

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

STATE OF WASHINGTON,

Respondent,

vs.

ATIF RAFAY,

Appellant.

No. 55217-1-I

STATEMENT OF
ADDITIONAL

RECEIVED AUTHORITY
COURT OF APPEALS
DIVISION ONE

REC'D

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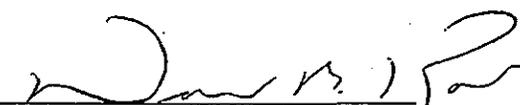
Pursuant to RAP 10.8, appellant cites to the following additional authority on the psychological impact in "Mr. Big" operations:

Smith, Stinson, Patry, *Using the "Mr. Big" Technique to Elicit Confessions: Successful Innovation or Dangerous Development in the Canadian Legal System?*, Psychology, Public Policy, and Law, Vol. 15, No. 3, 168-193 (American Psychological Association 2009) (concluding that the pressures exerted on suspects are extreme and go far beyond what a suspect might experience during in-custody interrogations, providing "fertile ground for false confessions").

DATED this 3rd day of May, 2010.

Respectfully submitted,

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

USING THE “MR. BIG” TECHNIQUE TO ELICIT CONFESSIONS: SUCCESSFUL INNOVATION OR DANGEROUS DEVELOPMENT IN THE CANADIAN LEGAL SYSTEM?

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Canada's legal system recognizes that police interrogation procedures may contribute to false confessions, and has provided safeguards designed to protect the rights of the accused and reduce the likelihood of these errors. Police in Canada are using a complex noncustodial interrogation procedure called the “Mr. Big” technique, to elicit confessions for recalcitrant suspects. Remarkably, this undercover (in that suspects do not know they are speaking to law enforcement officers) interrogation technique boasts a 75% confession rate and a 95% conviction rate when used (Gardner, 2004). However, it is possible that suspects in these situations may experience undue pressure to confess falsely. The purpose of this paper is fourfold: (1) to explore the nature of the Mr. Big technique; (2) summarize some recent Canadian legal cases relevant to confession evidence (e.g., *R. v. Oickle*, 2000; *R. v. Mentuck*, 2000); (3) examine Canadian law and police practices in the context of different jurisdictions around the world; and, (4) discuss the scientific evidence relevant to the Mr. Big procedure. We conclude the paper by discussing recommendations for current and future police practice, directions for future research, and the ways in which psychological research could inform legal policy and procedures in the future.

Keywords: confessions, false confession, legal issues in confession, international perspectives on confession, police undercover operations, Mr. Big undercover operation

I. Overview and Introduction

In 1992, Marie Dupé, a 46 year-old store clerk, was stabbed to death at the convenience store in which she worked in Cape Breton, Nova Scotia. Nine years later, forensic techniques had progressed enough that a DNA sample was obtained from a discarded cigarette butt found at the scene. Through Canada's National DNA Databank, police obtained a hit on Gordon Strowbridge, who had been forced to give a DNA sample after being convicted of assault in Ontario. Although Strowbridge had been a suspect at the time of the crime, there was no evidence he was involved in the crime, only that he had been at the scene. While being processed on an outstanding warrant, Strowbridge was befriended by an undercover police officer. The officer pretended to be another criminal and offered him a job for easy money. Over the next 3 months, Strowbridge was involved in a number of car thefts orchestrated by police. Ultimately, he was brought to a

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Toronto hotel to be "interviewed" for a higher-level job within the criminal organization. He was told the "Big Boss" would be interviewing him. When Strowbridge met "Mr. Big," with little prompting, and on hidden camera, he readily admitted that he had been involved in the murder of the store clerk. Arrested and charged with murder, Strowbridge ultimately pled guilty to a lesser charge and was sentenced to life in prison (National DNA Databank, 2004).

This approach to obtaining confessions may seem extreme, but in Canada, it is becoming quite common. The "Mr. Big" technique is designed to elicit inculpatory statements or confessions from recalcitrant suspects or in cases where little forensic evidence is available. Gudjonsson (2003), called as an expert witness in such a case, has called the Mr. Big technique a "non-custodial interrogation procedure," although one might argue this is not an interrogation as it is typically conceived. Interestingly, there is no empirical evidence we could find exploring or describing the Mr. Big technique at all. Indeed, the Gudjonsson reference (a case in which, incidentally, he believed there had been a false confession) is the only mention of the Mr. Big technique we could find in the scientific literature.

Thus, the purpose of this paper is to shed some light on this type of noncustodial interrogation technique and to discuss how the psychological literature on interrogations and confessions relate to both this investigative technique and recent legal decisions in Canada. Therefore, this paper will first describe some examples of the Mr. Big technique, discuss its legal status in Canada, and compare it with more traditional in-custody interrogation practices. The next section of the paper will cover protections built into the legal system to prevent false confessions, and a discussion of the extent to which recent legal decisions and police practices complement the relevant scientific research. Following this, we will take an international perspective and discuss practices and policies of other countries relating to interrogation procedures, and explore the extent to which a Mr. Big-type approach would be acceptable within those countries. Finally, we highlight areas where further integration of scientific evidence would be worthwhile, and discuss policy and practice implications for Canada and abroad.

We shine the spotlight on Canada and this technique for two reasons. First, Canadian field interrogation techniques and related undercover policing procedures used to obtain incriminating statements are different from those of other countries. As far as we can tell, the Mr. Big undercover operation is uniquely Canadian. Second, we know of no other examination of Canadian legal decisions bearing on interrogations, confessions, and affiliated police procedures. Finally, it is not clear the extent to which Canadian police practices (specifically, the use of the Mr. Big technique) are consistent or not with either the current scientific knowledge on the issue, or the standards of other countries.

II. The Mr. Big Technique: A Noncustodial Interrogation Procedure

Generally reserved for serious cases, a Mr. Big operation involves the use of undercover police officers to lure the suspect into becoming involved in an ostensibly criminal organization. Usually, undercover officers posing as members of a gang befriend the suspect and suggest that he or she join their organization. The undercover officers then involve the suspect in a series of minor crimes, pay

the suspect generously for these criminal activities, and often display evidence of wealth (e.g., expensive cars, large rolls of money). Once committed to the organization, the suspect is then "interviewed" for a higher level job in the group and assured that this promotion will produce substantial financial rewards. However, before meeting the organization's leader (i.e., Mr. Big) and becoming a full-fledged member, the suspect must confess to a serious crime (the one under investigation) for one of several reasons: as a form of "insurance" for the criminal gang, so they have something "on" the suspect if he ever turns against them; so that Mr. Big can draw on his purported influence and connections to make the evidence or "problem" disappear; or both. Undercover officers elicit the confession, which serves as a pivotal piece of evidence against the defendant and usually results in a conviction.

The Royal Canadian Mounted Police (RCMP) has indicated that prior to 2004 the Mr. Big technique had been used at least 350 times, with a 75% success rate and a 95% conviction rate (Gardner, 2004). It is unclear how many times it has been used since 2004, but there are no indications it is being used any less than in the past. But one might ask: how does the Mr. Big technique really work? In order to address this, we will describe four relatively recent murder investigations where the Mr. Big technique has been used.

The Bonisteel case. On February 6, 1975, the bodies of 14-year-old Judy Dick and Elizabeth Zeschner were found in Richmond, British Columbia; they had been stabbed to death, after having been missing for 3 weeks. The next day, Robert Bonisteel and his family left British Columbia and drove to Saskatchewan and Manitoba where, over the course of 1 week, Bonisteel committed two sexual assaults. He was arrested, charged, and subsequently pled guilty to two rape charges. A forensic examination of Bonisteel's car and apartment revealed small amounts of human blood and a pair of brown suede shoes which also contained human blood. RCMP detectives from Richmond, BC interviewed Bonisteel in 1975 and several more times over the years, but could not obtain a confession to the murders. In March, 2002 the RCMP began an undercover operation designed to obtain that confession. The operation involved undercover agents who engaged Bonisteel in a series of minor crimes in order to induce him to become interested in increasing his commitment to this criminal organization. The undercover agent indicated that Bonisteel first needed to participate in a job interview with "Buck," the leader of the organization. Buck told Bonisteel that he needed to know everything about Bonisteel and that Buck would check on everything that he divulged. Bonisteel reported that he had spent 20 years in prison for the two sexual assaults and he had been a suspect for the Dick and Zeschner murders.

In the fall of 2002, undercover officers showed Bonisteel a forged police report stating that "Toni," a woman ostensibly working for the organization, had lied about events that transpired during a drug deal (of course, Toni was an undercover police officer). Undercover officers asked Bonisteel to try to get Toni to acknowledge what happened during that drug deal. Bonisteel's efforts at convincing Toni to confess failed; subsequently, he heard shouting and pounding noises coming from an adjacent room where Toni was supposedly being beaten by a member of the organization. Later, Buck told Bonisteel that his background research revealed that he had killed the two Richmond girls, police had forensic

evidence linking him to the murders, and that new technology would confirm his guilt. Buck displayed fake police documents demonstrating that Bonisteel was the suspect. Buck then told Bonisteel that a prison inmate, who owed him a favor and was dying, had agreed to confess to the Dick and Zeschner murders; all Buck needed was for Bonisteel to divulge the details. But if he did not confess, he would lose his job (he had been promised up to \$80,000 once the "job was done"). Eventually, Bonisteel confessed. On July 9, 2005, a jury found Robert Bonisteel guilty of the first degree murders of the two girls. The evidence at the 12-week trial included blood evidence gathered from Mr. Bonisteel's car in 1975, DNA evidence from a the shoe, and his confession (*R. v. Bonisteel*, 2008).

The Mayerthorpe RCMP murders. In March of 2005, James Roszko shot and killed four RCMP officers at his Mayerthorpe, Alberta ranch before turning the gun on himself. Although it was clear he acted alone at the ranch, police were convinced that two of Roszko's acquaintances, Dennis Cheeseman, and Shawn Hennessey were somehow involved. A Mr. Big undercover operation was deployed. The RCMP used a woman to lure Cheeseman into a criminal organization. Ultimately, over 50 undercover police officers were involved in the charade which included strippers, lap dances, two officers naked in bed together, and a trip to British Columbia to meet "Mr. Big." Cheeseman (and later Hennessey) admitted to giving Roszko a shotgun and giving him a ride back to his property when they knew that Roszko was planning to kill RCMP officers. They subsequently pled guilty to manslaughter, and were sentenced to 12 and 15 years in prison, respectively (Canadian Broadcasting Corporation [CBC], 2009a).

The Karissa Boudreau case. On January 27, 2008, Penny Boudreau reported to Bridgewater, Nova Scotia RCMP that her daughter Karissa disappeared after an argument in a grocery store parking lot. Two weeks later, a young boy found Karissa's body on an embankment along the nearby LeHave River (CBC, 2009b). Police and forensic investigations revealed that Karissa had been strangled elsewhere and her body had been dragged to the location where she was found. Although police suspected her mother or Penny's boyfriend were involved in Karissa's death, they could not get a confession. A Mr. Big operation was undertaken. Undercover police officers involved Boudreau in organized crime activities (such as counting large sums of money) and slowly drew her into the organization. Eventually, the officers revealed that the police had evidence to convict Boudreau, and offered to help her destroy the incriminating evidence. They explained that in order for Mr. Big to make her "problem" disappear, they had to understand fully the events that transpired so that they could help her. Penny Boudreau explained to the "Boss" that she had killed Karissa, because Karissa was impinging on her relationship with her boyfriend. Boudreau's verbal accounts were recorded on tape, and she also provided a written account. Subsequently, Boudreau returned to the crime scene with the undercover police officer to describe and re-enact in detail how she strangled her daughter and disposed of her body. In January of 2009, Penny Boudreau confessed in court to killing her 12-year-old daughter. She pled guilty to second-degree murder and was sentenced to life in prison with no possibility of parole (*R. v. Boudreau*, 2009).

The Jason Dix case—A rare failure. Although the Mr. Big technique appears to be effective at eliciting confessions, it is not always successful. On October 1st, 1994, two men were killed in an execution-style shooting at a paper

recycling plant near Edmonton, Alberta. RCMP investigators on the scene initially thought the victims had been accidentally electrocuted and allowed the scene to be cleaned, thereby losing vital forensic evidence. Despite significant evidence to the contrary, the RCMP became convinced that Jason Dix, an acquaintance of the two men, was the prime suspect, at least in part because he lied about an extramarital affair during an initial interview. He too was befriended by an undercover police officer and then brought into a "criminal" organization. On one particular outing, undercover officers staged an execution-style killing in front of Dix and told him that Dix now had "dirt" on them. These undercover officers then instructed Dix to confess the paper plant crime so that they would have "dirt" on him. Although Dix maintained his innocence, police nonetheless concluded that he was probably the killer because his participation in the criminal enterprise showed his "criminal mind." The police spent several hundred thousand dollars on this investigation, yet obtained no useful evidence (CBC, 1998).¹ The Mr. Big strategy was also unsuccessful in *R. v. Valliere* (2004) and in *R. v. T.C.M.* (2007) which involved a juvenile defendant.

Should We Worry About the Mr. Big Technique?

As we mentioned above, we have found no published or unpublished empirical work relating to the Mr. Big technique or its psychological correlates and consequences. Although the RCMP claims a remarkable 75% success rate with the technique (Gardner, 2004), little is known about the "failures." Indeed, we know about the "successes" because of the media and through trial transcripts. Although undefined, success appears to be a full-fledged confession. As we discuss below, a serious concern is that these types of interrogation practices may create situations that increase the likelihood of false confessions.

III. The Legal Status of the Mr. Big Technique

The Canadian legal system recognizes the importance of providing protections for defendants that are designed to ensure that confessions are voluntary and not coerced. In the last several years, there have been Supreme Court of Canada decisions that have touched on the gray area between police procedures that are permissible and those that violate the rights of the accused. With the advent and popularity of the Mr. Big Technique, it is not surprising that it has received attention in the courts, albeit often as a secondary consideration to other facts of the case.

¹ Ultimately, the police used a letter written by an RCMP officer (which threatened a witness) to hold Dix in jail for almost 2 years. They continued to use a number of undercover operatives to try to obtain a confession from him in jail. Dix's marriage broke up, he was denied contact with his children, and he tried to commit suicide. When a judge discovered the letter used to hold Dix had been in fact been fabricated, the charges were dropped and Dix was released. In 2002 Dix was awarded \$765,000 in damages from the RCMP and the Crown Attorney's office. One of the RCMP investigators has since been promoted twice, and now leads the detachment that conducted the original investigation (Sands, 2005).

Legal Safeguards Designed to Protect the Rights of Defendants and Minimize Errors

The Canadian Charter of Rights and Freedoms (hereinafter referred to as the Charter) was enacted in Canada with the signing into law of the Canadian Constitution by the Queen on April 17th, 1982. The Charter guarantees certain civil and legal rights and protections for Canadians. The Charter, in terms of legal protections for citizens, is similar to the U.S. Bill of Rights.

The warning. In Canada and the United States, criminal suspects have the right to silence and the right to consult a lawyer. In the United States, these rights are specified in what is commonly known as the Miranda warning (*Miranda v. Arizona*, 1966). The Charter² provides the legal foundation for Canada's caution, which typically takes this form: "You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence." The Canadian warning does not specify that statements uttered by suspects may be used against them in court, nor do suspects have the right to have a lawyer present during all questioning (but they do have the right to consult a lawyer if they request it). Once the suspect is under arrest, however, the warning typically takes this form: "You are under arrest for the charge of _____. You have the right to retain a lawyer; we will provide you with a lawyer referral service if you do not have your own lawyer. Anything you say can be used in court as evidence." (*R. v. Hebert*, 1990). Do these warnings actually inform people of their rights? Although it is difficult to measure this in context and provide empirical data that speaks to this question, there are some indications that these warnings may be serving to inform suspects of their rights. As Slobogin (2004) points out, knowledge of these rights (even as we see in many shows on television) at the least ought to minimize coercive features of the interrogation. Yet, there are numerous cases of proven false confessions that demonstrate the ineffectiveness of warnings as a safeguard for in-custody interrogations (see Kassin, 2008). Of course, this key safeguard is absent in noncustodial interrogations such as Mr. Big.

Recording interrogations and confessions. Many jurisdictions require that interrogation procedures be recorded (preferably videotaped). Depending on its scope, a recording of an interrogation can inform the trier-of-fact of the suspect's demeanor when the confession was provided, the conditions surrounding the confession and, ideally, the context around which it was elicited (i.e., interrogation practices). Interrogations are generally recorded in Canada and often in the

² The relevant sections of Canada's Charter of Rights and Freedoms include Section 7 "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 10 "Everyone has the right on arrest or detention a) to be informed promptly of the reasons therefore; b) to retain and instruct counsel without delay and to be informed of that right; and c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful." Section 11 "Any person charged with an offence has the right . . . c) not to be compelled to be a witness in proceedings against that person in respect of the offence; d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal . . ." Section 13 "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

United States (although this is not required). However, what often occurs is that only the actual confession statement is videotaped; the preceding interview and interrogation is not always recorded. In the United Kingdom, by comparison, police are required to videotape interrogations only at a police station (Home Office, 2003); there is no requirement to record interviews or interrogations that occur in other venues (e.g., police vehicles, etc.). The extent to which law enforcement professionals conduct interviews and interrogations in other venues (where documentation is not required) to skirt this requirement is unknown.

Thus, within the context of the Mr. Big technique, there are at least two elements of the confession videos that should be taken under consideration. First, the only element that is typically recorded and presented at trial is the final session with "Mr. Big" when the suspect confesses. Thus judges and jurors are not privy to the contextual information, which could be quite informative to the jury. Conversely, within noncustodial interrogation practices such as Mr. Big, video recordings of the investigation could actually have a prejudicial effect for the suspect. In the Mr. Big scenario, the suspect becomes involved with criminal activities. Thus, evidence of a propensity to commit other crimes is being presented to the judge and jury. Importantly, these are crimes for which the suspect is not on trial, but nonetheless come to light for the trier-of-fact. Though not relevant to the crime in question, this could influence the judgment of these triers-of-fact.

Jury instructions cautioning on the dangers of false confessions. In Canadian jury trials involving police interrogation procedures exhibiting coercive tactics, the trial judge may deem that special cautionary instructions to the jury are warranted (e.g., *R. v. Hodgson*, 1998). These instructions are designed to counteract the possibility that jurors may not appreciate why someone would falsely confess to a crime. In *R. v. Hodgson* (1998), the majority opinion held that in situations where there were concerns about false confessions, the instructions should caution jurors about accepting the suspect's statement and about assigning weight (if any) to the statement. Importantly, however, the Canadian courts have overwhelmingly determined that the elements in Mr. Big undercover procedure do not include reprehensible coercive tactics and that cautionary instructions to the jury are not warranted (e.g., *R. v. Osmar*, 2007). Moreover, the cautionary instructions do not apply to undercover operations because, from the suspect's perspective, the undercover officer is not a person in authority (*R. v. Hodgson*, 1998), an important issue we discuss below.

Legal Status of Confession Prior to 2000

As far back as the 1700's, when Canada was still part of the British Empire (confederation occurred in 1867) legal scholars recognized that there are situations where an innocent suspect might confess to a crime they did not commit. Typically, this would be cases involving the use of "third degree" type tactics (beatings, threats, torture). However, the courts came to realize that these types of confessions could well be the result of a desperate attempt to escape the situation or avoid perceived threats, rather than a reflection of true guilt, and thus were not reliable. Ultimately, England's court determined that these types of confession were involuntary and therefore not admissible in court (*The King v. Warrickshall*,

1783). Only those confessions that were voluntarily provided by the suspect were considered reliable enough to be presented as evidence in court. Courts excluded any statement made to an authority (e.g., police) unless the prosecution (i.e., the Crown) could prove beyond a reasonable doubt that the statement was made voluntarily (e.g., *Prosko v. The King*, 1922).

Consistent with this logic, courts typically found a statement to be involuntary if it has been obtained by "fear of prejudice or hope of advantage" (*Ibrahim v. the King*, 1914), meaning that the use of threats or promises by the police may make the confession involuntary. This definition was later expanded to include cases where suspects' statements could not be deemed as voluntary because of a failure of their "operating mind" (i.e., suspects did not understand what they were saying or that their statement may be used against them at a later time; *Horvath v. The Queen*, 1979; *R. v. Whittle*, 1994; *Ward v. The Queen*, 1979). Although the status of confession evidence has enjoyed a relatively stable history in the Canadian courts, recent legal decisions have revisited the issue of voluntariness and police tactics in relation to the admissibility of confession evidence. We focus primarily here on several fairly recent cases (and one older case), that bear on police interrogation procedures and the admissibility of suspect confessions.

R. v. Oickle (2000)—A Restatement of the Confession Rule

In *R. v. Oickle (2000)*, the Supreme Court of Canada made its first comprehensive restatement of the confessions rule since the Charter was established (see Ives, 2007, for an excellent review). The majority made a thorough analysis of the common law (judge-made) rule, bearing in mind the balance between the rights of the individual defendant, without overly limiting the police's ability to investigate crimes.

Oickle was a Nova Scotia arson case in which eight fires were under investigation. Police identified the defendant (*Oickle*) and brought him to a local motel for questioning. After being informed of his rights, the accused took a polygraph test and was told he had "failed" the test. Afterwards, he was questioned for about an hour. After a short break, he was questioned again by a different officer during which time he confessed to setting one fire in his fiancée's car. He was placed under arrest and brought to the police station. Early the next morning, *Oickle* agreed to a re-enactment of several fires and he was subsequently charged and convicted of seven counts of arson.

The central issue on appeal was the voluntariness of the defendant's confession. The defense claimed that a number of factors raised reasonable doubts as to voluntariness, among them the fact that the police exaggerated the reliability of the polygraph, they threatened to give his fiancée a polygraph, and they minimized the legal significance of multiple convictions. The Nova Scotia Court of Appeal overturned the conviction on the basis of the voluntariness claims made by the defense. The Crown appealed the decision to the Supreme Court of Canada, which reinstated the conviction. The majority established that at common law, the voluntariness of confessions is central, and the standard for demonstrating voluntariness is beyond a reasonable doubt. A number of factors are relevant to a judge's determination of voluntariness, including police trickery, threats, or promises.

Moreover, the analysis must take into consideration the defendant's 'fear of prejudice' and 'hope of advantage.' If a person in authority conveys either of these notions, then the voluntariness of the confession is suspect. The overall determination must be made on an analysis of the totality of circumstances surrounding the confession.

Examples of techniques that would normally warrant the exclusion of any subsequent confession would include quid pro quo offers of leniency. Interestingly, police told Oickle that he could receive psychiatric assistance after he confessed, but the majority viewed this as a lesser inducement. Interrogation tactics that subtly minimize the legal and moral consequences of conviction and subtle suggestions about the benefits of confessing are deemed useful to police and allowed, so long as they do not raise questions as to voluntariness. Police exaggeration of the reliability of evidence, including the polygraph, is a well-established interrogation technique and does not invalidate confessions, as long as it does not raise a doubt as to voluntariness of subsequent confessions.

The Court's position on police use of deception was similar. The majority clearly identified deception as a useful police tactic, one that is allowed so long as the deception does not shock the community's conscience or create fear of prejudice and/or hope of advantage to a level that raises a reasonable doubt about the voluntariness of any subsequent confession. The Court did not frown upon police use of false evidence, but indicated that courts should consider its use in determining whether the confession was voluntary.

Rothman v. The Queen (1981)—Person in Authority

A few Canadian cases have addressed the requirement that, for a confession to be admissible, it must be made to a "person in authority." In the Rothman case, the accused was charged with marijuana possession with the intention to traffic. After his arrest, and after receiving his legal warning, the accused declined to give a statement. However, Rothman was put in cell with a police officer posing as truck driver ostensibly charged with traffic violations. During his conversation with the undercover officer, Rothman provided several incriminating statements.

After a *voir dire* (in Canada, a hearing to determine the admissibility of evidence), the trial judge ruled that in the circumstances, the undercover policeman was a person in authority, that the statement had been improperly elicited, and was therefore inadmissible. A majority of the Court of Appeal disagreed with the trial judge and ordered a new trial. The fundamental question in their view was whether or not the suspect believed the person he was confessing to was a person in authority. If he did, he should have been afforded certain rights and warnings, but because he did not, the confession was admissible. However, the Court did state that an admissible statement could still be excluded if the manner in which the admission was obtained brought the administration of justice into disrepute. Specifically, the Court ruled that confession evidence could be excluded if the police were found to use a level of trickery that shocked the "community conscience" of the judiciary. In other words, if the police used tactics that the trial judge might find so distasteful that the only solution would be to disassociate the judiciary from the act in order to preserve the integrity of the system. In these cases, the evidence stemming from the behavior of the police should be excluded.

It is interesting to note however, that it is not completely clear how this decision is to be reached. There is only minimal guidance provided in the Rothman (and subsequent) decisions, but presumably, it is ultimately up to the individual judgment of the presiding justice in a given case. Fundamentally, *R. v. Rothman* and subsequent rulings have not prohibited the use of police trickery (e.g., exaggerating the strength or amount of evidence against a suspect)—it is still an allowable interrogation technique, as long as it does not bring the administration of justice into disrepute, in the eyes of the trial judge.

R. v. Hodgson (1998)—Further Definitions of Persons in Authority

Another case that deals, in part, with the person of authority issue is *R. v. Hodgson* (1998). In this case, Hodgson confessed to a sexual assault after the father of the victim held a knife to his throat. Hodgson was convicted, and on appeal, argued that his confession should be ruled inadmissible. The Supreme Court of Canada ruled that the confession was voluntary and admissible because the person holding the knife to Hodgson's throat was not a person in authority. Interestingly, in the decision, the Court recognized the unfairness of the situation, but it left it up to Parliament to address the legal aspects of this circumstance.

R. v. Hebert (1990)—The Right to Silence

In this case, the Court considered a confession actively sought by an undercover police officer despite the defendant's explicit indication of his wish to remain silent. One of the issues in this case was whether the accused's right to silence was infringed. Hebert refused to talk to police, but was placed in a cell with a undercover police officer posing as a suspect. The undercover officer began a conversation during which Hebert made several incriminatory statements regarding a hotel robbery. At trial the incriminatory statements were excluded and the accused was subsequently acquitted. But the Yukon Territories Court of Appeal determined that the trial judge erred when he rejected Hebert's inculpatory statements and resolved that the accused's right to silence and right to counsel were not breached.

Ultimately, the Supreme Court of Canada reversed the judgment of the Court of Appeal and restored Hebert's acquittal. However, the Supreme Court specified that there are some parameters around the suspect's right to silence. Police are permitted to question a suspect or accused after counsel has been retained and without the presence of counsel. Thus, the right to silence applies only after detention, and does not affect voluntary statements the accused might make to others, including undercover police officers posing as cell mates. Finally, the court found that there were cases where a violation of the suspect's rights might occur, but when a judge might reasonably decide to allow the evidence to be admitted, as long as it does not bring the administration of justice into disrepute. In cases where police are able to argue they have acted with due care for the suspect's rights, it is likely the statements would remain admissible (*R. v. Hebert*, 1990). Essentially, the Hebert decision provides safeguards involving the right to silence and the right to counsel for persons who have been detained by police. However, this is not an absolute right. These safeguards apply to in-custody interrogation

procedures; the safeguards are not relevant for suspects involved in noncustodial interrogation procedures, including a Mr. Big type operation.

In 2005, Canada's Supreme Court stated further that for a confession to be inadmissible, the suspect must believe both that the person they are speaking to is a person in authority, and that by making a statement, they can influence the outcome of the case (*Grandinetti v. R.*, 2005). In *Grandinetti*, the accused did not believe that the undercover agent was acting for the state, although he did believe that the agent could influence the outcome of the investigation. This is similar to the *Boudreau* case above, where the suspect was told that the Big Boss could make the evidence against her disappear.

R. v. Mentuck (2000)—A Mr. Big Case

In this Manitoba case, Clayton Mentuck stood accused of the murder and sexual assault of 14 year-old Amanda Cook. Cook had been last seen at Harvest Festival Fair grounds on July 13th, 1996. Her body was found several days later in a field near the fairground. On the day after Cook's body was found, Mentuck, who had been staying with family nearby, and who had also attended the fair on July 13th, left town. This was apparently typical behavior for Mentuck, but it made police suspicious of him, as did his comments to his cousin, wherein he indicated he would never take the blame for a crime he did not commit, not even for "a million dollars" (*R. v. Mentuck*, 2000, p. 19). However, as there was no physical evidence to connect Mentuck to the crime, the police developed a fairly typical Mr. Big type scenario to extract a confession from him.

Mentuck was befriended by an undercover officer (named Teufel) and became involved in a number of minor criminal activities for which he was paid cash. The undercover officer asked Mentuck to help count large sums of cash and told him this was "chump change" relative to what he could make as part of the gang (*R. v. Mentuck*, 2000, p. 32). The undercover officer also told Mentuck he had to "come clean" to become part of the organization. The officer introduced Mentuck to the leader of the gang who asked him specifically about the Cook murder. The Big Boss told Mentuck that if he confessed to the crime, he could become part of the gang and earn large sums of money; if Mentuck did not confess, Teufel would also have to leave the organization for bringing in an unreliable person. Mentuck complained that police still believed that he was guilty of the Cook murder, but he vehemently and repeatedly denied his involvement. Teufel then told Mentuck that a person dying of cancer and AIDS would confess to police, so the police would stop bothering him about the Cook murder. Teufel continued to pressure Mentuck into confessing, declaring that if he did not confess, they would both lose their jobs with the organization. Furthermore, if Mentuck did confess, the Big Boss would provide him with a lawyer and the necessary funds to sue the government for having wrongfully charged and jailed Mentuck—Mentuck's portion of the settlement was guaranteed to be a minimum of \$85,000 or 10% of the award, whichever was greater. Mentuck then confessed to the Big Boss that he committed the murder.

However, Mentuck's details were very sketchy—he indicated he must have been "very drunk" when he committed the crime. Before Mentuck wrote and signed the confession, he wrote a note indicating that what he was about to say

was untrue, that he learned all the details from two police officers during the investigation, and that he was innocent of the Cook murder. At trial, the confession was the primary evidence used against Mentuck. Although Mentuck was ultimately found not guilty of the murder and the trial judge recognized the inducement that elicited his confession (going as far as calling it "overpowering"), the Court did not disallow the Mr. Big procedure. Functionally, the decision reaffirmed the procedure as acceptable. As mentioned in the *Rothman* case, whether a police procedure is acceptable includes an assessment of whether the police trickery shocks the conscience and brings the administration of justice into disrepute (*R. v. Rothman*, 1981). Evidently, in the eyes of Canadian courts, the Mr. Big technique does not rise to that level.

Is the Mr. Big Technique Entrapment?

Before moving on to addressing the psychological research on the topic of false confessions, it would be worthwhile to consider another legal issue with regard to the Mr. Big technique. Some readers might consider the Mr. Big technique to be a form of entrapment. Entrapment occurs when a government agent (typically law enforcement) induces a person to commit an illegal act that he or she would not otherwise commit (see Edkins & Wrightsman, 2004, for a review of the topic from a U.S. perspective).

In *R. v. Mack* (1988), the Supreme Court of Canada defined and discussed the issue of entrapment in some detail. Essentially, the accused is not entrapped if the police simply provided the opportunity to commit a crime. Thus, the goal of the police activities must be "to gain evidence for the prosecution of the accused for the very crime which has been so instigated" (*Amato v. The Queen*, 1982, p. 46). If the accused was induced to commit a crime and is charged with that crime, it is entrapment. Because the Mr. Big undercover operation is designed to elicit inculpatory statements or a full confession regarding an event that occurred *before* the operation started and not for criminal activity *during* the undercover operation, this type of sting operation falls outside of the Canadian definition of entrapment.

Summary of Legal Status of the Mr. Big Technique

Essentially, the legal cases cited above indicate the extent and limits of the protections provided to suspects in police custody. Importantly, the protections are afforded to suspects who clearly understand that they are dealing with the police. Practically, there are no safeguards for suspects who become involved and are questioned in the context of a noncustodial interrogation procedure. As long as the suspect does not know the ruse is being orchestrated by police and he or she does not know that the persons involved in the organization are police officers, then it is reasonable to expect that the suspect believes members of the group are not persons of authority. The suspect's ignorance, coupled with the extraordinary motivations to acquiesce to the undercover officers' requests or demands place the suspect at a considerable risk for self-incrimination. However, in their efforts to balance the competing goals of not unduly hampering police investigations, maintaining the integrity of the justice system and ensuring that probative evidence is not unnecessarily excluded, the courts are clear that the Mr. Big technique is a reasonable use of police trickery that would not bring the admin-

istration of justice into disrepute. What is not clear is if the Mr. Big technique's powerful inducements increase the likelihood of a false confession.

IV. The Scientific Evidence and the Mr. Big Technique

For over 20 years, psychologists have explored the psychological factors present during in-custody police interrogations and have identified aspects of interrogation procedures that contribute to false confessions. Although the precise numbers are impossible to determine, false confessions occur with some regularity, and have been documented all over the world (Kassin et al., 2009). Self-reports of incarcerated criminals have found that 12% claim to have falsely confessed to the police (Gudjonsson, Sigurdsson, Einarsson, Bragason & Newton, in press, as cited in Kassin et al., 2009). Icelandic and Danish students interrogated by police claimed to have falsely confessed between 3.7% and 7% of the time (Gudjonsson, Sigurdsson, & Einarsson, 2004; Gudjonsson, Sigurdsson, Asgeirsdottir, & Sigfusdottir, 2006). North American police investigators have estimated that just fewer than 5% of innocent suspects they have interrogated have falsely confessed (Kassin et al., 2009). Although self-report data could be subject to all sorts of biases, there is also clear scientific data on false confessions. The U.S. Innocence Project found that out of 130 cases in which DNA evidence has resulted in post-conviction exonerations, 27% involved false confessions. Researchers estimate that 15%–20% of DNA exonerations in the United States involved a false confession (Garrett, 2008; Scheck, Neufeld, & Dwyer, 2000; <http://www.innocenceproject.org/>). As DNA exoneration cases attest, once a false confession is uttered, it is difficult to detect, and the chain of events that follows is difficult to break.

There are numerous reasons why people confess to crimes they did not commit (see Kassin, 2005, for a review). Our focus is on the role that police interrogation practices, specifically noncustodial techniques such as the Mr. Big operation, play in suspect confessions. These types of confessions, where the suspect often retracts their confession shortly after the interrogation are typically called "coerced-compliant" confessions (see Kassin, 2005). People who falsely confess in this manner know they are not guilty but confess to escape the situation they are in or to gain some sort of perceived reward. These confessions are the most commonly identified false confession types (although it is impossible to know if they truly are the most *common* occurring type of false confession).

One place to start our analysis is to consider how in-custody police interrogation practices differ from noncustodial interrogation practices such as Mr. Big operations. Thus, below we will briefly describe the research which has explored how (and to what extent) the psychological factors and procedures involved in interrogations might increase the risk for false confessions.

In-Custody Interrogation Practices

Although there are some variations, in-custody interrogations usually involve a police officer or detective initially interviewing the suspect regarding a particular crime. The purpose of the initial interview is simply for the officer to determine if there is evidence of guilt (Kassin, 2005). The officer's suspicions can be based on witness evidence, informants, forensic evidence, criminal profiles, or

even "hunches" the officer may have. Thus officers assess the extent to which a suspect is being deceptive, often based on techniques recommended by Inbau, Reid, Buckley, and Jayne (2005; hereinafter referred to as the Reid Technique). The Reid Technique has interrogators focus on verbal cues (such as qualified or rehearsed responses) non-verbal cues (gaze aversion, frozen posture) and behavioral cues (anxiety, being relaxed) to determine whether or not the suspect is lying. Inbau et al. indicate that officers who use these techniques can achieve an 85% accuracy rate when determining if suspects are being deceptive. However, this claim is belied by research suggesting that even trained interrogators are rarely accurate above chance levels (see e.g., Bull, 1989; Memon, Vrij, & Bull, 2003; O'Sullivan & Ekman, 2004; Porter, Woodworth, & Birt, 2000; Vrij, 2003).

Nonetheless, interrogators seem to be biased toward labeling suspects as guilty and deceptive (Kassin, 2005). Presumably, in cases where police use the Mr. Big technique, investigators already believe the suspect to be guilty. Otherwise they would not be staging these elaborate undercover schemes (sometimes costing hundreds of thousands of dollars) to try to obtain a confession. For the investigator who adopts a "guilt-presumptive" frame of mind, the only "successful" outcome is a confession. Indeed, several studies have shown that interrogators who expect the suspect to be guilty asked more guilt-presumptive questions, used more techniques to try to get the suspects to confess, exerted more pressure on the suspects, and made the suspects behave more anxiously (i.e., which is interpreted as "suspicious" behavior; see Kassin, Goldstein, & Savitsky, 2003). When interrogators fail to make progress with a suspect who vehemently maintains innocence, they tend to use increasingly confrontational techniques in order to promote the expected outcome—inculpatory statements or a confession (Kassin et al., 2003).

It is important to note that the consequences of confessing are quite apparent in formal police interrogations. It is clear to the suspect that there are legal implications to providing inculpatory information and that punishment is a possibility. As we discuss below, the consequences are not nearly as apparent in noncustodial interrogations; in fact, we maintain that the motivation to confess is overwhelming and that the drawbacks of doing so are nearly nonexistent. Indeed, the cost of not confessing is typically much higher than the cost of confessing.

Noncustodial Interrogation Practices: The Mr. Big Technique

Although there are some similarities between traditional in-custody interrogation practices and the Mr. Big undercover technique, it seems likely that the two approaches create a considerably different psychological context for suspects. Table 1 offers a comparison of the two types of interrogation practices. It is worth noting from Table 1 that many of the protections inherently built in to in-custody interrogations are missing from Mr. Big-style operations, and many of the inducements and quid pro quo offers of leniency, which are restricted and at times render any confession inadmissible for in-custody interrogations, are allowable in a Mr. Big scenario.

As noted above, the Mr. Big technique involves a great deal of deception. Undercover police officers misrepresent themselves as criminals and promote the notion that suspects can improve their financial and/or legal situation by collab-

Table 1
Comparison of In-Custody (Standard) Versus Non-Custody (Mr. Big) Interrogation Tactics

Interrogation strategy	Standard interrogation	Mr. Big interrogation
Situation is clearly a police interrogation	Yes	No
Suspect knows interrogator is a person of authority	Yes	No
Suspect given explicit/direct inducement to confess	No	Yes
Suspect warned of their right to remain silent	Yes	No
Suspect given option to contact lawyer	Yes	No
Suspect is explicitly threatened by interrogators	No	Yes
Interrogators use minimization tactics	Yes	Yes
Interrogators use confrontation tactics	Yes	Yes
Interrogators use isolation tactics	Yes	Yes
Interrogators deceive suspect about evidence	Yes	Yes
Interrogators explicitly offer lenient legal treatment	No	Yes
Interrogators offer quid pro quo to suspect	No	Yes
There is disclosure of holdback evidence	No	Yes
Police involve suspect in illegal activity	No	Yes

orating in illegal activities. From the very beginning, suspects are clearly motivated to engage with agents who offer work opportunities (albeit ones that suspects generally understand to be illegal) at a time when many suspects cannot secure employment (e.g., Jason Dix was fired from his job which he had held for many years, his wife left him, and he had no income). The agents then gain the suspects' trust over a period of time and form a relationship that some suspects construe as friendships. The culmination of the operation involves the meeting with Mr. Big when the suspect is provided with numerous incentives to provide inculpatory information to the agents.

For suspects, there are no clear drawbacks to refusing to confess in a Mr. Big scenario. After all, suspects believe the agents are criminals who commit illegal acts (some of them very serious, such as the execution-style murder in the Jason Dix case described above). Suspects stand to benefit financially because a confession produces "full membership" in the criminal organization and an opportunity to make large sums of money. Suspects also believe (or want to believe) in Mr. Big's ability to ensure that inculpatory evidence is destroyed. Indeed, in many cases, Mr. Big promises that he can get someone else to confess to the crime, as long as they know the details. For example, in *R. v. Franz* (2000), the suspect was told that a convict serving a life sentence in Mexico would admit to the murder which would permit the convict to be extradited to Canada; the clear implication was that Franz's confession would improve the convict's prison conditions and quality of life. In *R. v. Mentuck*, the suspect was told a cancer patient in prison was willing to confess in exchange for financial security for his family on the outside. Thus the inducements for suspects are tremendous, overt, and seemingly hard to resist.

Psychological Features of Interrogations

Fundamentally, the typical approach to police interrogations can be reduced to three key psychological features (Kassin, 1997, 2005). *Isolation* serves to

remove the suspect from his or her sources of support, often in a special room, and to increase anxiety and desperation. The stress-inducing effects of isolation serve to increase the suspect's motivation to escape the aversive situation (see Kassin & Gudjonsson, 2004 for a review). *Confrontation* serves to convey to the suspect the police officer's suspicions and the facts indicating the suspect's culpability. The interrogating officer may produce evidence (which may or may not be real) and block attempts at denial. Finally, *minimization* serves to reduce the suspect's perceptions of the seriousness of the crime and to provide the suspect with a psychological equivalent of a promise of leniency (Kassin, 2005). The resulting psychological amnesty (Ekman, 1997) serves to reduce the suspect's sense of embarrassment and responsibility for the crime.

Minimization also includes underrating the consequences of the confession, so when it is coupled with isolation and confrontation, the three features set the stage for the suspect to believe that confessing is a viable means to escape the aversive situation. Indeed, in a study designed to assess the impact of minimization on confessions, Russano, Meissner, Narchet, and Kassin (2005) found that using minimization tactics almost doubled the rate of true confessions (42% to 81%), but it also tripled the rate of false confessions (6% to 18%) relative to no specific tactic. Similarly, offers of leniency increase both true (46% to 72%) and false (6% to 14%) confessions relative to no tactic. However, when the tactics were combined, this had little additive effect on true confessions (87%), but dramatically increased false confession (43%) to over seven times the base rate. Importantly, the Russano et al. work was done with in-custody interrogations. The Mr. Big technique not only is missing the protections of an in-custody interrogation, but officers are much more free to apply the confrontational tactics, such as staging a beating for another recalcitrant member of the organization (i.e., the Bonisteel case) and minimization tactics such as offering to have someone else confess (i.e., the Mentuck and Franz cases).

Thus, the pressure on suspects to confess in a Mr. Big-type scenario is substantial, and the enticements are both explicit and significant (see Table 1). It is clear that even in-custody interrogation procedures are prone to eliciting false confessions from suspects. With the pressure on suspects greater, and the perceived costs of confessing eliminated (indeed the cost of not confessing can be substantial), the Mr. Big technique seems likely to provide fertile ground for false confessions.

An International Perspective: Would Mr. Big Stand Up in Other Jurisdictions?

Historically, laws and practices surrounding confessions have been grounded on several theories: privilege against self-incrimination, ensuring the reliability of the confession, preventing abusive interrogation practices, and protecting the rights of suspects to make voluntary and autonomous decisions (see Skinnider, 2005 for a discussion). Countries differ in the extent to which their laws and procedures have reflected consideration for these theoretical approaches. We note here Canada is the only country to explicitly permit the use of the Mr. Big technique for securing confessions.

The United Kingdom has a sophisticated approach to interrogations, which the Canadian and U.S. legal system would do well to consider. After a series of

miscarriages of justice, a new national training program was developed in the United Kingdom to help police officers avoid interrogation styles that might elicit problematic confessions (Bull & Milne, 2004; Kassin et al., 2009). The principles of the PEACE training program (Planning/preparation; Engaging of and explaining to the suspect; Account from the suspect; Closure; and Evaluation) include:

1. The role of the police is to obtain accurate information from suspects.
2. Interviews should be approached with an open mind.
3. Information obtained from the suspect must be compared with what the interviewer already knows.
4. The interviewing officer(s) must act fairly.
5. Vulnerable suspects must be treated with particular consideration.
6. The interviewer need not accept the first answer given.
7. Even when the suspect exercises the right to silence, the interviewer still has a right to ask questions in order to try to establish the truth (so long as these questions are relevant and not repetitive).

These codes of practice were developed in conjunction with police officers, psychologists and lawyers. The PEACE training package has been updated and refined over the years (see Bull & Milne, 2004), and has become respected in the international community. The interview and interrogation process now takes a more conversational tone, rather than a confrontational one. In the U.K., the Police and Criminal Evidence Act (PACE; Home Office, 2003) requires the suspect to be given the "caution" as soon as police suspect criminal activity. Police must also inform suspects that they are entitled to legal representation and that their lawyer may be present during any interrogation, but police must provide this information only when they bring the suspect into the police station (Home Office, 2003; see Slobogin, 2004 for a review).

The U.K. guidelines require that suspects must be reminded of their rights after every break, have 8 hours of uninterrupted rest in each 24, and those who are less than 18 years of age (or who have below normal mental functioning) must have an "appropriate adult" accessible to provide advice and ensure the fairness of the procedures (Home Office, 2003). Importantly, the United Kingdom does not allow the use of police "misdirection" or "falsehoods" to encourage suspects to confess. Police cannot pretend they have evidence they do not possess. As discussed above, misdirections and deception are central elements of the Mr. Big procedure.

Of course, interrogation procedures and suspect rights vary considerably between nations. In France, police have considerably greater power and discretion in conducting inquiries, mostly because the French legal system tends to value crime control over protection of individual liberty (Ma, 2007). Although France recognizes the importance of the right against self-incrimination, police do not provide warnings or cautions to suspects regarding the right to remain silent. Suspects at the police interrogation stage have few rights; it is only when a magistrate receives the case that suspects are entitled to be informed of the

charges and are entitled to legal representation (and after 20–36 hours of police detention). This is especially the case when they are investigating a serious offense (see Ma, 2007 for a review). Although French courts have recently shown a greater inclination toward excluding evidence obtained in the course of a violation of procedural rules (including confessions), it is not clear how well the exclusionary rules would work in the absence of a record of the interrogation procedure. Importantly, even under this system, there is no evidence that the French use Mr. Big-type sting operations.

Russia's Supreme Court has also ruled that inculpatory statements and/or confessions are only admissible if the suspect was provided with a caution regarding the right to remain silent and was provided with the opportunity to have legal counsel. Once a trial judge determines the confession was voluntary and admits it into evidence, the defense is not permitted to offer testimony regarding its voluntariness (including, for instance, testimony regarding promises, inducements, or violence preceding the confession; law.jrank.org, 2009). However, it appears that Russian police routinely convince suspects to waive their rights to silence and counsel. Furthermore, the exclusionary rule is rarely applied, making its role as a safeguard questionable at best.

Australia's approach to confessions offers a different perspective. The common law rule is to exclude a confession unless it is deemed to be voluntary. The three step test is: 1) Was it voluntary? 2) If so, is it reliable? and 3) If so, should it be excluded in the exercise of discretion? (*R. v Swaffield*, 1998; *Pavic v. R.*, 1998; Australia Evidence Act, 1995; see Skinnider, 2005). Here, the burden is on the Crown to demonstrate that the evidence is admissible.

Thus, we see that countries have different traditions with dealing with the question of admissibility of confession evidence and with exclusionary rules. There is a wide variety of approaches, from including policies and procedures designed to maximize reliability and minimize coercion, to placing the burden on prosecutors to demonstrate that the confession statement is voluntary and reliable. Although no jurisdiction explicitly outlaws undercover operations, there is no procedure which we could identify in other countries that is analogous to the Mr. Big technique used in Canada. In this regard, Canada appears to be unique on the international stage.

V. Policy and Research Implications

The Mr. Big technique is a police interrogation procedure that has been used regularly in the Canadian legal system. It has been tested in the courts and in the field and has been found to be an effective and admissible way to obtain confessions from reluctant suspects. However, what is also clear is that the pressures exerted upon suspects are extreme and go far beyond what a suspect might experience during an in-custody interrogation (see Table 1). Based on the psychological literature of in-custody false confessions, we believe the use of these types of noncustodial interrogation techniques may put suspects at high risk of confessing falsely. We know that some of the suspects the police use the Mr. Big technique are probably innocent (e.g., Jason Dix, Clayton Mentuck). However, as with all such cases, it is much easier to avoid a false confession than it

is to determine if a given confession is false after the fact. It is generally preferable to avoid an error than to try and identify it after it has occurred.

A review of the state of knowledge regarding the psychology of interrogations and confessions along with an international bird's eye view of legal, policy, and practice issues lead us to several observations and recommendations with regards to the use of the Mr. Big technique by investigators. We recognize that police agencies and the scientific community share the common goal of seeing justice served. We also recognize the challenges that law enforcement agencies have when investigating serious crimes with increasingly sophisticated criminals. However, it behooves the criminal justice system and social psychologists to work together to help create a situation where the guilty confess and the innocent do not. Although there is no empirical research that focuses on the impact of the Mr. Big technique, there is enough empirical research on in-custody false confessions to raise serious concerns about the Mr. Big technique, and allow us to make some recommendation for future research and practice.

Safeguards

Record the interrogation. Experts have long made the case that recording the entire interrogation so that the focus is shared between the police officer and suspect is of paramount importance (e.g., Lassiter & Geers, 2004; Kassin et al., 2009). Within the Canadian system, videotaping in custody interrogations is the norm. Lassiter and his colleagues (e.g., Lassiter & Geers, 2004; Lassiter, Geers, Munhall, Handley, & Beers, 2001) have argued that filming the interrogator at all times would give judges and jurors the best opportunity to understand the interrogation from the suspects' point of view. This has already been applied in some jurisdictions. For example, New Zealand's national policy is that recordings should focus equally on the suspect and the police officer (see Lassiter & Geers, 2004).

Within a Mr. Big scenario, videotaping the development of the procedure would probably help triers-of-fact understand the context and pressure a suspect may feel to falsely confess to a crime. However, there is a secondary issue to consider as well. As we mentioned above, suspects in a Mr. Big scenario engage in criminal activity. To what extent can jurors distinguish between the defendant's activities in the undercover investigation—for which he or she is not charged—with those of the charges in question? It is possible that jurors could interpret the accused's criminal activities as evidence of a "criminal mind" and, by extension, indication of his or her culpability for the crime. Clearly a careful balancing act must be performed in cases such as these, which allows triers-of-fact enough information to make an informed decision about the context of a confession, while at the same time not introducing prejudicial information about the defendant.

Police deception or trickery. The decision-making process during in-custody interrogations involves, in part, a cost-benefit analysis of capitulating to the pressure to confess against prolonging (or potentially prolonging) the unpleasant and distressing interrogation. During the Mr. Big technique, police frequently introduce real and fabricated evidence against the defendant. However, research suggests that police introduction of false information serves only to facilitate a

desired outcome—a confession (Horselenberg et al., 2006; Kassin & Kiechel, 1996). But whether or not it is a true confession which is elicited is debatable.

We argue that the Mr. Big technique is highly troublesome. Canadian courts have deemed this type of sting operation to be legal and the ensuing confessions to be voluntary. However, courts have made this determination with little (or arguably no) consideration of the considerable body of research on the psychological factors impinging upon interrogations and confessions that, in our opinion, is directly relevant to an analysis of the extent to which the Mr. Big technique produces voluntary and true confessions. Importantly, as we have highlighted in Table 1, the pressures to confess in a Mr. Big-type scenario are substantially greater than during an in-custody interrogation, whereas the immediate costs are minimal. Indeed, there are tangible, immediate, and significant costs to not confessing.

More stringent procedures for evaluating evidence gleaned during investigations. Police should assess all the evidence carefully in terms of whether it supports or contradicts the confession, and they should seek external corroborating evidence (see Meissner & Kassin, 2004). Police need to be willing to accept that exculpatory evidence is just as valid as inculpatory evidence; in other words, police should be cognizant that their pre-existing biases may indeed be influencing their perceptions of evidence. Once police are aware of their biases, they may be better able to counteract them (Wegener & Petty, 1997; Wegener, Kerr, Fleming, & Petty, 2000). This is a fundamental precept of the U.K. PEACE initiative. It is important to note, as we mentioned above, that once police have begun a Mr. Big-type approach to a suspect, they are likely convinced of the suspect's guilt. This sets the stage for significant biases in thinking and interpretation of evidence. Indeed, it is worth noting that in several cases where the Mr. Big approach has failed, no other suspect was ever convicted (or apparently even considered, e.g., the Jason Dix case, *R. v. Mentuck*, 2000).

Limiting the use of the Mr. Big technique. Asking police to stop using the Mr. Big Technique is not practical. It is clear that the Mr. Big technique has helped resolve some very troublesome cases. As mentioned above, the police boast a 75% success rate for confessions, and a remarkable 95% conviction rate using this technique (Gardner, 2004). It is clear it is a very useful investigative technique. However, it does seem reasonable to consider limits on the use of this approach. Indeed, our discussions with an RCMP officer who has been involved in many undercover investigations has suggested that police are supposed to use the Mr. Big technique only in cases where there is forensic evidence linking the suspect to the crime scene, but issues such as motive and level of involvement in the crime are unclear. However, it is clear this is not always the case. In the Jason Dix case for example, all of the forensic evidence had accidentally been destroyed. Perhaps specifying clear limits on the use of the Mr. Big Technique would resolve some of these issues. For example, it could be stipulated that only in crimes where there was strong physical evidence linking the suspect to the crime should this technique be used.

Vulnerable or high-risk populations. Certain populations are vulnerable to influence and to producing false confessions (see Gudjonsson, 2003; Meissner & Kassin, 2004 for reviews). Factors such as psychological disorders, youth, suggestibility, anxiety, and so forth, should be assessed and considered carefully

before interviewing or interrogating people. In *R. v. L. T. H.* (2008), the Canadian Supreme Court found that juveniles and those at higher risk due to mental illness require a higher standard of treatment from police. In these cases, police (during in-custody interrogations) must be sure beyond a reasonable doubt that the suspect understands his or her rights.

Once again however, this does not protect juveniles in a Mr. Big-type scenario. Although Mr. Big scenarios seem rare in juvenile cases, they do still occur (*R. v. T.C.M.*, 2007). In *T.C.M.* police investigating a drug-related fatal shooting relied on eyewitness testimony that *T.C.M.* was among the numerous persons in the immediate area during the shooting. Shortly thereafter, police began a Mr. Big undercover operation designed to elicit incriminatory statements from the juvenile. Undercover officers paid *T.C.M.* to work for a so-called criminal organization and forecast that *T.C.M.* would earn more over time. *T.C.M.* soon saw the potential to move from being a small-time drug dealer in the rough streets of Vancouver to a more comfortable life working with the organization. Eventually, *T.C.M.* provided a series of inculpatory statements that essentially constituted a confession, but some of the statements were inconsistent with the forensic evidence. In arriving at a verdict, the trial judge determined that there were sufficient questions about the evidence to preclude it from meeting the burden of proof. *T.C.M.* was acquitted. Perhaps another reasonable limitation would be to ensure that the Mr. Big technique is not used with juveniles or vulnerable populations.

Summary. Prior work in psychology and law had been effective in creating paradigm shifts in police policy and procedure. One noteworthy example is the shifting police culture with regard to eyewitness identification procedures: it is becoming more and more common for police to use sequential lineup procedures, due to the proven reduction in false identification rates using this approach. Eyewitness research is gradually permeating police policy and practice by a variety of routes, including official inquiries (e.g., Manitoba, 2002), policy working groups (e.g., the U.S. Department of Justice Guide for Eyewitness Evidence; see Wells et al., 2000), as well as expert testimony in criminal proceedings (S. Fulero, personal communication, 2009). It seems clear that policy shifts become possible when psychology has amassed compelling evidence suggesting the importance of those changes (see Patry, Stinson, & Smith, 2009, for a discussion). We feel strongly that research efforts could help understand the consequences of the Mr. Big technique relevant to false confessions, and thus influence policy and practice.

Future Research

There is a clear need for research exploring the impact of various versions of the Mr. Big technique on false confession. We see this is an area where there are a number of fruitful directions that could be explored by psychological and legal researchers. As far as we could find, the only mention of the Mr. Big technique in the empirical literature is by Gudjonsson (2003) who came across the technique during testimony as an expert witness.

There are a number of areas that warrant research. First, does the lack of protections built into the in-custody interrogations (see Table 1) increase the number of false confession in Mr. Big type scenarios? This is a large question, and

not one that is easily addressed. However, the eyewitness testimony literature offers some guidance on how to approach this question. It would be completely reasonable for a critic (legal or otherwise) to argue that the only way to assess the Mr. Big technique would be to develop a reasonable analogue, and then manipulate guilt of the suspect. However, this is clearly not practical. Nonetheless, as was done with eyewitness research, elements of the technique could be assessed individually. If any of these factors, alone or in combination, led to increased false confession, this would provide useful information. For example, we see in Table 1 that inducements to confess are clearly present in the Mr. Big technique. One could manipulate level of inducement (perhaps using specific ones employed in previous Mr. Big stings) and explore their impact on false confessions. Over time and studies, several of these factors could be assessed, some in combination, which would allow researchers to make specific recommendations about the Mr. Big technique. However, it is worth noting that many of these features (e.g., minimization, confrontation, offers of leniency, etc) have been tested empirically for in-custody interrogation and have all been shown to increase the rates of false confession, especially in combination. Perhaps more importantly, the courts have also disallowed many of these techniques (e.g., direct inducements, offers of leniency, quid pro quo offers) during in-custody interrogations, thus their use in noncustodial interrogations are clearly suspect.

As we have mentioned above, the Canadian courts have deemed that this type of deception does not "shock the conscience" of the judiciary so substantially as to bring the justice system into disrepute; however, there is no published research that examines this issue—we urge researchers to shed some light on this question. Research examining the public's views on who is a person of authority may also help inform policy makers and legal decision-makers. It is important to note, however, that Courts may be reticent to consider social science evidence when deciding whether a particular law enforcement technique rises to the level of shocking the conscience or bringing the administration of justice into disrepute. This test was first established in *Rothman* and the Court later elaborated the criteria for a judicial analysis of this issue in *R. v. Collins* (1987). Quoting from Morrissette (1984) Justice McIntyre (dissenting) noted in *Collins* that "I do not suggest that we should adopt the 'community shock' test or that we should have recourse to public opinion polls and other devices for the sampling of public opinion. (p. 34)" The (possible) utility of social science evidence in this context is in some ways analogous to the utility of social science for evaluating the "evolving standards of decency" doctrine in capital punishment jurisprudence in the United States: social science evidence may be irrelevant to the legal analysis depending on its basis (see Schopp & Patry, 2003).

V. Conclusions

Ultimately, the Canadian courts have both allowed and re-confirmed (e.g., *R. v. Mentuck*, 2000; *R. v. Bonisteel*, 2008) tactics in noncustodial interrogation that have been demonstrated in the psychological literature to elicit false confessions in the context of in-custody interrogations. There is therefore reason to believe that the Mr. Big technique may be very problematic from this standpoint. The adversarial nature underlying many legal structures tends to put the focus on

winning, sometimes at the expense of justice (Yant, 1991). Police and prosecutors are under pressure to produce a high percentage of convictions, and this pressure is amplified in high profile cases, as use of the Mr. Big scenario exemplifies. The problem with false confessions, as with any mistakes made in the legal system (e.g., mistaken eyewitness identifications; poor hypnotic procedures) is that they are easier made than identified and undone. The best approach is to avoid the errors in the first instance by ensuring policies and procedures maximize accuracy while not unduly restricting police investigative techniques or stifling individual rights. Psychological research has much to offer in this respect, and future research may bear out important changes in the law that can help reduce the likelihood of false confessions with the Mr. Big technique, and limit the likelihood of related wrongful convictions.

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 55217-1-I
)	
ATIF RAFAY,)	
)	
Appellant.)	

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I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

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