Should Investigators Be Allowed To Lie About Evidence To A Subject During Interrogation?

The state of New York is considering legislation that would prohibit investigators from lying to a subject about evidence in the case, such as indicating to the subject during the interrogation that there is a DNA match with samples taken from the victim; that there is a witness who says that they saw the subject commit the crime; that the subject's finger prints were found at the scene of the crime; or that an accomplice made an incriminating statement implicating the subject in the commission of the crime. Let's examine what the courts say about investigators lying about evidence, whether or not lying about evidence is likely to cause a false confession, and what we teach about the use of deception during an interrogation.

In order to ensure that an interrogation was properly conducted and that the subsequent confession was voluntarily obtained, investigators should employ techniques that 1) ensure the subject's rights were not violated; 2) avoid force, the threat of force, or the threat of inevitable consequences; 3) avoid promises of leniency; and, 4) conduct the interrogation within the guidelines that have been established by the courts.

In 1969 the United States Supreme Court upheld the use of misrepresenting evidence to the subject. The case was *Frazier v.Cupp* (394 U.S. 731). In that case the Supreme Court upheld the admissibility of the defendant's confession, which was the result of the police falsely telling the subject that his accomplice had confessed. The Court held that the misrepresentations were relevant, but that they did not make an otherwise voluntary confession inadmissible. In reaching this conclusion, the Court judged the materiality of the misrepresentation by viewing the "the totality of circumstances."

It is important to highlight the Court's reference to an "*otherwise voluntary confession*," the clear implication being that if the subject's rights were honored; if there were no threats of harm or inevitable consequences; if there were no promises of leniency; and if the investigator followed the guidelines established by the courts, then misrepresenting evidence, in and of itself, will not jeopardize the admissibility of the confession.

This same thought has been reiterated in several cases and studies. In *State v. Kolts* (205 A.3d 504, 2019) the Supreme Court of Vermont upheld the defendant's confession that was made in response to the detective's false claim that there was DNA evidence to prove his guilt. From the Court's opinion:

> The detective's false claim of DNA evidence is not enough to render his confession involuntary *without other coercive actions*, such as a promise of leniency. But the detectives here made defendant no promises of leniency. And, as courts have reasoned, an interviewer's use of false evidence is less likely to

* (written by Joseph P. Buckley, President, John E. Reid and Associates, November 2019)

produce an involuntary confession than an interviewer's lie about matters external to the charge. For example, lies threatening a suspect's ability to retain custody of a child render a confession involuntary because they could induce a confession by overcoming a suspect's will. But lies about evidence of the charge are more likely to evoke, if any feelings at all, a suspect's beliefs about his or her own culpability.

In *Anderson v. Vannoy, Warden* (2019 WL 2077126) the US District Court upheld the lower court's decision not to suppress the defendant's incriminating statements:

Regarding certain falsehoods used by the police during questioning, the issue is whether or not such tactics were sufficient to make an otherwise voluntary confession or statement inadmissible. In *Lockhart*, a detective misled the defendant into believing that the police knew more about the case than they really did by telling him that the victims had identified him…*This court found that the detectives' statements to the defendant were not sufficient inducements "to make an otherwise voluntary confession inadmissible."*

In *Commonwealth v. Gallett* (481 Mass. 662, 2019) the Supreme Judicial Court of Massachusetts upheld the admissibility of the defendant's confession:

Gallett argues that the interrogating officers misrepresented evidence that strengthened their case and made false assurances that ultimately induced Gallett into making inculpatory statements. We conclude that the officers did not act impermissibly.

We have suppressed a defendant's statements in circumstances where police use trickery or a ruse in obtaining a confession. *Those cases generally have additional circumstances -- apart from the ruse itself -- that rendered the confession involuntary*.

The Court pointed out that these *additional circumstances* included "coercive tactics relating to defendant's son"; minimizing "the legal gravity of the alleged crime"; suggesting to the defendant that "if he did not confess, he would be charged with more serious crimes"; after defendant invoked his right to counsel, "dissuaded defendant from consulting with lawyer"; and, "implicitly promised leniency as well as alcohol counseling if defendant confessed".

In *State v. Johnson* (2018 WL 627063) the Court of Appeals of South Carolina upheld the voluntariness of the defendant's confession, indicating the misrepresenting evidence is not a coercive tactic:

Misrepresentations of evidence by police, although a relevant factor, *do not render an otherwise voluntary confession inadmissible*."… "Both this [c]ourt and the

United States Supreme Court have recognized that misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible .... The pertinent inquiry is, as always, whether the defendant's will was 'overborne.'

Consider the court's opinion in *US v. Graham* (2014 WL 2922388 (N.D.Ga.)) in which the court pointed out that misrepresenting evidence is "one factor to consider among the totality of the circumstances in determining voluntariness."

The court points out that there are a number of cases in which statements elicited from a defendant in response to police deception were found involuntary… but the court stated,

"these cases all involve significant aggravating circumstances not present here, such as, subjecting the accused to an exhaustingly long interrogation, the application of physical force or the threat to do so, or the making of a promise that induces a confession."

It is a consistent consensus of opinion by the courts that lying about evidence in an *"otherwise voluntary confession*," will not render a confession inadmissible. It is the view of the courts that behaviors such as threats of harm or inevitable consequences, denial of rights, promises of leniency or other such coercive behaviors will jeopardize the admissibility of the subject's confession.

In one research effort the author studied the first 110 DNA exoneration cases reported by the Innocence Project. The author reported that*, "This study failed to find a single false confession of a cognitively normal individual that did not include the use of coercive tactics by the interrogator…"* The author identified coercive interrogation tactics as "the use of physical force; denial of food, sleep or bathroom; explicit threats of punishment; explicit promises of leniency; and extremely lengthy interrogations." (J. Pete Blair, "A Test of the Unusual False Confession Perspective: Using Cases of Proven False Confessions" *Criminal Law Bulletin* (Vol 41, Number 2)

As a further illustration of this point, in his 2011 book, Convicting the Innocent, Brandon Garrett, a law professor at the University of Virginia, examined most of the case files for the first 250 DNA exonerations, which included 40 false confession cases. However, as pointed out by Dr. Deborah Davis and Dr. Richard Leo, "Many, and perhaps most, of the interrogations in the cases Garrett reviewed crossed the line of proper interrogation technique through the use of explicit threats and promises, feeding suspects crime facts, and/or other coercive practices."

To amplify this point we stated the following on our book, Criminal Interrogation and Confessions (2013, 5th ed):

" Consider an innocent rape suspect who is falsely told that DNA evidence positively identifies him as the rapist. Would this false statement cause an innocent person to

suddenly shrink in the chair and decide that it would be in his best interest to confess? Would a suspect, innocent of a homicide, bury his head in his hands and confess, because he was told that the murder weapon was found during a search of his home? Of course not!

However, consider that such false statements were then used to convince the suspect that, regardless of his stated innocence, he would be found guilty of the crime and would be sentenced to prison. Further, the investigator tells the suspect that, if he cooperates by confessing, he will be afforded leniency. Under these conditions, it becomes much more plausible that an innocent person may decide to confess – not because fictitious evidence was presented, but because that evidence was used to augment an improper interrogation technique (i.e., the threat of inevitable consequences coupled with a promise of leniency)."

Don't be Fooled by "the research"

Social psychologists oftentimes testify that research has clearly established that innocent people will confess when presented with false evidence. They refer to two primary studies that support this conclusion. The first of these studies, commonly known as "the Alt-key Study," required students to perform a data entry project and warned them not to hit the computer's Alt key, which would cause the computer to crash. The researchers forced the system to crash, falsely accused the students of hitting the Alt key, and confronted them with a "witness" who reported seeing them do so. Under these circumstances, a number of the students signed written confessions despite their innocence.

In the second study, students were given a set of assignments and told that in some assignments collaboration with classmates was acceptable, while in others it was prohibited. The researchers then accused innocent students of improperly collaborating on certain assignments, informed them that they had violated university rules prohibiting cheating, and, for some, minimized the extent of their wrongdoing and encouraged them to take responsibility for their actions. Half of the students were told that there was a hidden video camera in the room which would eventually reveal their guilt or innocence. Under this circumstance 93% of the guilty suspects confessed and 50% of the innocent suspects confessed. However, as it turned out, these innocent participants did not confess to helping the other person at all. Rather, they signed a prepared statement to that effect. Further, and most importantly, they were reassured that if the hidden camera exonerated them they would not get into any trouble by signing the statement. *

In *U.S. v. Jacques,* when discussing these studies, the court stated that "Obviously, these "interrogations" were not conducted by law enforcement, were not part of a criminal investigation, did not involve actual suspects, and did not present the students with a serious penalty. As a result, Professor Hirsch [the false confession expert in this case] readily admitted that these studies have "limited value," which, in the context of this case, is an understatement."

* (For additional details see "Research Review: The Lie, the Bluff and False Confessions" at http://www.reid.com/educational_info/r_tips.html?serial=129407139948903)

Even one of the authors of these two studies, Saul Kassin, stated, "One needs to be cautious in generalizing from laboratory experiments." *

While investigators clearly can lie about evidence during an interrogation, should they?

From our book, Criminal Interrogation and Confessions (5th ed, 2013) we state the following:

"Although it is generally acceptable to verbally lie about evidence connecting a suspect to a crime, it is a risky technique to employ. Before presenting such evidence, careful consideration should be given to the level of rapport established with the suspect, the probable existence of the evidence, and the investigators ability to "sell" the existence of the evidence. A miscalculation of any of these principles may cause the technique to backfire and fortify a guilty suspect's resistance. Furthermore, fictitious evidence implicating the suspect in the crime should not be used when the suspect takes the position that he does not remember whether he committed the crime because of being intoxicated, for example. Under that unusual circumstance, it may be argued that the introduction of evidence was used to convince the suspect of his guilt. For these reasons, introducing false evidence during an interrogation should be considered only when other attempts to stop the suspect's persistent but weak denials have failed."

Later we state, "We offer these recommendations with respect to introducing fictitious evidence during an interrogation:

- Introducing fictitious evidence during an interrogation presents a risk that the guilty suspect may detect the investigator's bluff, resulting in a significant loss of credibility and sincerity. For this reason, we recommend that this tactic be used as a last resort effort.

- This tactic should not be used for the suspect who acknowledges that he may have committed the crime even though he has no specific recollections of doing so. Under this circumstance, the introduction of such evidence may lead to claims that the investigator was attempting to convince the suspect that he, in fact, did commit the crime.

- This technique should be avoided when interrogating a youthful suspect with low social maturity or a suspect with diminished mental capacity. These suspects may not have the fortitude or confidence to challenge such evidence and, depending on the nature of the crime, may become confused as to their own possible involvement if the police tell them evidence clearly indicates they committed the crime.

*(Saul Kassin, et al, "Police-Induced Confessions: Risk Factors and Recommendations" *Law Hum Behav* (2010) 34:3–38)

The above recommendations are consistent with the guidelines recommended by several false confession experts in their White Paper, "Police-Induced Confessions: Risk Factors and Recommendations."*

In view of the discussion and several court cases, most notably the United States Supreme Court decision, *Frazier v. Cupp*, John E. Reid and Associates opposes legislation (as presently proposed by the State of New York) that would prohibit investigators from lying to a suspect about evidence during interrogation. In every instance, however, investigators should follow the precautions and guidelines set forth by the courts and required by statutes of their specific jurisdictions.

* Saul Kassin, Steven Drizin, Thomas Grisso, Gisli Gudjonsson, Richard Leo and Allison Redlich, "Police-Induced Confessions: Risk Factors and Recommendations" *Law Hum Behav* (2010) 34:3–38 [a White Paper written for the American Psychology-Law Society of the American Psychological Association]

In this White Paper the authors draw a distinction between misrepresenting evidence to a cognitively normal individual with misrepresenting evidence to a socially immature juvenile or individuals with significant mental or psychological disabilities:

"….a confession produced by telling an adult suspect that his cousin had confessed, the ploy used in *Frazier v. Cupp* might well be admissible. Yet a confession produced by telling a traumatized 14-year-old boy that his hair was found in his murdered sister's grasp, that her blood was found in his bedroom, and that he failed an infallible lie detector test…..would be excluded."