What do the courts say about the testimony of false confession experts?

For the past several years the courts have viewed with skepticism the testimony of "false confession experts", repeatedly suggesting that there is no actual science to support their views but rather, anecdotal evidence. Here is what some of the courts have said:

Re: Dr. Richard Ofshe

- "Dr. Ofshe's testimony at the Daubert hearing suggested that there was no methodology about false confessions that could be tested, or that would permit an error rate to be determined. In this area of research, the result of the lack of any reliable testing format to establish predictors of when a false confession might occur is a methodology consisting of analyzing false confessions only after a confession has been determined to be false. The trial court did not err in finding Dr. Ofshe's proposed trial testimony inadmissible under Daubert." *State v. Lamonica*, July 2010

- "Dr. Ofshe's testimony did not contain 'sufficient evidence to confirm that the principles upon which the expert based his conclusions are generally accepted by social scientists and psychologists working in the field. Therefore, his anticipated testimony that psychological coercion was employed during the interrogation of defendant, Argelis Rosario, which in his opinion would induce a person to falsely confess, does not meet the Frye standard for admissibility." *People v. Rosario*, March, 2008.

- "In essence, the military judge found that Dr. Ofshe's theory regarding coercive interrogations was not based on rigorous scientific analysis or even subject to scientific testing but was rather Dr. Ofshe's own subjective review of a group of particularly selected cases. By way of example, at one point Dr. Ofshe testified that his theory concerning the impact of certain police interrogation techniques on the danger of false confessions was as intuitive as the fact that the sun will come up each day. Essentially he argues that we can't necessarily prove causation but we just know how it works. Id. at 5, Record at 1202." *US v Wilson*, February 2007

- "This Court further observed in Riley that the admission of expert testimony based on the theory of false confessions was premature and unreliable inasmuch as there was insufficient scientific support and too many unanswered questions regarding such theory. Id. at 682-683(4), 604 S.E.2d 488. In short, false confession theory does not satisfy the evidentiary test in criminal cases set forth in Harper v. State, 249 Ga. 519(1), 292 S.E.2d 389 (1982)." *Lyons v. State*, October 2007

Some of the other cases in which Dr. Ofshe's testimony was excluded, limited or rejected* include:

People v. Balbuena, May 2010

People v. Ekblom, July 2010

State vs. Williams, February 2010

US v. Griffee, May 2009 * fall 2010 legal update

Brown v. Horell, February 2009

Smith v. State, March 2009

Contreras v. State, January 2009

People v. Rosario, March 2008

Fox,II, Appellee-Plaintiff v Indiana, February 2008

US v. Freeman, February 2008

People v. Cota, November 2007

Lyons v. State, October 2007

US v. Mamah, February 2002

State v. Tapke, September 2007

Re: Dr. Richard Leo

- The lower court had found that "Dr. Leo's testimony would not appreciably aid the jury in determining whether Vent made a false confession." The trial court judge was also "troubled by the fact that there was no way to quantify or test Dr. Leo's conclusions that certain techniques might lead to a false confession. He also concluded that jurors would be aware that some people do make false confessions and that this proposition could be developed by questioning and argument." *State vs. Williams*, February, 2010

- The trial court had refused to allow Dr. Leo to testify, concluding that nothing that the doctor had to say would assist the jury and that there was "not a shred of evidence before us at this point to render a basis for any opinion by Dr. Leo that the confession was false...." *People v. Lucas*, July 2009

- "Of particular significance to the Daubert analysis here, Dr. Leo has not formulated a specific theory or methodology about false confessions that could be tested, subjected to peer review, or permit an error rate to be determined. Dr. Leo's research on false confessions has consisted of analyzing false confessions, after they have been determined to be false..... Given the evidence before the trial court that Dr. Leo's expert testimony did not include a reliable scientific theory or anything outside the understanding of the jury that would assist it in assessing the reliability of Wooden's confession, the trial court did not abuse its discretion in refusing to admit Dr. Leo's testimony." *State v. Wooden*, July, 2008

Some of the other cases in which Dr. Leo's testimony was excluded, limited or rejected include:

US v. Redlightning, October 2010 * Fall Legal Update 2010

People v. Vargas, June 2010

State v. Law, June 2008

People v. Cerda, May 2008

State v. Law, June 2008

People v. Steele, June 2008

People v. Wroten, December 2007

People v. Muratalla, December 2007

People v. Rathbun, August 2007

Scott v. State, March 2005

Vent v. State, February 2007

Re: Professor Saul Kassin

- Pragmatic implication is a theory proposed by Professor Saul Kassin which posits that a subject of an interrogation may cognitively perceive threats or promises even though the investigator never threatened the suspect or offered the suspect a promise of leniency. In the case of *People v. Benson* (2010) the Court of Appeal, Third District, California rejected this premise. In this case the court found the following:

  "Here, Detective Rodriguez did tell defendant there was "a big difference between ... someone getting hurt and trying to shoot someone." However, the detectives made no promises or representations that defendant's cooperation would garner more lenient treatment or lesser charges. "No specific benefit in terms of lesser charges was promised or even discussed, and [the detective's] general assertion that the circumstances of a killing could 'make a lot of difference' to the punishment, while perhaps optimistic, was not materially deceptive." The general assertion that the circumstances of a killing could make a difference was not materially deceptive. It is not deceptive to state that an accomplice to murder may be better off than the shooter." *People v. Benson*, January 2010

- "The judge concluded that [Saul] Kassin's testimony did not meet the requirements set forth in the Lanigan case. We agree. As the judge stated, Kassin

conceded that his opinions are not generally accepted, require further testing, and are not yet a subject of "scientific knowledge." One of his own publications admitted as much. Accordingly, his proposed testimony that certain interrogation techniques have previously produced false confessions does not meet either the general acceptance or reliability criteria established by the Lanigan case. The judge did not abuse her discretion in refusing to admit Professor Kassin's testimony." *Commonwealth v. Robinson*, April 2007

Some of the other cases in which Professor Kassin's testimony was excluded, limited or rejected include:

State v. Cope, 2009

Bell, Petitioner v. Ercole, et al., June 2008.

Re: Mark Castanza

- "'Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness.'... A trial court may exclude the testimony of a false confessions expert where the defendant's testimony about why he falsely confessed is easily understood by jurors." *People v. Martinez*, March, 2008

Re: Dr. Solomon Fulero

- The Court held "that the subject of whether a person has falsely confessed 'does not depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence,' and therefore, 'there is no occasion to resort to expert testimony." *People v. Crews*, February 2008

Also see *Williams v. Brunsman,* May 2010 * Fall 2010 Legal Update

Downs v. Virginia, May 2006

Re: Dr. Jarvis Wright

- "Based on our evaluation of the testimony and application of the Kelly factors for reliability of scientific theory, we find that the Appellant did not meet his burden of providing by clear and convincing evidence that Dr. Wright's testimony was reliable and therefore relevant. Dr. Wright's testimony [on false confessions] could not have assisted the jury in understanding the evidence or in making a determination of a fact issue." *Munoz v. State*, August 2009

Re: Dr. Robert Latimer

- In the case of *State v. Rosales*, (July 2010), the Supreme Court of New Jersey stated that, "In rejecting the proposed expert testimony of Dr. Latimer, the trial

court stated: [Dr. Latimer] would be telling the jury that people have given false confessions in the past. Nothing else that he could say to the jury would be in any way scientifically established or accepted by the scientific community. We agree. Because that testimony was not about a field that is at a "state of the art" to be considered sufficiently reliable, the trial court properly denied Dr. Latimer's proposed testimony."

Dr. Allison Redlich

Edmonds v. State, April 2006

Re: Dr. Rosalyn Shultz

State v. Wright, March 2008

Re: Dr. Deborah Davis

People v. Gallo, July 2008

US v. Benally, September 2008

Zhao v. City of New York, et al., August 2008.

Re: Dr. Christian Meissner

US v. Markis, August 2009

Dodson v. State, March 2008

Re: Dr. Christopher Lamps

T.C., a minor, Appellant v. State, September 2009

Re: Dr. Gregory DeClue

US v. Dixon, January 2008

Re: Dr. Avak A. Howsepian

People v. Madrigal, January 2008

Re: Dr. Bruce Frumkin

People v. Nelson, December 2009 * Legal Update Summer 2010 Part 1

State v. Bennett, September 2007

Re: E. Clay Jorgensen, Ph.D.

State v. Sam, October 2009 * Legal Update Summer 2010 Part 1

Re: Dr. Jeffrey Vanderwater-Piercy

Ruiz v. State, May 2010 * Legal Update Summer 2010 Part 2

* Rejected also includes cases in which the expert offered some testimony but their argument was rejected by the judge or jury

Here are cases n which the courts felt that the testimony of an expert witness on the issue of false confessions should have been allowed to testify:

Re: Dr. Solomon Fulero

Terry v. Commonwealth, October 2010 * Fall legal Update 2010

Re: Dr. Richard Ofshe

US v. McGinnis, August 2010 * Fall Legal Update 2010

(The following is one our Investigator Tips from our website at www.reid.com)

Responding to Defense Experts' Characterization of Interrogation

May – June, 2010

In 1998 David Lykken wrote a book titled, "A Tremor in the Blood: The Uses and Abuses of the Polygraph Technique". In it, he advocated the use of his own "Guilty Knowledge Test" and attacked the existing Control Question Technique by initially offering a naïve description of control question theory. He then picked apart his own implausible theory. The uninformed reader was left with the forgone conclusion: 'Of course the control question polygraph technique is invalid, look at how faulty the underlying theory is.'

History is repeating itself. Defense "experts" are condemning contemporary interrogation techniques by presenting their own distorted portrayal of what occurs during an interrogation and then attacking their own inaccurate description. Fortunately, most courts have seen through their blatant attempt to discredit any confession obtained through a police interrogation. Nonetheless, it is instructive to know what these defense experts are saying.

The Defense Experts' Characterization of Interrogation

The following is taken from a report prepared by Dr. Richard Leo on a contested confession case in Wisconsin (Brendan Dassey). It is representative of how many defense experts describe the interrogation process:

A. "The sole purpose for custodial interrogation is to elicit a confession. Contemporary American interrogation methods are structured to persuade a rational person who knows he is guilty to rethink his initial decision to deny culpability and instead choose to confess."

B. "The first step of successful interrogation consists of causing a suspect to view his situation as hopeless. The interrogator communicates to the suspect that he has been caught , that there is no way he will escape the interrogation without incriminating himself, and that his future is determined – that regardless of the suspect's denials or protestations of innocence, he is going to be arrested, prosecuted convicted and eventually incarcerated."

C. "The second step of successful interrogation consists of offering the suspect inducements to confess – reasons or scenarios that suggest the suspect will receive some personal, moral, communal, procedural material or other benefit if he confesses to some version of the offense." There are three forms of such inducements:

- "Low-end inducements refer to interpersonal or moral appeals the interrogator uses to convince a suspect that he will feel better if he confesses."
- "Systemic inducements refer to appeals that the interrogator uses to focus the suspect's attention on the processes and outcomes of the criminal justice system in order to get the suspect to come to the conclusion that his case is likely to be processed more favorably by all actors in the criminal justice system if he confesses."
- "High-end inducements refer to appeals that directly communicate that the suspect will receive less punishment, a lower prison sentence, and/or some form of police, prosecutorial, judicial, or juror leniency if he complies with the interrogator's demand that he confess."

This portrayal of the interrogation process clearly describes techniques that are illegal and, if used, may cause a confession to be suppressed. It certainly does not describe The Reid Nine Steps of Interrogation. In fact, it contains a number of procedures that we specifically teach as being improper.

Reid's Response

We certainly take issue with the stated purpose of an interrogation being to elicit a confession. On page 4 of our training manual we state that the objective of an interrogation is to elicit the truth from a suspect, not a confession.

There are a number of possible outcomes of a successful interrogation other than obtaining a confession. Some of these are: (1) The suspect is innocent; (2) The suspect did not commit the offense under investigation but lied about some aspect of the investigation (motive, alibi, access, etc.) ; (3) The suspect did not commit the offense under investigation but knows who did. Throughout an interrogation the investigator's goal is always to learn the truth.

Leo states that the first step of an interrogation is to convince the suspect that his situation is helpless. This is an outright false statement. This statement or goal never appears in our text books or seminar manuals. On page 49 of our training manual we teach the opposite, that it is improper to tell the suspect that he is facing inevitable consequences. We reference cases where innocence people falsely confessed because the investigator convinced the suspect that he would suffer consequences regardless of his denials. On page 64 we offer information on how to identify truthful from deceptive denials and, on that same page, acknowledge that sometimes innocent suspects are mistakenly interrogated.

What we do teach is that, at the outset of the interrogation, the investigator should express high confidence that the suspect was involved in committing the crime. Guilty suspects are unlikely to tell the truth unless they believe the investigator already knows that they committed the crime. Consequently, expressing confidence in the suspect's guilt is necessary to learn the truth from guilty suspects. However, this procedure certainly does not result in false confessions from innocent suspects. Leo, and others, have taken the concept of expressing high confidence in the suspect's guilt and converting it to a self-serving portrayal that interrogations are designed to convince the suspect that he is in a helpless situation. This is simply not the case.

As to the second step of the process, any successful interrogation technique must offer the guilty suspect a real or perceived benefit of telling the truth. This is fundamental to persuasive communication and, on a daily basis, the average person is bombarded with incentives designed to influence their behavior. Whether the message is to buy a particular product, get a medical checkup, or watch a particular television program, all persuasive arguments involves a promise of benefit with one choice and adverse consequences with another choice.

Common law recognized that some promises of benefit or threats of adverse consequences may cause an innocent person to confess. Examples include promises to avoid a lengthy sentence or threats of physical pain if the suspect does not confess. These would fit the description of what Leo calls, "high-end inducements." Countries whose criminal justice system is based on common law forbid interrogation procedures that involve inflicting, or threatening to inflict pain or discomfort onto a suspect in an effort to obtain a confession. However, they differ somewhat on the use of promises to obtain a confession.

In the United Kingdom, promises of leniency in exchange for a confession are codified within their law, e.g., if a suspect confesses early during an investigation, by statue, he increases the probability of receiving a lesser sentence. In 2000 the Canadian Supreme Court provided a bright line distinction with respect to promises of leniency. In Oickle, the court ruled that only a quid pro quo offer by the interrogator for leniency in exchange for a confession is impermissible. The United States has the most stringent legal requirement concerning rewards for a confession. Very simply, an investigator cannot offer or imply a promise of lenience in exchange for a confession.

Applying legal standards, Leo's description of low-end inducements are certainly legal and are advocated in the Reid Technique. The high-end inducements are clearly illegal in the United States as well as Canada and we teach investigators not to use these tactics. There are multiple references to these illegal interrogation tactics in both our training manual as well as our text, Criminal Interrogation and Confessions.

This leaves "systemic inducements" which are designed to get the suspect to come to the conclusion that if he confesses, his case may be processed more favorably by the criminal justice system. From the interrogator's perspective, of course, this is desirable and yet the interrogator cannot mention or imply a benefit of more favorable treatment in exchange for telling the truth. It is perfectly legal, however, to allow the suspect to form his own conclusion that he may benefit in some way by telling the truth.

To allow a suspect to believe that it may be beneficial if he tells the truth, the Reid Technique takes advantage of two fundamental principles of human nature. The first is that criminal suspects justify their crime in some manner (blaming the victim, an accomplice, intoxication, financial pressure re-describing the intentions behind their crime, contrasting their crime to worse behavior, etc.). Second, it is human nature to not want to be blamed for something we didn't do. Given the choice, the average person will choose to suffer consequences for something he did wrong rather than have people think something about him or his behavior that was not true.

With this in mind, the first tactic within the Reid Technique that is used to allow a suspect to perceive some benefit of telling the truth is an interrogation theme. During the theme we express understanding toward the suspect's crime and offer moral justifications and excuses for committing it. The theme is intended to reinforce the existing justifications already present in the guilty suspect's mind. The guilty suspect who hears the interrogation theme may well conclude,

> "The investigator is right. I did have a good reason for robbing that store. I'm not a bad person and I really did need that money to help out my family. If the investigator can understand why I robbed that place, maybe others will too."

An innocent suspect who has not gone through the process of justifying the crime will not relate to the interrogator's theme and will reject the interrogator's suggested justifications. When presented with a theme, most innocent suspects offer persistent denials of involvement in the offense.

The second tactic takes advantage of the drive within each of us to not want others to think things about us or our behavior that are not true. We call it the use of an alternative question. An alternative question offers the suspect two choices concerning some aspect of his crime. Accepting either choice represents an admission of guilt. For example: "Did you plan this out for months in advance or did it just happen on the spur of the moment?"; "Did you steal that money and blow it on drugs and booze or did you take it for something important?" The perceived benefit offered through the use of an alternative question is that by choosing to confess, the guilty suspect may keep others from believing something about him or his crime that is not true, e.g., that he planned the crime out for months or that he blew the money on drugs and booze. The suspect, of course, always has a third choice which is to state that neither alternative is true – that he did not commit the crime.

Whether Reid's use of an interrogation theme or alternative question falls within the category of Leo's low-end or systemic inducements is insignificant since neither procedure offer a direct or implied promise of leniency. Rather, the techniques represent legally persuasive tactics that increases the likelihood that a guilty suspect will choose to tell the truth during an interrogation.

In summary, defense experts have attempted to suppress confessions by first providing a distorted and inaccurate description of the "standard police interrogation" and then presenting studies demonstrating that these improper interrogation techniques result in false confessions. As explained in this web tip, these experts are not describing procedures or tactics taught in the Reid Technique, nor tactics that are considered legal by most courts.