

No. 55217-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ATIF RAFAY,

Appellant.

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FILED S. D. #1  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 MAY 21 AM 10:54

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honourable Charles W. Mertel

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STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW  
OF APPELLANT RAFAY

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ATIF RAFAY  
#876362, WSR B-121  
PO Box 777  
Monroe, WA 98272-0777

table of contents

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INTRODUCTION . . . . .	1
A. ASSIGNMENTS OF ERROR . . . . .	2
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR. . . . .	5
C. STATEMENT OF THE CASE . . . . .	7
D. ARGUMENT	
1. DONNA PERRY'S ERRONEOUS DISMISAL . . . . .	8
a. The legal consequences . . . . .	8
b. Higher evidentiary standard required . . . . .	8
c. The defects in the findings . . . . .	14
d. Prejudice . . . . .	17
2. THE FAILURE TO DISMISS PASSIG . . . . .	21
3. THE INADMISSIBILITY OF STATEMENTS ELICITED BY THE 'MR BIG' OPERATION AFTER MAY 6 . . . . .	21
a. Cooperation, assistance, and admissibility . . . . .	21
b. The facts regarding cooperation and assistance in this case . . . . .	26
i. MLAT request . . . . .	26
ii. Request for 'Mr Big' . . . . .	26
iii. BPD assistance to the RCMP . . . . .	27
iv. BPD turns the screws . . . . .	28
v. RCMP meet with WA prosecutor . . . . .	28
c. Analysis of facts of joint operation . . . . .	29
d. Defects in the trial court findings . . . . .	29
i. The reliance on a Canadian ruling . . . . .	30
ii. Counsel's misrepresentations . . . . .	34
e. Consequences of absence of findings . . . . .	37
f. The involuntariness of statements after May 6 . . . . .	40
i. On 'what you would expect in a criminal environment' . . . . .	46
ii. Threat or inducement? . . . . .	47
iii. Comparing <u>Fulminante</u> . . . . .	50
g. Conclusion . . . . .	51

4.	INEFFECTIVE ASSISTANCE OF COUNSEL	
a.	The failure to recall Mark Siddell . . .	.54
b.	Misrepresenting the time of twilight . . .	.56
c.	Misrepresenting the law on admissibility of the statements . . . . .	57
d.	Informing the jury of custody . . . . .	57
e.	Failure to move to suppress the 'Mr Big' operation under ER 403 . . . . .	57
5.	STATEMENTS OBTAINED BY THE 'MR BIG' OPERATION WERE INADMISSIBLE UNDER ER 403.	58
6.	THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION . . . . .	.61
	CONCLUSION . . . . .	.62

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appendices

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- APPENDIX A: Videotaped Confessions: Panacea or Pandora's Box?  
by G. Daniel Lassiter, Jennifer J Ratcliff, et al.  
pp. 193 - 210 (18 pages)
- APPENDIX B: True Crimes, False Confessions  
by Saul M Kassin and Gisli H Gudjonsson  
pp. 1-2, 24-31 (10 pages)

table of authorities

THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Arizona v. Fulminante  
499 U.S. 279, 111 S.Ct. 1246,  
113 L.Ed.2d 302 (1991) . . . .30, 39-40, 50-51, 59

Blackburn v. Alabama  
361 U.S. 199, 80 S.Ct. 274,  
4 L.Ed.2d 242 (1960) . . . . .24

Bram v. United States  
168 U.S. 532, 18 S.Ct. 183,  
42 L.Ed. 568 (1897) . . . . . 22, 25, 34

Culombe v. Connecticut  
367 U.S. 568, 81 S.Ct. 1860,  
6 L.Ed.2d 1037 (1961). . . . . 29, 31-32, 37, 53

Dickerson v. United States  
530 U.S. 428, 120 S.Ct. 2326,  
147 L.Ed.2d 405 (2000) . . . . . 53

Escobedo v. Illinois  
378 U.S. 478, 84 S.Ct. 1758,  
12 L.Ed.2d 977 (1964). . . . . 23, 32

Haynes v. Washington  
373 U.S. 503, 83 S.Ct. 1336,  
10 L.Ed.2d 513 (1963) . . . . . 48

Hopt v. Utah  
110 U.S. 574, 4 S.Ct. 202,  
28 L.Ed. 568 (1884). . . . .52

Jackson v. Denno  
378 U.S. 368, 84 S.Ct. 1774  
12 L.Ed.2d 90 (1964) . . . . .24

Jackson v. Virginia  
443 U.S. 307, 99 S.Ct. 2781  
61 L.Ed.2d 560 (1979) . . . . . 61

Johnson v. New Jersey  
384 U.S. 719, 86 S.Ct. 1772,  
16 L.Ed.2d 882 (1966) . . . . . 23

Kastigar v. United States  
406 U.S. 441, 92 S.Ct. 1653,  
32 L.Ed. 212 (1972) . . . . . 21

<u>Lego v. Twomey</u>	
404 U.S. 477, 92 S.Ct. 619	
30 L.Ed.2d 618 (1972) . . . . .	36
<u>Linkletter v. Walker</u>	
387 U.S. 618, 85 S.Ct. 1731	
14 L.Ed.2d 601 (1965) . . . . .	.25
<u>Lyons v. Oklahoma</u>	
322 U.S. 596, 64 S.Ct. 1208,	
88 L.Ed. 1481 (1944) . . . . .	50
<u>Malloy v. Hogan</u>	
373 U.S. 1, 84 S.Ct. 1489,	
12 L.Ed. 653 (1964) . . . . .	21, 34, 47-48
<u>Mapp v. Ohio</u>	
367 U.S. 643, 81 S.Ct. 1684,	
6 L.Ed.2d 1081 (1961) . . . . .	21, 25, 52
<u>Michigan v. Tucker</u>	
417 U.S. 433, 94 S.Ct. 2357,	
41 L.Ed.2d 182 (1974) . . . . .	.23
<u>Miller v. Fenton</u>	
474 U.S. 104, 106 S.Ct. 445,	
88 L.Ed.2d 405 (1985) . . . . .	39, 49
<u>Mincey v. Arizona</u>	
437 U.S. 385, 98 S.Ct. 2408,	
57 L.Ed.2d 290 (1978) . . . . .	39
<u>Miranda v. Arizona</u>	
384 U.S. 436, 86 S.Ct. 1602,	
16 L.Ed.2d 694 (1966) . . . . .	.22-26, 47, 52
<u>Murphy v. Waterfront Comm'n of New York Harbor</u>	
378 U.S. 52, 84 S.Ct. 1594,	
12 L.Ed.2d 678 (1964) . . . . .	22-23
<u>Oregon v. Elstad</u>	
470 U.S. 298, 105 S.Ct. 1285,	
84 L.Ed.2d 222 (1985) . . . . .	24
<u>Rios v. United States</u>	
364 U.S. 253, 80 S.Ct. 1453,	
4 L.Ed.2d 1688 (1960) . . . . .	25
<u>Rogers v. Richmond</u>	
365 U.S. 534, 81 S.Ct. 735,	
5 L.Ed.2d 760 (1961) . . . . .	36

<u>Schneckloth v. Bustamonte</u> 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 834 (1973) . . . . .	23
<u>Sims v. Georgia</u> 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967) . . . . .	29
<u>Spano v. New York</u> 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) . . . . .	51
<u>Stone v. Powell</u> 428 U.S. 465, 96 S.Ct. 3037, 89 L.Ed.2d 1067 (1967) . . . . .	22
<u>United States v. Verdugo-Urquidez</u> 494 U.S. 259, 110 S.Ct. 1347, 108 L.Ed.2d 222 (1990) . . . . .	21-22
<u>Watts v. Indiana</u> 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949) . . . . .	53
<u>Withrow v. Williams</u> 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993). . . . .	22-25

THE WASHINGTON STATE SUPREME COURT

<u>State v. Broadway</u> 133 Wn.2d 118, 942 P.2d 363 (1997) . . . . .	30
<u>State v. Daugherty</u> 94 Wn.2d 263, <u>cert. denied</u> , 450 U.S. 958 . . . . .	38
<u>State v. Davis</u> 73 Wn.2d 271 . . . . .	38
<u>State v. Easter</u> 130 Wn.2d 228, 922 P.2d 1285 (1966) . . . . .	49
<u>State v. Elmore</u> 155 Wn.2d 758, 123 P.3d 72 (2005) . . . . .	9, 14
<u>State v. Gentry</u> 125 Wn.2d 570, 8888 P.2d 1105, <u>cert. denied</u> , 516 U.S. 843 (1995) . . . . .	17-18
<u>State v. Kelter</u> 71 Wn.2d 52 (1967) . . . . .	47

State v. Mendez  
137 Wn.2d 208 . . . . . 38

State v. Streeter  
67 Wn.2d 39 (1965). . . . . 48

THE WASHINGTON STATE COURT OF APPEALS

State v. Coles  
28 Wn.App. 563 . . . . . 38

State v. Cruz  
88 Wn.App. 905 . . . . . 30

State v. Davis  
34 Wn.App. 546 . . . . . 38

State v. Elmore  
90 P.3d 1110 (2004) . . . . . 9

State v. Fischer  
13 Wn.App. 665 . . . . . 38

State v. Haydel  
122 Wn.App. 365 (2004) . . . . . 38

State v. Holmes  
122 Wn.App. 438 (2004) . . . . . 49

State v. Hoyt  
29 Wn.App. 372 . . . . . 38-39

State v. Johnson  
128 Wn.2d 431, 909 P.2d 293 (1996) . . . . . 26

State v. Jordan  
103 Wn.App. 221, 11 P.3d 866 (2000)  
review denied, 143 Wn.2d 1015 (2001) . . . . . 17

State v. Medlock  
86 Wn.App. 89, 935 P.2d 693 (1997) . . . . . 25

State v. Moore  
17 Wn.App. 5 . . . . . 45

State v. Neeley  
113 Wn.App. 100 . . . . . 38

State v. Riley  
19 Wn.App. 289 . . . . . 38

S.S. v. Alexander  
--- P.3d ---, 2008 WL 352618 (2008) . . . . . 26

State v. Trout  
125 Wn.App. 403 . . . . . 30

State v. Vickers  
24 Wn.App. 843 (1979) . . . . . 25, 38-39

THE FEDERAL COURTS

United States v. Brown  
823 F.2d 591 (D.C. Cir. 1987). . . . . 8-9, 12, 14

Clanton v. Cooper  
129 F.3d 1147 (10th Cir. 1997) . . . . . 24

United States v. Covington  
783 F.2d 1052 (9th Cir. 1985) . . . . . 26

United States v. Karake  
443 F.Supp.2d 9 (D.D.C. 2006) . . . . . 24, 49-50

Kirkland v. Butler  
870 F.2d 276 (5th Cir. 1989),  
cert. denied, 493 U.S. 1051 (1990) . . . . . 58

United States v. McCullah  
87 F.3d 1136 (10th Cir. 1996) . . . . . 50

McKinney v. Rees  
993 F.2d 1378 (9th Cir. 1993) . . . . . 58

Medlock v. Wood  
221 F.3d 1348, 2000 WL 642477 (9th Cir. 2000) . 26

Peek v. Kemp  
784 F.2d 1479 (11th Cir. 1986) . . . . . 8, 10, 17

United States v. Rodriguez  
573 F.2d 330 (1978) . . . . . 15, 17

United States v. Rutledge  
900 F.2d 1127 (7th Cir. 1990) . . . . . 48-49

United States v. Symington  
195 F.3d 1080 (9th Cir.) . . . . . 9

THE CANADIAN COURTS

Burns v. United States of America  
117 C.C.C. (3d) 454 (1997) . . . . . 31-32, 46

Regina v. Mentuck  
2000 W.C.B.J. 515636, 47 W.C.B.2d 526  
(Manitoba Queen's Bench 2000) . . . . . 52

Regina v. Rothman  
1978 CanLII 61 (ON C.A.) . . . . . 31-32

Regina v. Towler  
2 C.C.C. 335 (1969) . . . . . 31

Regina v. Unger  
83 C.C.C. (3d) 228. . . . . 32

Regina v. Unger  
2005 MBQB 238 . . . . . 32-33, 52

THE KING'S BENCH

The King v. Warickshall  
1 Leach 262, 168 Eng.Rep. 234 (K.B. 1783) . . . 53

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

U.S.C.A. 4 . . . . . 21-22, 25, 29, 37

U.S.C.A. 5 . . . . . 4-5, 21-22, 24-25, 34, 37, 52

U.S.C.A. 6 . . . . . 2, 4

U.S.C.A. 14 . . . . . 2, 4-5, 24-25, 34, 37, 52

THE WASHINGTON STATE CONSTITUTION

Wash. Const., art. I, § 3 . . . . . 2, 4, 5

Wash. Const., art. I, § 9 . . . . . 4

Wash. Const., art. I, § 21 . . . . . 2

Wash. Const., art. I, § 22 . . . . . 2, 4-5

REVISED CODE OF WASHINGTON

RCW 2.36.110 . . . . . 2, 19

RCW 10.58.030 . . . . . 48

COURT RULES & RULES OF EVIDENCE

Criminal Rule 3.5 . . . . . 3, 30, 37-38

Evidence Rule 403 . . . . . 4, 57-58, 60

OTHER AUTHORITY

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. . . . . 38, 51

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MOTION PICTURES

12 Angry Men. 1957. Directed by Sidney Lumet. .9

Goodfellas. 1990. Directed by Martin Scorsese. . . . . 46

Verbatim Report of Proceedings Volume Index

1RP: 07-27-01	23RP: 06-16-03	63RP: 11-19-03
10-18-01	06-24-03	64RP: 11-24-03
10-19-01	06-25-03	65RP: 11-25-03
2RP: 11-30-01	06-26-03	66RP: 12-01-03
12-06-01	24RP: 07-07-03	67RP: 12-02-03
12-14-01	25RP: 07-08-03	68RP: 12-03-03
3RP: 01-04-02	26RP: 07-21-03	69RP: 12-04-03
01-09-02	27RP: 07-22-03	70RP: 12-08-03
01-25-02	07-23-03	71RP: 12-09-03
4RP: 03-13-02	28RP: 07-24-03	72RP: 12-10-03
03-29-02	07-28-03	73RP: 12-11-03
5RP: 04-08-02	29RP: 07-29-03	74RP: 12-15-03
04-29-02	30RP: 07-30-03	75RP: 12-16-03
04-30-02	31RP: 08-05-03	76RP: 12-17-03
6RP: 05-17-02	32RP: 08-06-03	76.5RP: 12-22-03
06-17-02	08-08-03	77RP: 12-23-03
06-28-02	33RP: 08-13-03	78RP: 01-08-04
7RP: 08-14-02	34RP: 08-14-03	79RP: 01-12-04
08-15-02	35RP: 08-15-03	80RP: 01-13-04
08-20-02	36RP: 09-22-03	81RP: 01-14-04
08-27-02	37RP: 09-30-03	82RP: 01-15-04
8RP: 09-20-02	38RP: 10-10-03	83RP: 01-26-04
10-08-02	39RP: 10-13-03	84RP: 01-27-04
10-30-02	40RP: 10-14-03	85RP: 01-28-04
12-16-02	41RP: 10-15-03	86RP: 01-29-04
9RP: 01-31-03	42RP: 10-16-03	87RP: 02-02-04
10RP: 02-18-03	43RP: 10-17-03	88RP: 02-03-04
02-19-03	44RP: 10-20-03	89RP: 02-04-04
11RP: 04-22-03	45RP: 10-21-03	90RP: 02-05-04
12RP: 04-23-03	46RP: 10-22-03	91RP: 02-09-04
13RP: 04-24-03	47RP: 10-23-03	92RP: 02-10-04
14RP: 05-13-03	48RP: 10-27-03	93RP: 02-11-04
05-20-03	49RP: 10-28-03 (am)	94RP: 02-12-04
15RP: 05-21-03	50RP: 10-28-03 (pm)	95RP: 02-17-04
16RP: 05-22-03	51RP: 10-29-03	96RP: 02-18-04
17RP: 05-27-03	52RP: 10-30-03	97RP: 02-19-04
18RP: 05-28-03	53RP: 10-31-03	98RP: 02-23-04
19RP: 06-03-03	54RP: 11-03-03	99RP: 02-24-04
06-17-03	55RP: 11-04-03	100RP: 02-24-04
20RP: 06-09-03	56RP: 11-05-03	101RP: 02-25-04
21RP: 06-10-03	57RP: 11-06-03	102RP: 03-01-04
22RP: 06-11-03	58RP: 11-10-03	103RP: 03-02-04 (am)
	59RP: 11-12-03	104RP: 03-02-04 (pm)
	60RP: 11-13-03	03-03-04
	61RP: 11-18-03 (am)	105RP: 03-04-04
	62RP: 11-18-03 (pm)	106RP: 03-08-04

107RP: 03-09-04  
108RP: 03-10-04  
109RP: 03-11-04  
110RP: 03-15-04  
111RP: 03-16-04  
112RP: 03-22-04  
113RP: 03-23-04  
114RP: 03-24-04  
115RP: 03-25-04  
116RP: 03-29-04  
117RP: 03-30-04  
118RP: 03-31-04  
119RP: 04-01-04  
120RP: 04-02-04  
121RP: 04-05-04  
122RP: 04-06-04  
123RP: 04-07-04  
124RP: 04-08-04  
125RP: 04-09-04  
126RP: 04-12-04  
127RP: 04-13-04  
128RP: 04-14-04  
129RP: 04-15-04  
130RP: 04-19-04  
131RP: 04-20-04  
132RP: 04-21-04  
133RP: 04-22-04  
134RP: 04-26-04  
135RP: 04-27-04  
04-28-04  
136RP: 04-29-04  
137RP: 05-03-04  
138RP: 05-04-04  
139RP: 05-05-04  
140RP: 05-06-04 (am)  
141RP: 05-06-04 (pm)  
142RP: 05-10-04  
143RP: 05-11-04  
144RP: 05-12-04  
145RP: 05-13-04  
146RP: 05-14-04  
147RP: 05-17-04  
148RP: 05-18-04  
149RP: 05-19-04  
150RP: 05-20-04  
151RP: 05-24-04  
05-25-04  
152RP: 07-09-04  
153RP: 07-13-04  
154RP: 08-06-04  
155RP: 09-03-04  
156RP: 09-17-04  
157RP: 10-22-04

## INTRODUCTION

My family was murdered in 1994 by persons who still remain unapprehended. In 1995, I, Atif Rafay, along with my friend Sebastian Burns, was coerced into making false statements in the belief that absent such statements we risked murder. After an inordinately long extradition process and pre-trial delay, I received a seriously defective trial which included the coerced confessions as evidence, but excluded all evidence of the probable culprits. The most diligent juror on my panel was removed as a result of speculative accusations, now shown to be false, by another juror, on motion of the State. A crucial witness establishing the time of the murders, and thereby the impossibility of our involvement in them, who had testified wrongly at trial and wrote to the State before it had rested acknowledging the errors and the discovery of a file establishing the truth, was not recalled. Many other serious errors have been noted by counsel in briefing. I was wrongly convicted in 2004. This Statement sets forth additional grounds supporting my request for the dismissal of these charges in the interest of justice, or, failing that, a fairer trial. I have attempted to meet the standards of a brief in this Statement, given limited resources, but acknowledge I have not attained them.

Argument 5, because it treats of preliminary cautions relevant to evaluating confession evidence, may be a useful preface to Argument 3. Appendix A, discussed in Argument 5, may prompt this Court to experiment in its selection of the record for its review. Apart from that, the Statement is best read in sequence.

Finally, since I have in this Statement used in some places the sequential numerical designation for reports of proceedings (xxxRP nnn) and the dated designation (mm/dd/yyRP nnn) in others, I have included the index matching these designations (from Appendix A of my counsel's Brief) on pages x and xi of this Statement, ante. I am grateful for this Court's patience and consideration.

A. ASSIGNMENTS OF ERROR

1. The trial court erred in fact and in law in dismissing a qualified juror for alleged misconduct when there was a reasonable probability that the impetus for the request to discharge was her view of the State's evidence, thus denying the Appellant his state and federal constitutional rights to a fair and impartial jury, and to due process, under Article I, § 3, 21 and 22 of the Washington State Constitution, and under the Sixth and Fourteenth Amendments to the United States Constitution.
2. The trial court violated the Appellant's state and federal constitutional rights to due process of law and to fair and impartial jury, under Article I, § 3, 21 and 22 of the Washington State Constitution, and under the Sixth and Fourteenth Amendments to the United States Constitution, when it denied a motion to dismiss an unfit juror as required by RCW 2.36.110, and failed even to conduct an inquiry into the issue.
3. The trial court erred in its finding of fact 2, from the "Findings of Fact and Conclusions of Law Re: Admissibility of Audio and Video Evidence Collected by the Royal Canadian Mounted Police", entered 8th October, 2003, that the interception was done "without the participation or assistance of any Federal or State law enforcement agency in the United States".
4. The trial court erred in its finding of fact 4, from the aforementioned "Findings...", that "Bellevue detectives did not request the RCMP begin its own investigation of the defendants nor did Bellevue detectives request the RCMP engage in an undercover operation or employ wire tap techniques in an attempt to gain admissions from the defendants."
5. The trial court erred in its finding of fact 5, from the aforementioned "Findings...", that the RCMP's investigation of the defendants "was done by the RCMP on its own accord and was not done at the request or with the assistance of the Bellevue Police Department", and that "[t]he Bellevue Police Department never participated in the RCMP's investigation of the defendants."
6. The trial court erred in its finding of fact 7, from the aforementioned "Findings...", that "[t]he RCMP undertook this trip

[to review BPD files in late February and early March 1995] on its own accord" and "[t]he Bellevue Police Department did not suggest or request the RCMP to make this trip or review its file."

7. The trial court erred in its finding of fact 8, from the aforementioned "Findings...", that "Corporal Dallin and the RCMP were solely responsible for the preparation of the affidavit in support of the electronic interceptions" and that, other than information sharing, "the Bellevue Police Department did not make any requests, participate in or assist the RCMP in making application for judicial authorization", and that "[t]he Bellevue Police Department acted in good faith when they shared information from their investigative file with members of the RCMP. There was no recklessness or negligence on the part of the Bellevue Police Department."

8. The trial court erred in its finding of fact 14, from the aforementioned "Findings...", that "[t]he RCMP conducted the undercover operation in the present case in a manner routinely used by the RCMP in homicide investigations. Courts in Canada approved the legality of this technique under Canadian law."

9. The trial court erred in its finding of fact 15, from the aforementioned "Findings...", that "[t]he Court of Appeals for British Columbia further found that there was no duress or coercion employed by the RCMP during the undercover scenarios in order to obtain the defendants' admissions. The Supreme Court of Canada did not disturb this finding. This Court agrees with the Canadian court and finds the same."

10. The trial court erred in its finding of fact 17, from the aforementioned "Findings...", in its entirety and in every assertion, excepting only the statement that "[t]he Bellevue Police Department never participated in or assisted the RCMP in intercepting and recording the defendants' communications."

11. The trial court erred in law in failing to enter the findings and conclusions required by CrR 3.5 to determine the voluntariness of the statements elicited by the RCMP. Indeed, the trial court made no finding of fact relevant to voluntariness except that the statements were non-custodial.

12. The trial court erred in law in regarding the Canadian ruling

to be relevant to the admissibility of the statements, since that ruling expressly declined to apply the test of voluntariness required by American law, and the record before the Canadian court was scant and defective.

13. The trial court erred in law in failing to subject the statements elicited by the RCMP to the required test of voluntariness before admitting them into evidence. To the extent that the trial court's conclusion that the statements were not the product of coercion may be interpreted as a finding of voluntariness, the conclusion is an error in law. Admission of these involuntary statements violated the Appellant's right not to be compelled in any criminal case to be a witness against himself, and his right to due process, under the Fifth and Fourteenth Amendments to the United States Constitution, and under Article I, § 3 and 9 of the Washington State Constitution.

14. Appellant was denied his constitutional right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and under Article I, § 22 of the Washington State Constitution, when his attorneys failed to recall a key witness to the time of the murders who had discovered documentary evidence that his testimony at trial was wrong and his initial statements to police were correct, when his attorneys failed to enter scientific evidence confirming the time of the murders, when his attorneys failed to correct misrepresentations of that time by codefendant's counsel in closing argument, when they appeared to accept the legally erroneous supposition that an involuntary confession could be admissible via the "silver platter" doctrine, and when they did not object to the jury being informed that the defendants were in custody.

15. The trial court denied the Appellant his right to a fair trial by failing to suppress the statements elicited by the RCMP under ER 403, as more prejudicial than probative, violating U.S.C.A. 14.

16. The trial court erred in denying the motion to dismiss on the insufficiency of the evidence. Even considering the State's evidence in the light most favourable to the State, no rational trier of fact could conclude that there was no reasonable doubt as to the identity of the culprits.

17. Even assuming that none of the foregoing errors on its own denied

the Appellant his right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution, and under article I, § 3 and 22 of the Washington State Constitution, the cumulative effect of these errors did so deny the Appellant.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court must not dismiss a juror if there is any reasonable possibility that the impetus for the juror's dismissal stems from the juror's views on the merits of the case. Was the trial court required to adopt a higher evidentiary standard in considering the allegations of misconduct before dismissing the juror in this case? [Assignment of Error 1]
2. Are a juror's disapproval of petty bickering and her sense of her own unusual diligence in her duties as a juror proper grounds for a trial judge to use to dismiss her? [Assignment of Error 1]
3. May a judge dismiss a juror for hardship when the juror not only wishes to continue but can and does point out that she is an outstanding juror? [Assignment of Error 1]
4. Trial courts may not remove empaneled jurors without an adequate investigation and only after determining the juror is not fit to serve. Where the record does not support the finding and in fact confirms that her views of the sufficiency of the evidence were the impetus for dismissal, did the dismissal violate the Appellant's constitutional rights? [Assignment of Error 1]
5. The trial judge must dismiss a juror who is unfit to serve. Where the record shows that a juror made a false complaint about another juror, after making previous unsuccessful complaints, and the same juror confidently made claims of "knowledge" where the evidence entitled her only to speculation, did the trial judge err in failing to investigate the issue, and in denying the motion to dismiss her? [Assignment of Error 2]
6. Did the presence on the Appellant's jury of a juror who, the record shows, made a false complaint of another juror, and who demonstrated an inability to apply basic standards of evidentiary rigour to claims of knowledge, deny the Appellant his right to a fair and impartial jury? [Assignment of Error 2]

7. Did the trial court err in its findings of fact asserting that there was no cooperation and assistance between the RCMP and the domestic authorities, where the record shows that the BPD sought the RCMP's assistance to obtain, inter alia, confessions, that the "conspiracy" charges were an "angle" "squeak[ed] out" to obtain the necessary authorizations, that there was daily contact and 15-20 meetings between State and Canadian authorities, that the BPD provided input into the undercover scenarios, that the RCMP received direction from a Washington State prosecutor, and when the Appellant was charged and prosecuted in Washington only? [Assignments of Error 3, 4, 5, 6, 7, and 10]

8. Did the trial court in law in finding "the same" as a Canadian court as a finding of fact, where the Canadian court did not apply the test for voluntariness as required by American law, but instead measured coercion and duress by the standard of "shocks the conscience" or "brings the administration of justice into disrepute", and where the Canadian court had a record only from a 2½ day extradition hearing? [Assignments of Error 8, 9 and 12]

9. Did the trial court err in law in applying the "silver platter" doctrine to the statements elicited by the RCMP, where the statements were involuntary and were elicited at the instigation and with the cooperation and assistance and for the use of Washington State prosecutors? [Assignments of Error 11, 12, 13]

10. The undercover RCMP operatives in this case told the defendants that they were only trustworthy because they were believed by the undercover operatives to be guilty, but that the undercover operatives believed that if the defendants were arrested, they would inform on the undercover operatives. The operatives made it clear that they would not allow that to happen, and that they had "taken care of" - murdered - those who might go to court before they had the chance to inform on them. The operatives insisted that the Bellevue Police were going to arrest the defendants, and that they had to prevent this from occurring, and that the only way to prevent this was to satisfy the undercover operatives with a full story of the murders, so that the undercover operatives could effectively sabotage the case in Bellevue. The Bellevue Police gave out press releases

to substantiate the RCMP operatives' claims. The statements by the defendants after May 6, 1995, were made in the belief that unless they were made, the defendants would be murdered by the undercover operatives to prevent them from informing on the undercover operatives. Are these statements free and voluntary? [Assignment of Error 13]

11. Did the Appellant's attorneys' numerous errors deny him effective assistance of counsel? [Assignment of Error 14]

12. Was the presentation of the RCMP undercover operation, in its mountain of prejudicial detail, in the use of a suspect-only camera angle, and given the inherent problems of "confession" evidence and the absence of holdback evidence in the statements, more prejudicial than probative? [Assignment of Error 15]

13. Is there sufficient evidence for a rational trier of fact, viewing the evidence in the light most favourable to the State, to find proof beyond a reasonable doubt of the crimes charged? [Assignment of Error 16]

14. Assuming that none of the errors above warranted a new trial by itself, did the cumulative effect warrant that? [Assignment of Error 17]

### C. STATEMENT OF THE CASE

The Appellant adopts the Statement of the Case presented in the Appellant's Brief by counsel, section B, pages 5-92, and in the Supplemental Brief of Appellant by counsel, section B, pages 2-3.

### NOTA BENE

The Appellant hereby adopts and incorporates by reference the entirety of the Supplemental Brief of Appellant by counsel, submitted May 2, 2008.

D. ARGUMENT

1. THE ERRONEOUS DISMISSAL OF DONNA PERRY (JUROR #4)

Rather than belabour here what has already been presented in the Appellant's Brief by counsel, the Appellant refers the Court of Appeals to the facts and argument presented in part C, section 3, of that brief, on pages 128-154. The Appellant herewith brings to the attention of the Court of Appeals the legal consequences of the trial court's error, and appends additional grounds in support of the conclusion of reversible error in the dismissal of juror Perry.

a. The legal consequences

It has been held as a matter of law that the erroneous replacement of a juror "may under certain circumstances deprive a defendant of his valued right to have his trial completed by a particular tribunal, his sixth amendment right to a fair, impartial and representative jury, and his due process rights grounded in the entitlement to procedure mandated by state law." Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986) at 1483. The error in this case is just such a deprivation, and a new trial is the only remedy.

b. Heightened caution was required of the trial court before discharging a juror, where there was evidence that the impetus for dismissal stemmed from the juror's view of the sufficiency of the State's evidence

In U.S. v. Brown, 823 F.2d 591 (D.C. Cir. 1987), the court noted that "unless the initial request for dismissal is transparent, the court will likely prove unable to establish conclusively the reasons underlying it. Given these circumstances, we must hold that if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." Ibid., at 596. In that case the request came from the juror himself, during deliberations;

clearly a request from another juror, or from the State, must be regarded with even greater suspicion by the trial court. The Ninth Circuit, in adopting the rule in Brown, slightly amended this evidentiary standard, concluding that if the record evidence discloses "any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." United States v. Symington, 195 F.3d 1080, at 1087. It is this standard that the Washington Court of Appeals, Division Two, applied in deciding State v. Elmore, 90 P.3d 1110 (Wash. App.Div 2 2004), citing the need to guarantee that a juror will not be excused "in a manner that appears to facilitate the rendering of a guilty verdict." Ibid., at 1115, citing Garcia v. People, 997 P.2d 1, at 8. The Washington Supreme Court subsequently affirmed the adoption of this standard, stating that "[i]t is not hard to imagine, as counsel noted at oral argument, that had the option been available to Lee J. Cobb in 12 Angry Men, he would have sent a note to the judge asking that Henry Fonda be dismissed from the jury, rendering moot that cinematic paean to the virtues of the American jury system." State v. Elmore, 123 P.3d 72, at 79.

Although the Washington Supreme Court, and the other courts that have considered this problem, have been presented with the issue in the context of deliberations, it is not hard to see that if courts were to narrow their concern solely on deliberations, even in the rare case of a seven month trial where jurors' feelings may become detectable to other jurors, Cobb would be successful in sending the note to the judge before deliberations. While in all but the rarest of cases the record would not disclose anything that might give a party or another juror any suspicion about a given juror's view of the sufficiency of the State's evidence, this is just such a case, where the record contains considerable evidence of the kind. In these unusual circumstances the trial court was obliged to adopt a heightened evidentiary standard in

considering Patricia Passig's notes and the State's urging in favour of the dismissal of Donna Perry.

Unfortunately; the trial court seems to have adopted instead the especially low standard urged by the State: "The presumption should be that we have a fair and impartial jury, and we should err on the side of making sure that that occurs. And that when there is evidence of misconduct, that we are on the side of removing the juror who engages in that misconduct, not err on the side of keeping them." 128RP 156. While the adoption of such a standard may not always infringe upon a defendant's "valued right to have his trial completed by a particular tribunal" (Peek v, Kemp at 1483) in the absence of an improperly motivated request to discharge, where such a request exists it does constitute a violation of the defendant's constitutional rights.

Donna Perry was, by all objective measures, the most active and engaged juror during the trial. She asked more questions than the rest of the jurors combined: an incomplete list of her enquiries is provided on pages 131-132 in Appellant's Brief by counsel. The quality of her questions is perhaps as notable as the quantity: their probing nature, for example, when enquiring after the religious background of the Appellant's family, or when wondering whether the undercover operative's selection of "soft" crimes for the defendants' participation implied a doubt of the defendants' capacity for violence, could not but have been of concern to the State. The State had, after all, successfully suppressed the evidence of the religious motivation for the murder disclosed by Douglas Mohammed. Counsel for the State had, in fact, been anxious to remove Perry from the moment she reported juror Grage's remark about "that foreign boy" (the Appellant), making a point of suggesting to her that she might, somehow, in consequence, be too upset to continue - a suggestion she vigorously controverted. 73RP 179. The State's repeated attempts to remove her (97RP 8, 100RP 6-7, 100RP 78-79, 106RP 8) came in the

wake of questions calling into doubt the State's case. As defence counsel noted, "I can say by her questions, she is making inquiries about the evidence that could make the State uncomfortable. And that may be the reason she may be a juror they are in favour of getting rid of." 128RP 155. The State's opinion on Perry's reported remark about confining her battles to deliberations was tantamount to an admission on record of fears of Perry's view of the evidence: "And it said fight her battles during deliberations. And so I take a very different view of that remark than Mr. Robinson does, that it was not just an opportunity for her to accept the court's invitation to get out of jury service, but was an indication that she is going to fight her battles during deliberations. And we frankly can't take that chance." 128RP 159. No doubt the State was alarmed by enquiries that evinced a genuine rather than decorative openness to the possibility that the defendant stood wrongly accused, and would have preferred jurors who elected "bickering over the bathroom labels" (128RP 143), but the trial court had a duty to deny the State that choice.

Juror Patricia Passig's animus for Donna Perry, meanwhile, was transparent. Counsel for the State was moved to remark on the persistence of complaints by her of Perry: "I pulled out some of the juror notes, starting back with the note from Juror No. 19, interestingly enough. [...] But it is from Juror No. 19, the same juror that submitted the final note we received today." 128RP 115-116. In that note, Passig claimed that "many jurors" were concerned about Perry's "motive during deliberations" as a result of the aforementioned remark, which the trial court rightly declined to find objectionable when it was reported, which no other juror seems to have found worth reporting, and which was, indeed, admirable in its conscientiousness. The crucial point here is the inference of improper motivation in Passig's concern with Perry's part in deliberations, which ought to have concerned the trial court.

The reasonable possibility of improper motivation was given full substance

when Passig, having failed to obtain Perry's removal by complaining about her sneezing and coughing, submitted her final note alleging the exact opposite of what her first note had claimed. Having failed to move the trial court with allegations that Perry would confine her battles to deliberations, Passig tried the opposite tack:

A: [...] And then this other juror went to her and said:

Did you mean what you said? How will you deliberate? And she said, well, when it comes up to deliberations, I will just do what the other jurors do. And we are all worried about deliberations with her. (128RP 13-14)

No other juror, of course, including Purdy, the "other juror" alluded to, claimed that Perry said that, and obviously the statement contradicts all of Perry's known statements, not to mention her 227+ pages of notes. It is absurd, of course, that Passig would worry that Perry might agree with everyone when it came to deliberations, but it is quite clear that Perry's deliberations were of concern to Passig - albeit for reasons different from the stated and contradictory pretexts to which she was willing to aver. Obviously no juror, nor counsel for the State, is ever likely to admit improper motives in seeking removal of a juror (voluntarily, anyway), and they may not even so regard their motives; it is precisely for such cases that the rule in Brown and progeny was created. Passig's history should have weighed strongly against the granting of any request to discharge stemming from her accusations.

Passig's charge that Perry was writing letters rather than notes corroborates an inference of improper impetus. As Passig put it, "I don't take a lot of notes, but when everybody else's pencil is still hers is going." 128RP 19. Perry's attention to evidence despite the attractiveness and plausibility of the State's case when not examined too closely or carefully seems to have bothered Passig. Perry's diligence must have seemed a deplorable and suspect scepticism

to a person as complacently committed to what "everybody knows" (128RP 14) as Passig demonstrated herself to be. Although the trial court refused to view Perry's notebooks, which would have disposed of Passig's charges, they provide further evidence to suggest that Passig's concerns stemmed from her observations of Perry's reactions to the evidence: the notes are replete with dismay at the insufficiencies of the State's evidence. For ease of reference, the Appellant herewith provides page numbers for the instances of perceptive observation cited by counsel in Appellant's Brief, pages 147-151, though no catalogue can do justice to a record of the evidence that deserves careful perusal by the Court of Appeals. Instances of notes pertaining to the recent fabrications of witnesses may be found on pages 4809, 4815-7, 4825, and 4921-4. Comments about Thompson and Gomes's interviewing tactics are at 4933. Further comment on Gomes is at 4923. A critique of claims that the defendant's "confessions" contained holdback evidence is at 4959. A remark on Thompson's practice of "supplementing" his notes later will be found 4955-6. Comment on Thompson's practice of labelling defendant additions of detail as "inconsistent" are at 4958. Perry's notes on Jimmy Miyoshi, who, she found, "seems to take his 'Q' ['cue', the Appellant presumes] from whatever it will take to make sure he's off the hook and this whole thing goes away", and whose RCMP questioners "are obviously trying desperately to get him to say what they want to hear", are found at 4961-5. Notes on the undercover operation may be found on pages 4985, 4995-7, 5000-4, and passim through the end of the notebooks at 5017.

None of this should be taken to suggest that Perry did not have an open mind. Indeed, on page 5007, she remarks a propos Gary's claim that Burns wanted to make large sums of money via criminal activity of any kind working for Al: "... Who knows what the truth is ... at this point." And the next page finds her making very critical remarks about defendant Burns's apparent character in the scenarios.

Perry's observations and analyses do great credit to her acumen and scrupulousness, yet her reactions must have seemed suspicious to a juror like Passig, who would have been unable to notice the details Perry did, even as she spent her time observing Perry, who she "knew" was writing letters. There is no requirement for jurors to wear poker faces, and after all, even the best poker players will evince reactions. Certainly there is no suggestion that Perry engaged in any improper discussion of the case. But it is not hard to see, with the extraordinary length of the trial, that improper concerns about jurors might arise: Cobb, to use the example cited by the Washington Supreme Court, might have found Fonda to be suspect as a liberal, or perhaps as a libertarian, and sought to remove him. Passig, this case's Cobb, sought to obviate deliberating with Perry; the State didn't want to take the chance of her deliberating. Here there was more than a reasonable possibility of improper impetus, and the rule first articulated in Brown and adopted in Washington in Elmore should have been applied by the trial court. The failure to do so was an error in law.

c. The defects in the trial court's findings in support of dismissal

That finding misconduct on this record would be manifestly unreasonable is evidenced by the State's concern that the trial court adopt a prejudice for dismissal where allegations exist. 128RP 159. Indeed, as the trial court itself admitted of the grounds upon which it ultimately removed Perry, "any one of these things standing alone would not be grounds for dismissal." 128RP 164. The trial court adopted a notion of cumulative misconduct, whereupon a succession of allegations, even coming, as these did, from a suspect source, was sufficient to warrant discharge. This was manifest error.

The Appellant largely rests with the facts and argument presented on pages 152-153 of Appellant's Brief concerning the supposition that Perry had been sleeping, except to note that Perry's explanation of her need, due to

her special contact lenses, to rest her eyes, was uncontroverted, and her notes attest to the untruth of those allegations. The Appellant adds, on the subject of the removal of pages, that Perry would have had to remove more pages than all the other jurors combined because she wrote more questions than all the other jurors combined. Since other jurors were not submitting questions with the frequency that Perry was, it is perhaps understandable that some of them might wonder at the tearing out of the pages, but the trial court had no reason to be perplexed on this point.

The trial court's finding of anger and pettiness on Perry's part deserves especial scrutiny. Perry's statement to Judge Mertel at 128RP 103 is eloquent refutation of the allegation, and well corroborated by her statements in her notes. Perry was distinguished by her conscientious probity. But what is more important, perhaps, is that reliance on such a factor amounts to a discharge for the purpose of ensuring juror unanimity. Perry's estimation of other jurors, which was in fact overly generous ("I'm sure my counterparts are just as studious as I am", in folded notes), was not a proper factor for the trial court to rely on in dismissing Perry. Indeed, it comes within the ambit of what is described in U.S. v. Rodriguez, 573 F.2d 330 (1978) at 332 as a "legally irrelevant reason". A decision based on such a reason constitutes prejudice per se, since "[t]here must be some 'sound' basis upon which the trial judge exercised his discretion". Ibid. This consideration should have played no part in Judge Mertel's assessment of Perry's fitness to serve, any more than it would be cause to disqualify in jury voir dire. Since the trial court's decision was close as it was, without this improper factor the court would not have had a record to support a dismissal, even "cumulatively". It remains a terrible perversity of the result that whatever criticisms Perry might have had of her fellow jurors were only too amply vindicated by the verdict that they ultimately returned.

Finally, with respect to the charges of dishonesty, the trial court's findings are untenably murky. Perry did not recall making a remark about wanting to get off the jury for the only too obvious reason that she did not, in fact, want to get off the jury. It is a matter of ordinary experience that people tend to remember what they intended to say rather than what they may have said, and they do not tend to have especially accurate memories of embarrassing expletives that may have been uttered in accompaniment, especially given the pervasive influence of the language of the RCMP undercover operatives. Under questioning, Perry acknowledged that she may have made some remark about wanting to go home. The trial court conceded that Perry was not lying about her statement in the following exchange with defence counsel Robinson:

[MR. ROBINSON]: [...] Lying to the court, the only thing I can concede that -- when the court has that concern, it has to be -- and if I were permitted, I would ask the court, to please tell me what the concern is because I want to address it. The one thing I can think of is the distinction between I will do anything to get off this fucking jury, or I just want to go home. And what I'm suggesting to the court is those two statements are so closely related, they mean exactly the same thing in the context of what was said back there, that if what we are talking about is the difference between the "F" word or not, that is not the basis to dismiss anybody from this jury.

THE COURT: That is what I meant by lying. (128RP 136-7)

The trial court sensibly agreed that this was the only basis for an accusation of lying, and that, moreover, it was no basis to dismiss, finding that "it is really irrelevant whether the expletive was included or not" (128RP 163). However, in the interim, the trial court appears to have decided, sub silentio, that contrary to what it acknowledged to Mr. Robinson earlier, the fine

distinction between the statement Perry acknowledged making and the one attributed to her by Passig was also a basis for suspecting dishonesty. Again, this is manifest error.

The Appellant adds nothing more to the "hardship" grounds except to note that literally all the evidence speaks to their unsoundness, and that they were motivated largely, it seems, by the trial court's wish to mitigate removal of an outstanding juror on grounds that cannot survive scrutiny.

d. Prejudice

A jury from which a juror has been dismissed on the basis of a request to discharge stemming from her view of the sufficiency of the State's evidence is ipso facto a tainted and unfair jury. It is precisely because such an exclusion so offends fundamental principles of justice that such vigilance must be exercised to prevent its occurrence. The finding in State v. Jorden, 103 Wn. App. 221, that there was "no evidence that removing the juror resulted in a tainted or unfair jury" (Jorden at 228) cannot be interpreted to propose some additional test beyond the one the court articulates further on, that of "whether the record establishes the juror engaged in misconduct." Jorden, at 229. Failure to meet that test cannot be saved by the mere availability of alternate jurors. "The right to a fair and impartial jury entitles a defendant in a criminal case to be tried by the jury originally selected to determine his guilt or innocence." Peek v. Kemp, at 1484. As put in Rodriguez, at 332, in the context of removal of a juror and replacement with an alternate, " 'prejudice' would include discharge of a juror for want of any factual support, or for a legally irrelevant reason. There must be some 'sound' basis upon which the trial judge exercised his discretion."

The trial court in Jorden found the impugned juror "the most inattentive juror I've seen in six and a half years of doing trials." Ibid., at 226. In State v. Gentry, 125 Wn.2d 570, meanwhile, "counsel for the defendant agreed

to the final panel and, in fact, participated in the error that resulted in replacing a regular juror with an alternate", which error was inadvertent. Gentry, at 616. These cases are simply not comparable to the facts at bar here. In neither does there exist the evidence here of the request to discharge stemming from the juror's views on the merits of the case, nor is there the reliance of the trial judge on an improper factor in his finding, when by his own acknowledgment none of the factors alone would warrant dismissal, nor is there the overwhelming objective evidence in the form of the juror's notes attesting both to her fitness and the falsity of allegations of misconduct. The removal of juror Perry, the most perceptive and diligent member of the jury, precisely because she was so, was improper. Although unnecessary for a finding of prejudice, it can hardly be avoided noting that the evidence of her notes suggest not merely an acquittal based upon reasonable doubt, but a conclusion of actual innocence of the defendants. The motion for mistrial following her removal should have been granted.

## 2. THE FAILURE TO DISMISS PATRICIA PASSIG (JUROR #19)

After the dismissal of juror Perry, the defence moved to have other jurors who had been alleged to be sleeping or committing other forms of misconduct dismissed also. The court denied the defence requests. The defence then moved to have Patricia Passig, Juror No. 19, removed for her misconduct, which the court also summarily dismissed, noting that dismissal of all the jurors requested would put the case in a mistrial posture. 128RP 173. In so doing the court failed to make a proper inquiry into the record insofar as it concerned juror Passig. Such an inquiry would have disclosed that juror Passig was unfit to serve. Her presence on the jury tainted it and resulted in an unfair, indeed an erroneous verdict.

In discussing Passig's allegation against Perry hitherto the Appellant

has confined the discussion to the inferences that may be drawn about Passig's motivations concerning Perry, and has forborn consideration of how those statements reflect on her fitness to serve as a juror. They reflect exceptionally badly. RCW 2.36.110 requires the judge to excuse from further jury service any juror who has manifested unfitness. Some of Passig's remarks to the trial court have already been cited, perhaps most troubling being the claim about what Perry said to another juror at 128RP 13-14, which no other juror confirmed, in regards to deliberations. This statement appears to be an outright lie, or at best a gross distortion of Perry's remarks, sufficient to warrant dismissal. But the picture of Passig's notions of what constitutes sufficiency of evidence should have been equally troubling to the court. She was adamant about her erroneous claims that Perry was writing letters. When the judge enquired about the note alleging this, Passig responded: "That was from me. There are a lot of us who know that she doesn't take notes; she writes letters." 128RP 11-12. The following exchange ensued with the State:

Q: Are we to take you literally, that all 16 of you know, or is there a group --

A: A great percentage. There is only a few -- well, for all I know, they may all know, but a great percentage of us know because we have talked about it. (128RP 14)

Asked by defence counsel how far her claims would go, she did not hesitate:

Q: [...] Is it your impression, or the impression of other jurors that you have talked to, that she is not doing any writing about this case?

A: I wouldn't say that. Sometimes she does, but what we are observing doesn't appear to be notes. It appears to be letters. (128RP 18)

And further on:

Q: [...] Have you been able to actually see, like to see the writing

so that you can tell it is a personal letter as opposed to notes about the case?

A: From the distance I sit -- she is sitting over there, and I'm over here, and it doesn't look like note writing. And at the time she is taking notes, nobody else is taking notes. (128RP 19)

This was the basis for Passig's claims of knowledge. It will not be lost on the Court of Appeals that whenever anyone is on trial it is what "everybody knows", to use Passig's chilling expression, what everyone thinks they "know", that is to be subjected to the most rigorous scrutiny to ensure that the evidence justifies a finding of proof beyond a reasonable doubt. Passig's colloquy with the court evinced a simple incapacity for such an inquiry. The other jurors, though in some cases very far from ideal in their behaviour, displayed a considerable contrast to Passig's certitude during the inquiry into her allegations. Though seated at a distance from Perry, Passig was frighteningly untroubled making asseverations of knowledge where her observations entitled her only to fanciful speculation. However efficient such a theory of knowledge may be, it is manifestly unfit for proper jury service. Passig was, of course, utterly wrong about what Perry was writing; she was also wrong about the Appellant. The trial court's failure to dismiss her, or even to conduct a proper inquiry into her fitness as a juror, resulted in the presence on the Appellant's jury of a person incapable of performing the duty that the law demands of a juror, in violation of the Appellant's constitutional right to trial by a fair and impartial jury. The error demands a new trial.

3. STATEMENTS ELICITED BY THE RCMP AFTER MAY 6, 1995,  
WERE NOT VOLUNTARY AND ARE NOT ADMISSIBLE EVIDENCE  
The Appellant agrees with counsel and the unequivocal holdings of  
binding authority, ancient and modern, that a defendant has been  
compelled to be a witness against himself if a statement elicited by  
foreign police is not voluntary and is nonetheless received into  
evidence against him at trial, regardless of whether there was any  
cooperation and assistance between the foreign police and domestic  
authorities. Nevertheless, the Appellant argues here that there was  
more than sufficient cooperation and assistance between the RCMP,  
Bellevue Police, and Washington prosecutors to warrant application  
of the voluntariness standard, even on the erroneous assumption that  
such a showing was needed. The Appellant further argues that the  
trial court mistook the Canadian ruling, and the requirements of  
American law, and failed to make findings or enter a conclusion as  
to voluntariness. Moreover, the facts at bar could not support a  
conclusion of voluntariness. The Appellant respectfully requests  
this Court to make an independent review and find the statements to  
be involuntary and inadmissible at trial.

a. Cooperation, assistance, and admissibility

In the case so heavily relied on in argument at the trial court,  
U.S. v. Verdugo-Urquidez, 110 S.Ct. 1056, at 1060, the Court stated  
that "[b]efore analyzing the scope of the Fourth Amendment, we think  
it significant to note that it operates in a different manner than  
the Fifth Amendment, which is not at issue in this case. The privilege  
against self-incrimination guaranteed by the Fifth Amendment is a  
fundamental trial right of criminal defendants. See Malloy v. Hogan,  
378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 654 (1964). Although conduct  
by law enforcement may ultimately impair that right, a constitutional  
violation occurs only at trial. Kastigar v. U.S., 406 U.S. 441, 453,  
92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)." Indeed, the privilege against  
compelled self-incrimination may be the most fundamental cornerstone  
of the Anglo-American system of justice. "[T]he American system of  
criminal prosecution is accusatorial, not inquisitorial, and the  
Fifth Amendment privilege is its mainstay." Malloy v. Hogan, 84 S.Ct.  
at 1493. The great difference between the Mapp exclusionary rule,

which derives from the Fourth Amendment, and the requirement for Miranda warnings, which derives from the Fifth Amendment, was instructively explained by the United States Supreme Court in Withrow v. Williams, 113 S.Ct. 1745 (1993), at 1753:

[T]he Mapp rule "is not a personal constitutional right," but serves to deter future constitutional violations; although it mitigates the juridical consequences of invading the defendant's privacy, the exclusion of evidence at trial can do nothing to remedy the completed and wholly extrajudicial Fourth Amendment violation. Stone, 428 U.S., at 486, 96 S.Ct., at 3048. Nor can the Mapp rule be thought to enhance the soundness of the criminal process by improving the reliability of evidence introduced at trial. Quite the contrary, as we explained in Stone, the evidence excluded under Mapp "is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." 428 U.S. at 490, 96 S.Ct. 3050.

Miranda differs from Mapp in both respects. "Prophylactic" though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination Miranda safeguards a "fundamental trial right." [Verdugo, above] The privilege embodies "principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle," Bram v. U.S., 168 U.S. at 544, 18 S.Ct. at 187, and reflects "many of our fundamental values and most noble aspirations: . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;' our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life;' our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" Murphy v. Waterfront Comm'n

of NY Harbor, 84 S.Ct. 1594, 1597.

Nor does the Fifth Amendment "trial right" protected by Miranda serve some value necessarily divorced from the correct ascertainment of guilt. " '[A] system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses' than a system relying on independent investigation. Michigan v. Tucker, supra, 417 U.S., at 338, n. 23, 94 S.Ct. at 2366, n. 23 (quoting Escobedo v. Illinois, 378 U.S. 478, 488-489, 84 S.Ct. 1758, 1763-1764 (1964)). By bracing against "the possibility of unreliable statements in every instance of in-custody interrogation, Miranda serves to guard against "the use of unreliable statements at trial." Johnson v. New Jersey, 384 U.S. 719, 730, 86 S.Ct. 1772, 1779 (1966). See also Schneckloth v. Bustamonte, 93 S.Ct. at 2054.

Withrow v. Williams, 113 S.Ct. 1745 (1993), at 1753.

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What is true of the Miranda prophylactic warnings would be true a fortiori of the requirement of voluntariness: indeed, in the dissent by Justices Rehnquist and O'Connor to the majority in Withrow v. Williams quoted at length above, the minority made it clear that their deprecation of the importance of Miranda did not carry over to the requirement of voluntariness: "Unlike involuntary or compelled statements - which are of dubious reliability and are therefore inadmissible for any purpose - confessions obtained in violation of Miranda are not necessarily untrustworthy." Withrow, at 1759. "Long before Miranda was decided, it was well established that the Fifth Amendment prohibited the introduction of compelled or involuntary confessions at trial. And long before Miranda, the courts enforced that prohibition by asking a simple and direct question: Was 'the confession the product of an essentially free and unconstrained choice,' or was the defendant's will 'overborne'?" Ibid., at 1761.

Thus, " '[t]he Fifth Amendment goal of assuring trustworthy evidence' exists independently of any deterrent effect the exclusionary rule might have under some circumstances." U.S. v. Karake, 443 F.Supp.2d 9, at 50 (quoting Oregon v. Elstad, 470 U.S. at 308, 105 S.Ct. 1285). As the Tenth Circuit put it, there is a category of "constitutional violation [that] may assist officers in gathering evidence, but the violation has both offended the Constitution and rendered the evidence unreliable. A coerced confession fits into this category. As stated by the Supreme Court in Jackson v. Denno, 84 S.Ct. 1774, 1785-1786: 'It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.'" Blackburn v. Alabama, 80 S.Ct. 274, 279-80.' " Clanton v. Cooper, 129 F.3d 1147 (10th Cir. 1997).

That the "silver platter" doctrine never applied to involuntary confessions may be seen in what Justice Frankfurter wrote for the minority in dissent from the majority's abrogation of the "silver platter" doctrine as it was applied formerly to evidence seized by the states in violation of the Fourth Amendment. Specifically, he noted that "[o]verriding public considerations are reflected in the exclusion designed to prevent people from being compelled to convict themselves out of their own mouths under the shelter of the Fifth Amendment's privilege against self-incrimination, and insofar as the Due Process Clause of the Fourteenth Amendment puts curbs on the evidentiary laws of the States." Rios v. United States, 80 S.Ct. 1453. Reiterating this distinction, the Supreme Court in Linkletter v. Walker, 85 S.Ct. 1731 (1965), in explaining why Mapp would not be made retroactive while decisions concerning confessions had been, stated that "there is no likelihood of unreliability or coercion present in a search-and-seizure case. [...] in each of the three areas in which we have applied our rule retrospectively the principle we applied went to the fairness of the trial - the very integrity of the fact-finding process." Linkletter, at 1742. Thus, in a long line of cases, from the seminal confession case in modern American jurisprudence, Bram v. United States, which aptly enough involved statements elicited by Canadian police in Canada, courts applied the test of voluntariness without regard to 'cooperation and assistance'. With the advent of the Miranda prophylactic warnings, however, courts did begin to assess whether there was sufficient cooperation and assistance between foreign police and domestic authorities to warrant the requirement of these warnings. Yet this assessment has always been controlled by a sense of the profound and indispensable criterion of voluntariness which those warnings serve, as discussed by the Supreme Court in Withrow and cited above at length.

Washington case law illustrates the point. In State v. Vickers, 24 Wn.App. 843, statements made in Canada to Canadian officers were deemed admissible because the defendant had not been subjected to "threats, violence, direct or implied promises or improper influence." More recently, in State v. Medlock, 86 Wn. App. 89, where the Appellant

contended that he was "not properly advised of his rights", the Court concluded that "[a]lthough Corporal Dunn admitted his intent was to help the Spokane authorities if a murder had occurred, at the time the statements were made, there was no knowledge, cooperation, or assistance between the two agencies." The Ninth Circuit Court of Appeals, however, found this to be an "unreasonable determination of fact" "after the point in time that Detective Geise affirmatively asked the Port Moody Police Department for assistance in obtaining information from Medlock." Medlock v. Wood, 221 F.3d 1348 (Table), 2000 WL 642477 (C.A.9 (Wash.)). (This unpublished opinion is cited as persuasive authority in accordance with the Court of Appeal's decision in S.S. v. Alexander, --- P.3d ---, 2008 WL 352618 (Wash. App.Div. 1), ¶ 28-33.) "This request for specific information not only created an agency/joint-venture relationship between the Canadian and Spokane authorities, but also created substantial involvement by the Spokane authorities. Miranda warnings were therefore required." Ibid., citing to U.S. v. Covington, 783 F.2d 1052, 1056 (9th Cir. 1985). The Ninth Circuit denied habeas relief because even "[i]f the state trial court had properly suppressed those [unwarned] statements [...]" the verdict would not have been influenced. Ibid.

b. The facts regarding cooperation and assistance in this case

The facts in this case go far beyond a mere request for information by phone; indeed, they make the contacts sufficient to vitiate the "silver platter" doctrine with respect to a ██████████ search and seizure in State v. Johnson, 75 Wn. App. 692, pale in comparison. A full summary, given the limitations of space and time, is not possible, but the most important points will follow.

i. The MLAT request: Deputy King County Prosecutor prepared a specific request under the Mutual Legal Assistance Treaty to obtain the ongoing help of the RCMP, and the RCMP initiated surveillance and efforts specifically aimed at obtaining DNA and confessions at the request of Washington authorities. In the case of DNA, the RCMP were not authorized to obtain it for the use of Canadian authorities: the sole purpose of the collection was for the benefit of Washington State authorities.

ii. The request for an undercover operation: On January 11,

1995, Corporal Dallin of the RCMP met with officers of the BPD. In his written record of the meeting, Dallin wrote: "They [the BPD] are basically requesting our help in engineering a UCO [undercover operation] to obtain the required evidence." Exhibit 16. At the time of this meeting there was no Canadian investigation of the defendants for any Canadian offenses. Indeed, what is clear is that the pretext of Canadian offenses was used in order to obtain the necessary authorizations to conduct the operation that the BPD had requested. ~~XXXXX~~ After six weeks of work, documented in 29 pages of notes without ever once mentioning the issue of conspiracy or fraud, the notion is first mentioned by Inspector Bass, who on 2/14/95 told Dallin that "we could possibly squeak something out on the conspiracy angle." Dallin, 4/24/03, page 280. By January 19, as documented in a letter from Inspector Bass to Mott, the RCMP had formed the intention to begin surveillance and then "send in the undercover operators." Exhibit 9. These intentions predated by several weeks the pretext of conspiracy or fraud that would legally justify the court-authorized wiretap and undercover taping. Even in his affidavit for the Part VI authorization, Dallin informed the Canadian court that "[s]ince January, 1995, I have been involved in the investigation of a triple homicide which occurred in Bellevue" and that the reason he was involved is that the suspects "currently reside in Canada" - not that a conspiracy occurred in Canada. Exhibit 10, at 1.

iii. Bellevue PD assistance to the RCMP: The BPD's assistance to the RCMP was substantial and continuous from January through to the time of the arrests. As noted by Dallin, he was in contact with Thompson "approximately every day." Dallin, 4/23/03, page 80. Thompson traveled to Canada 15 to 20 times. Thompson, 5/21/03, page 93. Dallin testified at length regarding Bellevue's assistance in preparing the affidavits submitted to obtain authorizations. Dallin, 4/23/03, page 140-151, 125-7. Of greatest importance is the BPD involvement in the undercover scenarios. Inspector Schwarz noted that Bellevue officers and Prosecutor Jeff Baird participated in discussions used to "get into the defendants' minds" in order to better craft future undercover scenarios. Schwartz, 5/28/03, page 101. Schwartz's

written notes read "Detectives from the Bellevue, Washington Police Department should be present to provide input into briefings and devising scenarios." Ibid., page 97. Dallin's notes confirm that the RCMP went "to Bellevue to discuss a logical plan to get him [defendant Burns] to talk." Dallin, 4/24/03, page 241, 243. Throughout the undercover operation, Thompson listened to recordings after each scenario, even as the RCMP accessed BPD files unavailable to other BPD officers.

iv. Bellevue turns the screws: The BPD discussed with the RCMP on May 17, 1995, the possibility of using the press to pressure the defendants into "talking". Schwartz, 5/28/03, page 126. The BPD would issue a press release in conjunction with a fake memorandum that the RCMP undercover operatives would present to the defendants. Sergeant Henderson described it as an attempt to create "tension" and get the defendants to be a "little more concerned". Henderson, 6/10/03, pages 269-271. In fact, this was an integral part of what convinced the defendants that they were being framed and served to escalate the urgency of the deadly threat with which the undercover operatives had confronted the defendants. Thompson 12/11/02, pgs 206-7.

v. RCMP meetings with the Washington State Prosecutor: Ever since BPD Detective Ed Mott's request that the RCMP "do an undercover operation for them [BPD]", in January, the two agencies worked to achieve that goal. Dallin, 4/23/03, pages 66-7. As early as January 16, Dallin noted his request to Detective Gomes to talk to the Washington prosecutor to find out about the admissibility of evidence, and eventually a meeting with Prosecutor Baird did in fact occur. Dallin, 4/24/03, pages 269-271. The RCMP, Detective Thompson, and Prosecutor Baird discussed Prosecutor Baird's (incorrect) theory regarding the "silver platter" doctrine. On May 17, the Prosecutor was provided with transcripts of the May 6 scenario in which the operatives' threat to the defendants was fully articulated, and his opinion on admissibility solicited. Instead of expressing concern that the RCMP not coerce statements from the defendants, or about the reliability of such statements, the prosecutor only made it clear that the "Canadian investigation was under the direction of Canadian authority" (as recorded by Thompson in his notes in Discovery,

page 4149), in blithe indifference to the fact that the RCMP, in making it clear that they intended any statements elicited for use in Washington courts, and asking about admissibility, had sought direction from him, and received it.

c. Analysis of the facts regarding assistance and cooperation

The level of cooperation and assistance involved in the preceding facts exceeds any standard required not merely for Miranda warnings, had statements been elicited under custodial interrogation, but indeed the higher standard required for the application of Fourth Amendment exclusionary rules. Indeed, the rationales commonly invoked for not applying Fourth Amendment rules, namely that the domestic authorities did not have any control over the impugned action, or did not themselves merit censure, are nullified by the facts at bar. Here, the RCMP were more than willing to comply with any criteria for admissibility that Prosecutor Baird might have shared. Here too, the BPD actively abetted in making the coercive circumstances more urgent and the threat more imminent for the defendants. As an officer of the court, the Prosecutor had a duty to ensure that trustworthy evidence was secured for the court, not attempt to evade the requirement by a pretense of not directing those who had come to him precisely for direction. The Prosecutor may well have been honestly wrong in his belief that the "silver platter" doctrine could enable the admission of an involuntary confession into evidence, but this is the last sort of ignorance of the law that may be excused. As discussed above, voluntariness has been "the only clearly established test in Anglo-American courts for over two hundred years." Culombe v. Connecticut, 367 U.S. at 602, 81 S.Ct. at 1879 (1961). Even on the erroneous supposition that some showing of "cooperation and assistance" was required before the statements elicited by the RCMP were subjected to the test of voluntariness, the facts in this case more than compel the application of that standard.

d. Defects in the trial court's findings and conclusions

The U.S. Supreme Court has held that "[a]lthough the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." Sims v. State of Georgia, 87 S.Ct. 639 (1967),

at 643. In Washington State, the criminal rules require that at the end of a "3.5 hearing" (admissibility of statement), the trial judge must set forth, in writing, "(1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefor." CrR 3.5 (c). State v. Trout, 125 Wn. App. 403. A court determines voluntariness under the totality of the circumstances. State v. Broadway, 133 Wn.2d at 132. The court considers any promises or misrepresentations made by the interrogating officers. And it considers the relationship between those promises and the confessions to determine whether the defendant's will was overborne. Id. The absence of findings of fact is harmless, though, if the trial court's oral opinion is clear and comprehensive and written findings would be just a formality. State v. Cruz, 88 Wn. App. 905.

In the case at bar, no such consideration is evident. The court failed to make any relevant finding of fact other than that the defendants were not in custody. The court did, however, appropriate a Canadian court's conclusion of law as finding of fact #15, to the effect that that "there was no duress or coercion employed by the RCMP during the undercover scenarios", and stated that it "finds the same." Incorporating the court's oral opinion provides no further clarification other than the trial court's mistaken belief that Fulminante's being in prison constituted "custodial status" for the purposes of voluntariness, in the crucial case of Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991). The trial court again cited the Canadian court's opinion that there was "no evidence of coercion", and again repeated that it makes "the same finding" as the Canadian court. 37RP 22-23.

i. A reliance on the Canadian ruling: At the very outset it is vital to note that the 2 1/2 day extradition hearing of which this decision of the BC Court of Appeals was a review had only the testimony of the undercover operatives to rely on. The record contained no recordings or transcripts of the meetings. Counsel's representations, even given that record, were ineffective, and it is appalling that a decision made on such a record should be considered relevant to the trial court's duty of making a finding on the complete record

before it. But perhaps even more fatal to the propriety of the trial court's use of the Canadian ruling is the fact that the BC Court of Appeals expressly declined to apply the test of voluntariness to the statements made to the RCMP undercover operative, even leaving aside the question of whether "voluntariness" under Canadian law is congruent with "voluntariness" in American law. "[C]ounsel for the appellants asks the Court to revisit the common law rule as to confessions, voluntariness and persons in authority. [...] In my opinion what the appellants seek to have the Court do on this issue would amount to a significant change in the common law and one that goes well beyond being 'incremental'." Burns v. United States of America, 117 C.C.C. (3d) 454 (1997), ¶ 6 and 9. The common law alluded to here is peculiar to Canada. Under Canadian law, "[i]t has been held repeatedly that where police officers or other in the employ of the police pretend to be criminals [...] as a result of which the accused makes incriminating statements, the statements are perfectly admissible as the pretending officer or other person can not be classed as one in authority and hence no confession in the true sense of the word is involved and there is no need to hold a voir dire. see R. v. Towler, 2 C.C.C. 335 (1969)", R. v. Rothman, 1978 CanLII 61 (ON C.A.), ¶ 15 (emphasis added). Patriotic feeling notwithstanding, the Appellant would be hard pressed to call this approach anything but manifestly unreasonable, nor does it seem defensible that the judicial convenience of not holding a voir dire should trump the cornerstone values inhering in the test of voluntariness since the Age of Enlightenment. This approach is, of course, utterly at odds with American jurisprudence, which requires that the prosecution prove by at least a preponderance of the evidence the voluntariness of every incriminating statement elicited by the police: "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? ... The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession." Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860,

6 L.Ed.2d 1037 (1961). It was, however, to another decision of the United States Supreme Court that Jessup, J.A., dissenting from the Rothman decision quoted above, cited: the prophetic words of Justice Goldberg for the majority in Escobedo v. Illinois, 378 U.S. 478 (1964), at 488-489. "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."

Canada has paid a fearsome toll for abandoning the test of voluntariness, heedless of the lesson to which the U.S. Supreme Court presciently hewed: probably no idiosyncrasy of Canadian law has caused ~~more~~ more miscarriages of justice. Fittingly, the case relied upon by the BC Court of Appeals in upholding the Appellant's committal for extradition, and quoted extensively by the Justices in their opinion, was R. v. Unger, 83 C.C.C. (3d) 228. The Manitoba Court of Appeal had upheld Mr Unger's conviction, which was based on statements obtained through a Mr Big operation. "One officer, posing as the leader of the gang, asked the accused to tell about killing somebody to show that he was someone who could be trusted. The accused responded by confessing to the crime that the police were investigating." Unger, at 248, quoted in Burns v. U.S.A., ¶ 14. As with the Appellant, leave to appeal to the Supreme Court of Canada was denied without reasons. Unger's co-accused was also convicted at trial; though granted a new trial on appeal, he committed suicide before the re-trial.

Ordering Mr Unger's release in 2005, Justice Beard of the Manitoba Court of Queen's Bench noted that Mr Big operations continue over weeks "and sometimes months and can involve heavy pressure if the suspect is not forthcoming with the admission being sought." R. v. Unger, 2005 MBQB 238, ¶ 16. The inducements that caused Mr Unger to confess were considerably less compelling than the threat to which the Mr Big operative in the Appellant's case resorted. Unger testified at trial that he had confessed to the murder, which involved a serious sexual assault and "horrible and degrading acts of violence", to obtain employment with the undercover RCMP operatives posing as criminals, to impress them, to earn a lot of money and

to join their group. Ibid, ¶ 17. As in the case at bar, there were discrepancies between the story told by the target of the Mr Big operation and what extrinsic evidence proved occurred in the crime. Mr Unger's confession was submitted by the Minister of Justice to Dr Gisli Gudjonsson, the expert cited in Appellant's Brief by counsel for review. (See Appendix B of Appellant's Brief, discussing, *inter alia*, the Canadian law.) Justice Beard, granting bail to Mr Unger, found "that there are very serious concerns that the applicant may have been wrongly convicted". Ibid, ¶ 19, 6, and 51. The crown, of course, persists in relying on the statements elicited by the Mr Big operation, but Dr Gudjonsson's report is expected imminently, and Mr Unger remains free, having served 13½ years for a crime he did not commit, joining the list of exonerated victims of the Mr Big operation, which includes Clayton Mentuck, O.N.E., and Andrew Rose.

Such, then, is the case on which the trial court implicitly relied, along with Canadian findings that, as discussed above, are not relevant to voluntariness. Indeed, the BC Court of Appeal's refusal to apply the test of voluntariness to the statements obtained by the Mr Big operation in this case should be understood as a tacit concession that they could not pass that test. Unfortunately, the trial court seems to have been insidiously influenced by the Canadian law, and misunderstood the Canadian findings of a lack of coercion or duress (the latter term, in Canadian law, signifying actual physical violence) sufficient to "shock the sensibilities of an informed community considering the brutality of the crime then under investigation" or "bring the administration of justice into disrepute" to be related to the voluntariness test required by American law. 37RP 11. Indeed, after quoting from the BC Court of Appeal's opinion stating that "[u]nder the common law the statements would be admitted into evidence, and it would be for the jury to determine what weight should be given to them, but the manner in which the statements were obtained may not violate the principles of fundamental justice", the trial court went so far as to add "Very parallel to the American case law." 37RP 10.

The Appellant respectfully submits that the formulation endorsed

here by the trial court does not even resemble, and indeed directly contradicts American case law. Mr Justice Brennan, delivering the opinion of the United States Supreme Court that held "that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States", specifically noted - as if anticipating the error of the trial court in this case - of voluntariness that "[u]nder this test, the constitutional inquiry is not whether the conduct of the state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary;[']". Malloy v. Hogan, 84 S.Ct. 1489 (1964), at 1492, and at 1493 (quoting Bram v. United States).

ii. Misrepresentations by counsel: The trial court was abetted in its error by the misleading representations of counsel for both the State and defence, both in briefing and on oral argument, that implied that a showing of "cooperation and assistance" was needed before the voluntariness test would be applied, and that absent such showing the only basis for exclusion was "outrageous conduct" that "shocked the judicial conscience." See Defendant Rafay's Memorandum in Support of Motion to Suppress Statements, submitted April 4, 2003, arguing that "[b]ecause the Bellevue police assisted and cooperated in the Canadian investigation, the evidence obtained by the Canadians in violation of the due process clause is inadmissible in this court", on page 26, specifically a propos the involuntariness of the confessions. The trial court's misunderstanding of the law is plain on oral argument in the following exchange:

[MS. FREITAS:] So I think there's no doubt and no disagreement, it violates the Washington constitution, it violates the federal constitution, it wasn't voluntary, and there were threats. No one has argued it. And the Fifth Amendment applies to all

persons. There's no argument by the State that it doesn't. COURT: People in the United States, that's different language.

MS. FREITAS: So if there was a joint investigation, which I think, I mean, by the number of contacts. I mean, you can sit here and you can come in court and say, no, we had two separate investigations, but Your Honour, you have got common

sense. You're an intelligent man. They clearly were working together. [...] ¶ I guess the State has only ever addressed this outrageousness. So say the Court doesn't find that this was a joint investigation. Then the conduct would have to be outrageous and shock the conscience of the Court. And I submit that this does. [...] (36RP 134-135, emphasis added) Counsel for the State, in their response to defence counsel's argument on voluntariness, reiterated the mistake that the trial court would adopt in its reasoning:

[MR. KONAT:] I don't want to forget to deal with the argument that Ms. Freitas makes on behalf of her client, Atif Rafay,

[continued on next page]

about these statements being involuntary and coerced. And I know that Mr. Davidheiser shared some of this with you, but the Court of Appeals in Canada in its committal proceeding did entertain this very notion, which is why we didn't spend any time briefing it here. What it said was, [...] "I do not find the undercover officers' conduct in this case shocking or outrageous, although they were deceitful, persistent, and aggressive. This kind of conduct is what you would expect in a criminal environment. (36RP 148, emphasis added)

Counsel for the State went on to quote the same passages about "shock" and "disrepute" that the trial court, accepting the State's invitation to treat the Canadian standard as equivalent to American voluntariness, relied on in its findings and conclusions. (Counsel for the State did further argue, if bald assertion be so called, that there were no threats, but in an oblique gesture toward actual facts, stated that "the threat that they [the Mr Big operatives] made to them [the defendants], if such a threat was made, was that we'll throw the pager in the salt". 36RP 149. This was far from the only threat, of course, but even the meaning of this one received no explication beyond the innocuous one scarcely applicable "in a criminal environment.")

That the trial court did not apply the voluntariness test but instead "paralleled" Canadian law and "silver platter" doctrine is further substantiated in its comments in rejecting Dr Leo's testimony. "[T]he final analysis and question for this jury to decide [is], number one if it's a confession and, number two, was it voluntary or coerced?" 11/19/03RP 65. The Supreme Court of the United States, however, holds otherwise: explaining its decision in Rogers v. Richmond, 81 S.Ct. 735, to reverse a conviction where there was a possibility that the determination of voluntariness had been left to the jury, the Court stated that "~~we did not believe~~ a jury could be called upon to ignore the probative value of a truthful but coerced confession; it was also likely, we thought, that in judging voluntariness itself the jury would be influenced by the reliability of a confession it considered an accurate account of the facts." Lego v. Twomey, 92 S.Ct. 619 (1972), at 623. (It is worth noting that while evidence of the reliability of a confession should not influence

a determination of its voluntariness, evidence that it is unreliable, as in the case at bar, not only may but must be considered relevant to that determination.)

Reviewing the record as a whole, not least the actual facts of how the defendants were compelled by the police to concoct their stories, cannot leave much doubt that the trial court did not apply the test of voluntariness to the challenged statements as required by law. Instead, the court borrowed the standards involved in Canadian law, and that applicable for excluding evidence seized in foreign searches in violation of the Fourth Amendment, for analyzing the admissibility of the statements under the Fifth and Fourteenth Amendments. This explains the absence of the findings and the reasoning required not only by CrR 3.5, but by the process that the U.S. Supreme Court holds is required, "at the least", to determine the voluntariness of statements:

The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external, 'phenomenological' occurrences and events surrounding the confession. Second, because the concept of 'voluntariness' is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal, 'psychological' fact. Third, there is the application to this psychological fact of standards of judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstance.

Culombe v. Connecticut, 81 S.Ct. 1860, 1879.

While recordings of the May 6 and later encounters between the police and the defendants may relieve the trial court of some of the burden as to the first phase, nothing in the record suggests the trial court performed the test set out by the Supreme Court. Instead, the court found the "same" as the Canadian court.

e. The legal consequences of the absence of findings

The failure to conduct the required inquiry is a denial of due process. Here the court's oral remarks actually aggravate

rather than compensate for the infirmities of the written findings. "The true test of admissibility is whether there is a causal relation between the confession and any improper inducing threats or promises. A pre-trial statement of a criminal defendant is considered to have been voluntarily made if it was not the product of threats, violence, direct or implied promises, or improper influence." Ferguson, Royce A., Jr. Washington Practice 12: Criminal Practice and Procedure (3d ed.) (2004), § 3316, page 872, referencing State v. Davis, 73 Wn.2d 271. Even pretending that there were no threats, as even the State had difficulty doing, the failure to consider inducements is a fatal defect. "The confession of one accused of a crime which is induced or influenced by promises made to the accused which hold out a hope of benefit or reward is not a voluntary confession and therefore inadmissible in evidence. The fact that the confession was made under such circumstances creates a fair probability of its untrustworthiness as testimony." Ibid, § 3319, page 877, referencing State v. Fischer, 13 Wn.App. 665, and State v. Riley, 19 Wn.App. 289. In the case at bar the inducement was inextricable from the threat held over the defendants, and there is not even the hint of a suggestion as to how these statements might have been anything but the product of the inducing threats and promises.

The Court of Appeals will "conduct a de novo review of conclusions of law in an order pertaining to a suppression motion. State v. Mendez, 137 Wn.2d 208." State v. Neeley, 113 Wn.App. 100, 106. The State has the burden of proof in respect of voluntariness, and "[t]he absence of a finding of fact in favor of the party with the burden of proof about a disputed issue is the equivalent of a finding against that party on that issue. If no finding is entered as to a material issue, it is deemed to have been found against the party having the burden of proof." State v. Haydel, 122 Wn.App. 365 (2004). "When CrR 3.5 has not been observed the appellate court must examine the record and make an independent determination of voluntariness. State v. Hoyt, 29 Wn.App. 372, State v. Vickers, 24 Wn.App. 843. See also State v. Daugherty, 94 Wn.2d 263, c.d. 450 U.S. 958. State v. Coles, 28 Wn.App. 563." State v. Davis, 34 Wn.App. 546, 550. Finally, where there is a verbatim report of proceedings,

"an appellate court may examine the record and make its own determination of voluntariness. State v. Vickers, 24 Wn.App. 843, 846 (1979), State v. Hoyt, 29 Wn.App. 372, 379, r.d. 95 Wn.2d 1032 (1981)." State v. Kelly, 33 Wn.App. 541, 545.

The Supreme Court of the United States, reaffirming its commitment to its "historic 'duty to make an independent evaluation of the record' ", noted that "[t]hat duty, as Mincey makes explicit, is not limited to instances in which the claim is that the police conduct was 'inherently coercive' " but rather "applies equally well when the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." Miller v. Fenton, 106 S.Ct. 445, 449, quoting Mincey v. Arizona, 98 S.Ct. at 2416, 2418. Indeed, the Supreme Court went on to add that "the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne", and that "assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of 'voluntariness.' " Miller v. Fenton, at 452-453 (emphasis in original).

Given the record in the case at bar, the Court of Appeals should have no hesitation making its own findings based on the complete record before it, as indeed did the appellate court in Arizona v. Fulminante. As Chief Justice Rehnquist noted in his dissent, the Supreme Court of Arizona "overturned the trial court's finding of voluntariness based on the more comprehensive trial record before it, which included, in addition to the facts stipulated at the suppression hearing, a statement made by Sarivola at the trial that "the defendant had been receiving 'rough treatment from the guys, and if the defendant would tell the truth, he could be protected.' " " Arizona v. Fulminante, 111 S.Ct. 1246, 1262. The U.S. Supreme Court affirmed the Arizona Supreme Court's judgment. Defendant Burns's testimony at trial confirms the evidence from the recordings and the reluctant concessions of the RCMP witnesses.

The trial court in Fulminante could at least try to defend its conclusion that Fulminante's statements were voluntary by pointing to Fulminante's actual stipulation that "at no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr Sarivola's 'protection.'" Arizona v. Fulminante, 111 S.Ct., at 1262. In the case at bar, Sebastian is heard frantically trying to reassure the adamantly disbelieving Al that he would not inform on Al even if he were arrested, and Sebastian assures Al that he and his friends, including the Appellant, know that they will be killed if they displease Al, and know that they could be 'gotten to' even in jail. Exhibit 546 (transcript of May 6, 1995), p. 75. Exhibit 541 (transcript of June 28, 1995), pp. 91, 106, 136. 27RP 289-295, and 298-301 (referencing pp. 52-54 of the transcript of July 18, 1995).

But with this comparison the Appellant arrives at the test of voluntariness itself.

f. The involuntariness of the statements after May 6, 1995

The Appellant confesses some astonishment, mixed with a despairing frustration, at the mystery that the trial court seemed to make of what compelled the false confessions at issue here, and at the notion that if they were true that might explain why they were made: "I can't explain it either why you would do that if it wasn't true." 157RP 107. Lest the "either" in this remark by the trial court be taken to imply that the Appellant couldn't explain it, this Court should note that the Appellant had just done so: "the lie that we told, the masks that we put on, the masks that we put on to survive a situation, an appalling, atrocious situation that was constructed. Constructed to entice us and elicit from us those very lies and that mask." 157RP 103-104.

What compelled the self-incrimination was quite clear to the RCMP agents who applied the coercion and offered the inducements in concert with the BPD: so clear, indeed, that the principal agent, Al, was moved, in cross-examination, to attempt to mitigate the threat made to the defendants with the observation that he would not actually have murdered the defendants if he thought they were going to jail, since he was not actually the ruthless head of an international crime

organization, as the defendants believed:

Q: And whether he was guilty or innocent, if he got nervous or afraid when he's sitting in jail, he could use information about you to help himself, right?

A: Sure.

Q: So at all costs, Sebastian needed to be kept out of jail both for your own protection and his right?

A: See, in real life, like in this situation, if he'd went to jail, it wouldn't have mattered.

Q: Because you weren't real?

A: Exactly.

Q: Exactly. But Sebastian thought you were real?

A: Yes.

Q: Okay. And so - and you had told him that if he went to jail, he might be able to sell information about you, the person he thinks is real, to help himself, right?

A: I could have left that inference, yes.

Q: And so at all costs, he had to be kept out of jail both for your own protection as the crime boss and for his protection, right?

A: That's what I was relaying to him, yes.

27RP 271-272.

The threat to the defendants' lives was quite clear. The defendants could only escape the fate of potential informants against 'Big' Al - death - by convincing him that they would not be arrested, and Al was adamant that he would only be convinced of this by their participation, by making confessions as Al demanded, in his scheme of sabotage of the BPD.

Q: And in terms of never giving Sebastian that opportunity [to inform on Al], you told Sebastian that you needed to help him with Bellevue so he wouldn't get arrested, right?

A: That and the inference that I'm the only person that could help him with Bellevue, yes.

Q: And because you're the only person who can keep Sebastian from getting arrested in Bellevue, he would then not have the opportunity to give you up because he would never be in their custody, right?

A: That's a very small part of it, but that would be part of it, sure.

Q: And as we discussed earlier, if Sebastian did get arrested he did have information about you to give up?

A: Yes.

27RP 294-295.

Thus in testimony Mr Haslett could not deny the existence of the threat used to compel the defendants to be (false) witnesses against themselves, but instead sought to deprecate it. Indeed, he elaborated on his rather peculiar estimate of the prospect of being murdered:

A: [...] But before I say that is - concerns. He [Sebastian]

mentioned to me at one point that I could put a bullet in his head and everything. Did he say Al, this concerns me? No.  
27RP 296.

The following excerpt from May 6, meanwhile, may be what Al Haslett had in mind when he testified that "he could have left that inference":

AH: What happens uh when these fuckin' bozos from down auh in Bellevue, come fuckin' up here and grab you?

GS: The ones in Washington.

[...]

AH: What happens then?

SB: Well...

AH: Who's the first person you're gonna give up?

SB: Huh?

AH: Well, you're looking at him, that's what I want to be fuckin' sure of you know what I'm saying?

SB: Umm. As if, as if, umm, well whatever, I mean fuck, first of all auh, auh, I don't know shit to give up and nor would I and auh.

AH: Not today you don't but in three months you might.

Exhibit 546, p. 74-75.

But it may also have been this, later on:

AH: [...] you have some concerns and I just want to be sure, uh, your concerns aren't gonna cause me fuckin' problems.

You know what I mean?

Exhibit 546, p. 80.

After Sebastian foolhardily revealed that he had noted down the licence plate numbers of the undercover agents' cars, however, Al responded with a fulmination that would be hard to describe as something that merely "could have left that inference", to use Al's delicate testimonial expression, even given Mr Haslett's penchant for understating in testimony the threat posed to the defendants --- indeed, Sebastian would testify that during this exchange he "thought they [Al Haslett and Gary Shinkaruk] were deciding right there whether they should kill me." 143RP 148.

GS: [...] And I know it took a lot of guts right now, to fuckin' tell me that, not knowing that if you say that, there's always that potential, shit hits the fan. At that time, when you knew fuck all, you were keeping your options open, and right now, knowing what I've done in the past, you just took a fuckin' major fuckin' leap forward in my books.

'Cause you had the balls to tell me that, in a round about way, for a young kid. But you know where I'm coming from.

SB: I, I understand. Alright.

Exhibit 546, p. 84.

What Gary had "done in the past" was murder, but evidently this was still not explicit enough for Al:

GS: [to Al, who is raging] Take it easy, man.  
[...]

AH: Don't ever, and I mean ever, fuck you around. I will put out [...] taking care of any fuckin' buddies that will ever go to fuckin' court, you can fuckin' finger you. 'Cause the minute I get fuckin' name on people that are working for me, are going to fuckin' jail, you know something, I got two things to lose, a lot of money, and a chance of me going to jail. There's two things I ain't gonna fuckin' do in my life, is go to jail, or lose money. And you always remember that.

SB: Kay.

AH: That's the fuckin' way to live.

GS: Al he's just talking his mind man...

Exhibit 546, p. 85 (emphases added).

What compelled the statements in this case cannot be accurately understood without the realization that the defendants never did forget Al's injunction, nor the menace palpable in Al's cold rebuff of Sebastian's attempt at conciliation immediately thereafter:

SB: I don't mind the way you talked to me or anything?

AH: I'm not talking to you anyway I'm just letting you know the facts.

Exhibit 546, pp. 85-86.

As for the question of the defendants' guilt or innocence, there was no question, for Al:

AH: You did that murder. And that's why you're, it's you're here today, because you're fuckin' solid.

Exhibit 546, p. 94.

SB: Well, I didn't say I did it.

AH: No you didn't but I fuckin' told you right that I fuckin' think very strongly so I don't give a fuck.

Exhibit 546, p. 96.

AH: They want your fuckin' ass for some reason.

SB: Yeah, but-.

AH: I don't care about but.

Exhibit 546, p. 130.

The urgency only escalates on June 28:

AH: [...] If you want me to help you I can help you. But, you're gonna help me.

Exhibit 541, p. 82.

AH: [...] I'm asking you for one reason, to protect my own ass.

Exhibit 541, p. 90.

AH: [...] So I'm not putting up with this bullshit, you lying to me now, or fuckin' uh, you come back and found these bodies. You must think I come down on last night's rain.

The minute you start thinkin' that about me...

[...]

AH: You're always started tellin' me you come back and found these bodies that I fuckin' know for a fact...

Exhibit 541, pp. 112-113.

AH: [...] And you take a fall, you know who else takes a fall after everything's done, Guess, right now, guess.

SB: No one.

AH: What do you mean no one?

SB: No one.

AH: Huh? No one? You're fuckin' stupid right now, you know who else goes down.

SB: You're gonna say you, right?

AH: Yeah.

SB: Okay, well.

AH: A And I can't afford to have me go fuckin' down.

Exhibit 541, pp. 136-137.

AH: No I don't give two fucks of whether you trust me or not. I fuckin' uh, I got your fuckin' uh, basically your fuckin' future in the palm of my fuckin' hand if I want it anyway [...]

Exhibit 541, p. 147.

AH: [...] don't fuckin' see me short, and don't ever let your fuckin' friends try to sell me short, because if they start selling me short, you being in the middle is gonna hurt [...]

Exhibit 541, p. 150.

That the threat had been conveyed to the Appellant is clear not only from what Sebastian tells Al about Jimmy and Atif knowing they'd be dead on July 18, but also from what the Appellant is so anxious to say to Al almost upon meeting him:

Q: In the middle of the page, it says Corporal Haslett. It says "Trust is the biggest thing." And Atif Rafay says, "I don't know how I can assure you, however," and you say, "Well." And Atif says, "If I, except that I would never, you know." And then you say, "Just wait a minute," and Atif says, "But I, I can assure you that I would never even on principle ever try to say anything to a policeman, and in your case particularly." Isn't Atif telling you that I would not rat you out?

A: He's telling me two things here. One that he would not rat out Sebastian Burns, and one that he would not rat me out.

Q: Correct. So apparently he's aware of your concerns about being ratted out?

A: He's aware of my concerns and he's aware of how I view how important trust is on, also dealing with my organization [...]

27RP 341-342.

The fate the defendants were made to believe they faced was most graphically described by Sebastian: "I would wake up one day with a bullet in my head [...] If I went to jail or something I'm sure I could still be gotten to, whatever, alright." Exhibit 541, p. 91.

The Appellant has resorted to such extensive quotation here simply to lay to rest the notion that the trial court's "findings" can be supported by the facts at bar. There were indeed threats, and in a context, moreover, that made for a coercive predicament of wicked

sophistication and compelling force. It is notable that the defendants continued to insist that the evidence that Al claimed existed must be fabricated or misrepresented, and that their concern about being framed persisted despite Al's discouragement of it. Exhibit 546, p. 141, and passim on July 18 and 19. Just as telling are the lies that Sebastian told Al about the progress of the film he and Atif were working on, and about the availability of funding for it, complete with a story about the friend of a girl he had met who purportedly "might double the budget", all told as part of his attempt to extricate himself from further involvement with Al. Exhibit 546, p. 72. (It was these attempts of Sebastian to discontinue involvement with the operatives that prompted Al to resort to the threat of murder to force Sebastian to "deal with" the threat of arrest from Bellevue.) Atif, meanwhile, immediately upon arrival on July 19, having had a coded conversation with Sebastian that virtually announces that he will be acting a role, lies about what Sebastian has told him about Al. That lie, however, unlike Atif's statements about his guilt, Al actually challenges. Thus not only the boys' disposition to lie to avoid displeasing Al, but their actual lies, are evident in the record.

The defendants were forced to the stark alternative: either confess (falsely) as Al demanded to the crime he already adamantly insisted that they were guilty of, and thereby avoid being killed by him and also obtain exoneration; OR refuse, and then be killed by Al as potential informants, failing which they faced merely a wrongful prosecution based on fabricated scientific evidence. Mr Haslett conceded the dilemma, but depreciated it as "all a game that's being played here, a role [...] a whole charade". 27RP 301. The psychological and hence legal irrelevance of this extenuation will be obvious to this Court:

Whether a confession is voluntary depends upon the state of mind of the accused, not the state of mind of the police officers  
State v. Moore, 17 Wn.App. 5, 12-13.

But with this observation a more careful treatment of the effects of this "Mr Big" operation is due.

i. On "what you would expect in a criminal environment": The foregoing phrase was rather carelessly used (ante, Burns v. U.S.A., ¶ 11) by the extradition judge to extenuate the "deceitful, persistent, and aggressive" conduct of the undercover officers, insofar as he knew of it. The Appellant here wishes to draw the attention of this Court to the full implications of the phrase for the 19-year old defendants with no experience of organized crime, save through the movies they had seen. In testimony Sebastian made an obscure allusion to the Henry Hill story: this is the 'true' story upon which Martin Scorsese's film GoodFellas was based. 143RP 102. Though it has been well over a decade since the Appellant last saw the movie, which was released in 1990, the gist of its depiction of the criminal underworld is still vivid, most particularly the explicit revelation that 'the men who came to kill you greeted you with smiles on their faces.' Repeatedly in the film, those who may be arrested and thus might become informants are murdered without any warning: no further explanation is deemed necessary than the narrator's explanation that 'it was just a matter of time before they got pinched.' The narrator and protagonist himself, along with his wife, spend much time agonizing about whether they have been targeted for execution. Explicit threats are not used in this milieu, because they would merely alert the

[continued on next page]

victims and cause them to go to the police if they hadn't already done so, or to raise their guard. Such depictions are ubiquitous in pop culture, and were thoroughly exploited by the police in this case. Thus Al, in testimony, strove to emphasize that the threat on the defendants was left by inference, and that he did not explicitly tell them he would murder them unless they confessed, even though the inference was obvious, and as seen above, unmistakable. The trial court's recitation of the defendants' non-custodial status is inapposite not only because, as the Washington State Supreme Court put it,

[t]he real question here as announced in Malloy v. Hogan, 373 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 653 (1964), is whether the noncustodial interrogation of the defendant, which elicited incriminatory admissions by him, was of such a nature as was likely to exert such pressure on the individual as to disable him from making a free and rational choice whether to speak with the officer. The United States Supreme Court in Malloy stated that the constitutional inquiry is:

whether the confession was "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." (Italics ours.) [here rendered by Appellant as underline]

State v. Kelter, 71 Wn.2d 52 (1967), at 55 (citing Malloy, 373 U.S. at 7).

but also because the coercion in modern custodial interrogations in most jurisdictions since the waning of the third degree pales in comparison to that present here. Prisoners in custody do not, whatever else they undergo, usually expect murder without warning for refusing to confess. And there is no equivalent to the Miranda warning ~~used~~ to dispel the coercion inherent in a 'criminal environment': Al's claims that he might walk away, made after he had obtained incriminating statements in July was belied both by his conduct and what was to be expected in a criminal environment.

Beyond this, safety when dealing with criminals demanded from the defendants an appearance of sangfroid, and a deferential and uncensorious attitude to their activities. Analysis of the voluntariness of the statements should not be distracted by any superficial casualness, or frankly, the emetic vulgarity of the interactions, from the coerciveness of the situation pertaining to the admissions sought by the police.

ii. Threat or inducement? A distinction without a difference in this case: Noting that Malloy had obliterated the distinction made in

RCW 10.58.030 between threats and inducements, the Washington Supreme Court approved the U.S. Supreme Court's opinion that

[...] [i]n other words, the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. Haynes v. Washington, 373 U.S. 503. State v. Streeter, 67 Wn.2d 39 (1965), at 43 (quoting Malloy, 373 U.S. at 6).

The Appellant is somewhat torn between extolling the compelling power of the priceless, precious inducement of exoneration from so infamous a charge as this, and the depreciation - only comparative - of this against the threat of being murdered. They were, of course, quite inextricable in this case: the threat of murder proceeded directly from the spectre of arrest. See ante, passim, and 143RP 102-3, 145RP 178-80. The State, in argument and cross-examination of Sebastian, made a bit of a fetish of insisting that the inducement of exoneration was more compelling, presumably on the (fairly dubious) theory that the guilty are more susceptible to that lure. But, as Sebastian noted, he had been compelled to cease maintaining innocence because of Al's threat on May 6, and was not himself interested in Al's plan apart from this threat, until he learnt that evidence was being fabricated or "perfectly misrepresented" on June 28. 146RP 15-16. Throughout it was Al's belief that the defendants were going to be arrested that posed the threat, and his refusal to be relieved of his concern by any other means than the defendant's confessions, that compelled the statements.

Happily for the economy of this Court's analysis, the test of voluntariness does not distinguish between these compulsions. Each taken alone is more than sufficient to render statements obtained thereby involuntary; together there can be no question. Even such a pragmatist critic of the orthodox construal of the voluntariness test as Judge Posner, who derides it as the "faculty of the will" approach and prefers to focus on whether it has been made "impossible for the defendant to make a rational choice as to whether to confess" agrees that if the police

feeds the defendant false information that seriously distorts his choice, by promising him that if he confesses he will be set free [...] then the confession must go out. U.S. v. Rutledge, 900 F.2d 1127 (7th Cir. 1990), at 1129.

And, "[o]f course if the confession is unreliable, it should go out, along with other unreliable evidence." Ibid.

This Court, meanwhile, has recently held, quoting the Washington Supreme Court, that

"[t]he right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt." State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (citations omitted). State v. Holmes, 122 Wn. App. 438 (2004), at 443, 93 P.3d 212, 215.

It is to be hoped that this Court will never adjudicate a more inquisitorial operation than the one in this case, which, having failed to obtain the desired admissions by the inducements now known to have elicited false confessions in several cases, resorted to the threat of murder and the promise of exoneration. This is hardly a technique "compatible with a system that presumes innocence and assures that conviction will not be secured by inquisitorial means". Miller v. Fenton, 106 S.Ct. at 452-3 (cited, ante, at page 39). It is, rather a technique premised on leaving the suspect no rational reason to maintain innocence.

The Court should not be misled by any superficial casualness in conversations after May 6, and especially in July. The defendants had by then been compelled to comply with Al's demands for confessions, and, after Sebastian's failure on June 28 to satisfy Al with a full story, had concocted one from the detailed accounts placed in The Province newspaper by the BPD. Exhibit . The threat from Al was not vague or general, but specifically tied to whether the defendants made the required admissions so that their arrests, and the threat that posed to Al, could be averted. The defendants were complying, and so had nothing, or rather, as little as possible, to fear from Al and his criminal organization. In this sense the scenarios from July are at best irrelevant to an accurate disposition of voluntariness, except insofar as they shed retrospective light on the states of the defendants' minds as they were compelled to their decision. There can be no question of attenuation here: as the learned judge in Karake noted,

"[t]he critical question with respect to attenuation is not the length of time between a previously coerced confession and the

present confession, it is the length of time between the removal of the coercive circumstances and the present confession. Lyons, 322 U.S. at 597, 64 S.Ct. 1208 (question is whether "the unlawful inducements which vitiated the prior confession" were alleviated prior to the second).

U.S. v. Karake, 443 F.Supp.2d 8 (D.D.C. 2006), at 89.

Here the coercive circumstances, courtesy of Al and the BFD's press release, had only increased in urgency, though it must be noted that this is not material, as the Tenth Circuit observed:

On the merits, the government ignores the clear language of Fulminante and suggests that the key to that case is "the imminency of the threat of physical injury and the lack of means to avoid physical harm." Aplee. Reh'g Petition at 14. However, the Supreme Court language is to the contrary:

Our cases have made it clear that a finding of coercion need not depend on actual violence by a government agent; a credible threat is sufficient.

U.S. v. McCullah, 87 F.3d 1136 (10th Cir. 1996), (quoting Fulminante, 111 S.Ct. 1246, 1252-1253).

iii. Comparing Fulminante: The U.S. Supreme Court, rejecting superficialities in the determination of voluntariness, held that though, as the minority observed, "[t]he conversations between Sarivola and Fulminante were not lengthy, and the defendant was free at all times to leave Sarivola's company", and though "Sarivola at no time threatened him or demanded that he confess", Fulminante's statements were not voluntary, having been made in the hope of Sarivola's protection. Arizona v. Fulminante, 111 S.Ct., at 1263 and 1252-1253. Leaving aside for a moment the threat of being murdered by Al, it would be perverse to suggest that Sarivola's temporary protection in prison - for he left a few weeks after the confession, while Fulminante remained in prison for another seven months (see Fulminante, at 1250) - was a more compelling inducement for Fulminante (who, as the minority noted, "was an experienced habitue of prisons and presumably able to fend for himself", ibid., at 1263) than that of avoiding jail, with its implicit violence, to say nothing of the death penalty, for the 19-year old defendants who had never been incarcerated at bar here. (Perhaps it is not quite irrelevant to note that the Appellant, like Fulminante, is "short in stature and slight in build." Ibid., at 1252.)

There was, moreover, no 'protective custody' from Al. The defendants explicitly acknowledged that they could be 'gotten to'

even in jail. As for Al's repeated admonitions about 'trust' and the occasional appearance of friendly relations between the agents and the targets, the U.S. Supreme Court has found such manipulation more, not less, coercive:

In addition, we note that Sarivola's position as Fulminante's friend might well have made the latter particularly susceptible to the former's entreaties. See Spano v. New York, 360 U.S. 315, 323 (1959).

Arizona v. Fulminante, 111 S.Ct. at 1252, footnote 2.

It is the use of the "Mr Big" operation against these defendants, even neglecting the threat of murder which, to the Appellant's knowledge, is unique to this case, that the trial court's finding of fact 14 that the operation was "routine" misses. As Mr Haslett admitted, they had never run a "Mr Big" operation against teenagers before. Although he mentions that subsequently they did do so, the case he may have been thinking of was that of a teenager whose initials are O.N.E., and who gave an infamous false confession.

Thus, the totality of circumstances presented a situation far more coercive in this case than the one found unconstitutional in Fulminante. Whether characterized as a test for inquisitorial methods, or of whether compulsion has constrained the free will of the defendants, or of whether a rational choice was subverted by a false dilemma that forced the defendants to inevitably prefer confession, there is no principled metric by which the statements at bar can be found to meet the test of voluntariness that the State, as proponent, must have them pass to be received into evidence.

g. Conclusion

Although confessions are hearsay and are to be received with great caution, they are considered reliable because the law presumes that no rational person would make admissions against his penal interest unless urged to do so by the promptings of his conscience to tell the truth.

Ferguson, Royce A., Jr. Washington Practice 12: Criminal Practice and Procedure (3d ed.) (2004), § 3301, p. 844.

As will be obvious to this Court, few presumptions could be more inapplicable to the statements at bar than the one cited here as the very basis for the admissibility of confessions. The defendants were speaking for their penal interest; they also thought they were avoiding the risk of being murdered. The law has long recognized the

See

inadmissibility of any statement obtained by the police by such inducement that

the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases. Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 568 (1884).

What the trial court missed in the paean to jury trials with which it prefaced its decision to admit these coerced statements is that such evidence has long been excluded from the consideration of jurors. 37RP 4-5. The distrust for reliance on confessions is due, in part, to their decisive impact upon the adversarial process. Triers of fact accord confessions such heavy weight that

the introduction of a confession makes the other aspects of a trial superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained. E. Cleary, McCormick on Evidence, 316 (2d ed. 1972). See also Miranda v. Arizona, 384 U.S. 436, 466, 86 S.Ct. 1602, 1623, 16 L.Ed.2d 694 (1966); Mapp v. Ohio, 367 U.S. 643, 685, 81 S.Ct. 1684, 1707, 6 L.Ed.2d 1081 (1961).

No other class of evidence is so profoundly prejudicial. See Saltzburg, Standards of Proof: Preliminary Questions of Fact, 27 Stan.L.Rev. 271, 293 (1975).

Thus the decision to confess before trial amounts in effect to a waiver of the right to require the state at trial to meet its heavy burden of proof. Cleary, *supra*, at 316.

That this is so has been proven repeatedly: in the Central Park jogger case, in the scores of exonerations resulting from the work of Innocence Projects. This remains so even, as in Unger, Mentuck, and the case at bar, where the confessions are demonstrably false and inconsistent with extrinsic evidence. The exclusionary rule of the common law, before the advent of the even more stringent standards demanded by the Fifth and Fourteenth Amendments, had rested on the understanding of jurisprudence ancient and modern, confirmed by modern social science, of the inability of most lay jurors to evaluate accurately the reliability of involuntary confessions. Hence the wisdom pronounced in the Age of Reason:

A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is considered as evidence of

guilt, that no credit ought to be given to it, and therefore it is rejected.  
The King v. Warickshall, 1 Leach 262, 263-264, 168 Eng.Rep. 234, 235 (K.B. 1783).

For over 225 years the principle enunciated here, cited recently by the United States Supreme Court in Dickerson v. United States, 120 S.Ct. 2326 (2000), at 2330, has been a shelter to the innocent. It should not cease to be so today.

"There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men." Watts v. State of Indiana, 69 S.Ct. at 1349.  
Culombe v. Connecticut, 81 S.Ct. 1860, 1881.

The Appellant respectfully requests this Court to reverse the convictions and reject statements made to the RCMP undercover operatives after May 6, 1995, from evidence.

4. THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

a. The failure to recall Mark Siddell

Mark Siddell is a crucial witness. He lived next door to the Appellant's home. Like Julie Rackley on the other side of the Rafay home, he heard the murders take place. When initially interviewed by the police, just hours after the murders, he reported the sounds he heard, which included a moan from Basma, and striking sounds that were determined to be those involved in the attacks on the Appellant's family by sound recreation tests conducted by the Bellevue Police. Mr Siddell reported the sounds as having taken place "at about 9:45 / 9:50." 71RP 146-147. Mr Siddell's interview was tape recorded and the transcript entered as Exhibit 36.

After learning that the defendants had attended the 9:50 showing of "The Lion King", Mr Siddell gave another tape recorded interview some three weeks later, on August 10. The transcript became Exhibit 38. Mr Siddell's account was essentially the same, but he moved the time from 9:45 / 9:50 to 9:20. 71RP 152.

At trial Mr Siddell claimed the sounds occurred between 9:00 and 9:20. 71RP 110-111, 159, 162-164. He further testified, for the first time, that he had heard kids' voices, crinkling paper, running water, the sounds of washing, and kids running in the halls, all inside the Rafay home. 71RP 140-141, 154-155. Though confronted in cross-examination with the fact that no previous statement ever mentioned these sensational claims, he persisted in them, expressing surprise at their absence in the transcripts. Counsel did not confront Mr Siddell with the sheer impossibility of hearing crinkling paper and running water from inside a house from a neighbouring driveway. (It is hard to imagine a clearer example of the capacity of well-meaning citizens to generate spurious memories against defendants whom the media suggest are guilty.)

Mr Siddell was sufficiently troubled by his testimony that after being dismissed he searched his computer and found a file that he had made the night of his first interview, memorializing all his recollections. The file confirmed that the time of 9:45 / 9:50 is correct, not the testimony he gave at trial, and further proved

to him that he had not heard anything that night other than the sounds he had mentioned in his first interview: Basma, and the striking of the bats or other weapons against the walls. Mr Siddell e-mailed the Prosecutor with this information, which the Prosecutor disclosed to the defence and the trial court, which opined that he ought to be recalled. Understandably, the State did not recall him. However, despite the insistence of the Appellant, defence counsel did not recall Mr Siddell either. No explanation was given, nor is one imaginable, for the failure to recall this essential witness, whose recantation of his erroneous testimony would have corroborated Julie Rackley's best estimate time of 9:56 for the attacks. In conjunction with the report of the US Naval Observatory to be discussed, Mr Siddell's testimony would have confirmed the utter impossibility of the defendants having been involved in the attack on the Appellant's family.

The Appellant has been unable to locate Mr Siddell's e-mail among the record of proceedings, but the Appellant does not have the entire record or Clerk's Papers. The truth of the aforementioned matters is acknowledged by the court in 157RP, at sentencing:

MS. ROSS: But I would just inform the Court and counsel that the documentary evidence was simply data from the United States Naval observatory which shows that in Bellevue, Washington, the end of twilight on July 12, 1994 was 9:44 p.m. Now I wasn't at the trial, but I will tell you what Mr. Rafay's position is, that that bolsters the testimony of a Mr. Sidell, who testified that the time he heard the thumping and sounds that were apparently the murders being committed in the house was just before full darkness. So the end of twilight would match that. And apparently Mr. Sidell [sic] also wrote an e-mail to the prosecution after he testified, after he was done testifying, that he checked his contemporaneous notes on the computer that he made at the time of the murders but checked after his testimony, and that those notes supported his original statements that he heard these sounds right before full darkness.

COURT: Those facts were fully disclosed to defense counsel.

MS. ROSS: [...]

COURT: The timing of Mr Sidell's observations, that was thoroughly discussed before this jury. Maybe here [read: there] were other things about it that weren't discussed, but there was full opportunity to air all of that with Mr. Sidell.

(157RP 96-97)

The court is correct that counsel had full opportunity to, and

indeed an obvious duty to, recall Mr Siddell. The failure to recall him, when he could remove any doubt about the time of the murders, and consequently the innocence of the defendants, and when he could also illustrate the process by which testimonial evidence is altered to aid the State, was clearly ineffective assistance of counsel.

b. The misrepresentation of the time of the murders

As noted above, Julie Rackley's best estimate of the time of the murders was 9:56. Mr Siddell's honest recollection of 9:45 / 9:50 corresponds with that nearly perfectly. But just as important, their recollection of the level of darkness at that time corresponds with independent observatory data as to the level of light at that time. Ms Rackley described it as being too dark to be working outside. 71RP 91, 99, 182-184. She also observed that because her window faced east and was located on a hill, it got darker earlier from her vantage. 70RP 162-163. Mr Siddell described it as "not that light out. It was getting dark." 71RP 60. These observations are confirmed by the US Naval Observatory, which recorded a sunset time of 9:05 and an end of twilight time of 9:44 for July 12, 1994, in Bellevue, Washington.

Unaccountably, Mr Robinson, counsel for Appellant's codefendant, told the jury in closing that "twilight was at 9:44. Julie Rackley describing it at 9:56, 12 minutes after twilight or just as it's starting to get dark." 150RP 58. The distinction here is vital: twilight begins at sunset; 9:44 was the end of twilight, when it was in fact as dark as both Mr Siddell and Ms Rackley recall it being when the murders took place. Counsel for the Appellant did nothing to correct Mr Robinson's error.

The State sought to exploit any weakness in the presentation to obscure, distort or otherwise confuse the clear evidence of the times. Counsel for the State argued, inter alia, that the neighbours had not heard the murders, that Ms Rackley heard them at 11:00 and Mr Siddell at 9:00, that it was completely dark etc. 150RP 125-134. Evidently some manner of hocus pocus worked, since the jury returned a guilty verdict, but the failure of counsel to present **the clear** scientific evidence on this issue and to correct the mistake of co-counsel was ineffective assistance of counsel.

c. The misrepresentation of the law on admissibility of confessions

This issue is presented in Part D, section 3, sub-section d (ii), on pages 34-37, ante, of this statement.

d. Informing the jury the defendants were in custody

Co-defendant's counsel, during jury voir dire where all jurors were present, chose to inform the jurors that the defendants were in custody. The fact that the defendants were in custody was at best irrelevant; courts take great pains to ensure that defendants are not seen to be in custody as a result of the prejudice involved. 59RP 77-79. One juror was even willing to admit that this information made her feel like the defendants were more probably guilty than not, based on that factor. No doubt the other jurors were aware that this notion, like other prejudices nonetheless quite apparent, for example, in implicit association tests (cf. the work of Jerry Kang), was not a respectable attitude to admit. Counsel should have objected. It is not inconceivable that the Appellants could have obtained bail. It was not, in any case, an issue which the jury needed to consider, like that of the sentence which the defendants might face.

e. Failure to move to suppress under ER 403 the "Mr Big" operation's "fruits"

This ground is treated in the next section, arguing that the statements obtained in the "Mr Big" operation were more prejudicial than probative, and hence inadmissible under ER 403.

5. STATEMENTS OBTAINED BY THE "MR BIG" OPERATION WERE INADMISSIBLE UNDER ER 403 AND THEIR ADMISSION AT TRIAL VIOLATED THE APPELLANT'S RIGHT TO DUE PROCESS

Egregious violations of the evidentiary rules can deny a defendant his right to a fair trial. See McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993). Moreover, failure of trial counsel to advance the ground of exclusion 'properly' is ineffective assistance of counsel.

This circuit has held that counsel's failure to move to suppress evidence, when the evidence would have been suppressed if objected to, can constitute deficient performance (cause), unless counsel's failure was due to a tactical decision. Kirkland v. Butler, 870 F.2d 276, 283 (5th Cir. 1989), c.d. 493 U.S. 1051, 110 S.Ct. 854, 107 L.Ed.2d 848 (1990). Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996).

The Appellant assembles under this rubric those aspects of prejudice arising from the admission of the statements made in the "Mr Big" operation that may be considered independent of the statements' involuntariness, though it is important to note that these concerns do in fact support, and are relevant to, determination of that involuntariness.

a. The unreliability of assessments of reliability

Separating truth from lies is tricky. In fact, most experiments have shown that people perform at no better than chance levels and that training programs produce, at best, small and inconsistent improvements compared with naive control groups. In general, professional lie catchers, such as police detectives, psychiatrists, customs inspectors and polygraph examiners, exhibit accuracy rates in the 45 to 60 percent range, with a mean of 54 percent.

Even with those statistics, trained investigators believe they are more accurate in determining guilt or innocence. Kassin, Saul M, and Gisli H Gudjonsson, True Crimes, False Confessions. In Scientific American MIND, Vol 16, No 2, 2005, p. 27.

The probative value of evidence depends upon its capacity to reliably lead to an accurate knowledge of some material fact. When a confession produces no holdback evidence (see Donna Perry's notes, 4959) and is demonstrably inconsistent with evidence, as here, all that the confession could truly serve to prove is the susceptibility of the defendant to the threats and inducements made.

Although most suspects confess for a combination of reasons, the most critical is their belief about the strength of the evidence against them. That is why the tactic of presenting false evidence [...] can lead innocent people to confess. [...] The sample [of proven false confessants] was disproportionately

represented by persons who were young (63 percent were younger than 25; 32 percent were under 18) [...]  
When police misrepresent the evidence, however, innocent suspects come to feel as trapped as the perpetrators - which increases the risk of false confessions.

[...]

Trial jurors, like others in the criminal justice system who precede them, can be overly influenced by confessions. Archival analyses of actual cases containing confessions later proved false tell a disturbing tale. In these cases, the jury conviction rates ranged from 73 percent (as found by Richard Ofshe of the University of California and Leo in 1998) to 81 percent (as found by Drizin and Leo in 2004) - about the same as cases in which the defendants had made true confessions.

Ibid., pp. 29-31.

The trial court's exclusion of the relevant experts prevents a full inquiry into this ground, but what is sketched at here discloses prejudicial power far in excess of any probative worth.

b. Illicit bad character evidence, and other irrelevant and prejudicial evidence

[T]he admission of the first confession led to the admission of other evidence prejudicial to Fulminante. For example, the State introduced evidence that Fulminante knew of Sarivola's connections with organized crime in an attempt to explain why Fulminante would have been motivated to confess to Sarivola. [App.], at 45-48, 67. Absent the confession, this evidence would have had no relevance and would have been inadmissible at trial. The Arizona Supreme Court found that the evidence of Sarivola's connections with organized crime reflected on Sarivola's character, not Fulminante's [...] [W]e cannot agree that the evidence did not reflect on Fulminante's character as well, for it depicted him as someone who willingly sought out the company of criminals. It is quite possible that this evidence led the jury to view Fulminante as capable of murder.

Arizona v. Fulminante, 111 S.Ct., at 1259-1260.

The prejudicial evidence that the U.S. Supreme Court identified in finding the admission of Fulminante's confession harmful pales in comparison to the repellent and despicable conduct and language introduced through the "Mr Big" operation. The RCMP were a very bad influence, but as the U.S. Supreme Court noted, such evidence reflected on the character of the defendants. Moreover, the State devoted much of their argument to grotesque representations of the defendants' character. Although one especially exceptionable joke was suppressed by the trial court, much irrelevant and prejudicial information was displayed to the jury on the premise that it would

bear on the jury's determination of the reliability of the confessions, a determination that, as discussed above, is no better than chance.

c. The use of the suspect-focus videos of July 18 & 19

[I]t has been convincingly shown that focusing the video camera solely on the suspect in an interrogation has the effect of impressing upon the viewers the notion that the suspect's statements are more likely freely and intentionally given and not the result of some of coercion [...] [T]he greater perception of voluntariness associated with suspect-focus videotapes is an unmistakable bias of the most serious kind, that is, one that runs contrary to the cornerstone of our system of justice, the presumption of innocence.

Lassiter, G Daniel; Ratcliff, Jennifer J; et al. Videotaped Confessions: Panacea or Pandora's Box? In Law & Policy, April 2006, Vol 28, Issue 2, 204.

Although, for the reasons discussed in Part D, section 3 (f), ante, the encounters in July are of little relevance for determining the voluntariness of the statements, it is certain now that the prejudice from their consideration extends to the very camera angle used. As discussed in the article quoted above, judges are affected by this bias as well, and the effect extends beyond voluntariness to the accuracy of differentiating true and false confessions. Ibid, 199-200, 201-203.

Paired comparisons showed that the interrogator-focus video produced greater accuracy than did the suspect-focus video, ( $p < 0.01$ ), the face-only video ( $p < 0.01$ ), and the equal-focus video ( $p < 0.05$ ). The interrogator-focus video produced similar accuracy to the body-only video, audio only, and transcript.

Ibid, 203.

Given this, Lassiter et al. have argued that

the prejudicial effect of camera perspective can be viewed as a particularly pernicious form of mental contamination, one that cannot be easily undone after the fact [and that] policy should preclude the possibility of judges or jurors ever seeing a videotaped confession that focused exclusively on the suspect.

Lassiter, Ratcliff, et al. Camera Perspective Bias in Videotaped Confessions: Experimental Evidence of Its Perceptual Basis, in Journal of Experimental Psychology: Applied, Vol 12(4), Dec 2006, 197-206 (emphasis added)

Although there are visual clues to the "improvisation" of the boys' stories in the video (Atif looking over to Sebastian for hints etc.), some of this Court's panel may wish to refrain from consideration of it, as an experiment --- beyond finding this evidence, of course, inadmissible under ER 403 for all the foregoing reasons.



CONCLUSION

This Court should dismiss the charges with prejudice, or, failing that, order a new, and fairer trial, without the use of inadmissible evidence.

Dated this 19th day of May, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Atif Rafay', written in a cursive style.

Atif Rafay, Appellant.

APPENDIX A

LAW AND POLICY

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pages 193 - 210

# Videotaped Confessions: Panacea or Pandora's Box?

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*Videotape is becoming an increasingly common means of recording and presenting confessions that are obtained during custodial interrogations. Many scientific, legal, and political experts view this procedural advance as a solution to the growing problem of some innocent people being induced to incriminate themselves when confronted by standard police interrogation tactics. We review a program of research that indicates, however, that the indiscriminate application of videotaping to solve the problem of coerced or false confessions slipping through the system could ironically exacerbate the situation.*

## I. INTRODUCTION

Since the introduction of the Video Home System (VHS) in 1976, videotape has become an increasingly common aspect of our everyday lives. It is not surprising, then, that videotape has found its way into the corridors of American justice. As early as 1979, Miller and Fontes reported on a program of research investigating the comparability of videotaped testimony and live testimony. For the most part, Miller and Fontes (1979) found that jurors in simulated civil trials responded in a similar manner to the testimony regardless of whether it was presented live or on videotape.

Less than a decade later, Cutler (1988) suggested that the emphasis on videotape technology within the criminal justice establishment had become pervasive. Supporting this assessment, Cutler noted that the Institute of Police Technology and Management had initiated courses to train police personnel on how to use videotaping to record and present lineups, crime scene descriptions, and surveillance footage. As we enter a new century, however, it appears that videotaping is likely to have its most significant, and possibly

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Lastly, with respect to the relative persuasiveness of videotaped confessions, Geller reported that “[e]ighty-seven percent of the responding agencies said videotaped confessions are somewhat more convincing (22.2%) or much more convincing (64.8%) than the confessions they have documented using audiotape or written methods” (ibid.: 109).

Geller concluded from his data that “the videotaping of suspect statements is a useful, affordable step on the road toward a more effective, efficient, and legitimate criminal justice system” (1992: 154). He also noted that “excluding the smallest agencies, the percentage of departments videotaping confessional evidence will likely exceed 50 percent within a few years” (ibid.).<sup>1</sup>

There are currently four states—Alaska, Minnesota, Illinois, and most recently Maine—in which the videotaping (or other electronic recording) of interrogations is required. The practice of videotaping police interrogations has many proponents in the legal community and related fields (Cassell 1996; Drizin & Colgan 2001; Dwyer, Neufeld & Scheck 2000; Kassin & Gudjonsson 2004; Leo 1996), and it appears to be only a matter of time before the videotaped format becomes the norm for introducing confession evidence at trial. Those who advocate videotaping interrogations argue that the presence of the camera will deter the use of coercive methods to induce confessions and will provide a complete and objective record of an interrogation so that judges and jurors can evaluate thoroughly and accurately the voluntariness and veracity of any confession. Other advantages of videotaping that have been proposed (or realized) include reducing defense claims of coercion that lack merit, reducing the time that detectives have to spend in court testifying on their conduct, and providing lawyers for both sides with a clearer sense of the strength of the case, which encourages plea agreements (Drizin & Reich 2004). At least one proponent is so sure of the soundness of the videotaping procedure that he has gone so far as to argue that legally required *Miranda* warnings to suspects concerning their rights to silence and counsel can be dispensed with if interrogations are routinely videotaped (Cassell 1996). However, despite the apparent objectivity associated with the making and subsequent evaluation of a videotaped interrogation and confession, the scientific literature on illusory causation suggests that the videotaping procedure has the potential to influence judgments in a manner that is unintended and far from salutary.

### III. WHAT IS ILLUSORY CAUSATION AND WHY DOES IT OCCUR?

Illusory causation occurs when people ascribe unwarranted causality to a stimulus simply because it is more noticeable or salient than other available stimuli (McArthur 1980; Taylor & Fiske 1978). For example, Taylor and Fiske (1975) had observers view a casual, two-person conversation. The vantage-point of the observers was varied by seating them in different locations around the two interactants. After the conversation ended, observers

rated each interactant in terms of the amount of causal influence he or she exerted during the exchange. The results revealed that greater causality was attributed to whichever person observers happened to be facing, which, of course, was determined by their seating position—an entirely incidental factor that logically should have had no bearing on their causal judgments.

Early attempts to specify a mediator of illusory causation emphasized memory processes (Fiske, Kenny & Taylor 1982). Generally, it was argued that salient information tends to be more memorable than non-salient information, and that this difference in memory is responsible for the greater causality ascribed to salient information. Recent studies (Lassiter, Geers, Munhall, Ploutz-Snyder & Breitenbecher 2002), however, suggest that illusory causation may have more to do with how people initially pick up or register information from an observed interaction than with how they subsequently remember that information (McArthur 1980). Because illusory causation seems linked to the earliest stages of information processing, over which people may have somewhat less mental control, there is reason to suspect that this phenomenon will be highly resistant to debiasing attempts (Wilson & Brekke 1994).

#### IV. ILLUSORY CAUSATION AND VIDEOTAPED CONFESSIONS

There is no doubt that, under certain circumstances, the videotape method, compared with more traditional methods of evidence presentation, can improve assessment of the voluntariness and reliability of confessions. Certainly, if interrogators use obviously assaultive coercion, any reasonable observer will recognize the illegitimacy of the confession. However, such third-degree intimidation has been replaced by non-assaultive psychological manipulation (Lassiter 2004; Leo 2004) that is not always recognized as coercive but, as research has shown, can nonetheless lead to false admissions of guilt (Kassin & Kiechel 1996; Leo & Ofshe 1998; Russano, Meissner, Narchet & Kassin 2005). In this age of psychologically oriented interrogation approaches, videotaping interrogations and confessions may not be a surefire preventive against convicting the truly innocent. In the United States and in many other countries (such as Canada, Australia, and the United Kingdom) videotaped interrogations and confessions are typically recorded with the camera focused on the suspect (Geller 1992; Kassin 1997). Positioning the camera in this manner seems straightforward and logical because trial fact-finders presumably need to see directly what the suspect said and did to best assess the voluntariness and veracity of his or her statements.

The illusory-causation phenomenon, however, suggests the alarming possibility that the default camera perspective taken when recording criminal confessions (i.e., focused on the suspect) could have an unintended prejudicial effect on trial participants' subsequent evaluations of the voluntariness of

the confessions. More specifically, observers of a videotaped confession recorded with the camera focused on the suspect, compared with the same confession recorded from a different camera perspective, might be more likely to judge the confession as voluntary (i.e., attributable to the suspect).<sup>2</sup> Considerable empirical data now exist indicating that this is not simply a possibility; it is a reality (Lassiter 2002; Lassiter & Geers 2004; Lassiter, Geers, Munhall, Handley & Beers 2001).

#### V. EVIDENCE FOR A BIASING EFFECT OF CAMERA PERSPECTIVE ON EVALUATIONS OF VIDEOTAPED CONFESSIONS

In an initial demonstration of the biasing effect of camera perspective, Lassiter and Irvine (1986) had participants view a mock, videotaped confession (regarding shoplifting) recorded with the camera either focused on the "suspect," focused on the "interrogator," or focussed equally on the suspect and interrogator. Following the presentation of the confession, participants were asked to indicate the degree to which they believed it was a product of force or coercion. The confession was judged to be the least coerced in the suspect-focus condition, more coerced in the equal-focus condition, and the most coerced in the detective-focus condition.

In a follow-up investigation, Lassiter, Slaw, Briggs, and Scanlan (1992) demonstrated that this *camera perspective bias* is generalized across different crimes (i.e., rape, drug trafficking, and burglary), and that the suspect-focus videotapes produced greater perceptions of voluntariness relative to both audiotape and transcript versions of the confessions. This result suggests that the focusing of the camera on the suspect led observers to judge these particular interrogations to be *less* coercive than they would have judged them had the confessions been presented in a more traditional format. Even individuals high in the need for cognition (Cacioppo, Petty, Feinstein & Jarvis 1996)—that is, those most inclined to be effortful and critical thinkers—fell prey to the bias.<sup>3</sup> Lastly, it is important to note that equal-focus videotapes yielded voluntariness assessments that were no different than those based on the audiotape and transcript versions of the confessions.

Lassiter, Beers, Geers, Handley, Munhall and Weiland (2002) found that collective deliberation among mock jurors prior to rendering their judgments was not sufficient to obviate the prejudicial effect of camera perspective. In addition, these authors showed that the biasing influence of camera perspective tainted not only assessments of voluntariness, but also perceived likelihood of guilt and sentencing recommendations—perceived likelihood of guilt was greater and recommended sentences were more severe when the suspect-focus videotape of a confession was viewed. In subsequent studies, Lassiter, Beers et al. (2002) attempted to eliminate the camera perspective bias first by forewarning mock jurors that their "judgments could be affected by the angle of the camera" (Study 2), and second by having them engage in a

task that forced more of their attention and concentration on the actual content of the videotaped confession, which was the same regardless of the camera perspective (Study 3). Both these procedures, however, failed to diminish the biasing influence of the camera's point-of-view. The mock confessions used in the studies described so far were designed to be short (no longer than five minutes in duration) and to be composites of various elements that have been documented to occur in real interrogations or that police manuals advise should occur. In a fourth and final study, Lassiter, Beers et al. (2002) presented mock jurors with a significantly longer confession (lasting approximately thirty minutes) that was derived entirely from an actual police interrogation. These changes also failed to yield improvement with regard to overcoming the camera perspective bias.

One criticism that could be leveled at the foregoing series of studies is that participants experienced no real sense of accountability for their judgments, and it is for this reason that they were influenced so readily by the trivial factor of camera perspective. According to this argument, if the stakes were raised such that decision makers knew in advance that they would be held accountable for, or had to justify, their judgments to an expert or relevant authority, they would not so readily succumb to the bias. Research investigating the effects of accountability on judgments does suggest that increased accountability can attenuate bias (e.g., Tetlock 1985). However, this literature also provides empirical examples of accountability amplifying bias (e.g., Siegel-Jacobs & Yates 1996), or having no effect at all on people's judgments (e.g., Simonson & Nye 1992).

Lassiter, Munhall, Geers, Weiland, and Handley (2001) conducted an experiment that addressed this issue directly. Some participants were made to experience a heightened sense of accountability for their evaluations of a thirty-minute videotaped confession by informing them that they would subsequently have to justify their assessments of the confession's voluntariness to a judge from the local criminal court. Participants in a relatively low-accountability condition did not receive this information; rather, they were assured that their judgments would be kept confidential. All participants then viewed either a suspect-focus or equal-focus version of the videotaped confession. Although supplementary measures indicated that high-accountability participants processed information contained in the videotaped confession more carefully and thoroughly, the camera perspective bias persisted.

Lassiter, Geers, Handley, Weiland, and Munhall (2002) noted some limitations of the preceding work on videotaped confessions with respect to its external validity. One issue with these studies is that, for the most part, there was no additional evidence for participants to consider other than the confession itself. In real trials, fact-finders are likely to be presented with other evidence in addition to the confession. It is conceivable that the presence of other kinds of evidence as well as the inclusion of the usual elements found in a courtroom trial (e.g., the testimony of multiple prosecution and defense witnesses, and opening and closing arguments of the

prosecution and defense) could cause a dilution of this prejudicial effect (Visher 1987). The prior studies also used only college students as mock-trial participants. Some investigators (e.g., Feild & Barnett 1978) have questioned the use of students as participants in jury-simulation studies. The responses of students, it is argued, may be quite different from those of jury-eligible adults, in which case the generalizability of the findings of studies using student mock jurors is likely to be severely compromised. A final drawback pointed out by Lassiter, Geers et al. (2002) has to do with the fact that participants made their judgments only on continuous rating scales. However, verdicts in actual courtrooms are made in an either/or manner, and it cannot be known for certain that the bias observed with rating scales will still occur with cruder, but more ecologically valid, dichotomous measures (Kerr 1978).

To address these concerns, Lassiter, Geers et al. (2002) conducted two studies that used an extensive videotaped trial simulation (derived from the actual trial of Bradley Page, a college student, who was convicted of the manslaughter of his romantic partner based largely on his disputed confession) that required from four to five hours of participants' time, and included the direct testimony and cross-examination of several witnesses, the presentation of physical evidence, prosecution and defense arguments, judicial rulings on points of law, and most of the other trappings associated with such legal proceedings. In Study 1, both non-student and student participants were used so that a systematic comparison of their responses could be made. In Study 2, all participants were non-student, jury-eligible adults. In both studies, dichotomous measures of participants' judgments were obtained. Lastly, Lassiter, Geers et al. (2002, Study 1) also tested whether various forms of judicial instruction might reduce the influence of camera point of view on mock jurors' voluntariness and guilt judgments.

As a whole, the data collected by Lassiter, Geers et al. (2002) showed that the camera perspective bias in videotaped confessions persists even when ecological validity is relatively high. For the first time, the perspective from which a videotaped confession was recorded was shown to affect mock jurors' verdicts regarding guilt or innocence. This result was obtained in the context of elaborate trial simulations, with jury eligible adults from a variety of communities, regardless of whether participants deliberated collectively, and despite various instructions from the judge designed to minimize any biasing effect of camera perspective.

Konecni and Ebbesen have argued that psycholegal research "must be concerned with issues of external validity and generalizability to an *unusually high degree*" (1979: 40, emphasis added). Or as stated more bluntly by Bornstein, "courts have not welcomed psycholegal research findings with open arms, especially when derived from methods that are neither very realistic nor representative of actual legal processes" (1999: 88). A critical goal of the following two experiments was to move the research on the camera perspective bias in videotaped confessions even closer to this

unusually-high-degree-of-generalizability standard needed to ultimately impact the legal system.

When a confession's legitimacy is disputed, a judge conducts a pretrial hearing to decide on the confession's voluntariness and admissibility. Thus judges are critical gatekeepers in terms of what confession evidence juries are actually allowed to consider. An important question, then, is do judges also succumb to the prejudicial effects of camera perspective? One possibility is that judges will be immune to the camera perspective bias. That is, their knowledge, experience, and understanding of the law pertaining to confessions could insulate them from the prejudicial effects of camera perspective. On the other hand, the findings indicating that the bias has its roots in perceptual processes that are not always controllable, suggest that judges may be no better in resisting the contaminating effects of the confession-presentation format than individuals who are without benefit of extensive legal training and experience.

Guthrie, Rachlinski, and Wistrich (2002) point out that systematic, controlled studies of judicial decision making are rare. In investigations these researchers conducted on judges' susceptibility to various cognitive illusions (e.g., the hindsight bias and the inverse fallacy), they found that although judges were as susceptible to some illusions as laypersons and other professionals, their relative performance with regard to other illusions was noticeably better. Findings such as these suggest the possibility that judges may be able to overcome the camera perspective bias.

A more theoretically based reason for thinking that judges may manifest greater resistance to the prejudicial effects of camera perspective can be derived from the Elaboration Likelihood Model (Petty & Cacioppo 1986). According to this model, people can usually process information either centrally or peripherally. Central processing of information is systematic, effortful, and emphasizes attention to and reliance on the most relevant information available—regardless of the difficulty associated with obtaining it—for reaching a conclusion. Peripheral processing by contrast is typified by a more heuristic mode of thinking, which involves greater attention and reliance on simple (and sometimes unreliable) cues that can be obtained without having to expend much in the way of cognitive resources. Judges, unlike laypersons, may be better at focusing their attentional resources on the information that is most revealing in terms of reaching an accurate assessment of the voluntariness of a given confession. Although laypersons in several of the previous studies were no doubt highly motivated to reach an accurate assessment, their lack of expertise with regard to deciding the voluntariness question may have made them gravitate to the most salient cues (e.g., the suspect makes a self-incriminating statement) rather than the most useful information (e.g., the suspect's self-incriminating behavior immediately followed a pragmatically implied promise of leniency).

To test directly whether judges exhibit the camera perspective bias in videotaped confessions, Lassiter and Diamond (2003) presented sixty-six

judges (who were attending a judicial conference at the University of Illinois College of Law) with either a suspect-focus, equal-focus, or detective-focus version of a mock interrogation and confession regarding a sexual assault. Results revealed that judges' evaluations of the voluntariness of the confession, like those of laypersons previously, were affected by the camera perspective. This was true even for the judges who had the most prior experience dealing with confession evidence (i.e., those who had previous experience as prosecutors, criminal defense attorneys, and trial court judges hearing criminal cases).<sup>4</sup> These data provide the kind of high-external-validity finding needed to help sway the legal system to give serious consideration to the important implications of this particular program of research.

Recently, Ware, Irvin, Lassiter, Ratcliff, and Brickner (2005) noted that the likelihood of the legal establishment paying heed to the scientific evidence for a camera perspective bias could be diminished by the fact that in none of the experiments reviewed so far were participants exposed to actual confessions obtained during real police interrogations. That is, the prior work used mock confessions that were designed to be composites of various elements known to occur in real confessions or that were constructed reenactments developed from transcripts of actual police interrogations. This type of simulated confession was required in the earlier stages of the research program because of the need to produce multiple camera perspectives of the same confession. However, critics can rightfully say that there were no serious consequences for the simulated "confessors" and therefore whether observers viewing actual videotaped presentations of interrogations and confessions will also manifest the camera perspective bias remains an open question.

As described earlier, audiotapes and transcripts of confessions produce evaluations that are comparable to those obtained with equal-focus videotapes. Based on this pattern of results, Ware et al. (2005) argued that comparing actual suspect-focus videotapes with audio only and transcript presentations of the same interrogation and confession would constitute a reasonable test of the camera perspective bias under conditions of high external validity. That is, if the bias truly occurs with real confessions, then an actual suspect-focus videotape should produce judgments of greater voluntariness than either an audio only or a transcript presentation.

To test their idea, Ware et al. (2005) used portions of two actual videotaped police interrogations. One involved a case of sexual assault and was originally recorded with the camera trained on the suspect (suspect-focus confession). The other involved a case of manslaughter and was originally recorded with the camera trained on both the suspect and interrogator (equal-focus confession). Audio-only and transcript versions of each interrogation were derived from the videotapes. The inclusion of an actual equal-focus confession allowed Ware et al. (2005) to rule out the possibility that the predicted differences between the suspect-focus videotape and its corresponding audio only and transcript presentation formats are a result

simply of a more general tendency to judge the confession as more voluntary when presented on videotape.

Ware et al. (2005) presented 103 undergraduates with either the video and audio, audio only, or transcript of one of the two aforementioned confessions. Following the confession presentation, participants, individually and without any prior group discussion, judged the voluntariness of the confessions. As predicted, for the suspect-focus confession, participants exposed to the video and audio format rated the confession as more voluntary than did participants exposed to the audio only or transcript formats. However, for the equal-focus confession, judgments of voluntariness did not vary as a function of presentation format.<sup>5</sup> These findings indicate that the camera perspective bias found previously with simulated confessions also occurs when actual police interrogations and confessions are being evaluated. They strengthen the case for developing and adopting a policy that would prevent *suspect-focus* videotaped confessions from being used as evidence at trial.

#### VI. DOES VIDEOTAPING LEAD TO MORE ACCURATE EVALUATIONS OF CONFESSION EVIDENCE?

There is at least an implicit assumption that an actual videotape of an interrogation and confession should make it possible for trial fact-finders to assess more accurately the reliability of the confession (cf. Gudjonsson 1992; Leo & Ofshe 1998). Yet, such an assumption has not heretofore been empirically tested. The fact that camera point of view has been shown to bias observers' evaluations of a videotaped confession might seem to suggest that just the opposite may in fact be true—that is, videotaping leads to less accurate assessments of reliability. But the presence of a bias in judgment does not necessarily impugn the accuracy of that judgment (cf. Funder 1987). For example, it has been repeatedly demonstrated that people consistently favor dispositional explanations for an observed other's behavior over situational explanations (Ross 1977). However, the question of whether this attributional bias increases, decreases, or has no effect on the accuracy of causal judgments typically has not been addressed (cf. Harvey, Town & Yarkin 1981). Similarly, the research reviewed so far was designed to allow for an examination of possible judgment bias, but not for an assessment of judgment accuracy. We now turn to the few studies that have specifically attempted to address the important issue of accuracy in the evaluation of videotaped confessions.

Lassiter, Beers, Geers, and Munhall (2003) argued that the effect of camera perspective on the ability of observers to differentiate true from false confessions could be examined by using events from an actual trial in which the truth regarding the guilt or innocence of a defendant is known for certain. That is, which camera perspective best allows mock jurors to

render judgments that most closely match the known facts of a case? One real case that fits this requirement is the trial of Peter Reilly. Reilly was wrongfully convicted of the manslaughter of his mother based on a coerced and false confession he made to police after intensive interrogation. Two years following his conviction, evidence was discovered that demonstrated that Reilly could not have been the actual killer. As a result, his conviction was overturned and all charges against him were dismissed.

Lassiter et al. (2003) used detailed accounts of the Reilly case provided by Barthel (1976) and Connery (1977) to re-create portions of the actual interrogation (of which there is an audiotaped record). This partial re-creation of the interrogation and confession of Peter Reilly was videotaped simultaneously by three cameras: one taking a suspect-focus position, another taking a detective-focus position, and the last taking an equal-focus position. Based on the Barthel and Connery accounts, a reenactment of key events occurring in Reilly's trial was also staged. The trial simulation was elaborate and was professionally videotaped in an actual courtroom with the assistance of the telecommunications department at Ohio University. The trial reenactment was video recorded from the vantage-point of the jury box. The camera remained stationary throughout the recording. Some zooming and panning of the camera occurred; for example, during witness testimony the camera would at points focus more closely on the witnesses' faces.<sup>6</sup>

Fifty-two community volunteers, recruited via an advertisement placed in a local newspaper, served as mock jurors. Participants viewed the trial with one of the three versions of the confession. At the conclusion of the trial, all participants individually provided assessments of the voluntary status of the confession as well as a rating of the likelihood that Reilly was guilty.

Results revealed a most interesting pattern: Participants more accurately judged that Reilly was less likely to be guilty and that his statements were less likely voluntary when they viewed an *interrogator-focus* version of the confession ( $M_{\text{voluntariness}} = 7.46$ ,  $M_{\text{guilt}} = 3.09$ ), as opposed to a suspect-focus ( $M_{\text{voluntariness}} = 12.66$ ,  $M_{\text{guilt}} = 5.89$ ) or an equal-focus version of the confession ( $M_{\text{voluntariness}} = 11.60$ ,  $M_{\text{guilt}} = 5.11$ ),  $ps < 0.05$ . These data suggest that observers were able to detect and/or appreciate better the external pressure to confess experienced by Reilly when the camera perspective made the source of that pressure, the interrogator, visually conspicuous (Arkin & Duval 1975; Storms 1973).

Lassiter, Clark, Daniels, and Soinski (2004) noted that a drawback to the preceding study was that observers viewed only a single, simulated false confession and that there were no non-video presentation formats to allow for an assessment of baseline accuracy. To address these issues, Lassiter et al. (2004) first obtained true and false confessions from several different individuals. Employing a modification of the methods of Kassin and Kiechel (1996) to induce false confessions, pairs of college students worked together on a computer task. The computer ostensibly "crashed" and the "cause" was either because of the actual participant (males in all cases) or a confederate

(females in all cases) hitting a certain key. The experimenter ("interrogator") questioned the participant ("suspect") about his role in crashing the computer—extracting a true confession in cases in which the participant did hit the critical key (at the urging of the confederate). In instances where the confederate was "guilty," she pleaded with the participant to take the blame so as not to hurt her chances of obtaining a research position with the faculty member conducting the experiment. This method was effective in getting some participants to give a false confession.

Participants' confessions were recorded and later presented to new groups of observers (256 undergraduates) whose task was to rate the truthfulness of four confessions (of which two were true and two were false). The presentation format was systematically varied seven ways (suspect-focus video, suspect's face-only video, suspect's body-only video, interrogator-focus video, equal-focus video, audio only, and transcript) so as to determine which format promotes the highest degree of judgmental accuracy.

Observers' ratings of truthfulness for the two false confessions were subtracted from their truthfulness ratings for the two true confessions to yield a relative accuracy index. The overall results were sobering: Observers were no better than chance at differentiating true from false confessions. However, consistent with the findings of Lassiter et al. (2003), the confession presentation format significantly influenced observers' accuracy in differentiating true from false confessions,  $F(6,249) = 6.11, p < 0.001$ . Paired comparisons showed that the interrogator-focus video produced greater accuracy than did the suspect-focus video ( $p < 0.01$ ), the face-only video ( $p < 0.01$ ), and the equal-focus video ( $p < 0.05$ ). The interrogator-focus video produced similar accuracy to the body-only video, audio only, and transcript.

Lassiter et al. (2004) noted that the pattern of their results was generally compatible with earlier findings in the deception literature (e.g., DePaulo, Stone & Lassiter 1985) in demonstrating that facial cues are not very helpful to observers in detecting falsehoods, whereas verbal cues are highly informative and revealing. Also in line with the deception literature, body cues seemed to facilitate observers' ability to correctly differentiate true statements from false ones. Overall these data suggest that one possible advantage of the interrogator-focus camera perspective is that it denies visual access to the less reliable (with regard to separating truths from lies) facial cues of the suspect while at the same time increasing the necessity of observers to rely on the more telling verbal and tone of voice cues emanating from the suspect.

## VII. POLICY IMPLICATIONS OF THE RESEARCH ON VIDEOTAPED CONFESSIONS

We noted at the outset of this article that many scientific, legal, and political experts have called for the universal adoption of videotaping as a relatively easy and straightforward solution for the problem of some innocent people

being induced to incriminate themselves when confronted by standard police interrogation tactics. The research we have summarized, however, indicates that the application of videotaping to solve the problem of coerced or false confessions slipping through the system is not as clear-cut as it might first seem.

As pointed out earlier, in the United States and in many other countries videotaped interrogations and confessions are customarily recorded with the camera lens focused on the suspect. One reason for this particular positioning of the camera is likely the belief that a careful examination of not only the suspects' words but also their less conspicuous actions or expressions, will ultimately reveal the truth of the matter (Geller 1992). The empirical validity of such beliefs aside, it has been convincingly shown that focusing the video camera primarily on the suspect in an interrogation has the effect of impressing upon viewers the notion that the suspects' statements are more likely freely and intentionally given and not the result of some form of coercion. Moreover, the subset of studies showing judgments derived from suspect-focus videotapes significantly deviate from judgments based on "control" media—transcripts and audiotapes—leads to the conclusion that the greater perception of voluntariness associated with suspect-focus videotapes is an unmistakable bias of the most serious kind, that is, one that runs contrary to the cornerstone of our system of justice, the presumption of innocence.

Is it the case, then, that videotaped interrogation and confession evidence should not be used at all in courts of law? On the contrary, this is not the case because the literature does not paint an entirely negative picture with regard to the use of videotaped confessions in the courtroom. For example, it was found that videotaped confessions that focused on both the suspect and the interrogator equally generated judgments that were comparable to those based on more traditional presentation formats, that is, audiotapes and transcripts (Lassiter et al. 1992; Lassiter, Beers et al. 2002). Thus, it is clear that the videotaping procedure *per se* is not inherently prejudicial. Rather, it is the manner in which the videotaping procedure is implemented that holds the potential for bias. It appears, then, that the advantages associated with the videotape method—for example, a more detailed record of the interrogation is provided to trial participants—can be maintained without introducing bias if an equal-focus perspective is taken by the video camera.

This very approach to preventing the camera perspective bias in videotaped confessions has already been adopted in New Zealand. In the early 1990s, the Police Executive Committee of New Zealand approved the videotaping of police interviews/interrogations on a national basis. In implementing this policy, various procedural guidelines were established. One critical issue that had to be dealt with was in which direction to point the camera. Lani Takitimu, one of the authors of "The New Zealand Video Interview Project,"<sup>7</sup> noted that the seminal research on camera perspective

and videotaped confessions (Lassiter & Irvine 1986) led them to opt for showing side profiles of both the police officer and the suspect, although they knew at the time, this was different from the procedure used in parts of Australia, Canada, and the United Kingdom.

Takitimu solicited comments from judges in New Zealand who had presided over cases involving equal-focus videotaped interrogations/confessions and they enumerated a number of advantages of this approach for both the defense and prosecution.<sup>8</sup> For example, judges noted that benefits to the prosecution included the elimination of defense allegations of false reporting by police interrogators, the avoidance of frivolous challenges from the accused, an increase in guilty pleas because of the fact there was less argument over what transpired, fewer *voir dire*s, fewer challenges to the admissibility of evidence, the elimination of doubt about what was said, and the fact that the words spoken were reinforced by the demeanor of the accused and the interrogator. Some advantages for the defense that were noted included the possibility of showing the interrogator pressing the suspect into admission, the elimination of any alteration or coloration of what the accused had said to police, the fact that the interrogation was recorded in full and in context, the demonstration of demeanor and consistency of denials to allegations, and the elimination of the misreporting of a suspect's statement made during an interrogation.

Takitimu's survey data suggest that the New Zealand policy mandating that police interrogations be videotaped from an equal-focus perspective has led to significant improvements and protections for all criminal-justice participants. Based on these data and the wealth of findings on the camera perspective bias reviewed here, we believe it would be prudent for the United States and the other aforementioned countries to seriously consider adopting a similar policy.

However, those who must make policy decisions regarding the implementation of the videotape method should not preclude the possibility of directing the camera primarily at the interrogator(s) whom a detained suspect must face. As the most recent studies on accuracy in evaluating videotaped confessions (Lassiter, Beers et al. 2003; Lassiter et al. 2004) suggest, this particular camera perspective may hold the greatest potential for facilitating judges and jurors' all-important evaluations concerning the reliability of a given videotaped confession.

That being said, we hasten to note that an interrogator-focus camera perspective that prevented any visual examination of the suspect could be problematic. For example, an interrogator-focus camera perspective would enable police to characterize the suspect's facial expressions, demeanor, and other aspects of his or her behavior for later evaluators of the videotape. To the extent that such characterizations contained intentional or inadvertent errors, there would be no way for observers to visually inspect and correct for these errors. To guard against such a possibility, we would recommend that a second camera focused on the suspect be used in conjunction with an

interrogator-focus camera. Should such a dual-camera approach not prove feasible, then we would urge that any (single-camera) videotaping policy require "full disclosure" in terms of both time (the entire interrogation is recorded) and space (both the interrogator[s] and suspect are equally visible).

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#### NOTES

1. A more recent survey of police experiences with recording custodial interrogations conducted by Sullivan (2004) confirms the earlier findings of Geller (1992). Sullivan (2004) surveyed 238 law enforcement agencies in 38 states and found that their experiences with videotaping have been "uniformly positive." Interestingly, Sullivan (2004) noted that most departments did not have any written regulations or guidelines regarding when and how recordings are to be conducted. As a result, recording decisions are often left to the discretion of the officer in charge.
2. As first noted by Lassiter et al. (1992), it is entirely possible that audiotapes and transcripts could be constructed in such a manner that they too suffered from a salience bias. For example, with audiotapes the volume of a suspect's voice could be artificially enhanced to make him or her more salient to listeners than an interrogator. Similarly, a transcript could be typed—for example, by using boldface or capital letters—so that the text provided by a suspect stands out more than does the text provided by the interrogator. We assume, however, that such blatant attempts to introduce bias do not generally occur or at least would be readily recognized as being prejudicial.
3. Recently, Lassiter, Munhall, Berger, Weiland, Handley, and Geers (2005), reported that evaluations of videotaped confessions by individuals who are particularly adept at reasoning about sophisticated causal relationships—that is, those identified as high in attributional complexity (Fletcher, Danilovics, Fernandez, Peterson & Reeder 1986)—are also swayed by the camera's perspective.
4. Mean ratings of voluntariness (on a nine-point scale) for the most experienced judges were 6.83, 5.67, and 4.45 in the suspect-focus, equal-focus, and detective-focus

- conditions, respectively (higher values indicate the confession was perceived to be more voluntary),  $F_{\text{linear}}(1,54) = 3.50, p < 0.05$ , one-tailed.
5. An ANOVA conducted on the suspect-focus confession was significant,  $F(2,32) = 3.96, p < 0.05$ , with follow-up comparisons indicating that the video and audio format produced significantly higher voluntariness judgments ( $M = 17.50$ ) than did the audio only format ( $M = 15.42$ ),  $t(32) = 2.53, p < 0.05$ , and the transcript format ( $M = 15.55$ ),  $t(32) = 2.32, p < 0.05$ . An ANOVA conducted on the equal-focus confession was not significant (means ranged from 14.65 to 15.00),  $F < 1$ .
  6. Included in the videotaped simulation were the testimony of two prosecution and three defense witnesses (one of which was "Reilly" himself), Reilly's confession, the introduction of other items of evidence, opening and closing arguments of the prosecution and defense, and the judge's rulings on points of law as well as his explication of the requirements of proof to the jurors. The videotaped trial lasted approximately two and a half hours, with the confession accounting for just over forty minutes of that time.
  7. Lani Takitimu, personal correspondence with G. Daniel Lassiter, 3 November 1993.
  8. Lani Takitimu, personal correspondence with G. Daniel Lassiter, 3 November 1993.

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APPENDIX B

SCIENTIFIC AMERICAN: MIND

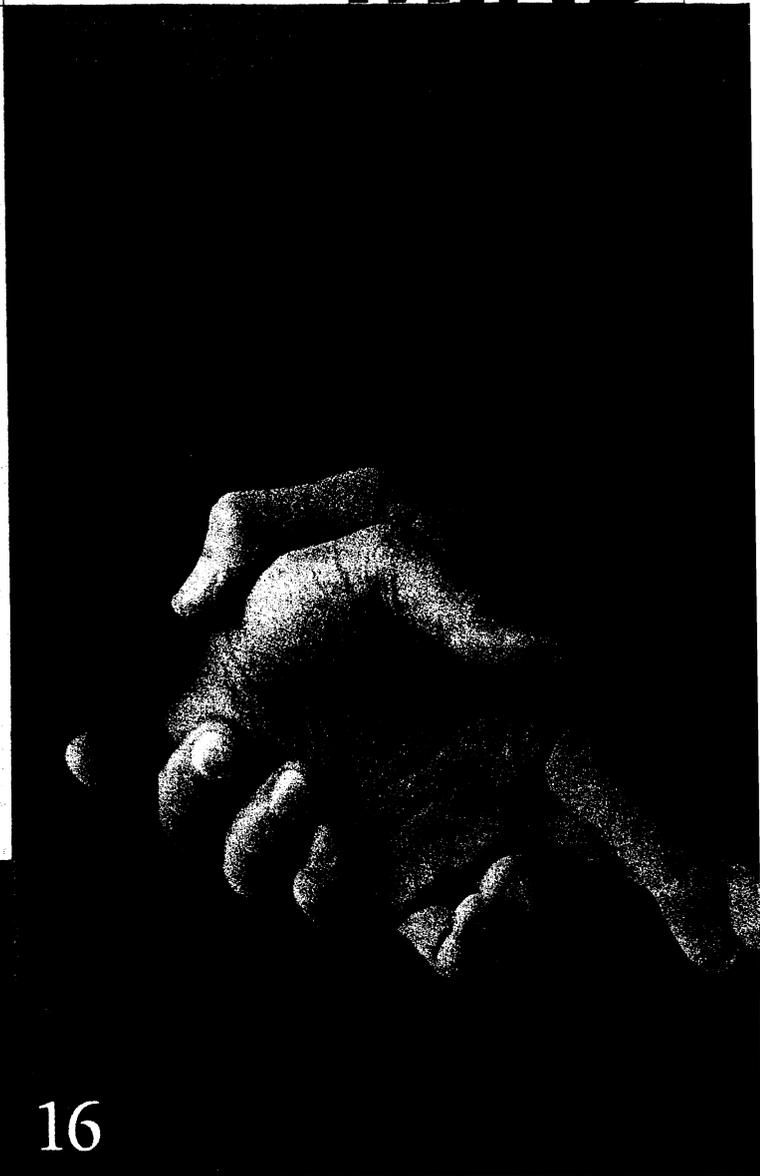
Volume 16, Number 2

2005

pages 1-2, 24 - 31

FEATURES

- 16» **Natural-Born Liars**  
Why do we lie, and why are we so good at it?  
Because it works.  
BY DAVID LIVINGSTONE SMITH
- 24» **True Crimes, False Confessions**  
How innocent people end up confessing to  
crimes they did not commit.  
BY SAUL M. KASSIN AND GISLI H. GUDJONSSON
- 32» **The Quest of Christof Koch**  
For this mountain-climbing neuroscientist,  
explaining consciousness is the ultimate  
extreme sport.  
BY DAVID DOBBS
- 38» **Sweet Dreams Are Made of This**  
What are dreams? Why do we have them?  
The answers are as intriguing as dreams  
themselves.  
BY GERHARD KLÖSCH AND ULRICH KRAFT
- 46» **The Truth and the Hype  
of Hypnosis**  
Though often denigrated as fakery, hypnosis is  
a real phenomenon with therapeutic uses.  
BY MICHAEL R. NASH AND GRANT BENHAM



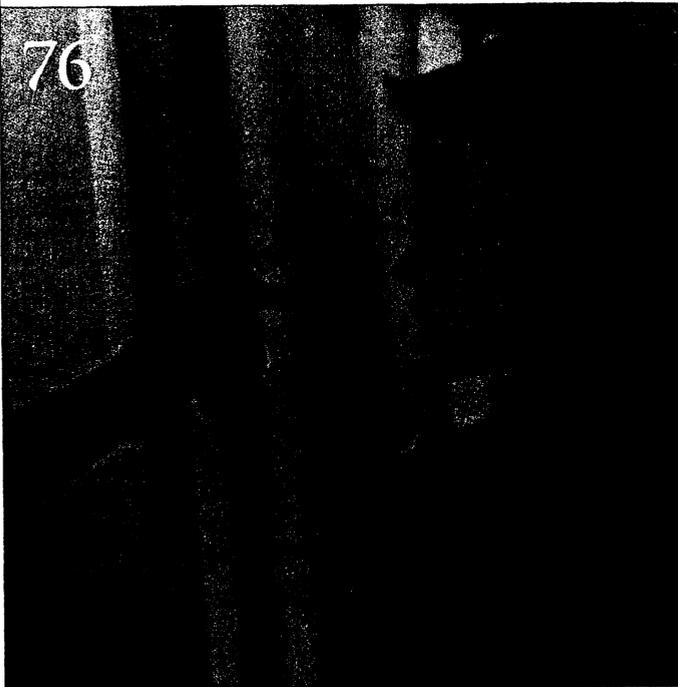
16

- 54» **A Great Attraction**  
Magnetically stimulating the brain could lift  
depression and perhaps even boost creativity.  
BY HUBERTUS BREUER
- 60» **Your Own Hall of Memories**  
You can improve your recall with a trick from  
the Greeks and Romans.  
BY MICHAEL SPANG
- 66» **Head Attack**  
You're late, the traffic is a nightmare and the  
kids are fighting in the back. How much  
does your mental stress raise your risk for  
a heart attack?  
BY MICHAEL FELD AND JOHANN CASPAR RÜEGG

COVER IMAGE BY KENN BROWN

60

76



72» **Buy This**

Companies spend billions on marketing campaigns, but neuroscientists could someday determine which ads best capture consumers' attention.  
BY ANNETTE SCHÄFER

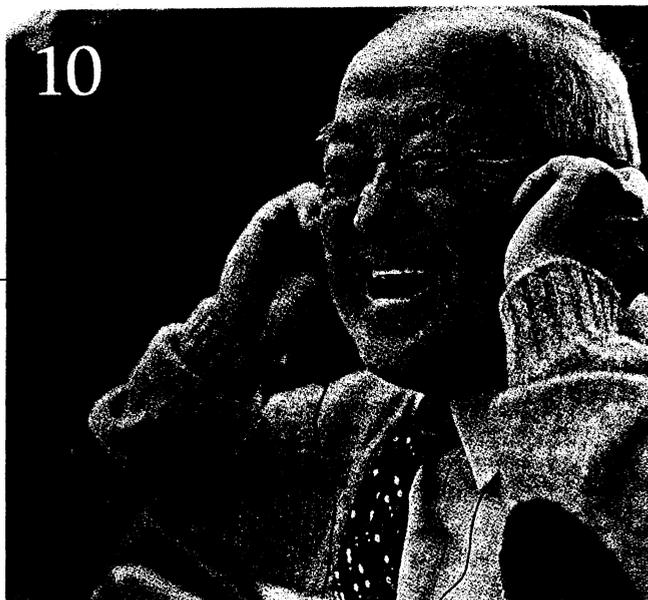
76» **Stopping the Bullies**

School can be torture for children who are targeted by abusive students.  
BY MECHTHILD SCHÄFER

82» **Signing Gets a Scientific Voice**

Sign language is as rich and complex as spoken communication, probably because the brain creates and deciphers it in the same way.  
BY JENS LUBBADEH

10



DEPARTMENTS

4» **From the Editor**

6» **Head Lines**

- » The whistler's voice.
- » Nicotine cravings.
- » Cooling hot aggression.
- » Teen control backfires.
- » Alzheimer's jam.



10» **Perspectives**  
**Experience versus Speed**

How the brain compensates to keep seniors just as sharp as youngsters.  
BY MARION SONNENMOSER

12» **The Ethics of Scan and Tell**

You volunteer for a study involving brain scans. Then researchers spot something abnormal in your head. Should they tell you?  
BY JAMIE TALAN

14» **Psychotherapy Lite**

Qualms about neurolinguistic programming.  
BY SUSANNE KEMMER

88» **Think Better**

BY MAJA STORCH  
Self-regulation beats self-control.

90» **Live Better**

BY OLAF SCHMIDT  
Psychotherapy can outperform Viagra.

92» **Mind Reads**

*Everything Bad Is Good for You. Really?*

94» **Head Games**

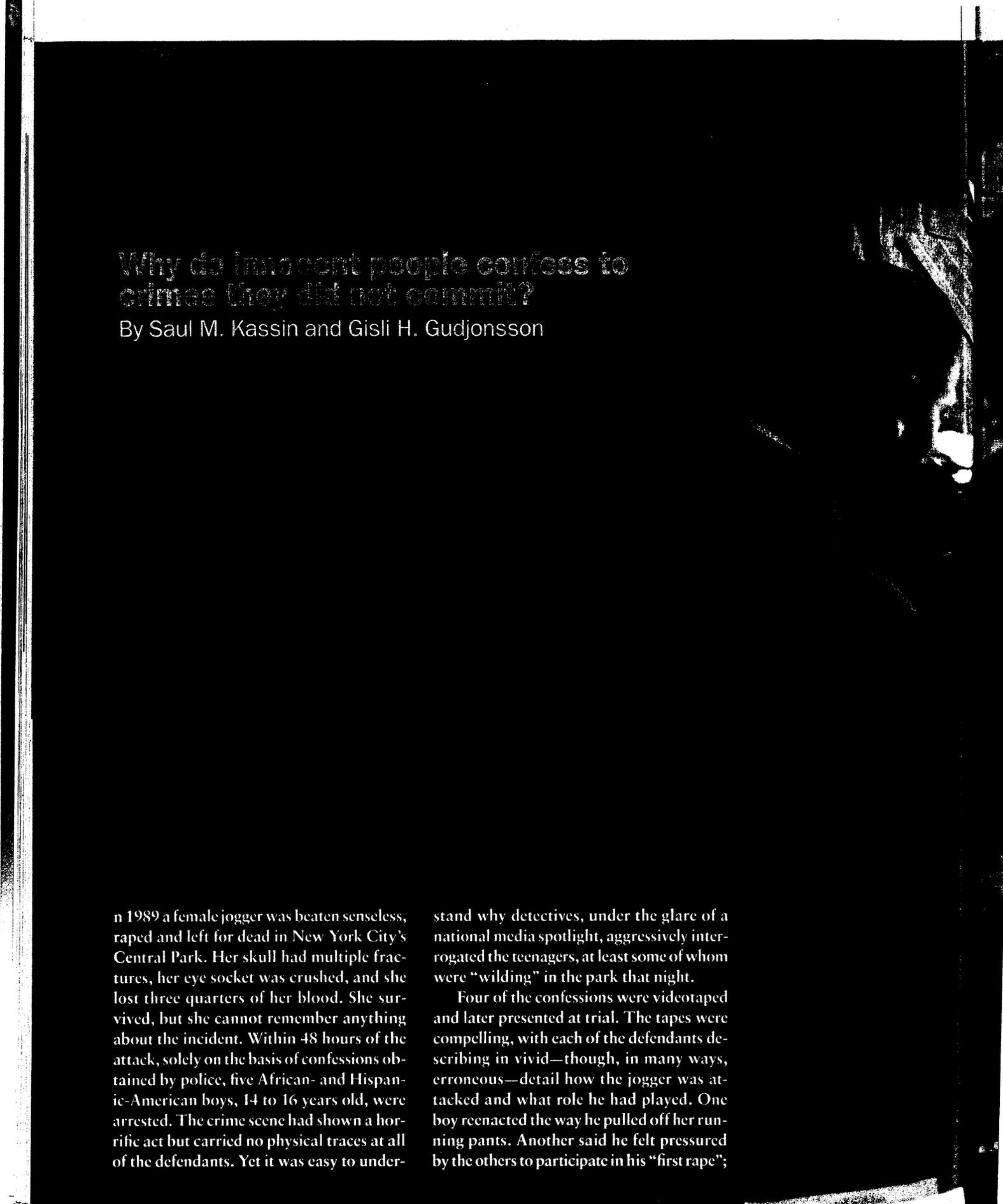
BY ABBIE F. SALNY  
Match wits with the Mensa puzzler.

96» **Illusions**

BY VILAYANUR S. RAMACHANDRAN AND  
DIANE ROGERS-RAMACHANDRAN  
Now you see it...

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## Why do innocent people confess to crimes they did not commit?

By Saul M. Kassin and Gisli H. Gudjonsson

In 1989 a female jogger was beaten senseless, raped and left for dead in New York City's Central Park. Her skull had multiple fractures, her eye socket was crushed, and she lost three quarters of her blood. She survived, but she cannot remember anything about the incident. Within 48 hours of the attack, solely on the basis of confessions obtained by police, five African- and Hispanic-American boys, 14 to 16 years old, were arrested. The crime scene had shown a horrific act but carried no physical traces at all of the defendants. Yet it was easy to under-

stand why detectives, under the glare of a national media spotlight, aggressively interrogated the teenagers, at least some of whom were "wilding" in the park that night.

Four of the confessions were videotaped and later presented at trial. The tapes were compelling, with each of the defendants describing in vivid—though, in many ways, erroneous—detail how the jogger was attacked and what role he had played. One boy reenacted the way he pulled off her running pants. Another said he felt pressured by the others to participate in his "first rape";

he expressed remorse and promised that it would not happen again. After their arrest, the youths recanted these confessions, because they had believed that making a confession would have enabled them to go home. Regardless of the denials, the tapes collectively persuaded police, prosecutors, two trial juries, a city and a nation; the teenagers were convicted and sentenced to prison.

Thirteen years later Matias Reyes, who was in jail for three rapes and a murder committed after the jogger attack, stepped forward of his own initiative. He volunteered that he was the Central Park assailant and that he had acted alone. The Manhattan district attorney's office questioned Reyes and discovered that he had accurate, privileged and independently corroborated

crime? A scan of the scientific literature reveals how a complex set of psychological factors comes into play. First, techniques commonly used by investigators during interviews make them prone to see deceit in suspects, a perception that tends to bias the outcome of the questioning. When the accused waive their constitutional rights to silence and to counsel during questioning by the police, they may also unwittingly lose procedural safeguards and put themselves at greater risk of making a false confession. Other contributors include a given person's tendencies toward compliance or suggestibility in the face of two common interrogation tactics—the presentation of false incriminating evidence and the impression that giving a confession might bring leniency. In

## (A disturbing number of cases have involved defendants who were convicted based only on false confessions.)

rated knowledge of the crime and crime scene. DNA testing further revealed that the semen samples recovered from the victim—which had conclusively excluded the boys as donors—belonged to Reyes. (Prosecutors had argued at trial that just because police did not capture *all* the alleged perpetrators did not mean they did not get *some* of them.) In December 2002 the five teenagers' convictions were vacated.

Despite its notoriety, the case illustrates a phenomenon that is not new or unique. The pages of legal history reveal many tragic miscarriages of justice involving innocent men and women who were prosecuted, wrongfully convicted, and sentenced to prison or to death. Opinions differ on prevalence rates, but it is clear that a disturbing number of cases have involved defendants who were convicted based only on false confessions that, at least in retrospect, could not have been true. Indeed, as in the case of the Central Park incident, disputed false confessions have convicted some people notwithstanding physical evidence to the contrary. As a result of technological advances in forensic DNA typing—which enables the review of past cases in which blood, hair, semen, skin, saliva or other biological material has been preserved—many new, high-profile wrongful convictions have surfaced in recent years, up to 157 in the U.S. alone at the time of this writing. Typically 20 to 25 percent of DNA exonerations had false confessions in evidence.

Why would an innocent person confess to a

short, sometimes people confess because it seems like the only way out of a terrible situation.

More troubling, confession evidence is inherently prejudicial, influencing juries even when they are shown evidence of coercion and even when there is no corroboration. Ultimately, we believe, society should discuss the urgent need to reform practices that contribute to false confessions and to require mandatory videotaping of all interviews and interrogations.

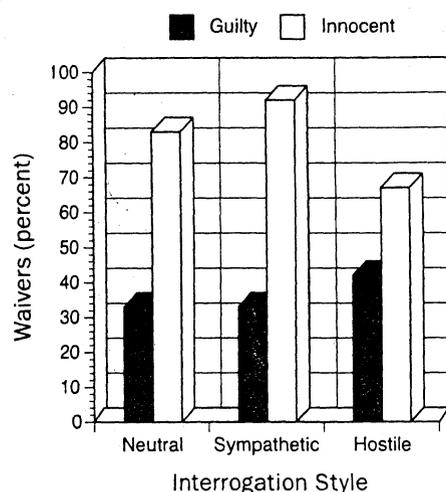
### Discerning the Truth

A 2004 conference on police interviewing attended by the two of us illustrates the problem of bias during questioning. Joseph Buckley—president of John E. Reid and Associates (which has trained tens of thousands of law-enforcement professionals) and co-author of the manual *Criminal Interrogation and Confessions* (Aspen Publishers, 2001)—presented the influential Reid technique of interviewing and interrogation. Afterward, an audience member asked if the persuasive methods did not at times cause innocent people to confess. Buckley replied that they did not interrogate innocent people.

To understand the basis of this remark, it is important to know that the highly confrontational, accusatory process of interrogation is preceded by an information-gathering interview intended to determine whether the suspect is guilty or innocent. Sometimes this initial judgment is reasonably based on witnesses, informants or other ex-



## Waiving Rights



Innocents are especially at risk for waiving rights to counsel and silence that were established by the U.S. Supreme Court in *Miranda*, believing they have nothing to hide (left). Yet longer exposure to questioning leaves them at greater risk for a false confession.

*Miranda* may not yield the protective effect for which it was designed for two reasons. First, a number of suspects—because of their youth, level of intelligence, lack of education or mental health status—do not have the capacity to understand and apply the rights they are given. Second, police use methods of presentation that elicit waivers. After observing live and videotaped police interrogations, Leo found that roughly four out of five suspects waive their rights and submit to questioning. He also observed that individuals who have no prior or felony record are more likely to waive their rights than are those with a history of criminal justice “experience.” In a 2004 study by one of us (Kassin) and Rebecca Norwick of Harvard University, subjects guilty or innocent of a mock crime (stealing \$100) were confronted by a neutral, sympathetic, or hostile “Detective McCarthy” who asked if they would waive their rights and talk. Only 36 percent of guilty subjects agreed, but 81 percent of innocents waived these rights, saying later they had nothing to hide or fear [see chart above].

### Interrogation Tactics

In the past, American police routinely practiced “third degree” methods of custodial interrogation—inflicting physical or mental pain and suffering to extract confessions and other types of information from crime suspects. Such tactics have mostly faded into the annals of criminal justice history, but modern police interrogations remain powerful enough to elicit confessions. At the most general level, it is clear that the two-step approach employed by Reid-trained investigators

and others—in which an interview generates a judgment of truth or deception, which in turn determines whether or not to proceed to interrogation—is inherently biased.

For innocents who are initially misjudged, one would hope that interrogators would remain open-minded and reevaluate their beliefs over the course of questioning. A warehouse of psychology research suggests, however, that once people form a belief, they selectively seek, collect and interpret new data in ways that verify their opinion. This distorting cognitive confirmation bias makes such personal convictions resistant to change, even in the face of contradictory evidence. It also contributes to the errors committed by forensic examiners whose judgments of handwriting samples, bite marks, tire marks, ballistics, fingerprints and other “scientific” observations are often corrupted by a priori expectations, a problem uncovered in many DNA exoneration cases.

In one instance in 2002, Bruce Godschalk was exonerated of two rape convictions after 15 years in prison when laboratories for both the state and the defendant found from his DNA that he was not the rapist. Yet the district attorney whose office had convicted Godschalk—even though Godschalk disavowed his initial confession—argued that the DNA tests were flawed and refused at first to release him from prison. When the district attorney was asked what foundation he had for his decision, he asserted, “I have no scientific basis. I know because I trust my detective and his tape-recorded confession. Therefore, the results must be flawed until someone proves to me otherwise.”

The presumption of guilt also influences the way police conduct interrogations, perhaps leading them to adopt an aggressive and confrontational questioning style. Demonstrating that interrogators can condition the behavior of suspects through an automatic process of social mimicry, Lucy Akehurst and Aldert Vrij of the University of Portsmouth in England found in 1999 that increased gestures and physical activity among police officers triggered movement among interviewees—fidgeting behavior that is then seen by others as suspicious.

It is important to scrutinize the specific practices of social influence that get people to confess. Proponents of the Reid technique advise interro-

the figure is closer to 60 percent. In Japan, where few restraints are placed on police interrogations and where social norms favor confession as a response to the shame brought by transgression, more than 90 percent of suspects confess.

In so-called self-report studies, researchers ask why people confessed. In 1991 one of us (Gudjonsson) and Hannes Petursson of University Hospital in Reykjavik, Iceland, published the first work in this area carried out on Icelandic prison inmates, which was replicated in Northern Ireland and in a larger Icelandic prison population with an extended version of a 54-item self-report instrument, the Gudjonsson Confession Questionnaire.

Although most suspects confess for a combi-

## (*Miranda* may not yield the protective effect for which it was designed.)

gators to conduct the questioning in a small, barely furnished, soundproof room. The purpose is to isolate the suspect, increasing his or her anxiety and desire to escape. To further heighten discomfort, the interrogator may seat the suspect in a hard, armless, straight-backed chair; keep light switches, thermostats and other control devices out of reach; and encroach on the suspect's personal space over the course of interrogation.

Against this physical backdrop, the Reid operational nine-step process begins when an interrogator confronts the suspect with unwavering assertions of guilt (1); develops "themes" that psychologically justify or excuse the crime (2); interrupts all efforts at denial and defense (3); overcomes the suspect's factual, moral and emotional objections (4); ensures that the passive suspect does not withdraw (5); shows sympathy and understanding and urges the suspect to cooperate (6); offers a face-saving alternative construal of the alleged guilty act (7); gets the suspect to recount the details of his or her crime (8); and converts the latter statement into a full written or oral confession (9). Conceptually, this system is designed to get suspects to incriminate themselves by increasing the anxiety associated with denial, plunging the suspect into a state of despair and then minimizing the perceived consequences of confession.

Rates of confession vary in different countries, indicating the underlying role that institutional and cultural influences play. For example, suspects detained for questioning in the U.S. confess at a rate around 42 percent, whereas in England

nation of reasons, the most critical is their belief about the strength of the evidence against them. That is why the tactic of presenting false evidence—as when police lie to suspects about an eyewitness that does not exist; fingerprints, hair or blood that has not been found; or lie detector tests they did not really fail—can lead innocent people to confess. In a 1996 laboratory experiment that illustrates the point, Kassin and Katherine L. Kiechel of Williams College falsely accused college students of crashing a desktop computer by hitting a key that they were told was off-limits. When a fellow student who was present said she had witnessed the students hit the forbidden key, the number induced to sign a confession increased by 45 percent. Also increased were the numbers who internalized a belief in their own guilt and fabricated false memories to support that belief.

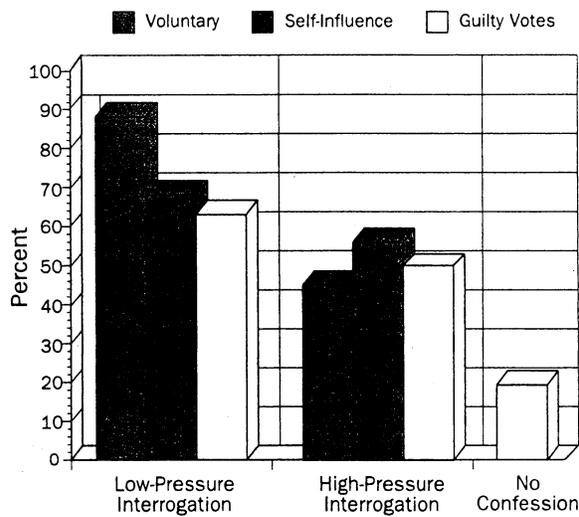
### False Confessions

In 2004 Steven A. Drizin of Northwestern University School of Law and Leo analyzed 125 cases of proved false confessions in the U.S. from

### (The Authors)

**SAUL M. KASSIN** and **GISLI H. GUDJONSSON** study the psychology of false confessions. Kassin is professor of psychology at Williams College. He has published many research articles on police interviewing, interrogations, and confessions—and the impact of this evidence on juries. Gudjonsson is professor of forensic psychology at King's College London. He pioneered work on the nature of suggestibility and has written extensively on the reliability of confessions, witness memories and other evidence.

## Confessions and the Jury



The existence of a confession—true or false—predisposes juries toward reaching a guilty verdict. Mock jurors were asked whether they judged the confession to be voluntary, whether it influenced their verdict, and whether they voted for conviction.

between 1971 and 2002, the largest sample ever studied. Approximately two thirds were exonerated before the trial, and the rest came after conviction. Ninety-three percent of the false confessors were men. Overall, 81 percent occurred in murder cases, followed by rape (8 percent) and arson (3 percent). The most common bases for exoneration were that the real perpetrator was identified (74 percent) and that new scientific evidence was discovered (46 percent). The sample was disproportionately represented by persons who were young (63 percent were younger than 25; 32 percent were under 18), mentally retarded (22 percent) and diagnosed with mental illness (10 percent). Astonishingly, 30 percent of the cases contained more than one false confession to the same crime, as in the Central Park jogger case, typically indicating that one false confession was used to get others.

Recognizing that people confess in different ways and for different reasons, psychologists categorize false confessions into three groups:

**Voluntary false confessions.** When aviator Charles Lindbergh's baby was kidnapped in 1932, some 200 people stepped forward to confess. In the 1980s Henry Lee Lucas falsely admitted to hundreds of unsolved murders, making him the most prolific serial confessor in history. People might voluntarily give a false confession for reasons including a pathological desire for notoriety; a conscious or unconscious need to expiate feelings of guilt over prior transgressions; an inability to distinguish fact from fantasy; and a desire to aid and protect the real criminal.

**Compliant false confessions.** In these cases, the suspect confesses to achieve some end: to escape an aversive situation, to avoid an explicit or implied threat, or to gain a promised or implied reward. In *Brown v. Mississippi* in 1936, for example, three black tenant farmers admitted to murder after they were whipped with a steel-studded leather belt. And in the Central Park jogger case, each boy said he had confessed despite innocence because he was stressed and expected to go home if he cooperated.

**Internalized false confessions.** During interrogation, some suspects—particularly those who are young, tired, confused, suggestible and exposed to false information—come to believe that they committed the crime in question, even though they did not. In a classic case, 18-year-old Peter Reilly of Falls Village, Conn., returned home one night to find that his mother had been murdered. Reilly immediately called the police but was suspected of matricide. After gaining Reilly's trust, the police told him that he failed a lie detector test (which was not true), and which indicated that he was guilty even though he had no conscious memory of the event.

After hours of interrogation, the audiotape reveals that Reilly underwent a chilling transformation from denial to confusion, self-doubt, conversion ("Well, it really looks like I did it") and finally a full confession ("I remember slashing once at my mother's throat with a straight razor I used for model airplanes.... I also remember jumping on my mother's legs"). Two years later independent evidence revealed that Reilly

could not have possibly committed the murder.

Trial jurors, like others in the criminal justice system who precede them, can be overly influenced by confessions. Archival analyses of actual cases containing confessions later proved false tell a disturbing tale. In these cases, the jury conviction rates ranged from 73 percent (as found by Richard Ofshe of the University of California at Berkeley and Leo in 1998) to 81 percent (as found by Drizin and Leo in 2004)—about the same as cases in which the defendants had made true confessions.

colleagues found that such covert assurances can contribute to false confessions.

### The Need for Reforms

To assess any given confession accurately, police, judges, lawyers and juries should have access to a videotaped record of the interrogation that produced it. In Great Britain, PACE mandated that all sessions be taped. In the U.S., four states—Minnesota, Alaska, Illinois and Maine—have mandatory videotaping, although the practice is

( Trial jurors, like others in the criminal justice system, can be overly influenced by confessions. )

In light of such findings, the time is ripe for law-enforcement professionals, policymakers and the courts to reevaluate current methods of interrogation. Although more research is needed, certain practices clearly pose a risk to the innocent. One such factor concerns time in custody and interrogation. The 2004 study by Drizin and Leo found that in proved false confession cases, the interrogations lasted for an average of 16.3 hours. In the Central Park case, the five boys were in custody for 14 to 30 hours by the time they confessed. Following the Police and Criminal Evidence Act of 1986 (PACE) guidelines implemented in England and Wales, policy discussions should begin with a proposal for the imposition of time limits for detention and interrogation or at least flexible guidelines, as well as periodic breaks for rest and meals.

A second problem concerns the tactic of lying to suspects about the evidence. Research shows that people capitulate when they believe that the authorities have strong evidence against them. The practice of confronting suspects with real evidence, or even their own inconsistent statements, should increase the reliability of the confessions ultimately elicited. When police misrepresent the evidence, however, innocent suspects come to feel as trapped as the perpetrators—which increases the risk of false confession.

A third matter revolves around the use of minimization, as when police suggest to a suspect that the conduct in question was provoked, an accident or otherwise morally justified. Such tactics lead people to infer leniency in sentencing on confession, as if explicit promises had been made. In a study that is now in press, Melissa Russano of Roger Williams University and her

often found elsewhere on a voluntary basis. Videotaping deters interrogators from using the most aggressive, psychologically coercive methods. It also will block frivolous defense claims of coercion where none existed. And it provides an objective and accurate record of all that transpired, avoiding disputes about how the confession came about.

A 1993 National Institute of Justice study revealed that many U.S. police departments already have videotaped interrogations—and the vast majority found the practice useful. More recently, in 2004, Thomas P. Sullivan of the law firm Jenner & Block interviewed officials from 238 police and sheriff's departments in 38 states who made such recordings voluntarily and found that they enthusiastically favored the practice, which increases accountability, provides an instant replay of the suspect's statement that reveals information initially overlooked and reduces the amount of time spent in court defending their interrogation conduct. As a counter to the most common criticisms, those interviewed found that videotaping is not costly and does not inhibit suspects from talking to police.

Such reforms are sorely needed. Only then can society trust the process of interrogation and the confessions that it produces—and help to promote justice for all.

### (Further Reading)

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- ◆ **The Psychology of Confessions: A Review of the Literature and Issues.** Saul M. Kassin and Gisli H. Gudjonsson in *Psychological Science in the Public Interest*, Vol. 5, No. 2; November 2004. More information is available at [www.psychologicalscience.org/journals/](http://www.psychologicalscience.org/journals/)
- ◆ More on wrongful convictions is available at the Innocence Project Web site: [www.innocenceproject.org](http://www.innocenceproject.org)