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An Overview of Expert Psychological Testimony in False Confession Cases

False confession cases¹ draw upon decades of well-established psychological principles and research findings. The defendant may be a youth or young adult, possess developmental disabilities, or may suffer from a mental illness, rendering him or her uniquely susceptible to social influence. In such cases, developmental and clinical psychological perspectives are informative. The interrogation in which the defendant confessed may have been intense, replete with maximization and minimization tactics and other ploys that wear down the defendant's ability to defend himself, alter his or her choice architecture, and render him or her highly susceptible to social influence. In such cases, social and cognitive psychological perspectives are informative. The interrogation may have been preceded by a polygraph exam, which the defendant was informed he or she miserably failed. The polygraph may or may not have been legitimate. The post-polygraph interrogation may have been conducted by none other than the investigator who administered the polygraph. In such cases, psychophysiological and psychological perspectives are informative.

When contesting a confession as false, it behooves the defense lawyer to understand the relevant psychological principles that got the defendant into his or her predicament. Psychologists serving in the role of consultants and expert witnesses can help educate the lawyer about the relevant principles, perform the relevant assessments, and ultimately educate the factfinders, through reports and testimony, about the relevant principles and the risks of false confessions. Because of the potential psychological contributions to a case, however, no one psychologist can perform all of the functions described in the previous paragraphs. Psychology is a diverse field, and post-graduate training is typically narrow. This article provides an overview of three different expert witness subjects that lawyers should consider, depending on the unique features of their cases: false confession experts, clinical forensic experts, and polygraph experts.

False Confession Experts

Psychological and social scientific research on false confessions is substantial. The research informs us about the breadth of complex issues surrounding false confessions. False confession experts are typically social, cognitive, developmental, or clinical psychologists, though some have training in criminology, law, or sociology. The false confession expert can explain the prevalence of false confessions in exoneration cases. The false confession expert should be familiar with the types of false confessions, typically referred to as voluntary false confessions, coerced false confes-

BY BRIAN L. CUTLER, PH.D., JEFFREY S. NEUSCHATZ, PH.D.,
AND CHARLES R. HONTS, PH.D.

sions (or compliant false confessions), and internalized false confessions (or persuaded false confessions).²

The false confession expert would identify the relevant personal and situational risk factors for false confession. The typical personal risk factors include youth, suspects with developmental disabilities, and suspects with mental illness.³ The false confession expert should be able to explain the ways in which cognitive processing and decision-making differ for these disadvantaged groups relative to older, more intelligent, and more mentally healthy counterparts.

The situational factors reviewed by the false confession expert would include such factors as isolation, fatigue, hunger, and physical discomfort experienced by the suspect. The isolation of the interrogation room alone causes stress and internal pressure to escape the interrogation. Fatigue due to lack of sleep prior to interrogation and/or interrogations that are excessive in duration deplete the suspects' resistance and renders them more susceptible to social influence. Similarly, hunger due to lack of eating prior to interrogation or during excessively long interrogations and physical discomfort due to illness, injuries and/or withdrawal deplete resistance to pressure as well. Interrogation length is a particular risk factor for false confession,⁴ for it wears down resistance through prolonged stress, fatigue, hunger, discomfort, repeated use of interrogation tactics, and repeatedly arguing one's innocence.

Most false confessions result at least in part from high-intensity interrogations. With increasing frequency, the false confession expert's opinions are informed by a review of the recorded interrogation. High-intensity interrogations are those in which the interrogator uses heavy doses of accusations, minimization tactics, threats, incentives, and evidence ploys (including false evidence ploys). The interrogator repeatedly accuses the suspect of having committed the crime and expresses unwavering confidence in the suspect's culpability. When the suspect protests her innocence, the interrogator accuses the suspect of lying. The interrogator uses minimization tactics, such as offering up excuses or rationales for having committed the crime and that give the appearance of making the crime seem less heinous, more acceptable, and less worthy of punishment. Another form of minimization is to make the crime seem less serious than it actually is. Yet another form is to normalize the crime, that is, to suggest that it happens all the time and it is not a big deal. The

interrogator may use explicit or implicit threats of harsher consequences for maintaining one's innocence or suggest, explicitly or implicitly, that a confession will result in more lenient treatment or will make it easier on the suspect's family if she just admits her culpability.

One particularly powerful risk factor for false confession is the use of false evidence ploys.⁵ The investigator may inform the suspect that he failed the polygraph exam when he in fact passed. The investigator may claim that the suspect was identified by one or more eyewitnesses or victims. Or the investigator may indicate that DNA found at the crime scene is being analyzed. The investigator may tell that suspect that her accomplice has already confessed and that the investigator is trying to allow this suspect the same courtesy. The investigator may claim that forensic evidence has or will soon unequivocally tie the suspect to the crime.

The false confession expert should be able to explain the common psychological effects of interrogation, discussing such effects as impulsivity, stress, temporal discounting, and regulatory decline.⁶ Impulsivity is a hallmark of youth, but it is not limited to the young. It is characteristic of individuals of all ages who engage in antisocial behavior. Stress is inherent in the interrogation. Temporal discounting refers to short-sighted decision-making, or, in other words, the tendency to make decisions based on short-term needs rather than long-term consequences. Choosing to confess in order to end an intense interrogation at the expense of the long-term consequences of imprisonment is an example of temporal discounting. Temporal discounting is also linked to false confessions.⁷ Regulatory decline refers to the depletion of one's mental resources. Mental resources can become depleted due to fatigue, hunger, discomfort, and repeated, prolonged attempts to persuade the interrogator of one's innocence.

There is a growing literature on how being innocent affects one's behavior before and after interrogation.⁸ Innocent people are more likely to waive their custodial rights, more likely to believe they can persuade others of their innocence, and more likely to believe that, even if they confess, their innocence will eventually set them free. Even innocent suspects, who may begin the interrogation *relatively* unstressed, become more stressed as the interrogation ramps up.⁹ Indeed, when an innocent suspect perseveres at maintaining her innocence during interrogation, the investigator who believes her to be guilty doubles down with more intense

accusatory interrogation techniques.¹⁰ Thus, the false confession expert can explain how innocence itself puts people at risk for false confession.

False confessions may contain a level of detail that makes the suspect look culpable in the eyes of the factfinder. The false confession expert should be able to explain how a false confession becomes contaminated in the course of interrogation and how the contamination makes the confession vivid, compelling, and convincing. In content analyses¹¹ of the false confessions in DNA-based exonerations cases, the false confessions were found to represent richly detailed narratives, the likes of which can only be produced by the guilty suspect. For example, confessions typically contained thoughts and emotions of the perpetrator, reactions by the victim, and details about how and specifically where the crime occurred. Sometimes the false confessions were accompanied by apologies and expressions of remorse. The details provided by the innocent suspects were learned from the interrogators who, inadvertently (or intentionally), conveyed them to the suspect during the course of intense interrogations.¹² In sum, the false confession expert should be able to explain the process by which investigators advertently or inadvertently leak crime details to the suspect and educate her about the crime so that when she succumbs to pressure and falsely confesses, her confession contains detail that only a guilty suspect should know.

Last, the false confession expert should be able to educate the lawyer about modern standards for interrogation and alternatives to accusatory interrogation. While accusatory techniques such as the Reid Technique¹³ are *de rigueur* in the United States, other techniques, typically referred to as "information-gathering interviews," are commonplace in the United Kingdom, are becoming more commonplace in Canada, and are occasionally being trained in the United States as well. Research comparing accusatory interrogation techniques with information-gathering interviews shows that the latter lead to fewer false confessions but comparable levels of true confessions.¹⁴ The expert's role would not be to provide an opinion about whether a confession is false but rather to provide the factfinder with relevant scientific knowledge to aid in this determination.

Clinical Forensic Experts

The false confession expert, as described above, limits his opinions to the scholarship of false confessions



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(broadly defined) and police interrogation techniques. In cases in which the lawyer has concerns about the defendant's abilities in the investigation and the extent to which these abilities threatened the defendant's competence to waive *Miranda* rights or rendered her

assessments in confession cases.¹⁵ The assessment procedure is similar when evaluating waiver voluntariness and confessions. The clinical forensic psychologist will begin by reviewing details regarding the physical and psychological environment in which law

The expert should be able to explain how a false confession becomes contaminated during interrogation and how the contamination makes the confession vivid, compelling, and convincing.

particularly susceptible for false confession, the lawyer should seek a psychological evaluation of the defendant from a licensed clinical forensic psychologist.

The report and testimony of a clinical forensic psychologist can be helpful before trial when the lawyer moves to suppress a confession on the basis that the defendant did not voluntarily waive her *Miranda* rights and/or at trial to help explain why a defendant was particularly vulnerable to falsely confessing, either voluntarily or in response to the psychological pressure induced in interrogation.

One clinical forensic psychologist described the procedures that he regularly uses in conducting psychological

enforcement officers obtained the waiver or confession. These details would include all relevant events leading up to the waiver or confession. In the case of a waiver, the expert would review the physical conditions in which *Miranda* was administered and, to the extent possible, the way it was administered. In the case of a confession, the clinical forensic psychologist would review the events leading up to the interrogation and the interrogation itself if a recording is available. The clinical forensic psychologist also reviews any available education, medical, psychological, and criminal records of the defendant.

Armed with this context and background information, the clinical forensic psychologist conducts a forensic assessment with the defendant. During the assessment, the clinical forensic psychologist will administer a variety of assessments, such as a psychiatric screening instrument, an intelligence test, a neuropsychological screening test, a test of reading and listening ability, and a test for cognitive deficits. Other tests may include a test for feigning or exaggerating symptoms. The expert may also administer more specialized instruments, such as a *Miranda* comprehension test¹⁶ and a test of suggestibility.¹⁷

The assessments inform the clinical forensic psychologist's opinion about the defendant's current state of mind. The clinical forensic psychologist can then integrate these opinions with what he learned about the context in which the police took the waiver or confession and develop expert testimony about the defendant's state of mind at the time of the waiver. The expert opinions are typically communicated in the form of a written report and sometimes accompanied by expert psychological testimony.

Polygraph Experts

Although polygraph tests can be used as legitimate investigative tools, they are sometimes used as an elaborate evidence ploy during an interrogation.¹⁸ The investigator persuades the suspect who professes her innocence that taking a polygraph can help establish her innocence, and the suspect agrees to submit to the polygraph exam. The investigator who conducts the polygraph typically begins the exam with what appears to be an investigative interview, but often serves as a foundation process for a confession-oriented interrogation. The examination then continues with an explanation of the polygraph, often overstating its ability to detect deception, sometimes grossly so. The investigator walks the suspect through a demonstration in which the suspect is instructed to lie, and the polygraph examiner claims to be able to detect the lie from the polygraph recording. The examiner then reviews the test questions that will be asked during the polygraph, including the critical questions addressing culpability for the crime under investigation.

When the polygraph exam formally begins, the investigator typically cycles through a series of pre-planned questions — including the critical questions — a minimum of three times. The coop-

erative suspect answers each question. Following the exam, an investigator informs the suspect that he failed the exam, further confirming the already unwavering belief in his guilt and putting more pressure on the naïve — and perhaps already worn down — suspect to confess.

This tactic is called the “polygraph ploy” because in some documented cases the polygraph results are exaggerated or even completely fabricated. In other cases, law enforcement organizations have built in policies and practices that minimize errors of clearing the innocent at an extreme cost of falsely accusing the actually innocent. Thus, the polygraph is sometimes used as an elaborate false evidence ploy, and false evidence ploys are known to increase the risk of false confessions.¹⁹ Polygraph tests may be a particularly egregious false evidence ploy as the examiner will have attempted to establish himself or herself as an impartial figure who is only interested in conducting a valid test. Such trust can then be easily subverted toward what may have all along been a plan to interrogate the suspect.

The intent of this analysis is not to disparage the polygraph as a scientific instrument, for when used properly, the polygraph can yield impressive accuracy rates.²⁰ Also, the intent is not to disparage all polygraph examiners, for some are well trained, use evidence-based testing methods, and administer polygraph exams diligently and with integrity. The critical question for the defense lawyer is, was the polygraph examination administered to the client a legitimate test or was it a cynical false evidence ploy, the likes of which enhance the risk of false confession?

Consulting polygraph experts are typically polygraph researchers and/or highly experienced polygraph examiners. The polygraph expert can assist the lawyer by reviewing the polygraph report and, ideally, the video recording of the polygraph administration. The expert can inform the lawyer about the qualities of the polygraph apparatus, the specific polygraph test used by the examiner, the validity of the test in general, and any aspects of the test that compromised the results or made the results ambiguous. The expert can review the polygraph data and provide the lawyer with an independent assessment of the suspect’s truthfulness with respect to the critical questions. The polygraph expert can tell defense counsel if the test was conducted and scored under scientific best practices. The expert can inform the lawyer

about any bias created by having the polygraph administered by an investigator who is invested in the case and the case outcome.

Indeed, it is particularly problematic when the polygraph examiner, following the exam, pressures the suspect to confess. Think of the polygraph as a forensic test designed to provide data about the suspect’s culpability. The polygraph administrator should therefore be at arm’s length from the investigation. In what other realm does the technician who conducted a forensic test (e.g., DNA, hair or fingerprint analysis) conduct the interrogation and take the confession following the forensic test? If the case goes to court, the expert can educate the factfinder about all of the matters discussed above.

Conclusion

False confession experts, clinical forensic experts, and polygraph experts can assist lawyers with understanding their evidence and educating factfinders about the relevant psychological principles in the case. In some cases, the expert testimony on these topics may be novel and/or contested at the admissibility stage. The expert can be helpful in addressing typical challenges to admissibility. For example, challenges to false confession experts typically center on whether the testimony is helpful to the jury (Is it a matter of common sense?) and lack of expert consensus about the expert opinions. Over the years, psychologists have addressed these issues empirically and have convincingly demonstrated that false confessions are *not* matters of common sense and that there is a high degree of expert consensus on these matters.²¹ Experts help the lawyer make the argument and provide the relevant peer-reviewed sources. When feasible, expert psychologists should be retained early in the case. The expert may be in a position to assist the lawyer with developing discovery relevant to the expert’s opinion. When the expert is retained late in the game, there may be missed opportunities to gather opinion-relevant details about the crime or witnesses. When expert testimony is not admitted or the lawyer chooses not to proffer the expert, the expert may nevertheless be helpful in educating the lawyer about the evidence and assisting with various aspects of trial strategy, such as developing questions for examination and cross-examination of other witnesses.

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Notes

1. There is a distinction to be made between false confessions and disputed confessions, where false confessions are those established to be false (e.g., in exoneration cases) and disputed confessions are those in which a defendant confessed, and the lawyer is challenging the confession’s veracity. We use the term false confessions throughout this article but our opinions apply to disputed confessions as well.

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About the Authors

Brian L. Cutler is Professor of Psychology at Ontario Tech University and President of Coral Coast Group, Inc., which houses the Interrogation Evaluation Clinic and Eyewitness Evidence Evaluation Clinic. Dr. Cutler regularly serves as a consultant and expert witness in false confession and eyewitness identification cases.



Brian L. Cutler, Ph.D.

Ontario Tech University
Oshawa, Ontario
Canada

EMAIL cutler@coralcoastgroup.com

WEBSITE www.coralcoastgroup.com

Jeffrey S. Neuschatz, Ph.D., is a Distinguished Professor of Psychology at the University of Alabama in Huntsville. Dr. Neuschatz has pioneered research on jailhouse informant testimony. He has testified as an expert witness or qualified as an expert in approximately 100 criminal cases in nine states, federal courts, and military courts.



Jeffrey Neuschatz, Ph.D.

University of Alabama
Huntsville, Alabama
256-824-2321

EMAIL neuschaj@uah.edu

WEBSITE www.uah.edu

Charles R. Honts, Ph.D., is Professor of Psychological Science at Boise State University. He is one of the world's top experts on polygraph testing. Professor Honts has appeared as an expert more than 130 times in courts in the United States, Australia, and Canada.



Charles R. Honts, Ph.D.

Boise State University
Boise, Idaho
208-867-2027

EMAIL chonts@boisestate.edu

WEBSITE <http://charleshontsphd.com>