

What's Interrogation Gotta Do With It: Defending Confession Cases

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I. Prepare to defend your case by learning how police interrogate suspects: Understanding the Reid Method of Interviewing and Interrogation:

Part One: Amateur Psychologist - The Behavior Description Interview

Most police officers are taught to interview and interrogate suspects by using the Reid method or some variation of it. The Reid method was developed by John Reid and Fred Inbau as a way to interrogate suspects by using psychological methods instead of using physical pressure. The method was considered so psychologically coercive that the United States Supreme Court referred to it in the Miranda decision. Reid and Inbau are long gone but the method lives on. You can learn about the Reid method in depth by reading their book, *Criminal Interrogations and Investigation*, now in its fifth edition. It can be purchased on their website, www.reid.com, on www.amazon.com or check out a copy at your local university or law school library. Reid and associates trains law enforcement officers all over the country in this methodology; a copy of their seminar schedule can be found on their website. They will admit any paying customer to their seminars, including criminal defense lawyers.

The Reid method divides questioning of suspects into two sections – an interview, all the Behavior Description Interview (BAI) and the Interrogation. The BAI is a short (20-45 minutes) non-accusatory interview used to determine if suspect is “truthful”. The BAI consists of 17+ “Behavior Provoking” questions and the police interviewer then makes a truthfulness decision based on assessment of verbal and non-verbal responses to questions.

The 17 Questions are:

1. What is your understanding of the purpose of the interview.
2. We are investigating ____, if you did ____ you should tell me now.
3. Do you know who did ____?
4. Who do you think did ____? Tell us your suspicion even if wrong. Promise confidentiality.
5. Is there anyone you know who you would rule out?

6. How do you feel about being interviewed for this?
7. Do you think that _____ really occurred? If suspect was accused: Is accuser lying?
8. Who would have the best opportunity to do ___?
9. Why do you think someone did ___?
10. Did you ever think about doing ___ even though you didn't?
11. Why wouldn't you do something like ___?
12. What do you think should happen to the person who does ___?
13. How do you think the investigation results will come out for you? Or willingness to take polygraph and how they think it will turn out.
14. Do you think the person who did ___ deserves a second chance?
15. Alibi/account of events
16. Did you tell anyone you were here today? Who? etc.
17. Bait question. (see sec. II)

As you can see, many of these questions have nothing to do with actually investigating a crime.

The Reid school claims that the interviewer can evaluate the verbal and non-verbal answers and accurately determine if the subject is lying. They teach that truthful subjects will be composed, interested, concerned, realistic, cooperative, give direct & spontaneous responses, make specific denials and use of accurate language, are open, helpful, sincere, express confidence in the investigation's outcome, and voice a desire for punishment of perpetrator.

They claim that deceptive subjects will make passive denials, use "guilty" phrases such as: "Oh you're kidding"; "to the best of my memory"; "that's as far as I can recall". They claim guilty subject will act confused; disinterested; claim mental blocks; be irrational; give one and two word answers to questions; blame others; give contradictory explanations, lie by referral (I already told...); lack confidence in investigation results; minimize the offense; endorses light punishment or feel the offender should have a second chance; are overly polite; uses permission phrases and show a lack of emotion.

They claim that liars can be spotted based on the grammar of denials. They teach that truthful persons say, "I didn't..." compared to liars who don't use contractions, in other words, stating "I did not..." is a sign of being deceptive.

Reid acknowledges that both truthful and untruthful person may exhibit anger, surprise, nervousness and fear.

Analyzing the Non-Verbal Responses: A Foray into Junk Science. The Reid school teaches police officers to reach the following conclusions after the behavior description interview:

Police should analyze the interviewee's rate of speech claiming the truthful person will increase their rate of speech and raise vocal pitch while the deceptive person will decrease speech rate, pitch and clarity fall off and they will stop/start their responses.

As to posture and body: The truthful are upright, open, relaxed, lean forward occasionally, frontally aligned with interviewer and make casual posture changes, while deceptive people: retreat, slouch, act frozen, their heads and body slump, exhibit guarded and defensive body language such as placing their hand over their mouth, cross their arms, make erratic and rapid posture changes, make "erasure" signs after false denials and have dry mouth.

Reid claims that in normal conversation persons make eye contact 30-60% of the time but deceptive persons avert their gaze. They promote concepts of neurolinguistic programming: subjects who break gaze and look to the right are liars, those who look left are truthful.

All of the above is considered junk science by other researchers. A leading researcher in deceptions, Aldert Vrij, has reached the opposite conclusions regarding symptoms of untruthfulness. His book, Detecting Lies and Deceit, Pitfalls and Opportunities, Wiley Series in Psychology of Crime, Policing and Law, 2d Ed 2008, contains an extensive discussion which debunks myths about the conduct of liars.

There are many law enforcement departments that use all or part of the nine steps of interrogation but do not follow the Reid interview protocol.

The Reid Method of Interviewing and Interrogation: Part Two: Con Artist - The Bait Question

The Reid school uses a bait question as final question in the interviewing process. They evaluate answer using same criteria as other interview questions as well as whether bait question causes suspect to change their version of events and if they give a delayed response to the bait question.

This involves the use of an evidence ploy- a claim of real or false evidence. They "educate" the suspect before they bait – e.g. tell the suspect that science will allow them to match physical evidence in suspect's possession to crime scene evidence. This may involve the use of props such as thick file, news articles about other cases, etc. The investigator must be careful to use bait questions that the suspect can't see through; the suspect should be told the investigation is ongoing and the interviewer should not pin himself down on having the evidence because the suspect may ask to see it.

Police are taught to phrase bait questions as "Is it possible that..." in order to testify that they didn't lie to suspect but asked suspect a hypothetical.

Some Bait Question examples:

- Would there be any reason that person A says they saw you take the money?

- Would there be any reason why the footprints taken in the mud at the scene would match yours? Why would the mud on your sneakers match the DNA of the mud where the crime occurred?
- Why would a video surveillance tape of the building that burned down show you in the area?
- Is there any reason why the blood found at the scene will show your DNA when it comes back from the lab?

After asking the bait question, the investigator concludes the interview; he leaves briefly and may confer with colleagues. He will then return to the interrogation room and begin the interrogation, using what the Reid school labels as the nine steps of interrogation.

The Reid Method of Interviewing and Interrogation: Part Three: the Nine Steps

When the interrogation starts, the tone of the conversation will shift to being accusatory. The steps are:

1. Directly and positively present the suspect with the statement that he is considered to be the perpetrator. Says things such as
 - “Our investigation shows that you are the person who _____”.
 - Begin standing, four to five feet from suspect (social zone).
 - Avoid realistic words –e.g. “You took” (not stole); “you made her have sex” (not raped); “you caused death” (not murdered).
 - Firm tone of voice.
 - Transition: from dominance to empathy, sit down, move closer, begin step two.

2. Theme Development: The essence of the Reid technique

The Reid Official Explanation of theme development is that the interrogator is to express a supposition about reasons for the crime’s commission whereby the suspect is offered a moral excuse (affix moral blame on the victim, accomplice, circumstances, etc.) so he can accept his conduct and admit to the crime. The theme centers on how the interrogator believes that the suspect’s actions are not so bad and juxtaposes it against more aggravated conduct. Interrogators are taught to use storytelling that contains theme to get suspect to buy into theme. Some common types are:

- Use of fictitious or true stories in which interrogator relates that he worked on a similar case, using minimization, person denied crime at first, then a “happy ending”, after person confessed.
- Use of first person themes where interrogator tells of similar experience, tries to bond with suspect through this story.

- Use of “role reversal” – put suspect in position of decision maker- two people who committed similar crime – one had the “prove it” attitude, other was sorry and explained circumstances – ask “who would you want to talk to?” and point out that suspect is acting like the “prove it guy”. Avoid making suspect the judge/jury – it just reinforces legal consequences. No explicit mention of leniency.

During the theme development part of the interrogation, the interrogator is taught to use an empathetic tone and move closer to the suspect. They are to give the suspect the impression that it is helpful to confess to the thematic behavior that is being offered. This is coupled with repeating the bait evidence and interrogator’s assertions of absolute confidence that suspect is guilty and cornered.

Interrogators will use language which implies that interrogator will be able to help the suspect if he confesses – but the interrogators are trained to avoid legally explicit terms. For example they are taught to say:

- “We’re here to work with you” - not “to help you”.
- “Once they told the truth, the weight of the world was off their shoulders” or “they learned from the experience”- not a specific outcome.
- Tell suspect they may be afraid of jail but either way, a decision will have to be made and here is their chance to tell their side of story.

The Reid school has developed specific themes for different crimes. Some theme examples are:

- Theft –Needed \$ for a good reason, being exploited by boss, it began as borrowing and you intended to repay.
- Sex Assaults- blame victim’s behavior, style of dress, overly mature or seductive child, poor parenting.
- Homicide – deceased began a fight, was a bad person, drug dealer, stole from you.
- All cases – suspect was intoxicated, under stress, not acting normally.

3. Handling Denials

The basic method is to dominate the suspect and cut off his repetition or elaboration of denial and return to the theme. They will say things such as, “I’m thinking you did (worse thing) and I’ll have to investigate ... I don’t even have to or need to talk to you to prove this but I thought I’d give you a chance to tell your side of the story...“I think you’re stonewalling me- I thought well of you before but now I’m thinking poorly of you.” The interrogator will Reveal evidence – or false evidence- if absolutely necessary.

Cutting off denials is premised on the belief is that the more a person is allowed to deny a crime, the harder it will be to get an admission.

4. Overcoming Objections.

This is not the same as a denial – an objection is a denial coupled with a suspect’s statement about his own character, for example, “I couldn’t have done this, it violates my religion”. Reid advocates listening and incorporating this into the theme.

5. Procurement and retention of the suspect’s full attention

The interrogator is to get closer, pat the suspect’s shoulder and act sympathetic.

6. Handle suspect’s passive mood.

The interrogator views this as the time that the suspect is giving up on resisting the interrogation. It provides the opportunity to move in and get the admission by use of step seven.

7. Present the alternative question.

When the interrogation believes that he has worn down the suspects denials and can get an admission to the criminal conduct, he presents two alternatives – a “bad” one and a “lesser” one based on the theme. Both are guilt choices. The “bad” reason must be bad enough that suspect could not admit to it and the desirable alternative seems good.

If this doesn’t work and the suspect continues to deny here, the interrogator is to return to the theme and try to develop new ones.

8. Have suspect orally relate details.

An admission is not enough; now police must obtain a confession. They are taught to continue to avoid legal terminology, get the suspect committed to admission and description of the offense and obtain details.

9. Convert the statement to writing.

The Interrogator should write the statement, making deliberate errors to be corrected and initialed by the suspect. The suspect should be invited to write a letter of apology.

Here are some other suggestions the Reid school makes about conducting interrogations:

- Conduct interrogation in private, without distractions.
- Investigator should dress in “plain clothes”- no uniform or conspicuous signs of being in law enforcement.
- Know the details of the crime.
- Learn details about the suspect during the interview. Appeal to their personal values.

- Keep pencils and paper out of sight during interrogation (it reminds the suspect of legal significance).
- Have Miranda warnings given by someone other than the interrogator.
- Physical proximity to suspect shifts at critical moments; move in closer.
- Seek admission of lying about some incidental aspect of the event.
- Have the suspect put himself at the crime scene or in contact with the victim or occurrence.
- If suspect has fear of embarrassment, promise that *you* will not tell the person.
- Play one co-defendant against the other.
- Use leading (cross examination) questions to get agreement on as much as possible, bringing them down the pathway of “yes” answers.
- Compliment suspect on their past acts and traits.
- If suspect gets up to leave, talk to empty chair.

How are police to know if the confession is true: According to the Reid school police must obtain dependant and independent evidence for confession to be valid. Dependant evidence are facts that only true perpetrator would know and must have been withheld from suspect during the interrogation. Independent evidence is something that interrogator didn’t know before the interrogation which can now be verified.

Reid acknowledges that their interrogation tactics can lead to false admissions but they claim that strict use of their technique, including this step, will prevent false confessions)¹.

Real world police tactics

While some police departments adhere strictly to the Reid methodology, others adapt parts of it. Other common interrogation methods are using fabricated forensic and eyewitness evidence, subjecting the suspect to a polygraph or voice stress analyzer and telling them they failed the test

They will often tell a suspect who says, “I know I didn’t do it, I have no memory of it” that they were on drugs, alcohol or are so upset that they’ve suppressed the memory of the offense. Some interrogators alternate a “good cop – bad cop” and conduct relay interrogations. When a suspect is interrogation multiple times they are often interrogation by detectives on different shifts and thus sleep deprived.

II. Defending a Confession Case: Develop a Theory of the Case

¹ “The Importance of Accurate Corroboration within a Confession”, December 2004 monthly investigator tip at www.reid.com.

Preliminary Steps

Educate yourself about how police in your jurisdiction interrogate suspects and get confessions. Obtain police training materials by subpoena or open records; you will use these in cross examination. Consult with recently retired police officers about how the department trains detectives and conducts interrogations.

Interview your client thoroughly about the interrogation process as early as possible in the case. If the interrogation is unrecorded you have to reconstruct what occurred. Have the client prepare a time line regarding the interrogations and obtain details about the interrogations. Use your knowledge of interrogation techniques and ask about specific techniques that law enforcement use in your jurisdiction.

If the interrogation is recorded, have it transcribed and play the recording for your client with a draft of the transcript in hand – transcriptions of interrogations are difficult to produce and often contain inaudible portions your client can help to clear up. Interview your client about what he was thinking and feeling as the interrogation progressed. Ask why he decided to cave into the pressures of interrogation. Find out how your client provided the details that were incorporated into the confession.

Gather evidence to corroborate as much as you can about what the client tells you about the interrogation. View the interrogation room(s) just as you would any other crime scene. Measure and photograph the rooms. If your client was subjected to multiple interrogations and not taken to jail cell where he could sleep, document jail cell proximity and get photos of that area as well. Investigate whether any administrative rules concerning jail conditions were violated.

Research the officers involved. Compare notes with other attorneys in the jurisdiction about the practices of the police detective in obtaining confessions. Get transcripts of other suppression hearings where the detective(s) testified. Research officer using legal search engines, public records, open records of department discipline and determine if the detective was involved in any civil cases as a party. Ask prosecutor and move court for *Brady/Kyles* evidence, e.g. to obtain police personnel file to establish an officer's unlawful or inappropriate practices or violations of departmental rules.

Review the interrogation line-by-line. Make two lists: one in which you note every coercive technique used and another list of everything that police did that contaminated the interrogation. You must account for where each fact in the statements come from. Is it a fact that the police mentioned during the interrogation? Was it in the press? Was your client a witness but not a participant? Did the true perpetrator tell your client about the crime? Were the things your client said just unlucky guesses?

Expert Witnesses

Two types of experts may be retained in a false confession case, depending on the circumstances. The first is a clinical psychologist who will interview your client to see if he is particularly susceptible to police interrogation methods. If your client is a juvenile, suffers from cognitive disabilities or mental illness or is particularly suggestible or compliant with authority, this type of expert can be helpful. Testing should include general psychological and personality tests as well as IQ testing. There is a specific test, the Gudjonsson Suggestibility Scale, which measures susceptibility to interrogative suggestibility. An expert can also test the client to see if he comprehends Miranda enough to knowingly and intelligently waive his rights; the test used is the Grisso Comprehension of Miranda test. If the results demonstrate that your client had particularly vulnerable personal characteristics

which led him to give a false confession, this expert is essential to both a motion to suppress and in a jury trial.

Studies of proven false confessions have demonstrated that many false confessors are neither juveniles, mentally disabled or suggestible but give false confessions purely driven by the pressures of police interrogation. A social scientist who is an expert in this field can testify to this if the court permits the testimony. This expert will review the interrogation and statement; they generally do not interview the client but rely on information gathered by the lawyer. The expert can then testify how studies of known false confessions and scientific experiments have shown that certain types of interrogation techniques have elicited false confessions. If you do retain plan to elicit such testimony, be prepared to move the court in limine to admit the testimony and demonstrate how such testimony meets the *Daubert* standard.

Theory of the Case

Once you have amassed all the facts you are ready to develop your theory of the case. What is the story of the case that you want to tell your jurors? Since a theory must incorporate all facts beyond change in a case, you have to own the confession. The worst thing you can do is to be afraid of the confession. Your theory must put the confession forward front and center as a false story which is wholly the product of police interrogation. Work with your list of coercive techniques and contamination as you create your trial story; the coercive techniques are why your client gave a false confession; the contamination is the proof that the confession is false. Own the confession in every phase of the trial. Tell the jurors in the voir dire that your client falsely confessed; ask them what they know about false confessions. Find out which jurors believe that it is impossible for an innocent person to confess to a crime they didn't commit and strike them. Take the confession head on in your opening statement. If there's a tape you may want to play it in opening. During opening, cross and closing play the parts of the tape that are most powerful to support your theory of the case. Re-enact the key parts of the interrogation in opening and closing. Get the defense point of view out front at the very first opportunity of the trial.

III. Motion Hearings

There are numerous pretrial issues you can raise to try and suppress confessions. The two most common are violations of Miranda and lack of voluntariness:

Miranda: Miranda warnings must be given to anyone being questioned by law enforcement whenever they are in custody. The issues that generally arise around Miranda are:

Definition of custody: When police fail to read the warnings, they often claim your client wasn't under arrest either because it was pre-arrest (such as a traffic stop) or client came in to talk voluntarily and police only made post-admission arrest.

Arrest and in custody are not identical. Custody is defined as whether, under the totality of the circumstances, a reasonable person in the defendant's position would have felt "at liberty to terminate the interrogation and leave". *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). In making this determination, the sole issue is how a reasonable person in the suspect's position would have understood their situation. *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). Custody does not require

confinement in a jail; it can occur at any location, including in one's home. *Orozco v. Texas*, 394 U.S. 324 (1969).

Here are some chapters for cross where custody in issue:

- Restrictions on client's freedom
- Length of stop
- Police orders that client had to comply with
- Handcuffing
- Show of force
- Scope of stop beyond traffic issue
- What would occur if client left
- Public Safety
- Location and duration of conversation at police department
- Transporting Client
- Custodial Type Setting
- Interrogation techniques used to break denial.

Interrogation. Sometimes police will claim they didn't read warnings because they weren't questioning your client, they were just responding to his questions. Questioning or its functional equivalent designed to elicit an incriminating response is interrogation. *Rhode Island v. Innis*, 446 U.S. 291 (1980). "A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation". *Id.* at 301. Chapters for cross where interrogation in issue: What the detectives were taught about interrogation, what interrogation techniques were used such as storytelling, monologues, themes and evidence ploys. What the difference is between interrogation and obtaining a post-admission narrative and reviewing the post-admission narrative facts.

Waiver. Some people may think this is a dead issue after *Berghuis v. Thompkins*, 560 U.S. ____ (2010) which holds that when a suspect answers any question posed by the interrogators, this constitutes a waiver; a waiver does not have to be explicitly taken before questioning commences. Waiver issues may be viable under state constitutional law, be sure to check your state's constitution.

A waiver must be made understandingly, knowingly and voluntarily meaning it must be made with full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it *Colorado v. Spring*, 479 U.S. 564 (1987). A lack of cognitive ability can preclude a knowing and intelligent waiver. *State v. Lee*, 499 N.W.2d 250 (Wisc. App. 1993). Courts are to use an objective standard in determining whether a person is able to waive of Miranda rights which includes "the education, experience and conduct of the accused", *Pettyjohn v. United States*, 419 F.2d 651 (D.C. Cir. 1969) *cert. denied* 397 U.S. 1098 (1970).

Chapters for Cross on waiver:

- Client's awareness of his rights
- How police knew what his awareness was
- What efforts they made to find out if it was a full awareness
- What training they've had on that point
- What would less than a full awareness be & has the police officer ever seen that

Expert examination and testimony will be needed if you litigate this issue. Typically a psychologist tests client for IQ, cognitive disabilities, significant mental health issues. There is a specific test known as the Grisso Miranda comprehension test, which can be helpful in determining whether or not your client knew what he was doing when he waived his rights. Linguists and educators may also be helpful witnesses.

Assertions of Right to Silence and to Counsel. Often a client will not ask for a lawyer but just tell police that he doesn't want to talk to them. Police must immediately stop the questioning but can later re-approach the suspect to re-interrogate them under the standards set forth in *Michigan v. Mosely*, 423 U.S. 96 (1975) which requires that the original interrogation was promptly terminated; the interrogation was resumed only after the passage of a significant period of time; the suspect was given complete Miranda warnings at the outset of the second interrogation; a different officer resumed the questioning and the second interrogation was limited to a crime that was not the subject of the earlier interrogation. Police rarely follow these guidelines. Another frequent claim is that the client didn't explicitly assert his right to silence so the situation was ambiguous. Carefully review interrogation tapes and argue that assertion is clear to an ordinary person even if the magic words weren't used. A person being interrogated is not required to "speak with the discrimination of an Oxford don" when requesting counsel, *Davis v. United States*, 512 U.S. 452,459 (1994). Cross examine the detectives about training they've had in cultural competency; many police departments require this and you may be able to find something in their training records showing they should have known you're your client meant. Consider using expert testimony on linguistics or cross-cultural communication to testify about what the intent of your client's communication was.

Selective assertions of Miranda rights must also be respected. Statement to the officer such as, "I won't answer that question" constitutes a selective waiver. Interrogation on the subject in right to silence invoked must cease, can only ask about other subjects. *United States v. Eaton*, 890 F.2d 511 (1st Cir. 1989); *Bruni v. Lewis*, 847 F.2d 561 (9th Cir. 1988).

If a suspect asserts his right to counsel, interrogation must cease and the suspect may not be approached for further interrogation until at least two weeks after being released from custody. *Maryland v. Shatzer*, 559 U.S. 98 (2010). Police may re-initiate questioning a suspect when after invocation of the right to counsel, suspect indicates they've changed their mind and want to talk to police. This can consist of as little as the suspect asking, "What's going to happen to me?", *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). However, if your client asked about other arrestees, families or other topic, argue this is not a re-initiation under *Bradshaw*.

Voluntariness.

The base issue in voluntariness is whether the statement given to police is the result of the un-coerced free will of the suspect. Coercion by a state actor is a necessary element before a statement is found to be involuntary. *Colorado v. Connelly*, 479 U.S. 157 (1986). If there is coercive police conduct, then

the court is to examine and balance defendant's personal characteristics against the degree of coercion that was exerted.

Here are some relevant police pressures and tactics in a voluntariness analysis

- Length of Interrogation. Questioning suspect for excessively long time without a break. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). Juvenile suspect left alone in interrogation room for two hours, then questioned for 5.5 hours noted to be longer than most interrogations and can lead suspect to wonder if interrogation will ever cease. *State v. Jerrell C.J.*, 699 N.W.2d 110 (Wisc. 2005).
- Length of isolation and detention. *Spano v. New York*, 360 U.S. 315 (1959); *Darwin v. Connecticut*, 391 U.S. 346, (1968); *Watts v. Indiana*, 338 U.S. 49, (1949); *Ashcraft v. Tennessee*, Id.; *Ward v. Texas*, 316 U.S. 547 (1942); *Chambers v. Florida*, 309 U.S. 227, (1940).
- Police Deception. Deception does not, standing alone, render a confession involuntary. *Frazier v. Cupp*, 394 U.S. 731 (1969).
- Leniency. Telling suspect that cooperation would be to his benefit is not coercive conduct so long as leniency is not promised. *State v. Deets*, 187 Wis.2d 629 (Ct. App. 1994).
- Exposure to Violent Persons. Confession involuntary when it was obtained as a result of an offer of protection from other inmate where there is a credible threat of violence in prison setting. *Arizona v. Fulminante*, 499 U.S. 279 (1991). When police threatened to return a mentally ill suspect to cell which contained people he implicated. *Smith v. Duckworth*, 910 F.2d 1492 (7th Cir. 1990).
- Threat of unlawful consequences to others. Confession was held involuntary when police threatened to arrest suspect's wife. *Rogers v. Richmond*, 365 U.S. 534 (1961), made threats to take suspect's children away. *Lynumn v. IL*, 372 U.S. 528 (1963); made threats to prevent obtaining counsel. Suspect told, "If you want a lawyer you can't cooperate with officer". *U.S. v. Anderson*, 929 F.2d 96 (2d Cir.1991).
- False Statements regarding consequences of confession or promises to not use statements. Suppression results when a suspect was assured he wouldn't be arrested if he cooperated. *U.S. v. Rogers*, 906 F.2d 189 (5th Cir. 1990). It was improper in a non-custodial setting, when the defendant had no reason to think he was the subject of a criminal investigation for an agent to make reference to their prior relationship and told him that his statements would be "off the cuff". *U.S. v. Walton*, 10 F.3d 1024 (3rd Cir. 1993). A confession was suppressed when a defendant thought statements were an "off the record" proffer and police didn't clearly inform him that statements were on the record. *U.S. v. Swint*, 15 F.3d 286 (3d Cir.1994). Other similar cases: Defendant's statement was not voluntary because the officer interrogating him led him to believe he was only a witness and would not be arrested and that his statement would not be used against him. *U.S. v. Knowles*, 2 F. Supp.2d 1135 (E.D. WI 1998); Police promised to bring cooperation to prosecutor's attention. *U.S. v. Tingle*, 658 F.2d 1332 (9th Cir.1981); after receiving Miranda and asking for attorney, police told suspect that if he got

attorney he could not talk with police and “that might be worse”. *Collazo v. Estelle*, 940 F.2d 411 (9th Cir.1991), cert. den. 502 U.S. 1031 (1992).

- The use of the Reid technique at its most extreme can make a confession involuntary. In *Commonwealth v. DeGiambattista*, 813 N.E.2d 516 (MA 2004), a classic case of Reid Interrogation techniques in an arson case, the police began with an initial period of conversational mild mannered questioning. They used the baiting technique by having other officers come in with thick “case file” and videotapes and tell suspect: "If I told you that somebody at the Paolini Construction was under surveillance by an insurance company for a workers' comp fraud case, is there any reason you would show up on that videotape?" The confrontation statement included telling the suspect that his statements were inconsistent with other witnesses and they had witnesses who saw him at the scene. The theme development downplayed the crime by pointing out no one was hurt, discussing the deplorable condition of the premises that were burned down and stating that the officer could relate to and understand the defendant’s emotions of anger at his landlord. The police continued with the theme that the suspect didn’t mean to hurt anyone, his crime was a product of stress, alcohol consumption and understandable frustration with his living situation and he needed counseling. They posed a classic alternative question: he had either done this to hurt someone deliberately or that he had to be upset, under stress while drinking and made a mistake. The police used different interrogators, had the suspect sign a written statement with corrections and write a letter of apology composed at officer’s suggestion. The Court held under totality of circumstances test, the presentation of false evidence combined with implied leniency through minimization techniques rendered the confession involuntary. (note: In MA, state must prove voluntariness of confession beyond a reasonable doubt).

Juveniles are considered to be more easily coerced into confessing. *State v. Jerrell C.J.* 699 N.W.2d 110 (Wisc. 2005). Special Caution is to be exercised when assessing voluntaries of juvenile confessions – the condition of being a child renders one uncommonly susceptible to police pressure. *Id.* See also *Hardaway v. Young*, 302 F.3d 762 (7th Cir. 2002); *Gallegos v. Colorado*, 370 U.S. 49, 53-55 (1962); *Halley v. Ohio*, 332 U.S. 596, 599-601 (1948).

IV. Motion Hearings: Cross Examining Law Enforcement Interrogators when Challenging Voluntariness

Here is a cross examination paradigm for a motion to suppress when you are challenging a confession as involuntary, particularly in an unrecorded interrogation. Unlike a trial cross, the more open ended questions the better. You are trying to seek as much information as possible for your trial in the (most likely) event the motion is denied because you will want to know how these questions are answered if you have to go to trial, the confession is coming in and your defense is that your client gave a false confession

- Set up with innocuous general questions first – officer has had training, training helpful, he follows his training etc.
- Ask about police plan – was anyone in charge of the interview and interrogation, what was done to prepare, what they knew about the case & how they found out, who controlled the interview and interrogation.

- Establish there is a difference between interview and interrogation and which occurred at what times. Go through interview questions asked.
- Go through the process cop engaged in with the suspect. Don't assume the detective is telling things in the correct chronological sequence- recreate the sequence – what is the first thing anyone said...the next thing, then what was said, was anything else said, then what & who said it. Ask what exact words were used. The more “I don't recall” answers the better.
- Break down time periods into small units –total time client questioned, in custody, left alone, talked to by detectives, from first contact to reading of Miranda rights, client speaking, client silent.
- Ask about tone of voice, emotion, volume, speed & pace, demeanor, posture, accompanying gestures, facial expressions, who came in & out of the room, where they took up position.
- Ask about intent of statements – why did you say that, what was your plan or purpose, what did you expect to happen.
- Ask about police interpretation of statements- what do you think client meant by that, why so, did you consider any other possibilities, what were they, did you follow up on them.
- What bait questions were used, what client was told about the evidence.
- What props were brought into the room and used.
- What themes were suggested and stories told by the interrogators.
- How interrogator handled denials. If they state client was silent, find out why. Did they request he just listen to what they had to say? Persuasive monologues are planned parts of interrogation.
- What interrogators told client regarding negative consequences of silence.
- What alternative questions were used.
- Did client write out his/her own statement, why or why not, was s/he given the choice. If the police wrote statement, exactly when they wrote it, why they chose to write it at a particular time, use of cross-outs, were other notes taken, were other notes preserved.
- What was client's demeanor, intoxication, health, mental health, educational level, language and reading ability, prior police contact emotions, pain, and fear. What were client's questions and nonverbal responses. Was contact with family or friends permitted if requested.
- Client's awareness of his rights, how police knew, what efforts they made to find out if it was a full awareness, what training they've had on that point, what would less than a full awareness be, has police officer ever seen that.

- Police knowledge of any deficits client has and training and experience in those.
- Reasons for and use of breaks.
- Impeachment of Officer
 - Many will deny use of Reid techniques. Be careful about language – if they haven't been to the Reid course, they may not call it that or use same terminology.
 - Use the training materials you have from the subpoena. Show each to officer and have him acknowledge that he received these in training and training conformed to what is contained in the materials.
 - If officer claims “on the job” training – establish that others in department went through similar interrogation training.
 - Submit training materials as an exhibit to show that officer's claim of ignorance or lack of use of these techniques is not consistent with his earlier statements (Remember the beginning of your cross?).

Ideally, every officer who participated in the interrogation process should testify, regardless of who calls them. Consider calling trainers or others in department to submit information on what was taught in training to show that methods taught conform to what your client says occurred in the interrogation.

Recorded Interrogation Cross in Motions and Trials

Motions to suppress confessions shift from arguing what occurred to examining the interrogations and arguing that either Miranda rights were violated or the statement was involuntary. A third option is to argue that the statement is so contaminated that it is unreliable and should not be admitted at trial.

Transcripts must be prepared well in advance. Be aware that one hour of recorded interrogation can take a secretary about eight hours to transcribe. The recordings often have people talking over each other, contain inaudible portions, etc. You will need time to review the transcript with your client in advance of the motion hearing or trial to ensure maximum accuracy.

When reviewing the recording, make two lists: a coercion list and a contamination list. You will need to point out both in the motion hearing and the trial.

When preparing the motion, describe exactly what occurred that violated your client's rights, pointing out the page and line numbers. Attach the tape and transcript to the motion for the judge to review.

Many judges will not want to take testimony when they can review a tape and transcript of the interrogation. If it is clear that the tape and transcript are part of the record, you may not need police testimony. On the other hand, if you need to elicit information that is not contained in the recording, insist on calling the witness and talking testimony.

If the police clearly violated your client's rights, such as not respecting an assertion of silence, the prosecutor may want to elicit evidence that the detective never heard your client assert his rights. Object and point out that Miranda is objective; the police complied or they didn't; any excuses they offer are irrelevant.

With an actual transcript you can count up exact number of denials your client made and when detective cut them off. You can explicitly detail all bait questions and themes. Make sure you get that in the record and explicitly point it out or it will get lost in the shuffle.

In a trial you will show how each fact obtained from client was either the result of police contamination or an (un)lucky guess!

In trial, chances are good that the detective will only review a report summarizing the client's statement and not refresh their memory by listening to the tape. Most likely they will testify incorrectly as to what really occurred in the interrogation process. Be well prepared to impeach! Write out all the chapters of cross and the exact pages and lines in the transcript that substantiate your cross. Note the exact start and stop times of the recording. Then edit the tape into separate video files that you can play to impeach the detective, while showing the jury what was said by placing that portion of the transcript on a visual presenter. The recordings go by quickly and the jury will have a hard time comprehending everything so they will retain a lot more information when they can read along while the tape is playing.

Your chapters regarding contamination in the interrogation are the key to showing how your client could give a false confession. Play all parts of the time where police leaked information to your client, led him to certain answers or asked multiple choice questions that your client had a 50% chance of answering correctly.

V. Other Grounds for Suppression

There are a few other grounds to raise in a motion to suppress a confession. These are:

Suppression for failure to record interrogation

In appropriate cases, consider moving to exclude the confession because law enforcement failed to record the interrogation in its entirety. You will have the best chances of success when the following three factors come together:

- The prosecution evidence is weak enough that there are serious doubts about the truthfulness of the confession.
- Your client is sympathetic.
- The trial judge is open minded enough to doubt the police version of what occurred.

Recording complete interrogations is becoming more common all the time, mostly as a result of legislative initiatives. Numerous state courts have rejected requiring police to record interrogations. Federal courts have also rejected a recordation requirement to admit confessions. Two state Supreme Courts, Minnesota in *State v. Scales*, 518 N.W.2d 587 (Minn. 1994), and Wisconsin, (limited to juvenile cases) in *State v. Jerrell C.J.*, 699 N.W.2d 110 (Wisc. 2005), used their supervisory authority to require electronic recording of all in custody interrogations in order for a defendant's statement to

admissible in court. One state, Alaska, in *Stephan v. State*, 711 P.2d 1156 (Alaska 1985) held that interrogation recordation is a due process requirement under its state constitution for confessions to be admissible. New Hampshire, in *State v. Barnett*, 789 A.2d 629 (N.H. 2001) took a different direction and used its supervisory authority to bar the admission of selective recordings of statements; a recorded statement is only admissible if the interrogation is recorded in its entirety after reading Miranda rights. New Hampshire does not suppress the statement however; police testimony regarding what the defendant stated is still admissible.

Simply because your jurisdiction has previously ruled against mandating recorded interrogation doesn't mean you shouldn't raise it again. Nationally there is a trend towards recording and the highest court in your jurisdiction may change its ruling, particularly if it has repeatedly issued advisements to police to record which have been ignored – or if new justices on the bench have a different take on the issue.

Suppressing Confessions Due to Contamination

Recorded interrogation has demonstrated that these police claims are not always accurate. Many recordings have revealed substantial contamination in police interrogations as detectives inform suspects that their answers to questions don't match the evidence and shape the suspect's answers to conform to the facts known to the investigating law enforcement officers. The advent of DNA evidence has again raised concerns among the judiciary about the problems of coercion and false confessions. In *Corley v. U.S.*, ___U.S.___129 S. Ct. 1558 (2009), the court noted, "there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed, see, e.g., Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. 891, 906-907 (2004)."

Contamination renders a confession extremely unreliable. Even though there is no current case law, when law enforcement is the provable source of contamination in a confession, bring a motion to suppress on the grounds that the contaminated interrogation violates your client's right to due process. A parallel legal doctrine from which you can draw an analogous argument is suppression of an eyewitness' identification due to undue police suggestiveness.

Eyewitness identification, like false confessions, is recognized as a leading case of wrongful convictions. Recognizing that law enforcement can contaminate accurate identifications through unduly suggestive lineup procedures, in *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), the United States Supreme Court held that "reliability is the linchpin in determining the admissibility of identification testimony". If an identification procedure is unduly suggestive, an in-court identification is only permitted if the prosecution can demonstrate an independent source for the identification, so that their identification is reliable notwithstanding the improper police procedures.

Move the court to adopt a similar two step analysis in deciding whether to admit a confession into evidence. If you can show that your client's confession was contaminated by the interrogating detectives, argue the statement can only be admitted if the state shows an independent basis for believing the confession. Unfortunately, it is virtually impossible to develop this level of proof in an unrecorded confession. But if the interrogation and confession in your case is recorded from start to finish, the opportunity exists to support your motion with this high degree of specificity.

Suppression for Delay in Presentment

In *Corley v. U.S.*, 556 U.S. 303 (2009), the court revived what has been come to be known as the *McNabb-Mallory* rule. The court held that if a confession occurred more than six hours after arrest and before presentment in court, a court must decide “whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed.”

Because the *McNabb-Mallory* rule is based on statutes and rules of admissibility in federal courts, it is not applicable to state court proceedings. One theory to move for suppression is whether there was delay in bringing a defendant before a magistrate in violation of *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), a Fourth Amendment violation. *Riverside* was a civil case and the United States Supreme Court has not ruled on whether a *Riverside* violation is a basis for suppression. Some states hold that the exclusionary rule is a remedy for *Riverside* violations. See *Black v. State*, 871 P.2d 35 (Okla. 1994); *State v. Huddleston*, 924 S.W.2d 666 (Tenn. 1996); *People v. Jenkins*, 122 Cal. App. 4th 1160 (Cal. Ct. App. 2004).

Some states hold a delay in presentment is a basis for suppression on other grounds. Rhode Island hold there is grounds to suppress if the delay is “operative in inducing the confession”, *State v. Lionberg*, 533 A.2d 1172, 1178 (R.I. 1987). A defendant who seeks to have an inculpatory statement suppressed because of an unnecessary delay in presentment "must demonstrate both: (1) that the delay in presentment was unnecessary and (2) that such delay was 'causative' with respect to" the making of the inculpatory statement. *State v. King*, 996 A.2d 613 at 622 (R.I. 2010). In Wisconsin, a delay in presentment may give rise to suppression when police are delaying in order to obtain a “sew-up” confession. *Phillips v. State*, 139 N.W.2d 41(Wisc. 1966); *Wagner v. State*, 277 N.W.2d 849 (Wisc. 1979).

Sixth Amendment Violations of the Right to Counsel

Until 2009, police were not permitted to approach and question defendants regarding the crime they were charged with if they were represented by counsel, even if they had not specifically asserted their right to counsel. *Michigan v. Jackson*, 475 U.S. 625 (1986). In *Montejo v. Louisiana*, 556 U.S. 778 (2009), the Supreme Court overruled *Jackson* and held that an individual’s interests under the Sixth Amendment are sufficiently protected when law enforcement officers approach a represented suspect charged with a crime and read him Miranda rights.

Argue that your state court should reject *Montejo*’s reasoning and hold that their state constitution affords suspects great protections than the United States Constitution as was done in Wisconsin in *State v. Forbush*, 769 N.W.2d 741(Wisc. 2011).

Cross Examination at the Trial

To win a confession case, you must persuade the jury not only the confession is coerced **but also that it’s false**. The key to proving a confession is false is to show the jury how the confession became contaminated by police interrogation. You must account for the source of each and every fact in the confession – whether from police suggestions, “lucky” guesses, media coverage, and client’s information obtained from true perpetrator, client was present but only a witness, etc.

You must answer the question – why would someone confess to a crime they didn’t commit. You must show the jury how and why the false confession occurred.

All phases of the trial are crucial; ask about false confessions in voir dire, make the interrogation techniques and the false confession a centerpiece of your opening statement, have client testify if able to, prepare jury instructions on false confession.

Here are the chapters for cross examination of the interrogator. As you can tell many of these are the same as the motion cross, but now with a different emphasis.

- Generalities about job as a detective – observes crime scene, works with partner, interviews witnesses, interrogating suspects, becoming familiar with the physical evidence. Establish training important and contributes to doing a good job.
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- Go through special training and experience; detective has in fooling people, e.g. working undercover in drug investigations (if appropriate).
- Go through particularities of the crime scene and detective’s familiarity with it, whether from personal observation, witness interviews or shift briefing. Show that the detective knew all the facts and could feed them to defendant for factual part of confession, if confession matches known crime facts; or that the confession does not match known facts/physical evidence.
- Go through the specifics of what the detective has been taught in police training that are relevant to the methods used to get the confession in your case. If you have the training materials, also lock in testimony using these. Use the information you developed from the motion hearing about the interrogation methods actually used by the detective with your client.
- Establish that interrogation of suspects is a crucial part of the job. For example in a homicide case sometimes the only witnesses are the perpetrator and the deceased. Or that witnesses lack credibility.
- Point out the cop’s only purpose in talking to client was to get a confession – they already had an opinion of his guilt. That’s why client was arrested and read Miranda warnings. Use this to show bias and prejudice. NOTE: NEVER do this when there is suppressed or inadmissible evidence; it will open the door to the admission of such evidence.
- Contrast the number of police in room, their size, strength & power compared to client. Paint a word picture of the interrogation room.
- Use demonstrative evidence to show the coercive environment. Recreate the interrogation room in front of the jury on the courtroom floor with masking tape, chairs using the exact dimensions. Use blow up photographs of the actual room.
- Show that police controlled the environment and made all decisions. When the client came into and left the interrogation room, was able to eat, sleep, and use the bathroom. Establish that client was isolated from outside world. No access to telephone, family, friends, etc.

- Detail all the time it took to get the confession, contrast with how long it takes to read the written statement to the jury or to write out the statement. Point out that detective failed to write down both all the things he said while interrogating client and what the client said.
- Go through Bait Questions.
- Go through the evidence that the police brought into interrogation to induce a confession – from vague items like the thick police case file filled with reports to photos, witness statements, etc.
- Show that police have specialized legal knowledge and used it to get a confession. Go through the themes that were developed. Point out how the themes downplayed seriousness of crime compared with a much worse version.
- Use of leading questions or questions that suggest only 2-3 answers in the interrogation. Example: Did he get out of the driver or passenger side of the car? If the right answer was passenger, your client had a 50% chance of getting it right.
- Detail any misrepresentations that were used to induce the confession, like claims of fingerprints, eyewitnesses, etc. Get the detective to agree he did a good job to get client to believe these misrepresentations were true.
- Alternative question that was used.
- Impeach with training materials if cop refuses to acknowledge use of Reid-type techniques. This is a win-win for you. If the cop acknowledges techniques such as telling client he had absolute confidence in client's guilt, using bait questions and theme development that minimized the client's culpability, then you can argue this is how a false confession was obtained. If detective claims he didn't use these techniques, you can argue he deviated from acceptable police practices which are designed to prevent false confessions.
- Show the opportunity to engage in coercive behavior – physical abuse, threats, promises of leniency and that detective would be in trouble for doing so. They could lose promotions, their job, even be charged with a crime.
- If client has particular vulnerabilities – mental illness, retardation, etc. – point out either police unaware, ignored it or that they have no expertise in this area (especially if you're calling an expert). Show they didn't modify their conduct – for example they read the client standard Miranda warnings when he only had a first grade reading level. If police knew, show they took advantage of client.
- Unrecorded Interrogations: show all the opportunities that were available to take statement in the client's exact words- having client write out statement himself, taping or videotaping and this wasn't done. Point out the language of the statement – that it is the detective's words, not client's.

- Unrecorded Interrogations: Point out no taping and the ease and low cost of recording and storing interrogations in the digital era. If there are other occasions where the department records, point this out. Examples:
 - Police discipline interviews are recorded in many locations per union contract
 - Wiretaps, wired confidential informant.
 - Recordation in specific case types but not this type.
- Unrecorded Interrogations: Show that they can't recall many things that happened during the interrogation. The decision not to record resulted in jury not getting all the information.
- Get acknowledgement that false confessions exist. They can be checked against known physical facts. Physical facts/scientific evidence not susceptible to the procedure of interrogation.
- Highlight implausible or inconsistent aspects of the confession. Show the confession doesn't match crime facts- or only matches facts that were known to police at time of interrogation, which may later have been proven to be incorrect.
- Point out all contamination that took place during the interrogation. Be specific about each item. Note: This is almost impossible to do without a recorded interrogation.
- If all investigation ceased once confession obtained, point this out. Investigators should verify facts obtained in a confession to insure its accuracy.