes the following material as potential areas of inquiry when examining the investigators:

- Did the client specifically state he wanted a lawyer?
- Did he name a particular lawyer or ask for a public defender?
- Did he ask how and when he could get a lawyer? How did police respond?
- Was he told he could have a lawyer, but he would have to wait to see one until he was brought to court or transferred from a holding facility to a jail?
- Was he told that getting a lawyer would mean that the prosecutor would review the case without the client's statement because the client could not have a lawyer until after he was charged?
- Was he told this would disadvantage him with the prosecutor?
- If he didn't ask for a lawyer, did he tell the police he didn't want to talk anymore?
- What words did he use when he said this?
- Did he specifically say he didn't want to answer questions at all, refuse to answer on a particular topic or refuse to answer particular questions?
- Did he ask to go back to his cell, to go home, or to make a phone call before answering any more questions?
- How did the police respond to his requests?
- Did they use delaying tactics or offer to stop questioning him about the crime and, instead, to talk about another subject?
- Did your client try to disengage from police during the interrogation by looking down, trying to tune them out, closing his eyes. or any other method of self-distraction?
- How did the police respond to this?
- Did they move closer to your client? touch him at all or tell your client to look at them directly?
- Did your client assert his rights at the outset or sometime in the idle of the interrogation? If it wasn't at the beginning, why did he initially agree to talk and then decide to try to stop the questioning at that particular point?

If police did honor your client's rights and talked to him again later, ask the same questions of your client enumerated above. Find out if the subsequent attempt was made by a different set of officers. Was your client questioned regarding the same matters?

Ask whether your client was ever handcuffed, told he was free to go or ever asked to leave and whether police transported him to a place to be interrogated.

Was the door to the interrogation room open, closed or locked not only during questioning, but during any times the officers were not in the room and your client was there alone? How were police officers positioned relative to the door in the interrogation room?

Small details are important; for example, whether the client was able to use the bathroom at will or was escorted to and from the bathroom and had access to food and water whenever he wanted.

Whether the client was able to use a phone or keep his cell phone with him is also crucial information. Find out if the client came into the police building using public entrances and elevators or stairwell.

Your client's activities in the hours before his arrest may have a bearing on his ability to withstand a psychologically coercive interrogation. Find out your client's activities in the 24 hours leading up to the arrest and interrogation.

Obtain details regarding how much sleep the client got the night before being questioned; what and when the client last ate; and whether the client consumed any drugs, medications, or alcohol in the hours before the interrogation.

There also may be segments of the police interrogation that are not recorded. Even if this seems benign, such as a conversation while being escorted to and from the interrogation room, find out what was said. If the tape was turned off for any reason, try to recreate what occurred during unrecorded portions.

If the recording is audio only, ask your client about movements by the police during the interrogation.

Sometimes there will be an initial interrogation during which your client asserts the right to counsel or the right to remain silent; the interrogation is terminated; then, later, there is another recorded interrogation. At the outset of the second interrogation police will often confirm on tape that your client has now changed his mind and wants to talk to them. If so, find out what led up to the later interrogation session. Who reinitiated contact? How and where did it happen? Was it a result of your client asking police questions about his case? What were those questions, and were they really about his case or did he ask what was going to happen to other people who might have been arrested or questioned?

Find out if your client was interviewed at all before the Miranda warnings were read to him; frequently, police will ask questions about a client's family or personal history before reading him his rights. If so, ask how long this took and the specifics of what was discussed.

Did your client ask any questions before receiving Miranda warnings, and how did the police respond?

How were the Miranda rights read to your client?

Did the officers pause after reading each right to ask the client if he understood that right or did they read the rights all at once?

Was a card used or did they recite the rights from memory?

Did they ask him if he wished to waive his rights individually after each segment, or only once at the end of the entire reading?

Did the police present Miranda warnings to the client in a way that implied the client would be better off talking to the police?

If your client is a juvenile, has a low educational level, has mental health issues or is developmentally disabled, did the police ask him to explain the meaning of each of the rights in his own words?

Did your client sign a written waiver or just give an oral waiver?

Ask your client if, before the police questioned him regarding the allegations, they questioned him regarding his personal history and background. Did they attempt to tease out personal details that they later referred to when questioning him about the alleged offense? Did the police ask open-ended questions in a mild tone of voice and then later change to a more accusatory tone when questioning your client about the offense? Were Miranda rights read to your client before or after questioning him about his personal background and other non-offense-related topics?

Did the police ask your client not only for his version of what occurred but also question him about what should happen to the person who committed the crime or if the perpetrator deserved a second chance? Did they ask your client if he ever thought about or fantasized about committing the offense? At what point did they say that if a person thinks the perpetrator of the crime should be treated leniently or fantasizes about the crime, that is an indication of guilt?

Part Two

In many instances, when the defendant has confessed to the crime that they committed, they will often claim before or during the trial that the investigators coerced the confession, and undoubtedly, the defense will move to suppress the confession.

In her book, **Suppressing Criminal Evidence** Deja Vishny* offers a number of strategies for attorneys to get potential evidence, including confessions, against their client suppressed. The book takes the reader through the suppression litigation process, step by step, from the initial client interview to drafting the motion and arguing at the hearing. Here is an abbreviated Table of Contents:

Chapter 1 Early Steps in the Case

Chapter 2 Motion Practice

Fourth Amendment Searches and Seizures

Chapter 3 Fourth Amendment Primer

Chapter 4 Searches of the Home

Chapter 5 Probable Cause and Reasonable Suspicion: Arrests, Seizures, Stops and Frisks

Chapter 6 Motor Vehicle Searches

Chapter 7 “Special Needs” and Other Fourth Amendment Searches

Chapter 8 Search and Seizure of Electronic Devices

Chapter 9 Police Interrogation Practices

Chapter 10 Litigating Miranda Rights
Chapter 11 Suppressing Involuntary Confessions
Chapter 12 Other Grounds for Suppressing Confessions
Chapter 13 Eyewitness Identification

Given the above, once the prosecutor and investigator understand the strategies that the defense may employ in challenging the confession, they will be better prepared to respond to the challenges and to testify about the circumstances and procedures the investigator followed in obtaining the confession.

Here are some of the recommendations that Deja Vishny offers in her book regarding the suppression of the subject's statements or confession:

Questions re: Motions to Suppress Statements

- **Governing Principles**

Motions to suppress statements generally require a lengthier interview than 4th Amendment litigation. Taking a thorough social history is essential to your determination of whether to bring a motion challenging your client's ability to freely and voluntarily waive his Miranda rights and whether his statements were voluntary or the product of police coercion.

The nature of your client interview will vary depending on whether or not the police interrogation was recorded. If police questioning was not taped, you will have to painstakingly recreate what happened in the interrogation room. The same interview will be required if the police only recorded the client's confession, but did not preserve the interrogation.

This should be done as early as possible in the case, before your client's memory for the details becomes hazy. It is also helpful to ask your client to write out a timeline or account of what occurred in the interrogation before your interview.

- **Questions to Ask in Every Case**

Custodial Status

Questions concerning your client's custodial status at the time of interrogation are particularly important in cases where the police claim your client was not under arrest. Ask whether your client was ever handcuffed, told he was free to go or ever asked to leave and whether police transported him to a place to be interrogated.

Was the door to the interrogation room open, closed or locked not only during questioning, but during any times the officers were not in the room and your client was there alone? How were police officers positioned relative to the door in the interrogation room?

Small details are important; for example, whether the client was able to use the bathroom at will or was escorted to and from the bathroom and had access to food and water whenever he wanted.

Whether the client was able to use a phone or keep his cell phone with him is also crucial information. Find out if the client came into the police building using public entrances and elevators or stairwell.

Client's Activities Prior to Interrogation

Your client's activities in the hours before his arrest may have a bearing on his ability to withstand a psychologically coercive interrogation. Find out your client's activities in the 24 hours leading up to the arrest and interrogation. Obtain details regarding how much sleep the client got the night before being questioned; what and when the client last ate; and whether the client consumed any drugs, medications, or alcohol in the hours before the interrogation.

- **When the interrogation was recorded review the entire tape with your client**

Whenever you don't understand something on the tape, stop it and ask your client to clarify what was said. You also want to find out what your client's thought process was as the questioning proceeded. If the police persuaded your client to change his version of what occurred, ask why he did so at each point in the process. As you review what the police did to persuade your client to confess ask how he interpreted what the police were telling him as the process went on. If your client hesitates before answering questions, looks down, avoids giving answers, cries, or exhibits any unusual behavior during the interrogation, ask why he reacted in that manner.

There also may be segments of the police interrogation that are not recorded. Even if this seems benign, such as a conversation while being escorted to and from the interrogation room, find out what was said. If the tape was turned off for any reason, try to recreate what occurred during unrecorded portions.

If the recording is audio only, ask your client about movements by the police during the interrogation.

Sometimes there will be an initial interrogation during which your client asserts the right to counsel or the right to remain silent; the interrogation is terminated; then, later, there is another recorded interrogation. At the outset of the second interrogation police will often confirm on tape that your client has now changed his mind and wants to talk to them. If so, find out what led up to the later interrogation session. Who reinitiated contact? How and where did it happen? Was it a result of your client asking police questions about his case? What were those questions, and were they really about his case or did he ask what was going to happen to other people who might have been arrested or questioned?

- **Questions to Recreate an Unrecorded Interrogation**

Miranda Warnings

Find out if your client was interviewed at all before the Miranda warnings were read to him; frequently, police will ask questions about a client's family or personal history before reading him his rights. If so, ask how long this took and the specifics of what was discussed.

Did your client ask any questions before receiving Miranda warnings, and how did the police respond?

How were the Miranda rights read to your client?

Did the officers pause after reading each right to ask the client if he understood that right or did they read the rights all at once?

Was a card used or did they recite the rights from memory?

Did they ask him if he wished to waive his rights individually after each segment, or only once at the end of the entire reading?

Did the police present Miranda warnings to the client in a way that implied the client would be better off talking to the police?

If your client is a juvenile, has a low educational level, has mental health issues or is developmentally disabled, did the police ask him to explain the meaning of each of the rights in his own words?

Did your client sign a written waiver or just give an oral waiver?

Assertion of Right to Remain Silent and Counsel

Go beyond simply asking your client if he asked for a lawyer or told the police he didn't want to talk to them.

If that is the case, find out exactly how he communicated this to the police and how the police responded to him.

Ask the following:

Did the client specifically state he wanted a lawyer?

Did he name a particular lawyer or ask for a public defender?

Did he ask how and when he could get a lawyer? How did police respond?

Was he told he could have a lawyer, but he would have to wait to see one until he was brought to court or transferred from a holding facility to a jail?

Was he told that getting a lawyer would mean that the prosecutor would review the case without the client's statement because the client could not have a lawyer until after he was charged?

Was he told this would disadvantage him with the prosecutor?

If he didn't ask for a lawyer, did he tell the police he didn't want to talk anymore?

What words did he use when he said this?

Did he specifically say he didn't want to answer questions at all, refuse to answer on a particular topic or refuse to answer particular questions?

Did he ask to go back to his cell, to go home, or to make a phone call before answering any more questions?

How did the police respond to his requests?

Did they use delaying tactics or offer to stop questioning him about the crime and, instead, to talk about another subject?

Did your client try to disengage from police during the interrogation by looking down, trying to tune them out, closing his eyes. or any other method of self-distracted?

How did the police respond to this?

Did they move closer to your client? touch him at all or tell your client to look at them directly?

Did your client assert his rights at the outset or sometime in the middle of the interrogation? If it wasn't at the beginning, why did he initially agree to talk and then decide to try to stop the questioning at that particular point?

If police did honor your client's rights and talked to him again later, ask the same questions of your client enumerated above. Find out if the subsequent attempt was made by a different set of officers. Was your client questioned regarding the same matters?

- ***Pre-Offense Interview***

Ask your client if, before the police questioned him regarding the allegations, they questioned him regarding his personal history and background. Did they attempt to tease out personal details that they later referred to when questioning him about the alleged offense? Did the police ask open-ended questions in a mild tone of voice and then later change to a more accusatory tone when questioning your client about the offense? Were Miranda rights read to your client before or after questioning him about his personal background and other non-offense-related topics?

Did the police ask your client not only for his version of what occurred but also question him about what should happen to the person who committed the crime or if the perpetrator deserved a second chance? Did they ask your client if he ever thought about or fantasized about committing the offense? At what point did they say that if a person thinks the perpetrator of the crime should be treated leniently or fantasizes about the crime, that is an indication of guilt?

Ms. Vishny's Description of the Reid Technique

In her book and published articles Ms. Vishny offers a very distorted representation of the Reid Technique. Here are some examples:

Example 1

“The Reid Behavior Analysis Interview (BAI) is a short (20-45 minutes) non-accusatory interview used to determine if the suspect is “truthful”. The BAI consists of 17+ “Behavior Provoking” questions and the police interviewer then makes a truthfulness decision based on an assessment of verbal and non-verbal responses to questions..... The Reid School claims that the interviewer can evaluate the verbal and non-verbal answers and accurately determine if the subject is lying.”

Response:

The Reid interview process – the BAI – is a non-accusatory, non-confrontational information-gathering conversation. At the outset of the interview, the investigator must be sure to comply with all legal requirements, such as the appropriate advisement of rights. It is imperative that throughout the interview, the investigator maintains an objective, neutral, fact-finding demeanor.

The investigative interview should consist of three types of questions:

- questions about the subject's background
- questions that are relevant to the specific issue that is under investigation
- behavior-provoking questions

The background questions generally focus on biographical information about the subject, which may include questions about the subject's employment activities or if the subject is a student, their school activities; and, they may include some casual conversation about recent events (a news item, a sports event, a weather situation, etc.). The purpose of spending several minutes on these topics is to establish rapport with the subject, to acclimate the subject to the interview environment, and, most importantly, to establish a behavioral baseline – the subject's normal behaviors (posture, eye contact, use of illustrators, verbal characteristics, etc.).

The most important element in evaluating a suspect's potential culpability in committing a crime or an act of wrongdoing is the content of their statement compared to the case facts and evidence. This underlying principle is almost always ignored by social psychologists, defense attorneys, or academicians who are critical of interrogation techniques in general and the Reid Technique specifically. The essential element to evaluate during an investigative interview is whether or not the case facts and evidence support the subject's story or contradict what the subject has stated.

The investigative questions will deal with the issue that is under investigation. One of the first things the investigator should do is ask the subject an open-ended question that invites the subject to tell their story.

- What happened?
- What did you see or hear?
- What were your activities on the day in question?

After the subject relates their initial story or version of events, the investigator will then ask a series of questions to develop additional details, as well as questions to clarify the who, what, when, where, why, and how of the incident that is under investigation. During the interview, the investigator should attempt to resolve any inconsistencies or contradictions that may have surfaced from the interviews of other subjects or from the investigative information.

If the subject offers an alibi for the period in question, every effort should be made to substantiate the alibi.

See our Investigator Tip, “**The Reid Behavior Analysis Interview: Part 1: Do the Case Facts and Evidence Support the Subject's Story? Part 2: The Interview Structure and the Value of Behavior Symptom Analysis.**” for a detailed description of the Reid BAI and the value of the investigative questions.

In our book, *Criminal Interrogation and Confessions*, we devote over 100 pages to discussing the investigative questions that should be asked during the interview process.

It is interesting to note that Ms. Vishny never mentions that investigative questions are asked during the BAI.

The third type of question that we utilize in the interview is called a behavior-provoking question (BPQ). BPQs are questions that most truthful individuals answer one way, while deceptive individuals often answer completely differently. The investigator will present these questions as casual inquiries.

Here is an example of two behavior-provoking questions from a staff member who is being interviewed regarding a child abuse investigation at a daycare facility:

The THINK question: “John did you ever think about engaging in sexual activities with any of the children here at the daycare facility?”

ANSWER: “I think that everyone working here has thoughts like that.”

The PUNISHMENT question: “Jim, what do you think should happen to a staff member who has engaged in sexual activities with any of the children?”

ANSWER: “Well I guess it depends on how often it happened.”

The Reid investigative interview process very obviously involves much more than the disingenuous characterization that it is just 17 behavior-provoking questions.

Example 2

Ms. Vishny states that Reid teaching investigators to evaluate the subject’s verbal and nonverbal behavior for indications of truthfulness or deception is considered junk science by other researchers.

Response:

It is accurate to say that the majority of the research studies have shown that evaluators were no better than chance at determining the truthfulness of a subject based on their verbal and nonverbal behaviors. However, when you examine the “research” studies, there are numerous deficiencies, including the following:

- The subjects (students/prisoners) had low levels of motivation to be believed or to avoid detection... minimal consequences

- The interviews of the subjects were not conducted by investigators trained in investigative interviewing techniques
- The studies did not employ the type of structured interview process that is commonly utilized by investigators in the field
- In most studies, there was no attempt to establish a behavioral baseline for each subject to identify changes from their normal behavioral pattern as they answered investigative questions
- The research was based on the faulty premise that there are specific behavior symptoms that are unique to truth or deception...in fact, there are no behaviors unique to truthfulness or deception
- There was no consideration given to the various factors that can affect a person's behavioral responses, such as
 - Age/maturity
 - Cultural influences
 - Mental capacity
 - Emotional and psychological stability
 - The subject's physical condition at the time of the interview (drugs, alcohol, medical issues, etc.).
- Furthermore, in most research studies the interview is evaluated in a vacuum. In the real world, the investigative interview of a subject takes place in the context of an investigation. For example, by the time the investigator interviews a suspect they may already have developed information about the subject's relationship with the victim, their whereabouts at the time of the crime, their financial situation, and/or other relevant background information.

In the Reid Technique, we teach that there are several rules that need to be followed in the evaluation of a subject's behavior symptoms.

- Establish the subject's normal behavioral pattern/baseline and then look for changes from that norm or baseline
- Read all behavioral responses across all three channels of communication: verbal, paralinguistic, and nonverbal
- Read behavioral clusters - the overall behavioral pattern - not single, isolated observations
- Consider timing and consistency for all nonverbal responses
- Always evaluate behavior symptoms in conjunction with the case evidence and facts
- Always evaluate the potential impact of possible factors such as the subject's mental capacity, psychological stability, maturity, culture, and physical well-being on their behavior symptoms

If these rules are followed, investigators can be reasonably accurate in assessing a subject's credibility. Unfortunately, these assessment rules were not followed in the research studies.

Example 3

Ms. Vishny describes one of our interview questions – the Bait question – as a question that involves the use of a claim of real or false evidence.

Response:

We teach in our training programs and written materials that the investigator should not lie to a suspect about the presence of incriminating information or evidence during the investigative interview (the BAI). During the BAI we do not make any statement to the subject that we have evidence implicating them in the commission of the crime (unless of course, we do have such evidence).

The bait question is a non-accusatory question that implies the *possibility* of developing incriminating evidence. For example, in an armed robbery case in which the subject has denied being in the area where the robbery occurred, the bait question may be phrased as follows; “John the police are currently collecting videos from the stores and apartment buildings in the area where this robbery occurred. When they review the videos, is there any reason that any of them will show you in the immediate area at the time of this robbery last Saturday night?”

Example 4

Ms. Vishny says that during the interrogation process, the interrogator will tell the suspect that they have an airtight case against him...but they suggest the belief that if they hear the suspect’s version of events, it will minimize the suspect’s culpability.

Response:

In the above statement from Ms. Vishny there is implied leniency in the statement “it will minimize the subject’s culpability” We teach that the core principles of the Reid Technique include the following:

- Always treat the subject with dignity and respect
- Always conduct interviews and interrogations in accordance with the guidelines established by the courts
- Do not make any promises of leniency or threats of harm or inevitable consequences
- Do not conduct interrogations for an excessively long period of time
- Do not deny the subject any of their rights
- Do not deny the subject the opportunity to satisfy their physical needs
- Exercise special cautions when questioning socially immature juveniles or individuals with mental or psychological impairments

Courts consistently find it acceptable for an investigator to minimize the moral seriousness or psychological consequences:

- 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...”

- 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. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38
- In *Gomez v. State* the US District Court stated the following:
...Investigators can suggest the defendant may not have been the actual perpetrator or may not have intended a murder victim to die.
.....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."
- 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 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."

To reiterate, minimizing the moral seriousness of the suspect's behavior or the psychological consequences of their behavior are acceptable techniques, but minimizing the legal consequences of the subject's behavior or threatening inevitable consequences or more severe punishment if they do not confess is clearly unacceptable.

Example 5

Ms. Vishny describes that during the interrogation in the Reid process, the investigator uses Maximization and Minimization techniques. The interrogator will imply that if the suspect will simply confess and adopt the suggested mitigating circumstances, then the consequences to him will be less severe than if he does not.

Response:

Our training is very specific that the excuses (interrogation themes) that the investigator discusses should minimize the moral seriousness of the subject's crime by offering psychological excuses for the crime but not removing legal consequences. Consider the following excerpts from our book *Criminal Interrogation and Confessions*:

“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.”

“..... 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.”

“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.”

And as previously stated, we teach investigators not to make any promises of leniency or threats of harm or inevitable consequences.

Example 6:

Ms. Vishny describes that during the interrogation “The Reid Official Explanation” of theme development is that the interrogator is to express a supposition about reasons for the crime’s commission whereby the suspect is offered a moral excuse (affix moral blame on the victim, accomplice, circumstances, etc.) so he can accept his conduct and admit to the crime. The theme centers on how the interrogator believes that the suspect’s actions are not so bad and juxtaposes it against more aggravated conduct.

Response:

What Ms. Vishny fails to consider (and perhaps fails to understand) is that according to criminal psychologists, studies indicate that the majority of criminals either make excuses for or attempt to justify their actions.... "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.

“I didn’t really hurt anybody,” “They had it coming to them,” and “I didn’t do it for myself” are, as Sykes and Matza point out, examples of neutralizations. Neutralizations, also called rationalizations, are defined as justifications and excuses for deviant behavior.

"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.

Example 7

Ms. Vishny erroneously states that Reid acknowledges that innocent people confess in the context of the Reid Technique and references one of our Investigator Tips, “The Importance of Accurate Corroboration within a Confession” August 2004. As the source of this statement.

Response:

What we stated in the referenced Investigator Tip was that innocent people can be coerced into confessing when threatened, promised leniency, denied their rights, denied the opportunity to satisfy their physical needs, etc. We pointed out the importance of developing corroborating information to substantiate the authenticity of the subject’s statement.

Here are several articles/Investigator Tips on www.reid.com that will be helpful when dealing with “false confession experts” and the issues related to testifying in a confession case.

The Reid Technique is a Non-confrontational, Non-accusatory Process

False Confessions - the Issues to be Considered

The Reid Behavior Analysis Interview: Part 1: Do the Case Facts and Evidence Support the Subject's Story? Part 2: The Interview Structure and the Value of Behavior Symptom Analysis

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?

“I did it” is that a valid statement of guilt?

Responding to a False Confession Expert in Your Case

What Do False Confession Experts Say in Their Reports?

The Disingenuous Testimony from Social Psychologists About the Reid Technique

A General Outline of Richard Leo's Testimony on False Confession Issues and Reid Responses

Reid Policy on the Use of Deception During an Interrogation

What False Confession Experts Say About the Reid Technique and Our Responses

Clarifying Misrepresentations About Interrogation Techniques (updated May 2023)

The Truth About the Research Social Psychologists Use as the Basis for Testimony Regarding False and/or Coerced Confessions

Principles of Practice: How to Conduct Proper Investigative Interviews and Interrogations

What Questions Should be Asked to Determine the Voluntariness and Validity of a Subject's Confession?

