

The Courts: Unacceptable Investigator Interrogation Behaviors

Over the last 20 years we have published numerous court decisions on interrogation issues in an effort to keep our audience up to date with the courts' views as to acceptable and unacceptable interrogation behaviors. In this article we will specifically describe a number of decisions in which the courts identify behaviors that they view as coercive and/or unacceptable. Before detailing these court decisions we have listed the Reid Core Principles and Best Practices that all investigators should follow and that we teach at all of our training courses and have published in our books.

The Core Principles of the Reid Technique are as follows:

- 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 lengthy 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 juveniles or individuals with mental or psychological impairments

Within any established procedure (medical, therapeutic, manufacturing, education, engineering, etc.) there are optimum or ideal conditions under which the probability of success is maximized. These optimum procedures are called "best practices." Because of uncontrolled or unanticipated events, it is not always possible to apply best practices within a procedure in every instance. However, a practitioner should always strive to utilize best practices when feasible.

The successful interrogation is one in which (1) the suspect tells the truth to the investigator and, (2) persuasive tactics used to learn the truth are legally acceptable. With these goals in mind, the following are a list of the **Reid Technique Best Practices** for applying the Reid Nine Steps of Interrogation, along with a brief discussion of each practice:

Conduct an interview before an interrogation. Absent a life-saving circumstance the investigator should conduct a non-accusatory, non-confrontational interview before engaging in any interrogation. During the interview the investigator can establish rapport with the suspect, assess their credibility, develop investigative information and establish a behavioral baseline. Also, during the interview the suspect is more likely to reveal information that can be used to develop an interrogation strategy.

Conduct an interrogation only when there is a reasonable belief that the suspect is guilty or withholding relevant information. The belief that a suspect is guilty of a crime or is withholding relevant information may be based upon investigative information, evidence, the suspect's demeanor, or verbal responses to interview questions. The investigator should avoid conducting an accusatory interrogation as a technique to separate innocent from guilty suspects.

Consider a suspect's behavior in conjunction with case facts and evidence. The assessment of a suspect's credibility during an interview will be enhanced and likely more accurate if it is based not only on the suspect's verbal and nonverbal behavior, but also on case facts (the suspect's established opportunity, access, motive and propensity to commit the crime) as well as forensic or testimonial evidence.

Attempt to verify the suspect's alibi before conducting an interrogation. The most efficient means to prove a suspect's innocence is to verify his or her purported alibi. Conversely, when it is determined that the suspect provided a false alibi, this finding offers support for the suspicion of the suspect's probable guilt.

There should be no barrier between the investigator and suspect within the interrogation room. A desk or table separating the suspect from the investigator provides the suspect a sense of security and confidence in not having his lies detected. This is obviously undesirable. Rather, the furniture within the interrogation room should be arranged in such a way that the suspect and investigator are facing each other about 4-5 feet apart without any physical barrier between them.

A single investigator should be the lead communicator. While it is often appropriate to have a third person in the room during an interrogation, perhaps as an observer or witness, there should only be one primary investigator communicating with the suspect at a time. A guilty suspect is more likely to offer a voluntary confession to a single investigator who has established a rapport and trust with the suspect. A tactic to be avoided is to have two or three investigators simultaneously bombarding the suspect with themes or alternative questions or working as a "tag team" wearing the suspect down over an extended period of time.

Do not threaten the suspect's well-being or make threats of inevitable consequences. It is clearly improper to threaten a suspect, directly or indirectly, with physical harm or pain. This would include threats directed at the suspect's family members or loved ones in an effort to obtain a confession. Similarly, an investigator should never attempt to falsely convince a suspect that he or she is in a helpless situation and that the only way to avoid an inevitable consequence is by confessing.

Do not offer the suspect promises of leniency. An investigator should not offer the suspect a quid pro quo promise of leniency in exchange for a confession. In other words, there should be no promise that the suspect will receive a less severe punishment if the suspect confesses.

Do not make promises you cannot keep. There are many promises an investigator can make to a suspect which are proper and will not cause a confession to be suppressed. These are promises that can be kept such as including the fact that the suspect cooperated in a written report or a promise not to reveal to coworkers the suspect's confession. However, false promises jeopardize the admissibility of a confession. An example of a false promise is the investigator telling the suspect, "If you confess you can sleep in your own bed tonight," when, in fact, the suspect is taken into custody after confessing.

Do not deny the suspect his legal rights. An investigator is legally obligated to honor a

suspect's rights whether it be a custodial suspect's Miranda rights, a military suspect's article 31 rights or, within the private sector, a union member's rights.

When interrogating a non-custodial suspect, do not deprive the suspect of his freedom to leave the room. The suspect's exit from the interrogation room should not be blocked by positioning the investigator's chair between the suspect's chair and the door. The room should not be locked from the inside (requiring a key to open the door) and the room should not be in an area that requires a key or pass code to exit the building. Finally, the investigator should not make verbal statements implying that the suspect is not free to leave the room, e.g., "You're not going anywhere until we get this clarified!"

Do not conduct excessively long interrogations. In most instances, if the suspect is still adamantly maintaining his innocence and has not made any incriminating statements or admissions after three to four hours of interrogation the interrogation should be re-assessed and possibly terminated.

Exercise extreme caution when interrogating juveniles, suspects with a lower intelligence or suspects with mental impairments. This class of suspect is more susceptible to false confessions and, therefore, the investigator should be cautious in utilizing active persuasion such as discouraging weak denials, overcoming objections or engaging in deceptive practices. Proper corroboration of a confession will be critical with this class of suspect.

When using interrogation tactics involving deception the investigator should not manufacture evidence against the suspect. Courts make a distinction between false verbal assertions, e.g., "We found your fingerprints in her bedroom." which are permissible and manufacturing evidence, which is not permissible. An example of manufacturing evidence is taking the suspect's fingerprints and transferring the prints to an evidence card which indicates that the prints were found in the victim's bedroom.

When a suspect claims to have little or no memory for the time period when the crime was committed the investigator should not lie to the suspect concerning incriminating evidence. While it is not uncommon for guilty suspects to feign memory loss, an overriding concern is an innocent suspect who experiences true memory loss for the time period when the crime was committed. Under this circumstance, if the investigator lies to the suspect about incriminating evidence and the suspect confesses, it may be argued that presenting false evidence caused an innocent suspect to believe that he had committed the crime.

Do not reveal to the suspect all information known about the crime. A legally admissible confession should include corroboration. One form of corroboration is information only the guilty suspect would know, e.g., the method of entry in a burglary, a memorable statement made to a victim, the denomination of money stolen, etc. When interviewing a suspect or offering information to the news media, the investigator should carefully guard this protected information so that the only person who would know it would be the investigator and the person who committed the crime.

Attempt to elicit information from the suspect about the crime that was unknown to the

investigator. The best form of corroboration is information not known to the investigator about a crime that is independently verified as true. Examples of independent corroboration include the location of a knife used to kill the victim, where stolen property was fenced or the present location of a car the suspect stole.

The confession is not the end of the investigation. Following the confession, the investigator should investigate the confession details in an effort to establish the authenticity of the subject's statement, as well as attempt to establish the suspect's activities before and after the commission of the crime.

In conclusion, failure to follow the best practices of the Reid Technique will not necessarily result in a false or inadmissible confession. However, if these best practices are followed there is an extremely high probability that a confession will be a true statement of guilt and that the confession will be admitted as evidence against the defendant at trial. Consequently, an investigator should always strive to follow best practices when utilizing the Reid Nine Steps of Interrogation.

Court Decisions

The following are judicial decisions in which the courts found the defendant's confession was coerced or given in response to inappropriate investigator behavior.

Threat of harsher punishment if he did not confess

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

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

Miranda violation

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

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

Defendant: "I'm done."

Tarckini: "You're done with what?"

Defendant: "I'm done talking. I don't wanna talk no more."

Tarckini: "You don't wanna talk anymore?"

Defendant: "No. 'Cause y'all really don't believe me."

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

Coerced through the use of false evidence

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

Interrogators presented Gray a fake document purporting to originate from the Kentucky State Police linking his parents' DNA to his vehicle..... A confession obtained by police through trickery is not a new issue for us..... "the mere employment of a ruse, or 'strategic deception,' does not render a confession involuntary so long as the ploy does not rise to the level of compulsion or coercion." In essence, we have refused to hold that intentional police misinformation by itself makes a confession involuntary..... statements deceptively overstating the evidence against a criminal defendant during interrogation fall within the trickery we have traditionally tolerated. But we have never faced a situation where deceptive interrogation tactics included fake reports made to link DNA evidence to the defendant.

When a criminal defendant, like Gray, can establish that the police use falsified documents to induce a confession, we will presume this tactic is unconstitutional until the Commonwealth can firmly establish that the document(s) did not overwhelm the defendant's will and was not a critical factor in the defendant's decision to confess.

Fabricated evidence

In *Garnett v. Undercover Officer C0039* the US District Court, S.D. New York, ruled the following regarding the fabrication of evidence: (from the court's opinion)

A jury found Undercover Officer C0039 ("UC 39") liable for denial of the plaintiff's right to a fair trial. To do so, the jury found that the officer fabricated evidence. UC 39 argues here that so long as he had probable cause to arrest the plaintiff, he was free to fabricate additional evidence

to support a conviction for the charged offense without incurring liability. He further argues that he was free to fabricate evidence without liability so long as the evidence that he fabricated was arguably not admissible as evidence. These arguments are wrong as a matter of law. The Second Circuit Court of Appeals has clearly held that "[n]o arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee. To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice."...

Intentional misrepresentation of rights

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

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

Lying about polygraph results and interrogated over several days

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

"The facts underlying this appeal—many of which are undisputed—are hardly believable. Plaintiff–Appellant, Byron Halsey, a young man with limited education, learned that the two small children for whom he had been caring had been tortured and murdered. He wanted to help in the investigation of these heinous crimes but found himself isolated in a police interview room, accused of the murders, told he had failed a polygraph examination (that we now know he passed), and confronted with false incriminating evidence.

For a time, he maintained his innocence, but, after being interrogated for a period extending over several days, and in a state of great fear, he signed a document purporting to be his confession to the crimes. Subsequently, he was charged, indicted, convicted, and sentenced to prison for two life terms. But his "confession" contained details that the investigators must have inserted because Halsey could not have known them. And the real killer, though he had a record of sexual assaults, was known to the police, and was an obvious potential suspect as he lived in an apartment next to the one that Halsey, the children, and their mother occupied, avoided arrest. Finally, after 22 years the State of New Jersey released Halsey from prison, not because trial

error cast doubt on the result of his criminal trial, but because it had been established beyond all doubt that he had not committed the offenses.

Miranda violation

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

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

Miranda violation

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

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

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

Mr. Brown: Am I under arrest?

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

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

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

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

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

Mr. Brown: Nah, not no more.

Detective Hange: Why?

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

Detective Hange: All right?

Mr. Brown: Can I make my phone call?

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

The Court of Appeals found that "Here, when the detective explicitly asked whether Brown wished to continue talking, Brown answered, "Nah, not no more." Our courts

have held equivalent statements to be a clear invocation of a suspect's Fifth Amendment rights.... The trial court therefore erred as a matter of law to the extent it found Brown did not invoke his right to remain silent.

Promise of leniency

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

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

"Quid pro quo" offer

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

Finally, Appellant's constant requests for the detective to give him more details of how he could help, even in one instance demanding such an explanation before giving an answer, show a preoccupation with the detective's promises and an invited expectation of receiving a benefit in exchange for a statement. Even though Appellant's preoccupation with the promises was readily apparent, the detective never stopped to explain that he had no control over what the prosecutor would choose to do with Appellant's statement. Under the unique circumstances of this case, the trial court should have excluded the interview from evidence, at least after the point when the

detective began to offer "help." Accordingly, we reverse and remand for a new trial to be conducted without the benefit of the involuntary interview statements.

Misrepresenting the charges/Promise of Leniency

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

The court stated that: "McGhee argues that his confession was involuntary because Detective Cole obtained it by using "misrepresentations of fact and promises of leniency." Specifically, he notes that, during the videotaped interview, Detective Cole told McGhee that "it's embarrassing sometimes for an uncle to have sex with his niece, but it's not against the law if she wanted it." According to McGhee, his confession was obtained as a result of Detective Cole telling him that his conduct was not criminal, rendering the confession involuntary and inadmissible. We agree."

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

Creating fictitious evidence

In *State v. Patton* Defendant was convicted of murder and related offenses. Defendant appealed. In determining whether a confession was coerced, a court will consider whether a suspect's will has been overborne by police conduct; to make this decision, courts traditionally assess the totality of circumstances surrounding arrest and interrogation.

During the early morning hours of August 10, 1998, police found the lifeless body of Gloria Deen Hoke in an alley in Camden. In the early evening of the same day, the Camden police, acting on an anonymous tip of a "man with a gun," stopped, searched and arrested defendant Ronald Patton on a weapons offense and took him to police headquarters. During the ensuing nineteen hours between the time of defendant's arrest and the commencement of interrogation, law enforcement officers fabricated an account of Hoke's murder.

A law enforcement officer, posing as an eyewitness, was "interviewed" on an audiotape that was later played to defendant who, despite his early denials of involvement, upon hearing the audiotape, confessed to the murder. The fabricated audiotape, identified as such, was later introduced into evidence at trial, and defendant was convicted of murder and related offenses. His motion to suppress the confession and objection to the use of the fictitious audiotape at trial were denied as was his challenge to the initial arrest and search. We reverse.

We hold that law enforcement officers may not fabricate evidence to prompt a confession and later introduce that police-fabricated evidence at trial to support the voluntariness of the confession. We reverse the denial of the motion to suppress and remand for a new trial.

[In their opinion the court very carefully examines the use of trickery and deceit in the interrogation of suspects and draws a very clear distinction between verbally misrepresenting evidence and creating a fictitious piece of evidence. The court extensively reviews the history of the trickery and deceit issue and what numerous courts have had to say on the issue.]

Threats to the defendant's ability to maintain contact with his infant daughter were psychologically coercive

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

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

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

Threat of deportation of family members could cause a coerced confession

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

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

This was plain error.....Hortencia testified, for example, that the officer said "your siblings are all going to the Department of Family." Before the magistrate judge, Hortencia testified that an officer said to Feliz, "We are going to deport your mother." She also testified there that the officers told Feliz that if he did not turn himself in, "they were going to deport me and they were going to call the Department of the Family to take the boy and girls." That testimony would not show that Feliz's siblings would truly be sent to the Department of the Family if he did not turn himself into police custody, or that she would have been deported. Rather, the testimony, if

credible, would show the fact that the police officer made the threat to Feliz, a fact within Hortencia's personal knowledge.

Given that the improperly excluded testimony was both plausible and significant in this case, the proper course was for the district court to admit the evidence and "give it such weight as his judgment and experience counsel."

We vacate the order denying the motion to suppress, vacate the judgment of conviction, and remand for further proceedings consistent with this opinion.

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

In *U.S. v Guzman* the US District Court, W.D. Texas, ruled that "By implying that he and Hernandez had the ability to determine whether Child Protective Services would take away the custody of her child, Mora improperly coerced Defendant into confessing to importing.... In the instant case, Defendant was separated from her minor child and, after being escorted into an interrogation room, was not informed of what steps would be taken with her child.

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

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

In *US v. Ortiz* the US District Court, S.D. New York, ruled that the defendant's incriminating statements (while in his apartment where a gun was found) were coerced by threats that the defendant's mother and aunt would be arrested unless he acknowledged owning the gun. In their opinion the court stated that, "The Second Circuit has never squarely addressed whether a threat to arrest a suspect's family member renders that suspect's confession involuntary. Several other circuits, as well as several district courts in this circuit, have considered this question, however, and have all reached a similar conclusion: such a threat does not render a confession involuntary if the police have probable cause to arrest the family member and thus could lawfully carry out the threat. Here, as a result of Martinez's threat, Defendant's confession fell on the wrong side of that line. Under the rule followed by courts in this circuit and others, Martinez's threat to arrest Montanez [mother] and Defendant's elderly aunt was improper unless the police had probable cause to arrest those individuals and thus could lawfully act on the threat. The government has already conceded that such probable cause was lacking as to Defendant's aunt, so the threat to arrest her clearly was improper....

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

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

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

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

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

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

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

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

[Detective] Fields went to defendant's home to question him about the suspicious activity. Defendant initially denied knowing anything about the fraudulent activity on his account. Fields asked defendant if he was in the National Guard, and defendant responded that he was. Fields then asked defendant if he knew about the military code of conduct, and defendant said that he did. Fields told defendant, "Well, this matter [can] be handled on the state level and not under the

military code. And I have not spoken to your commanding officer.” Fields continued, “I’m really interested to know who was actually making these checks.”

Following those statements, defendant told Fields that his cousin, Robey, had made the checks and that defendant had received about \$1,500 for allowing Robey to access his account. Defendant argues that “his initial statement was the product of a threat and implied promise of leniency,” therefore, under Powell and ORS 136.425, the trial court erred when it failed to suppress that statement. Defendant contends that Fields made “a threat to contact defendant's commanding officer if he did not cooperate and a promise that he would not contact defendant's commanding officer if defendant did cooperate.”

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

Threat of being raped in jail contributed to a coerced confession

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

For nearly two hours of stationhouse questioning, in the face of false reports that several witnesses had identified him, a false claim that his fingerprints were found in the vehicle, and persistent illusory promises of favorable treatment if he confessed, eighteen-year-old Jolonta Little remained steadfast in his denials that he was involved in the carjacking of which he was later convicted in this case. Things began to change, however, when a detective goaded him about the prospect of being sexually assaulted when he arrived at the D.C. Jail if he did not confess and thus give police “an opportunity to help [him] instead of incarcerate [him].” As Mr. Little began to waver, the detectives then proposed the idea of meeting with a lawyer to work out a deal. Under intensifying pressure, and having heard the detective mention a lawyer, Mr. Little inquired, “So where my attorney at?” and stressed that he was “trying to have that meeting set up.” There would be no such meeting with his lawyer unless Mr. Little put some “meat ... on the table” and confessed, the officer said: “I got to have a reason for that to happen, and that reason is going to have to be you telling me what happened that day when that lady got robbed.” At this point, in the face of a threat of being raped in jail, a confusing statement about when he could see a lawyer, and a statement that conditioned a meeting with a lawyer upon his confessing to the carjacking in this case, Mr. Little's resolve collapsed and he confessed.

The firmness of Mr. Little's denials during disquieting tactics and the persistence of those denials as the pressure increased help persuade us that when he finally did speak in the immediate wake of the most coercive tactics mentioned above, his statements were not made “freely, voluntarily,

and without compulsion or inducement of any sort." On this ground, we hold that Mr. Little's motion to suppress his confession should have been granted, and we reverse Mr. Little's convictions and remand for a new trial.

Threatening deportation was coercive

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

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

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

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

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

In *State v. Valero* (the Court of Appeals of Idaho confirmed the lower courts finding that the defendant's confession should be suppressed because "the deceptive tactics used by the detective, under the totality of the circumstances, rendered the confession involuntary." From the Appeals Court decision: "Deceptive police practices do not necessarily create coercion which would render a suspect's subsequent confession involuntary and excludable.... Confessions derived during the course of interrogations have been upheld as voluntary, notwithstanding misrepresentations of facts by the police, such as telling a defendant that his fingerprints were found on physical evidence or at the scene.... Courts have uniformly accepted the police tactic of "telling a suspect they have found some incriminating evidence to elicit statements from a

suspect on the view that an innocent person would not be induced to confess by such police deception.".... However, that acceptance wanes when the police misrepresent the law.

The detective misrepresented the law regarding the polygraph. Both before and after the polygraph the detective told Valero that the polygraph results would be admitted into court... After stating that he could testify one hundred percent to Valero's guilt, the detective returned to his themes. The detective again minimized the seriousness of the accusations, stating that they were "not the end of the world." Then, the detective stated: "What is getting you to the end of the world and getting you in a bad spot now is the crime of lying to the police." At that point, Valero was faced with the possibility of being punished for two crimes: (1) one based on the girl's allegations; and (2) the other purported crime of lying to the police and, according to the detective, the more serious of the two crimes.

Aside from the possibility of being punished for two crimes, Valero was placed in the position of being able to get out of the purportedly greater crime of lying by confessing to the purportedly lesser crime of inappropriate touching. The district court properly found that this false choice resulted in Valero's will being overborne.

While we do not hold that downplaying the seriousness of the accusations, by itself, resulted in Valero's will being overborne, it is a factor in the totality of the circumstances. Most importantly, in this case, the detective utilized downplaying of the seriousness of the victim's accusations to juxtapose that alleged crime against a threat of being charged with a more serious crime of lying to the police, which the officer could prove "one hundred percent" because the polygraph established that Valero was lying. Thus, Valero was faced with a Hobson's choice.

... Most critically, the detective's representation that Valero could be charged with a more serious crime of lying to police if he did not confess was inherently coercive. It is precisely the type of coercive tactic that could induce an innocent person to confess.

Confession found inadmissible due to threats and promises from the investigators

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

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

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

Officer R: OK. Now, now we are going to shift gears. And I am going to tell you right now I

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

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

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

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

Pies: Burglary?

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

Pies: Oh jees....

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

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

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

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

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

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

Officer R: What deal?

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

Officer R: Matt.

Pies: If I pled guilty.

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

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

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

Confession inadmissible due to promises and threats

In *People v. Fuentes* the Court of Appeal, Second District, California found the defendant's confession to be inadmissible because improper promises and threats were made during the interview, both express and implied, which rendered the confession involuntary as the product of coercive police activity. From the Appeal Court's decision:

"In making this argument, defendant focuses on exhortations that even good people can do bad things while intoxicated and that defendant's not being in his "right state of mind" when the incident happened would "help" him. In addition, defendant was told that not confronting the situation would be "worse" for him, if defendant lied the case would go "very, very bad" for him, and if defendant kept quiet he could be charged "for something more serious, very ugly."

Conversely, if a person tells the truth "it goes much better for them" and "the charges are lowered - a little." Finally, at least one and one-half hours after the interview started, defendant was given the alternative of spending either "the rest of [his] life" or "five or six years" in jail. He then confessed. In addressing the issue of voluntariness, the trial court concluded that under the totality of the circumstances the "latitude" taken by the police in questioning defendant was permissible. Based on our independent review of this legal issue, we reach the opposite conclusion (and therefore do not need to analyze the separate issue of defendant's Miranda waiver)."

Promises of leniency and threats of the death penalty are coercive

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

On January 5, 2012, a grand jury indicted Bussey for the first-degree premeditated murder. Prior to trial, Bussey filed a motion to suppress statements he made to two Pinellas County Sheriff's Office detectives during an interrogation in Lowndes County, Georgia, on January 2, 2012. The detectives told Bussey that it was "[o]ne of two options," that he "either walked in that store to kill a man or [he] walked in there to do a robbery and something accidentally ... went bad."

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

The detectives told him that he was not a cold-blooded killer and that it was a mistake. But they warned that if he continued to deny his involvement, they were going to end the interview and charge him with "first-degree murder" and "seek the death penalty." ... Bussey asked, "[I]f it's a mistake robbery, what is my time?" One detective that said he was not going to talk about time but that he would tell the state attorney if Bussey accepted responsibility. But the detective did promise that if Bussey continued to deny being in the store, the detective would be "seeking the

death penalty.” But the detectives reiterated that they could try to help him out if it was a mistake.

Bussey asked three more times if they were going to charge him with “mistake of robbery.” The detective said, “Darius, I'm gonna charge you with a robbery. Okay? But I need you to tell me what happened. I need you to be honest with me.” It was at that point that Bussey said “I will” and then “I ain't even know the gun went off, to be honest.” He then answered questions about the offense, explaining that he had ridden a bike to the store, that he had been wearing the clothes in the video but ditched them in a dumpster, that he threw the gun in a drain sewer, and that the gun went off accidentally. At the end of the interview, Bussey stated twice that “I just don't wanna get charged with no murder.” He stated, “I'll be good with robbery, but I can't get charged ... with no murder.” One detective said, “It's not up to us,” and the second detective said, “You can at least live now.”

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

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

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

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

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

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

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

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

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

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

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

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

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

.... Approximately 1 hour later Wheelles escorted Sharp to the camp where she re-enacted the events surrounding Owen's kidnapping and murder. During the re-enactment, Sharp told Wheelles that when Hollingsworth was standing over Owen with an axe, she had said to him,

"No, don't kill him." Wheelles requested clarification, "Did you say 'No, don't kill him,' or did you say, 'No, don't kill him here?'" Sharp responded, "Don't kill him here."

Sharp also admitted that Hollingsworth had then asked her to bring him some rope, and she told Cornell to go get it. She further admitted that it was her idea to burn Owen's things so there would not be any evidence to tie her to the events. "I said we have to burn it 'cause I don't need the evidence. I don't want to be tied to this."

Following the re-enactment, Wheelles brought Sharp back to the station. He asked her a few more questions and then left her alone in the interview room with her children. Approximately 1 hour after returning to the station, Wheelles was notified that the district attorney's office had decided to charge Sharp. When Wheelles told her that she was going to be placed under arrest, she became angry and upset. Sharp accused Wheelles of lying to her and said that he had tricked her, telling him: "This is bullshit."

Ms. Sharp seeks relief under S 2254, arguing the state supreme court erred in considering the coercive effect of Detective Wheelles's promises during his interview with her. She argues Detective Wheelles induced her confession by promising leniency and assistance in finding shelter for her and her children.

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

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

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

Having carefully reviewed the interview video and considered the totality of circumstances, we conclude Ms. Sharp's will was overborne once Detective Wheelles promised her she would not go

to jail after she admitted to participating in the crime. Once that promise was made, Ms. Sharp's subsequent incriminating statements were involuntary because she had been told she would not go to jail for her involvement. The trial court therefore erroneously admitted those statements at trial in violation of the Fifth and Fourteenth Amendments.

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

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

"... Chulpayev testified at the suppression hearing that Agent Jackson repeatedly indicated that he would protect Chulpayev from going to jail, and from a murder charge in particular, and the trial court credited that testimony.... Specifically, before the July 2012 interview, the FBI agent told Chulpayev that he would "keep the murder warrant off" if Chulpayev talked to him. The other law enforcement officers involved in the interview testified that Chulpayev was treated as a confidential informant in the murder case, and the recording of the interview ends with Agent Jackson telling Chulpayev that one of the things the agent cared most about was "keep [ing] [Chulpayev] out of jail."

Similarly, before the October 2012 interview, Agent Jackson told Chulpayev, "I'm the lead on the case, and as much as you do for me, ... I will make sure nothing happens to you.... I got you. Just come and do what I'm asking you to do"--and what the agent was asking Chulpayev to do was agree to be interviewed by the SSPD detectives. Agent Jackson's representations that he was the leader of the murder investigation and that Chulpayev would not be in any trouble if he spoke to the SSPD officers were supported by Detective Williams during the interview. Chulpayev testified that, after these promises by the then-lead investigator on the case, he gave the July and October 2012 interviews so that Agent Jackson could protect him.

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

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

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

"In September 2010, the Douglas County District Attorney charged Fernandez with aggravated indecent liberties with a child for the lewd touching of A.L.G., who was 7 years old at the time. During the investigation of the offense, Fernandez accompanied Lawrence police officer Anthony Brixius to the law enforcement center to be questioned about his interaction with

A.L.G.

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

At the suppression hearing, Marino testified that he has translated for police officers conducting interviews or interrogations "[a] handful" of times. The interrogation was videotaped. "In weighing Fernandez' age, intellect, and background, the district court relied, in part, on the clinical assessment of Dr. Barnett. Dr. Barnett's expert opinion that Fernandez functioned intellectually in the "low average" range and likely had some form of learning disability was unrebutted. Dr. Barnett also testified Fernandez had difficulty readily understanding and responding to questions posed to him. Again, that clinical observation went unchallenged in the sense the State offered no countering expert. The intellectual limitations Dr. Barnett suggested at least square with Fernandez' abbreviated education and his partial literacy, especially in English.

The district court found Fernandez' intellect played a part in rendering his statements involuntary. The district court was particularly troubled by the last two enumerated factors: the fairness of the interrogation and Fernandez' fluency in English. We share that concern. In this case, the two factors are closely related, so we discuss them together. Fluency in English typically comes into play when a suspect is literate in some other language but is interrogated in English... Illustrating the seamlessness of the generically labeled factors, fluency would also be implicated if a suspect knew only English but his or her mental incapacity substantially impaired his or her ability to communicate. That situation might also bear on mental condition and, possibly, intellect. This case presents a variant because Brixius sought out a translator, so the interrogation could be conducted in Spanish--Fernandez' primary language, although Fernandez understands some spoken English.

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

The district court was particularly troubled by Marino's use of "negociar" in conveying Brixius' assertion that "we can deal with" the situation if Fernandez had touched A.L.G. inappropriately for just a second. Both experts considered the translation to be misleading and suggestive of an accommodation in which Brixius could handle or negotiate any offense if Fernandez admitted to briefly touching A.L.G.'s pubic area or vagina. As translated for Fernandez, the statement might

be construed as a promise of lenient treatment or an outright deal, thereby affecting the truthfulness of any inculpatory admissions on the theory a suspect might falsely confess if he or she understood no charges or only minor charges would result. The emphasis Marino imparted with his use of "negociar" may not have been what Brixius specifically wanted or intended. But the deviation was one of degree given Brixius' interrogation technique that combined false representations about supposedly incriminating evidence with suggestions that inaccurately tended to minimize the legal consequences of some unlawful behavior. The result of those techniques over the course of the interrogation combined with communications issues resulting from subpar translation and Fernandez' limited intellectual capacity caused the district court to find the resulting statements to be involuntary and, thus, constitutionally suspect. Fernandez' limited fluency in English ties into the fairness of the interrogation. So we turn to that factor.

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

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

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

Repeated implied promises of leniency nullify confession admissibility

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

"Defendant responded to the officers' questions by saying that he could not remember what happened because he was intoxicated when the alleged incidents occurred. In response, the officers repeatedly told Defendant they would be meeting with the district attorney, that his claims not to remember were legally invalid, and that they had the ability to influence the district attorney with respect to the level of charges Defendant faced. Among other similar statements, Officer Pena told Defendant:] You're giving us nothing and that's what we're gonna [sic] go to the D.A.s with ... is that he gave us nothing ... he tried to use the old ... I don't remember because I was intoxicated defense.... And that's what we're gonna tell the D.A He came in and he gave us a convenient excuse.... Oh I was drunk.... Oh I don't remember.... It coulda [sic]] happened, but I don't know if it did ... or anything like that.... So if you do remember what happened, just come clean with us.... We're trying to help you here.... Okay, but we can only help you so much.... Okay, I can't go to the D.A.s and be like hey let's ... you know let's cut this guy a break or ... or let's ... you know let's do this or ... let's uh ... you know let's think about it second [sic] if you won't tell us what happened cuz [sic] I can't go to the D.A. with that.... Okay, I can't.... The D.A. ain't gonna [sic] buy that either.

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

In the specific exchange cited by the district court, the officers also discussed the range of prison terms for different degrees of felonies in response to Defendant's question about how much jail time he was facing. The following discussion then occurred:

Defendant: Is there a way I can like.... The only way I can help myself is to remember, right?

Officer Pena: That would be a big help.

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

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

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

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

These statements and the others like them constitute implied promises of leniency because their import was that Defendant would be arrested on serious felony charges if he continued to claim a lack of memory, but that if he made certain admissions, officers would intercede with the district attorney on his behalf, and that they had the ability to have charges reduced or not brought at all. ... The transcript contains numerous statements by the officers throughout the interview, the effect of which was to say that if Defendant gave a statement they would act on his behalf and had the ability to get the charges reduced. This was more than a mere offer to bring Defendant's cooperation to the attention of the district attorney, which courts have found acceptable.

We next turn to the overall question of voluntariness.... Again, our review of the transcript of the interview supports the district court's ruling. As the district court found, there were a multitude of implied promises of leniency that started at the outset of the interview and continued throughout, constituting coercive police overreaching. We also find it significant that prior to making both the oral and written statements at issue, Defendant indicated that he was acting in an effort to avoid prison... Before writing the apology letter at the request of the officers, Defendant said:

"I'll do anything to avoid jail cuz [sic] I don't wanna [sic] to miss out on my daughter[']s life." Also, while making statements purporting to remember the events of the evening, Defendant repeatedly said that his motivation was to avoid jail: "I'm trying to remember because I really don't want to go to jail or anything else.... I'm trying to remember because I wanna [sic] be able to just put this behind me and just move on." "I'm trying to remember but it's ... like I will do anything it takes to avoid jail time." "I'm just trying to remember so I don't ... I just ... you know, I don't wanna [sic] to go to jail."

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

Promise of concurrent sentences

In *US v. Sharp* the US District Court, W.D. Kentucky, ruled that the defendant's confession should be suppressed because it was the result of a promise that all sentences would run concurrently, and the statement if she did not confess the sentences would run consecutively. Specifically the court stated, "Defendant contends that the police promised in both the interrogation concerning the Hayes Oil robbery and the Kangaroo Express robbery that

she would be sentenced concurrently with the robbery of Fifth Third Bank. Based on the transcript of the interrogation on June 29, 2012, the Court finds substantial corroboration in the record that the police promised just prior to Ms. Sharp's confession in each instance that she would be sentenced concurrently with the Fifth Third robbery.

As to the interrogation concerning Hayes Oil, Detective Book informed Defendant that it did not matter how many crimes that she confessed to at that point because the Government was "not going to run sentences after sentences after sentences" on her.... Detective Book reiterated this point before informing her that the police had a video of her committing the Hayes Oil robbery.

The interrogation concerning Kangaroo Express followed almost the exact same pattern. In fact, Detective Herndon not only explained the difference between consecutive and concurrent sentencing but also specifically stated, "As a general rule, it doesn't matter how many crimes you've committed, they run the sentences concurrently." Detective Herndon then continued to explain that if she did not confess at that time and the police found more evidence to charge her with the robbery of Kangaroo Express, then "by the time that catches up you may have to run your case consecutively as opposed to concurrently." *Id.* at 35. Again, the conversation turned to a brief discussion about the existence of a video, and then Ms. Sharp confessed to robbing the Kangaroo Express.

Improper interrogator behavior – promise not to charge with murder

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

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

"We discern that certain things are patently obvious from the words and actions of the law enforcement officers conducting Garcia's interrogation. First, the officers knew that Garcia had

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

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

“

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

Improper offer of leniency nullifies a confession

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

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

Improper promise of leniency- treatment in lieu of jail

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

In their opinion the Iowa Supreme Court stated that, “It is true, as the court of appeals' majority noted, Detective Hull never overtly told Howard he would receive a lighter sentence if he

confessed. He never said an inpatient treatment program would be the only consequence. He stated no quid pro quo out loud. But, his line of questioning was misleading by omission. As the court of appeals' well-reasoned dissent aptly observed, "Officer Hull's statements strategically planted in Howard's mind the idea that he would receive treatment, and nothing more, if he confessed."... Detective Hull's repeated references to getting help combined with his overt suggestions that after such treatment Howard could rejoin Jessica and A.E. conveyed the false impression that if Howard admitted to sexually abusing A.E. he merely would be sent to a treatment facility similar to that used to treat drug and alcohol addiction in lieu of further punishment.

Significantly, Detective Hull did not counter this false impression with any disclaimer that he could make no promises or that charges would be up to the county attorney. We hold his interrogation crossed the line into an impermissible promise of leniency, rendering the confession that followed inadmissible."

Impermissible promise of leniency

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

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

..... After Monroe and Polk agreed to resume the interview, Monroe played on the fact Polk had children: I'm telling you, you need to start thinking about what you are going to do for yourself because I know you got a couple of kids out there and I'd hate to see the kids miss their daddy for a long time because you didn't want to talk about what's going on. Monroe continued: "Man if you don't want to do this for you, do this for your kids. They need their dad around. [35-second pause] Just don't forget you got kids that are depending on you. They need their pops around." The court of appeals observed, "It is clear from this statement that the officer meant to communicate that if Polk confessed, he would spend less time away from his children." We agree. The strategy worked--Polk promptly confessed to taking a firearm to the scene with the intent to shoot Henley and firing shots at Henley there.

Monroe's interrogation strategy goes beyond the permissible tactics approved in *Whitsel*. Monroe did not simply offer to inform the county attorney of Polk's cooperation. Instead, he

suggested the county attorney is more likely to work with him if he cooperates and implicitly threatened Polk that silence will keep him from his children for "a long time." Monroe's statements are similar to the officer's statement in Hodges that "there was a much better chance of ... receiving a lesser offense" if the defendant confessed.... In each case, the officer suggested the defendant's confessions would likely reduce the punishment.

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

Improper interrogator statements - promises and threats

In *Commonwealth v. Baye* the Supreme Court of Massachusetts found that the defendant's incriminating statements should have been suppressed as a result of the statements made to him by the investigators. From their opinion:

"Here, before making any inculpatory statements, the defendant unambiguously expressed his desire to speak to a lawyer.... Understanding that the defendant would consult an attorney if he thought that the troopers would "accuse or charge [him]," the troopers told him that they would not do so. Knowing also that they had warned the defendant at the outset, consistent with Miranda, that anything he said to them could be used against him, the troopers undermined their prior admonition by agreeing that his statements would not be used as the basis of an accusation or a charge.

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

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

The difference between "limited assurances" and promises of leniency

In *US v. Pacheco* the US District Court, D. Utah, drew a distinction between "limited assurances" and promises of leniency. In their opinion they stated that "Under Supreme Court

and Tenth Circuit precedent, a promise of leniency is relevant to determining whether a confession was involuntary....” The Supreme Court has recognized that when individuals are “in custody, alone and unrepresented by counsel,” they are “sensitive to inducement” by promises of leniency. Not all promises, however, are coercive. Courts have held that an officer may make a promise to talk with a prosecutor and recommend leniency. An officer may even speculate that such “cooperation will have a positive effect.” Because such statements are mere “limited assurances,” they are permissible. Statements, however, that go beyond limited assurances can “critically impair a defendant's capacity for self-determination.”

In this case, the investigator “made repeated improper use of the word “I” during the interrogation. He said I can charge you with one count or I can charge you with ten; I am the first point in judging in the federal system; I am going to indict you; I already have a U.S. attorney on board; and I can charge the January 17th robbery under the Hobbs Act.

Besides these statements, Detective Wendelboth conveyed to Pacheco that he was leaving it up to him to decide whether to confess so he could avoid a life sentence and get out to see his children grow up. The import of these statements is that Pacheco would have reasonably understood that Detective Wendelboth had the authority to make a deal, that he would decide what counts to charge based on the level of Pacheco's cooperation, and that if Pacheco confessed he would not receive a life sentence.

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

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

In *State v. Powell*, the Court of Appeals of Oregon upheld a lower court’s decision the suppress a confession from an employee because the “express and implied promises of immunity from criminal prosecution given to the defendant by the Fed Ex investigators render [] his statements to them involuntar[y].”

In this case the employee was told the following by the company investigators:

“It's apparent that you took this stuff, so now we're at a crossroads, okay? * * * We're at a point where either we handle it in-house here, in FedEx, or we can turn everything we have over to the [police department], and then they handle it from there. Now if you choose that route, there's nothing you can do. They'll be going to get search warrants for your house, for your mother's house. They'll go through all of your stuff. It's just gonna be a big mess, okay? * * *

“At this point, our base concern here at FedEx is we want to know, we need to make a customer happy. And if we can make the customer happy, then they don't come back on [defendant], okay? And I don't think you're a bad guy, okay? If I had thought you were a bad guy I would've taken all this stuff and we would've given it to the [police department] and said, ‘You gotta jack

him up, we're done with him,' okay? I don't feel that way. You've got a lot of stuff going on in your life right now, and I know it. People do boneheaded things, okay? But where we go now is what's going to decide your future. * * * Nobody but who's in this room needs to know.”

Police cannot promise drug treatment in lieu of incarceration

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

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

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

On February 10th, Jenkins made Yount aware of his drug addiction, and Yount discussed intervention in lieu of conviction with Jenkins, and he further indicated that the police department has “influence on things that happen throughout the trial.” On February 11th, Yount testified that he recommended treatment for Jenkins to the judge. Jenkins was fearful about going into withdrawal. While Yount did not guarantee treatment in exchange for Jenkins' confession, he implied by his conduct and words that such a benefit was a possibility.

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

Court finds confession inadmissible due to interrogator threats and promises

In *U.S. v. Ellington* the U.S. District Court, S.D. Texas, Houston Division, stating that “In this case, the coercive conduct of the law enforcement officials that participated in planning and executing Ellington's interrogation is the critical factor that leads the Court to conclude that Ellington's statement was involuntary.

Indeed, the Court is deeply troubled by the course of official conduct that ultimately caused Ellington to waive his rights and make an incriminating statement. The agents employed threats of significantly greater punishment for Ellington and his wife and made illusory promises of leniency if Ellington “cooperated.” They then made Ellington's sole opportunity to cooperate contingent upon his willingness to waive his right to counsel and incriminate himself. When considered together, as they were intended to be, these pressures were plainly coercive and, ultimately, caused Ellington to make a statement that was not the product of his free and rational choice.

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

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

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

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

would result. When viewed in their totality, the Detectives' statements during the course of the interview aroused in Defendant "an 'emotion of hope' " of lighter, more lenient sentence."

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

Promise of reduction in number of counts coercive.

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

As a result of these circumstances, the Court is convinced the Defendant believed he had been promised lenience."

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

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

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

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

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

Likewise, in *Samuel v. State*, 898 So.2d 233 (Fla. 4th DCA 2005), this court held a confession

involuntary where it ensued from an officer's threat to charge the suspect with fifteen robberies, where there was evidence of at most nine and probable cause for only one, if he did not tell the truth, writing that "Fowler's promise not to prosecute the other fictional crimes" was coercive and rendered the confession involuntary.

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