No. 2012-00306

Court of Appeals
of the
State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

ADRIAN THOMAS

Defendant-Appellant

AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT

DOROTHY HEYL
LATONYA BROOKS
MILBANK, TWEED, HADLEY & McCLOY LLP
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-5088
dheyl@milbank.com

Attorneys for Amicus Curiae
The Innocence Network

Date Completed: November 22, 2013

CORPORATE DISCLOSURE STATEMENT
PURSUANT TO RULE 500.L(F)

Proposed *amicus curiae* the Innocence Network is an affiliation of sixty-two Member organizations. It has no parents or subsidiaries.

Its member organizations include: the Alaska Innocence Project, Arizona Justice Project, Inc., Association in Defence of the Wrongly Convicted, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Cooley Innocence Project, Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Griffith University Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Indiana University School of Law Wrongful Conviction Clinic, Innocence Institute of Point Park University, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Brandeis Innocence Project, Kentucky Innocence Project, Maryland Office of the Public Defender Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern

Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Ohio Public Defender's Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project, Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project of the New York Office of the Appellate Defender, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project, Texas Center for Actual Innocence, Texas Innocence Network, The Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Project Clinic, University of British Columbia Law Innocence Project, University of Leeds Innocence Project, Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, and Wisconsin Innocence Project.

TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICUS CURIAE 1

PRELIMINARY STATEMENT 2

STATEMENT OF FACTS 21

A. Hospitalization of Matthew Thomas 21

B. First Statement by Adrian Thomas and Threat to Bring in His Wife for Questioning 24

C. Commitment of Adrian Thomas to Mental Health Facility and Additional Statements as to Cause of Death by Albany Medical 30

D. Second Statement of Adrian Thomas and Deception about Saving His Son's Life if He Confesses 32

E. Third Statement of Adrian Thomas and Police Demonstration of How Matthew Thomas was Forcefully Thrown 40

ARGUMENT 45

I. THE LEGAL FRAMEWORK FOR ANALYZING DISPUTE CONFESSIONS AS TO THEIR VOLUNTARINESS AND RELIABILITY 45

A. The "Voluntariness" Standard Under the Due Process Clause of the U.S. Constitution 47

B. The Broader "Voluntariness" Standard of New York C.P.L.R. 60.45 52

II. THE INTERROGATION OF ADRIAN THOMAS PRODUCED A COERCED AND UNRELIABLE CONFESSION 58

A. The Excessive, Indeterminate Length of the Incommunicado Interrogation 58

B. The Threat to Pick Up Wilhemina Hicks for Questioning 61

C. Promises of Leniency and the "Accident" Scenario 67

D. The Ruse that Mr. 70

E. Contamination 77

III. WHEN A DISPUTED CONFESSION IS ADMITTED INTO EVIDENCE, EXPERT TESTIMONY ON FALSE CONFESSIONS

MUST BE ALLOWED AS A NECESSARY SAFEGUARD TO PREVENT WRONGFUL CONVICTIONS 81

A. The Science on Police Interrogation Methods and False Confessions Satisfies the Requirements of Frye 87

B. Studies on Police Interrogations and False Confessions are "Beyond the Ken" of the Jury 90

IV. THIS COURT SHOULD REQUIRE THE VIDEOTAPING OF COMPLETE INTERROGATIONS IN ORDER THAT COURTS CAN ADEQUATELY ASSESS VOLUNTARINESS AND RELIABILITY. 100

CONCLUSION 105

TABLE OF AUTHORITIES

Page(s)

CASES

Aleman v. Village of Hanover Park,
662 F.3d 897 (7th Cir. 2011) (Posner, J.), *cert. denied*, 2012 U.S. Lexis 4869 (2012).....14, 55, 57

Berkemer v. McCarty,
468 U.S. 420 (1984).....49

Brown v. Mississippi,
297 U.S. 278 (1936).....47, 57

Bruton v. United States,
391 U.S. 123 (1968).....17

Corley v. U.S.,
556 U.S. 303 .....3, 46

De Long v. *Erie County*,
60 N.Y.2d 296 (1983).....90

DeLong v. Erie County,
60 n.Y. 2d 269 (1983).....90, 91

Dickerson v. United States,
530 U.S. 428 (2000).....49

Everett v. Murphy,
329 F.2d 68 (2d Cir. 1964) 75

Frazier v. Cupp,
394 U.S. 731 (1969).....72

Frye v. United States,
293 F. 1013 (D.C. Cir. 1923).....passim

Haynes v. Washington,
373 U.S. 503 (1963).....60, 61

J.D.B. v. North Carolina,
131 S.Ct. 2394 (2011).....3, 46

Jackson v. Denno
378 U.S. 368 (1964).....47

Leyra v. Denno,
347 U.S. 556 (1951).....73

Miranda v. Arizona,
384 U.S. 436 (1966).....passim

New York v. Schreiner,
77 N.Y.2d 733 (1991).....15

New York v. Spano,
360 U.S. 315 (1959).....passim

Parker v. Mobil Oil Corp.,
71 N.Y.3d 434 (2006).....88

People v. Abney,
13 N.Y.3d 251 (2009).....92

People v. Anderson,
42 N.Y.2d 35 (1977).....51, 52, 58, 59

People v. Bay,
76 A.D.2d 592 (1st Dep't 1980), *aff'd*, 67 N.Y.2d 787 (1985).....70

People v. Bedessie,
19 N.Y.3d 147 (2012).....19, 101

People v. Buffom,
214 N.Y. 53 (1915).....45

People v. Cronin,
60 N.Y.2d 430 (1983).....91

People v. Crosby,
180 Misc.2d 43 (Nassau Co. 1999).....69

People v. DeJesus,
63 A.D.2d 148 (1st Dep't 1978) 59, 69, 70

People v. *Diaz*,
20 N.Y.3d 569 (2013) 90

People v. Drake,
7 NY3d 28, 850 NE2d 630, 817 NYS2d 583 [2006] 82

People v. Everett,
10 N.Y.2d 500 (1962) 75

People v. Guilford,
21 N.Y.3d 205 (2013) 58, 59

People v. Helstrom,
50 A.D.2d 685 (3d Dep't 1975) 65, 7

People v. Jones,
73 N.Y.2d 427 (1989) 91

People v. Keene,
148 A.D.2d 977 (4th Dep't 1989) 7, 66

People v. Lee,
96 N.Y. 2d 157 (2001) 91, 92

People v. LeGrand,
8 N.Y.3d 81, 88, 89, 90

People v Leonard,
59 A.D.2d 1 (2d Dep't 1977) 60, 76

People v. Leyra,
302 N.Y. 353 (1951) 73, 74, 75

People v. Leyra,
302 NY 353 (NY 1951) 7, 74, 75

People v. Lyons,
4 A.D 3d (3d Dep't 2004) 62

People v. Pereira,
26 N.Y.2d 265 (1970) 72

People v. Santiago,
17 N.Y.3d 661 (2011) 81

People v. Tarsia,
50 N.Y.2d 1 (1980) 8, 73, 76, 77

People v. Urowsky,
89 A.D.2d 520 (1st Dep't 1982) 69

People v. Wesley,
83 NY2d. 417 87

People v. Young,
7 N.Y 3d 40 (2006) 82, 92

People v. Zimmer,
68 Misc.2d 1067 *aff'd*, 40 AD2d 955 ..... 59, 76

Rogers v. Richmond,
365 U.S. 534 (1960) ..... passim

Selkowitz v. County of Nassau,
45 N.Y.2d 9 (1978) 91

Stein v. New York,
346 U.S. 156 (1953) 45

United States v. Lynumn,
372 U.S. 528 (1963) 7, 64

Warney v. State of New York,
16 N.Y. 3d 428 (NY. 2011) ..... passim

Yarborough v. Alvarado,
541 U.S. 652 (2004) 49

RULES AND STATUTES

22 N.Y.C.R.R. 500.23(4)(iii) 1

C.P.L.R. Section 60.45 (2)(b)(i) 14

ARTICLES

Blair, J.P., *A Test of the Unusual False Confession Perspective: Using Cases of Proven False Confessions*, 41 CRIM. L. BULL. 127, 135 (2005).....98

Chojnacki, Danielle E., et al.., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 Ariz. St. L.J. 1,3-4 (2008) 9, 93

Costanza Mark, et al.., *Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony*, 7 J. OF EMPIRICAL LEGAL STUDIES, 231-247 (2010).....94

Davis & Leo, *Commentary: Overcoming Judicial Preferences for Person-Versus Situation-Based Analyses of Interrogation- Induced Confessions*, 38 J. AM. ACAD. PSYCHIATRY L. 187, 188 (2010) 96

Drizin, Steven A. & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 339-41 (2001).....102

Drizin, Steven A. and Leo, Richard A., *The Problem of False Confessions in the Post-DNA World,* 82 N. C. L. REV. 891 (2004).....passim

Dwyer, Jim, *After Baby Hope Confession, Assessing the Value of Taped Confessions* (N.Y. Times Oct. 24, 2013).....99

Garrett, Brandon L. *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010).....86, 102

Gross, Samuel R., et al., *Exonerations in the United States from 1989-2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (Winter 2005).....3

Gudjonsson, G., *The Psychology of Interrogations and Confessions* 141-151 (2003).....97

Gudjonsson & Pearse, *Suspect Interviews and False Confessions*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 33, 33-37 (2011) 97

Iris Blandón-Gitlin et al., *Jurors Believe Interrogation Tactics Are Not Likely To Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?,17* PSYCHOL. CRIM. & L. 1-22 (2010).....99

Kamisar, Yale, *A Look Back at a Half-Century of Teaching, Writing and Speaking about Criminal Law and Procedure*, 2 OHIO ST. J. CR. L. 69, 75 (2004).....3

Kassin & McNall, *Police Interrogations and Confessions*, 15 LAW & HUM. BEHAV. 233, 234-235 (1991).....97

Kassin, *A Critical Appraisal of Modern Police Interrogations*, in *Investigative Interviewing* 207-228 (Williamson ed., 2006).....96

Kassin et al., *"I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211, 216 (2005).....41

Kassin et al., *Police-Induced Confessions: Risk and Recommendations, 34 L. HUM. BEHAV.1* at 6 (2010).....41, 96, 97

Kassin & Gudjonsson, *The Psychology of Confession Evidence*, 5 PSYCHOL. SCI. PUB. INT. 33, 59 (2004).....85, 93, 98

Kassin, Saul M. *et al.*, *Police Interviewing & Interrogation: A Self-Report Survey of Police Practices & Beliefs*, 31 Law Hum. Behav. 381 (2007).....96

Kassin, Saul M. & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis,* 21 L. & Human Behavior 5 (1997).....82

Leo, Richard A. & Steven A. Drizin, The Three Errors: Pathways to False Confession & Wrongful Conviction, in Police Interrogations & False Confessions (1st ed. 2012).....54

Leo, Richard A. and Ofshe, Richard J., "*The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*," 88 J. Crim. L. & Criminology 429, 450 (1998).....95

Leo, Richard, *Inside the Interrogation Room* 86 J. CRIM. L. CRIMINOLOGY 1, 279 (Winter 1996).....98

Marcus, Paul, "*It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions,* 40 Val. U.L. Rev. 601 (2006).....49

McKinley, James, *Confession in 'Baby Hope' Killing Was Taped, but the Interrogation Was Not* (N.Y. Times Oct. 23, 2013).....103

Redlich & Goodman, *Taking Responsibility for an Act Not Committed: Influence of Age and Suggestibility*, 27 LAW & HUM. Behav. 141, 151 (2003).....97

Robles, Frances, "*Several Murder Confessions Taken by Brooklyn Detective Have Similar Language*," N.Y. Times (June 12, 2013) 4

Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 485 (2005).....97

Saul M., Meissner, Richard A., Richman, Christian A., Colwell, Kimberly D., Leach, Lori H., Leo, Richard A., Meissner, Christian A., Richman, Kimberly D., Colwell, Lori H., Leach, Amy-May & LaFon, Dana, *The Psychology of Confession Evidence* 96

Sullivan, Thomas P., "*Police Experiences with Recording Custodial Interrogation*," Nw. U. School of Law, Center on Wrongful Convictions, Number 1 (2004).....104

Vrij et al., *Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection*, 11 Psychol. Sci. Pub. Int. 89, 101, 102 (2010) 41

Zimbardo, Philip G., *The Lucifer Effect: Understanding How Good People Turn Evil* (New York 2007).....85

INTERNET SITES

http://articles.chicagotribune.com/2011-01-30/news/ct-met-riley-fox-report-0130-20110130_1_riley-fox-scott-wayne-eby-video-confession 18

http://legislature.omaha.com/2012/09/05/justice-comes-for-darrel-parker-from-jon-bruning/ 18

http://triblive.com/x/pittsburghtrib/news/westmoreland/s_340922.html#axzz2lC867T4a.....18

http://www.forensicpsychologyunbound.ws/OAJFP/Volume_5__2013_files/Garofalo%202013.pdf.....86

http://www.huffingtonpost.com/2009/11/25/ozem-goldwire-autistic-ma_n_371023.html 19

http://www.innocenceproject.org.....2

http://www.innocenceproject.org/ Content/False_Confessions Recording_Of_Custodial_Interrogations.php.....104

http://www.innocenceproject.org/Content/Background_on_Dixmoor_and_Englewood_cases.php 17

http://www.innocenceproject.org/Content/Byron_Halsey.php 18

http://www.innocenceproject.org/Content/Frank_Sterling.php 67

http://www.innocenceproject.org/Content/Korey_Wise.php 83

http://www.innocenceproject.org/fix/False-Confessions.php 104

http://www.nbcnews.com/id/14609924/.....18

http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202628574223.....11

http://www.nytimes.com/video/magazine/100000001188108/jerry-hobbs-confession.html 18

http://www.reid.com/educational_info/r_tips.html?serial=3258095019989437.....77, 78

http://www.syracuse.com/news/index.ssf/2011/10/an_open_and_shut_case_against.html.....19

http://floridainnocence.org/content/?tag=kevin-fox 95

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Innocence Network (or the "Network") is an association of organizations dedicated to providing *pro bono* legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The more than 60 members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Innocence Network and its members are dedicated to improving the accuracy and reliability of the criminal justice system in future as well as pending cases. Drawing on the lessons from cases in which innocent persons were wrongly convicted, the Network advocates reforms that will enhance the truth-seeking functions of the criminal justice system in order to reduce the incidence of wrongful convictions. Network members pioneered the post-conviction DNA model that has to date exonerated 311 innocent persons. As set forth in its motion for *Amicus Curiae* relief, the Innocence Network believes that this brief, which explains the framework for assessing disputed confessions and the need for expert testimony on false confessions, would be of assistance to the Court, pursuant to 22 N.Y.C.R.R. 500.23(4)(iii).

PRELIMINARY STATEMENT

False confessions are one of the leading causes of wrongful convictions. While the precise number cannot be quantified, the number of false confessions among DNA exonerations indicates the shocking magnitude of the problem. According to data compiled by the Innocence Project, of the 311 known wrongful convictions in the United States, 81 of them, or 27% of them, were caused by, or related to, false confessions.[1]

The problem of false confessions is even more pronounced with respect to homicide cases. Mis-identifications may be the leading cause of wrongful convictions for all of the DNA exonerations, but in exonerations of homicide convictions, false confessions are far and away the leading cause. False confessions were involved in 62% homicide cases, while mis-identifications explained half that number of homicide cases (or 31%). This statistic is consistent with studies showing that there are more documented false confessions to murders than to any other crimes.[2]

---

1 Innocence Project, http://www.innocenceproject.org (last visited November 21, 2013). This number is only the tip of the iceberg since most violent crimes lack biological evidence for DNA testing. Moreover, a substantial percentage of the Network's projects have had to be closed because the biological evidence was unfortunately lost or destroyed in the years after the crime occurred.

2 *See* Drizin, Steven A. and Leo, Richard A., *The Problem of False Confessions in the Post-DNA World,* 82 N. C. L. REV. 891 (2004) (finding that 81% of 125 false

New York has a particularly troubling history when it comes to false confessions to murder. This state is second only to Illinois in the number of proven false confessions. In their 2004 study of 125 proven false confessions—a study that has been cited twice by the United States Supreme Court[3]—Professors Steven Drizin and Richard Leo found that New York authorities had obtained at least 17 proven false confessions since 1989.[4] And since 2004, there have been an additional seven New York DNA exonerations where false confessions were used to secure the initial convictions for a total of 22[5]. One of the cases of false confessions cited by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 455, n.24 (1966),[6] is the New York case of George Whitmore, whose false confession in 1964 to the "Career Girl Murders" partly spurred the Supreme Court to provide criminal suspects with greater protections against police coercion during interrogations.

---

confessions studied were to murders). *See also* Gross, Samuel R., et al., *Exonerations in the United States from 1989-2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (Winter 2005).

3 *J.D.B. v. North Carolina*, 131 S.Ct. 2394,* 5 (2011); and *Corley v. U.S.*, 556 U.S. 303, 321(2009).

4 Drizin & Leo, *The Problem of False Confessions in the Post-DNA World at* 946.

5 Deskovic, Sterling, Kogut, Peacock and Warney. *See* Innocence Project website. This number does not include the multiple exonerations since 2004 that were achieved without DNA

6 *See* Kamisar, Yale, *A Look Back at a Half-Century of Teaching, Writing and Speaking about Criminal Law and Procedure*, 2 OHIO ST. J. CR. L. 69, 75 (2004) (discussing how Justice William Brennan, months before *Miranda,* berated Kamisar for failing to mention the Whitmore case in defending the Court's criminal procedure decisions at a public debate).

In our post-DNA age, false confessions now loom as a shameful problem for New York. The recent exoneration of John Ranta, whom the Brooklyn District Attorney's Office has conceded gave a false confession, led the DA's Office to reopen some 50 cases assigned to Detective Louis Scarcella, many of which involved questionable confessions.[7]

The large number of New York false-confession cases demonstrates that traditional confession-related safeguards have not worked to protect vulnerable defendants from being wrongfully convicted. These confession-related safeguards include both the Constitutional guarantee of Due Process under the 14th Amendment, which requires that confessions admitted into evidence be "voluntary," and the broader standard under New York statutory law, which takes into account whether the confessions are reliable. In virtually every single one of the wrongful conviction cases based on false confessions, each defendant waived *Miranda* rights, and their confessions were found "voluntary" beyond a reasonable doubt, if not by a judge in a Huntley hearing, then by a jury.[8] And in many of these cases, trial court rulings were affirmed on appeal, and sometime, by federal courts in habeas petitions. Viewed with the benefit of hindsight, there can be no

---

7 Robles, Frances, "*Several Murder Confessions Taken by Brooklyn Detective Have Similar Language*," N.Y. Times (June 12, 2013).

8 In each of the New York false confession DNA exoneration cases, defendants filed and lost motions to suppress the confessions, and those rulings were affirmed on appeal. Yet we now know to a certainty that those confessions were all unreliable.

doubt that judges and juries made errors in their determinations that excessive coercion was not involved and that the confessions were truthful.

This Court's jurisprudence concerning "voluntariness" has developed in cases of disputed confessions in which the underlying interrogations were not recorded in their entirety. Without a recording of the interrogation process, judges and jurors have had to choose sides in a swearing contest between suspects and police officers about what took place in the secrecy of an interrogation room. Perhaps not surprisingly, they have usually accepted the word of government officials over that of criminal suspects, in an exercise fraught with error.

People v. Thomas is the first case, in the post-DNA age, in which this Court has the chance to apply the Due Process and New York voluntariness tests to a confession that developed during a fully recorded interrogation. In doing so, this Court has a golden opportunity to announce guidelines for the admissibility of disputed confessions, including a rule of evidence that a written or videotaped confession should not be admissible, in the absence of a compelling excuse, unless there is a videotaped recording of the entire interrogation. This is crucial since trial courts need objective evidence of the complete interrogation in order to determine whether a confession is voluntary and reliable. Since there is a complete recording of the interrogation in this case, the Court should also take this opportunity to draw some bright lines for trial courts to use in determining what is acceptable in a

police interview with a suspect and what constitutes impermissible coercion and manipulation.

The Innocence Network believes that the extreme psychological techniques evident from the videotape of the Adrian Thomas interrogatory were impermissibly coercive and resulted in an unreliable confession. The recording shows that, over the course of nine hours, the police did everything in their power to convince Mr. Thomas to admit to admit a sceneraio that explained what the police believed to be the truth: that the child died from severe head trauma, resulting in a fractured skull or, if not that, a subdural hematoma. Rather than use information provided by Mr. Thomas to understand how the child might have died (*i.e.* sepsis[9]) or if any crime actually occurred, they persisted with a marathon interrogation until they got him to admit that he had violently hurled his infant from a height of five to six feet. Rejecting his repeated exculpatory statements of what led to his 911 call, the police, *inter alia*, insulted and cajoled him, accused him of lying, played "good cop/bad cop," provided him with excuses (so-called "scenarios") for hurting a child, and eventually got him to conclude that his best option (and the one that would save his wife from being charged) was to go along with what the police said he did, even while he continued to protest that he did not mean to hurt his child and any injury he caused was accidental.

---

[9] The evidence that Matthew Thomas died of natural causes is fully explained in the brief submitted by Defendant-Appellant ("Mov. Br."), at pages 4 to 48.

The Supreme Court and courts in this state have previously found that at least four of the methods used to manufacture Mr. Thomas's self-incriminating statements should have resulted in excluding them from evidence as coerced and unreliable. First, the police threatened to charge Mr. Thomas's wife if he did not confess to accidentally injuring his son. Confessions elicited by means of a threat to harm a loved one are deemed involuntary and therefore not admissible under the Due Process clause of the U.S. Constitution. *Rogers v. Richmond,* 365 U.S. 534 (1960) (threat to bring in petitioner's wife for questioning); *United States v. Lynumn,* 372 U.S. 528 (1963) (threat to take away children); and *New York v. Spano,* 360 U.S. 315 (1959) (threat that close friend's family would be destitute). Such confessions should also be excluded under New York's broader standard for inadmissibility under C.P.L.R. 60.45. *People v. Helstrom* (threat to arrest defendant's live-in girlfriend) and *People v. Keene* (threat to send to jail defendant's pregnant wife, who experienced labor pains as defendant watched her interrogation).

Second, the psychological tactics involved direct and implied promises of leniency, including that he would not be arrested and that the injury would be considered accidental. This Court has lambasted this technique as "a form of mental coercion, which, despite the good faith of the prosecution, we may not countenance here." *People v. Leyra,* 302 NY 353, 363 (NY 1951).

Third, the most elaborate of the police's lies and promises was that Mr. Thomas could save his son's life and not be considered a "killer" if he admitted to forcefully throwing his son on the bed so that doctors could save his life. This is not the kind of "mere deception" that courts tolerate. The deception, combined with both a promise (he could save his son) and a threat (he would be charged as a killer if he did not), crossed the line to become impermissible coercion. *See People v. Tarsia* (confession voluntary because defendant *not* told that polygraph was omniscient and the police did *not* browbeat the defendant with accusations of untruthfulness). The threats and promises used in the interrogation are of the kind that has led innocent suspects to falsely confess and should be outlawed.

Finally, and most important, the confession is so unreliable that it should not have been admitted into evidence because it was thoroughly contaminated by information provided to Mr. Thomas by the police. The police contamination was so extensive that the so-called confession was actually provided by Sgt. Mason, not Adrian Thomas. Sgt. Mason was the director of a drama in which Mr. Thomas was the unwilling actor, and Sgt. Mason was the author of the written statements that Mr. Thomas signed, statements that contained no exculpatory information or indication of the coercive tactics used. Sgt. Mason showed a grieving and perplexed father exactly how he had thrown his infant from a height of five or six

feet, first demonstrating himself with notebook binder four times in a row[10], and then coaching Mr. Thomas to throw the binder as hard as he could.[11] Mr. Thomas, a one-time high school football player, obliged. Afterward, in an exasperated remark that is audible on the videotape (but not transcribed[12]), Mr. Thomas said, "I'm being railroaded like I threw baby against the wall." This comment alone raises a reasonable doubt as to whether the confession was "voluntary" and reliable.

Contamination largely explains the number of wrongful convictions based on false confessions. Contamination occurred in nine out of ten false confession cases in New York studied by Professor Brandon Garrett.[13] This high correlation is because there is a direct connection between contamination and the specious trustworthiness of a confession that is in fact false. In *Warney v. State of New York,* 16 N.Y. 3d 428, 438 (NY. 2011), involving whether a statement was "voluntary" in the context of a statute governing the eligibility of wrongfully convicted persons for state compensation, Judge Smith observed in his concurring opinion that numerous details in Warney's confession "point strongly to the

---

10 A3177:1-3178:23.

11 A3180:16-3181:11.

12 A3181:21-22. (The statement is transcribed as "I mean you're acting like I threw the baby against the wall")

13 *See,* Chojnacki, Danielle E., et al.., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 Ariz. St. L.J. 1,3-4 (2008)

conclusion that the police took advantage of Warney's mental frailties to manipulate him into giving a confession that seemingly contained powerful evidence corroborating its truthfulness—when in fact, the police knew, the corroboration was worthless." *Warney v. State of New York,* 16 N.Y. 3d at 438. Judge Smith concluded that "a confession cannot fairly be called 'uncoerced' that results from the sort of calculated manipulation that appears to be present here—even if the police did not actually beat or torture the confesser, or threaten to do so." This "calculated manipulation" was police contamination.

The Innocence Network urges this Court to use this case to enhance the ability of courts to detect and exclude coerced, unreliable confessions and thereby sharply reduce the incidence of wrongful convictions based on false confessions. First electronic recording of custodial interrogations, from the reading of Miranda rights to the conclusion, is the single best reform available to stem the tide of false confessions since it is essential for detecting coercion and unreliability. Without a videotape of an entire custodial interrogation, contamination is not evident until long after a conviction, as is clear from both the "hindsight" required to recognize the contamination in *Warney*, and analysis facilitated by the videotape in this case.

According to data compiled by the Innocence Project, over 800 jurisdictions nationwide videotape interrogations regularly and in 18 states and the District of Columbia, videotaping of custodial interrogations is mandatory. In some states

mandatory recording was enacted by statute while in others by decision of the state's highest court. A 2004 study conducted by Illinois officials of 200 locations that implemented this reform found that police departments overwhelmingly embrace the measure as good law enforcement whose time has come. The benefits of electronic recording so dramatically outweigh the costs that there is no need for commissions to study the issue or pilot projects to test it. The longer that police departments drag their heels on implementing this simple and obvious reform, the longer courts will be required to make admissibility and reliability decisions with severely incomplete and inaccurate records.[14] Meanwhile, hanging in the balance are innocent people who might be wrongfully convicted.

The Innocence Network believes that the time has come for this Court to lead on this important evidentiary issue and require electronic recording of interrogations. One way to spur police departments throughout the state to record interrogations electronically would be to factor into the voluntary test the failure to record a custodial interrogation, which would create a high hurdle for proving

---

[14] Gov. Cuomo recently announced $700,000 in grants to allow 150 law enforcement agencies to buy or improve equipment to videotape police interrogations of suspects. The funds will go to 29 district attorneys' offices for distribution to police agencies within their counties. District Attorneys' Offices in 29 counties across the state will use the grants to purchase or upgrade equipment for 150 agencies, including police departments and sheriffs' offices, bringing the number of agencies that will use the technology statewide to approximately 400. There are more than 500 police departments and sheriffs' offices in New York. http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202628574223&700000_in_Grants_to_Fund_Interrogations_by_Police#ixzz2lDRyETn9.

voluntariness beyond a reasonable doubt in the absence of a recorded interrogation. Alternatively, this Court could go even further by creating a presumption, in the absence of good cause, of inadmissibility for confessions that were not recorded. As an added incentive for recording custodial interrogations, the Court could require in cases where confessions are admitted (because they otherwise satisfy the voluntariness test) that juries receive an instruction that in deliberating about the voluntariness and reliability of the confession they consider the People's failure to record the interrogation that led up to it.

Second, this Court should provide a uniform means for trial judges to assess whether a confession has been contaminated by the police. In *Warney*, this Court knew that the confession was demonstrably false—even in the absence of an unduly long interrogation, and even in the absence of evidence of direct threats and promises—and that the only way Warney could have known non-public facts about the crime was that he had been told them by the police. But the *Warney* court knew this only from hindsight. *People v. Thomas,* provides the perfect vehicle for this Court to apply the lessons of *Warney* as to the *risk* of a manipulated, contaminated confession because the entire interrogation was videotaped. There is no serious factual dispute on this point. The videotape shows that every single incriminating fact to which Mr. Thomas admitted was fed to him by Sgt. Mason. He told Mr. Thomas what to say, and after enough bullying and false sympathy

and inducements, the words came out of Mr. Thomas's mouth. There will be no guesswork or surmise in the Court's analysis of contamination. The Court can us the videotape to show trial courts how to best consider evidence of a confession's unreliability in the voluntariness calculus when hindsight is not an option—*before* such confessions are admitted into evidence and *before* they result in wrongful convictions.

When reviewing confessions for threshold reliability, judges should engage in a two-step process. First, they should assess the fit between the confession narrative and objectively knowable evidence of the crime, asking themselves, is this confession consistent with the facts? In this case, the trial judge should have compared Mr. Thomas's admission that he threw his four-month-old infant to the ground with the fact that there was no bleeding, no bruises, no evidence of any broken bones, as well as a medical history and diagnosis that provided a far more plausible explanation of the child's critical condition when admitted to the hospital. Second, judges should evaluate whether the confession is corroborated, by asking whether the suspect's statements led police to any additional relevant information or to evidence that the police did not know about prior to the confession. In this case, the trial judge would have found no corroboration, since Mr. Thomas's "confession" did not lead to any new evidence, and instead consisted entirely of what the police themselves believed to be the facts. To

summarize, if there is a lack of fit, or if the confession does not lead police to new evidence that independently corroborates the confession, these tell-tale signs of a contaminated confession should be factored by courts in their analysis of voluntariness and reliability. Obviously, there will be situations in which a suspect provides one or two pieces of corroboration but also lies about or downplays his involvement in a crime. Even in that case, if the suspect provides just one non-public held-back detail, the threshold for reliability would be satisfied.

Had the trial judge viewed the videotape of the Thomas interrogation from the perspective of reliability and contamination, as the prosecutor did in *Aleman v. Village of Hanover Park*, 662 F.3d 897, 906-907 (7th Cir. 2011) (Posner, J.), *cert. denied*, 2012 U.S. Lexis 4869 (2012), he would likely have found it "more exculpatory than inculpatory." Similar to this case, Aleman was charged with murder following the death of a child in his care, and gave an admission during the course of an unfair interrogation. But in *Aleman*, the case disintegrated when the prosecutor viewed the tape of the interrogation, in which the police used the same kinds of ploys and deceptions as in this case. Viewed from the perspective of *Aleman* and *Warney*, the Adrian Thomas confession provides an example of objectively known evidence of the crime contradicting the confession.

The strengthening urged by the Innocence Network can be accomplished under NY C.P.L.R. Section 60.45 (2)(b)(i) (referred to hereafter as "C.P.L.R.

60.45"), which, in addition to the Due Process definition of voluntariness, gives judges the power to consider evidence of a confession's reliability in assessing voluntariness. New York C.P.L.R. 60.45 provides that a confession is "involuntary," and therefore inadmissible, if the government obtains a confession "by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself." Judges, as gatekeepers of trial evidence, are required to use this evidentiary rule to keep from the jury this form of extremely prejudicial, unreliable evidence.

As an evidentiary rule, C.P.L.R. 60.45 should function in the same way as other evidentiary rules that keep from juries unreliable, prejudicial information, *e.g.,* in-court identifications when there has been an unduly suggestive out-of-court identification; hypnotically induced testimony;[15] and hearsay evidence. That kind of evidence is excluded because it is unreliable. Unfortunately, in the case of disputed confessions, courts have too often ignored or misapplied this crucial evidentiary rule, instead applying a rote, mechanical test for "voluntariness," which focuses on a defendant's willingness to talk with the police, lack of physical restraint and waiver of Miranda, rather than the specific police-induced manipulation or contamination that renders the confession coerced. This case provides the Court with the opportunity to make the application of C.P.L.R. 60.45,

[15] *New York v. Schreiner*, 77 N.Y.2d 733 (1991) (confessions that follow a hypnotic session are suppressed as a matter of law because they are inherently unreliable).

and the trial court's gatekeeper function thereunder, clear with respect to interrogations conducted with the psychological techniques taught and learned at police academies across the state.

This case also affords this Court the opportunity to announce a rule that if disputed confessions survive a Huntley Hearing, and are admitted into evidence, defendants must be permitted to call expert witnesses on the subject of police interrogations and confessions. In order to prevent wrongful convictions, expert testimony is needed to disabuse jurors of their skepticism about false confessions. Jurors need to learn how and why false confessions occur, and about the social psychology of police interrogations. Jurors need to learn about the tactics in which detectives are trained, both to break down a suspect and make him feel hopeless, and to motivate a confession by minimizing the seriousness of the crime under investigation. Jurors need to learn about contamination and the ways in which it contributes to false confessions. All of these subjects have been extensively studied and researched and the findings of these studies are generally accepted within the field of psychology, satisfying *Frye*. These subjects are also "beyond the ken" of the average juror. Indeed by their very nature, false confessions are counter-intuitive.

Confessions are a uniquely powerful form of evidence, which no doubt explains why they play a role in so many wrongful convictions. As the Supreme

Court stated in *Bruton v. United States*, 391 U.S. 123, 139 (1968), confessions are "probably the most probative and damaging evidence that can be admitted." Confession evidence is so powerful that New York jurors convicted the Central Park Five and Jeffrey Deskovic even though the results of DNA testing admitted into evidence *excluded* them as the source of semen found on the victims.[16] The main reason that jurors credit false confessions is that they believe that *they* would never confess to a crime they did not commit, and so they cannot conceive how and why the defendant could have done so. The problem of juror disbelief is particularly acute in the case of heinous crimes, such as murder, where an innocent person has every possible reason to refrain from self-incrimination. Jurors simply cannot conceive why anyone would falsely confess to murder, a crime that could result in the death penalty or a long sentence of incarceration. It is even more inconceivable to jurors that someone would falsely confess to harming a loved one. And Adrian Thomas's jury faced perhaps the biggest hurdle of all. In order to acquit Mr. Thomas, they had to accept that a father would falsely confess to the murder of his own child, the most reviled of crimes.

---

[16] Two cases from Chicago, Illinois, in the 1990s, Dixmore and Englewood, are strikingly similar to the Central Park Five case in New York. In both these cases, two different groups of five teenagers were interrogated concerning separate rape/murders and confessed to the crimes. Some were convicted and served lengthy prison sentences. In both cases, semen swabs from the victims excluded the teenagers as the rapist, but they were nevertheless charged. In both cases, DNA profiles in 2011 identified other perpetrators with relevant histories. http://www.innocenceproject.org/Content/Background_on_Dixmoor_and_Englewood_cases.php

Yet such false confessions are not uncommon in the annals of wrongful convictions. Husbands have falsely confessed to killing wives (Darrel Parker,[17] Frederick Walrath[18], Keith Longtin[19]), brothers have confessed to killing sisters (Michael Crowe[20], Ozem Goldwire), children have falsely confessed to killing parents (Gary Gauger[21] and Corethian Bell[22]) and parents have confessed to killing their children (Nicole Rickard,[23] Christina Mason, Kevin Fox,[24] Jerry Hobbs[25]) or children of loved ones (Byron Halsey[26]). In New York, a father of five in Syracuse, Daniel Gristwood, falsely confessed to attacking his wife in bed with a hammer as she slept, causing brain damage and paralysis, and was imprisoned until a neighbor (who subsequently brutally attacked two other women) confessed to the

---

17 http://legislature.omaha.com/2012/09/05/justice-comes-for-darrel-parker-from-jon-bruning/ (Last visited Nov. 20, 2013)

18 Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* at 942.

19 http://www.nbcnews.com/id/14609924/

20 Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* at 935.

21 *Id*. at 937.

22 *Id*. at 933.

23 http://triblive.com/x/pittsburghtrib/news/westmoreland/s_340922.html#axzz2lC867T4a (Last visited Nov. 20, 2013)

24 http://articles.chicagotribune.com/2011-01-30/news/ct-met-riley-fox-report-0130-20110130_1_riley-fox-scott-wayne-eby-video-confession (Last visited Nov. 20, 2013)

25 http://www.nytimes.com/video/magazine/100000001188108/jerry-hobbs-confession.html (Last visited Nov. 20, 2013)

26 http://www.innocenceproject.org/Content/Byron_Halsey.php (Last visited Nov. 20, 2013)

crime.[27] Ozem Goldwire of Brooklyn, New York, an autistic man, confessed after 21 hours of interrogation to killing his sister and spent a year in jail before prosecutors concluded that he had not committed the crime.[28]

This Court has recognized that "there is no doubt that experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions." *People v. Bedessie*, 19 N.Y.3d 147 (2012). Dr. Richard Ofshe, whose testimony was proffered in both this case and *Bedessie*, is one of the leading experts in the study of the psychology of interrogations and false confessions. Unfortunately, the Bedessie interrogation was not recorded, and Dr. Ofshe therefore lacked actual knowledge of the specific tactics used by the police. While this Court found that his proffered testimony was irrelevant, and therefore affirmed the trial court's ruling to exclude it, there is no suggestion in *Bedessie* that Dr. Ofshe was not qualified, that the research he would present did not meet the *Frye* test, or that the subject of his testimony was not "beyond the ken" of the jurors. *Id*. at 162-64. In this case, by comparison, Dr. Ofshe had the benefit of a recorded interrogation and

---

27 http://www.syracuse.com/news/index.ssf/2011/10/an_open_and_shut_case_against.html (Last visited Nov. 20, 2013)

28 http://www.huffingtonpost.com/2009/11/25/ozem-goldwire-autistic-ma_n_371023.html (Last visited Nov. 20, 2013)

proffered highly relevant expert testimony that was "beyond the ken" of the average juror.

To expect a jury to assess the truth of a potentially false videotaped confession without expert testimony on false confessions is akin to asking them to view a 3D movie without 3D glasses. Without the glasses, moviegoers can see and hear a 3D film but the content is blurry, the details are muted, and the special effects are not evident. Likewise, when an interrogation is played straight through for a jury, jurors get the visual impact of the defendant confessing, but may well have no sense of the psychological coercion that compelled the suspect to confess. In addition, contamination that gave an aura of credibility to the confession may well not be evident. An expert, like a pair of 3D glasses, is needed to bring these concepts into focus for jurors.

In sum, we urge the Court to use this case to clarify the standards for pre-trial assessments of false confessions, emphasizing the role of reliability that the statute already bestows on trial judges in that assessment and encouraging police statewide to record interrogations from start to finish. In addition, as a necessary safeguard against wrongful convictions, this Court should recognize the need for expert testimony on the science of false confessions if a disputed confession is admitted into evidence.

STATEMENT OF FACTS

Adrian Thomas, a 29-year old African-American man from Douglas, Georgia, with a tenth-grade education, met his wife Wilhemina Hicks of Troy, New York, at a chicken processing plant in Douglas where they both worked on the production line.[29] They married, moved to Troy in around 2002 or 2003,[30] and together had seven children. The last two, twins named Matthew and Malachai, were born in June 2008, two months premature. Mr. Thomas was 25 years at the time the twins were born, and had been out of work for several months after he was terminated by Home Depot. The family lived in a two-bedroom apartment, with the five oldest children sleeping in one bed, and the twins sleeping in bed with the parents. The apartment was neatly maintained and the children clean and well behaved.[31] There was no history of hospitalizations or medical records indicating suspected child abuse of any of the children.

A. Hospitalization of Matthew Thomas

On the evening of Saturday, September 20, 2008, one of the twins, Matthew, was feverish, wheezing, and crying excessively.[32] The parents cooled him down

---

29 A2950-2951.

30 A2953.

31 A2891:1-5.

32 A2970-2971.

and comforted him,[33] but it turned out that Matthew was suffering from fulminating pneumococcal infection. The parents put the twins to bed at around 11:30 p.m.[34] Somewhere around 3:00 a.m., Matthew woke up with a fever, and Mr. Thomas prepared formula for the twins. After the feeding, Mr. Thomas fell asleep, assured by his wife that Matthew's fever had gone down.[35]

The next morning, Mr. Thomas was awakened by his wife, who told him that "the baby is not moving. He's not breathing."[36] As his wife performed CPR, he called 911and the baby was taken in an ambulance to the emergency room at nearby Samaritan Hospital. There, he was found to have hypotension and extremely low blood pressure, white blood cell count, and temperature. The emergency room physician ordered a blood test and gave septic shock as the most likely explanation of her differential diagnosis. Matthew was transferred to the pediatric intensive care unit at Albany Center, arriving there shortly after noon on Sunday, September 21, 2008. A CT scan found fluid collections in his brain, but no skull fracture.[37] That afternoon, the baby was put on life support.

Even though the CT scan found no skull fracture, a physician at Albany Medical believed initially that Matthew's symptoms and condition were the result

---

33 A2971.

34 A2976.

35 A2979-2980.

36 A2980.

37 Exhibit E. (Mov. Br. at 2-3.).

of a skull fracture. He told the Troy Police, "This baby has a fractured skull . . . This baby was murdered."[38] He said, "The baby was slammed into something very hard like a high speed impact in a vehicle."[39]

At 6:00 p.m. on Sunday evening, the Troy Police and Child Protective Services ("CPS") visited the Thomas apartment, where Mr. Thomas was caring for his children.[40] CPS took the six children from the home. Sergeant Adam Mason, a homicide detective, spoke with Mr. Thomas for about an hour.[41] After Sgt. Mason and Detective Ronald Fountain left with CPS and the children, Mr. Thomas stayed alone in the apartment until midnight when Sgt. Mason and Det. Fountain returned.[42] Mr. Thomas agreed to accompany the officers to the police station.[43] Over the next two hours, the police interviewed in a room set up for video monitoring on the third floor of the Troy police station.[44] Together, officers questioned Mr. Thomas on the events leading up to Mathew's hospitalization, after which he provided the first of three written statements. The interrogation room was a "small office" with a desk and three chairs, on the third floor of the police

---

38 A588. (Mov. Br. at 4).

39 Mov. Br. at 37.

40 Mov. Br. at 73.

41 Huntley hearing, A257:5-9. This is not recorded.

42 Huntley hearing, A257:23-A258:10.

43 Huntley hearing, A258:17-18.

44 Huntley hearing, A258:21-25.

station.[45] Throughout the two sessions, Mr. Thomas, a very large man, was seated uncomfortably in a small chair without armrests at the center of the room, never leaving it, even when the police left him alone in the room for long stretches.

B. First Statement by Adrian Thomas and Threat to Bring in His Wife for Questioning

At the commencement of his first session with the police, Mr. Thomas is given a Miranda warning. The police assure him that he is not under arrest, but that "we do have to let you know what your rights are, all right by law." Terming the reason for the Miranda warning as "just a law," the police officer tells Mr. Thomas that it is like "cop shows."[46] When Mr. Thomas responds, "most times they in cuffs," Sgt. Mason replies, "You ain't in cuffs. You came down here of your own free will and you talked to us because you care about what happened and you want to set the record straight that you ain't got nothing to do with this."[47] The police lead Mr. Thomas to believe that the reason for the warning is not that he was about to undergo a custodial interrogation, but only because, "You're a human being and you got rights."

---

45 Huntley hearing, A261:21-24.

46 A2831:18-2832:2.

47 A2832:3-7.

Immediately after signing the Miranda statement, Mr. Thomas asks Sgt. Mason, whether the doctor is "99% sure my son is not going to make it."[48] Sgt. Mason replies that "there's damage on the brain," and "There's a fracture on the back of his skull." This mistaken diagnosis frames the remainder of this phase of interrogation, with Sgt. Mason asserting that "it just doesn't happen without someone being involved," and Mr. Thomas insisting that he has done nothing to hurt his child.[49]

Initially, the officers' strategy is to induce Mr. Thomas to admit that he may have hurt his son by accident (though the goal was to elicit a confession that he had hurled his son deliberately and with great force, consistent with what the doctor had told the police). Mr. Thomas adamantly insists that he did nothing to hurt his son on Sunday morning. Sgt. Mason then concocts an incriminating statement supposedly given by Mr. Thomas's wife: that Saturday evening the child had suddenly stopped screaming when Mr. Thomas was alone with him, and "she said he started acted funny after that."[50] When Mr. Thomas retells how he had comforted his child and did not notice anything different about him until Sunday morning, Sgt. Mason pretends to level with him: "I ain't going to bullshit you man, all right, your wife said you must have done it last night . . . you must have

---

48 A2836:9-11.

49 *See*, *e.g.*, A2837:2-6 ("Yeah, but I never")

50 A2877:4-17.

slammed the baby last night."[51] Mr. Thomas resists the ploy, even when a police officer tells him that "She signed the paperwork."[52]

The police then provide Mr. Thomas with a possible excuse for injuring his son. The officers point out that he has not worked in seven months and ask, "do you feel like a loser because of that?"[53] They suggest that he feels "a little shitty" that his rent is being paid by social services and he is not supporting his family.[54] This has the effect of making Mr. Thomas "feel bad,"[55] but does not elicit any admissions.

Next, the police officers state that some unidentified authority "is going to go after you criminally."[56] Suggesting that they themselves are not going after Mr. Thomas criminally (even though this was an incommunicado interrogation following a Miranda warning), Sgt. Mason states, "Right now we're trying to settle this before it gets to that point."[57] Since the child has a fractured skull, according to the officer, the only possibilities are that Mr. Thomas (or his wife) has injured the child accidentally or intentionally. Sgt. Mason illustrates an intentional injury

---

51 A2878:7-12.

52 A2882:19.

53 A2883:14-16.

54 A2884:16 to A2885:1.

55 A2885:2.

56 A2888:9-10.

57 A2888:10-11.

as "picking up a crying baby and saying I fuckin hate this baby, I want to kill this baby and throwing it on the ground."[58] Mr. Thomas sees the scenario as the fabrication it is, observing, "That sounds like a good court case but I didn't do it."[59] At this point, the light dawns on Mr. Thomas that he is the prime suspect ("You're telling me, you're saying I'm being prosecuted"[60]). The police officers continue their deception ("No, we never said that. . . .We're just throwing a scenario at you"), and Mr. Thomas continues to protest that "I didn't do it."

The police intensify their tone, and in loud accusatory voices, they tell him that the "doctor said somebody did it," and that his story "doesn't add up."[61] Both officers tower over a seated Mr. Thomas 45 minutes into the interrogation and one demonstrates to him how somebody "grabbed that baby by the shoulders, smacked him down on top something so it fractured the back of the baby's skull."[62] One of them slams his notepad onto the edge of the desk to demonstrate what he believes happened to the child.[63] As the officers ask him who could have done that to the child if he did not do it, Mr. Thomas responds that the action acted out by the officer was "intentional the way you just did it," and there would be blood

---

58 A2890:2-3.

59 A2890:13-14.

60 A2891:12-13.

61 A2893:2-7.

62 A2894:11-15.

63 A2894:11-2894:15.

everywhere.[64] Sgt. Mason counters that babies' heads are pliable and soft and "people drop babies all the time."[65] Turning Mr. Thomas's protests on their head, Sgt. Mason says, "You're convinced in your head that somebody intentionally tried to kill your son. We don't believe that to be true. We think it was an accident."[66]

Mr. Thomas asks why the officers are "coming at me like I got a rap sheet,"[67] and "I'm down here in jail."[68] Even after both officers tell him that "this ain't jail,"[69] Mr. Thomas knows better ("This the jailhouse"[70]). When Mr. Thomas notes that after midnight it will be his 26th birthday, and hears "happy birthday," he replies, "Happy birthday. My son is dying and I'm down at the jailhouse."[71] The police point out that there are screen windows and he is smoking a cigarette. He repeats, "This the jailhouse."

The officers tell him that "if you didn't accidentally harm your child then your wife did."[72] Mr. Thomas comes to a decision that he thinks will resolve the dilemma and protect his wife: "I'm not going to lie to you. I don't believe my wife

---

64 A2895: 1-12.

65 A2895:14-19.

66 A2904:1-4.

67 A2904:18-19.

68 A:2904:23.

69 A2905:1-3.

70 A2905:4.

71 A2906:19-20.

72 A2907: 6-8. (the transcript reflects this incorrectly as "your right")

did that . . . But if it comes down to it, I'll take the blame for it because – listen, I didn't do it, but if it comes down I take the rap for my wife so she won't go to jail."[73] This offer to "take the fall"[74] is rejected for the moment and the police tell Mr. Thomas that they are going to the hospital to "go pick your wife up"[75] and "probably going to scoop your wife out."[76]

At this point, the officers return to the theme of an accidental injury,[77] and Mr. Thomas takes the bait.[78] After discussing a possible scenario, and pressing him to think hard, one of the officers says, "Here's our deal. I'm telling you right now you're going home. You're going home within the next hour."[79] Mr. Thomas explains that one of his sons might have knocked Matthew's head against a toy truck in the living room[80] and that he had recently grabbed Matthew when he was about to fall off a couch.[81] They assure him that if he admits to accidentally causing harm that he will go home that night and not be arrested.[82] He soon states

---

73 A2907:10-16.

74 A2907:6.

75 A2908:13.

76 A2909:12-13.

77 A2910:10-13.

78 A2911:7 et. seq.(A2911:7-15).

79 A2923:19-23.

80 A2911 et. seq.

81 A2920-A2923.

82 A2924:8-13.

that "I could have bumped him going into the crib no lie but it was never out of anger."[83] The officers write out a statement summarizing the three scenarios of accidental injury, which Mr. Thomas reads and signs.[84] The statement says that one of the children might have hit Matthew with a truck[85] and that Mr. Thomas "grabbed" Matthew before he fell off a couch.[86] Although Mr. Thomas used the word the "bump" to describe the third incident, the statement says that "I also recall about 10 days or so putting Matthew in the crib and him *smacking* his head on the crib." (emphasis added). There is no reference in the statement to the "smacking" being accidental.

C. Commitment of Adrian Thomas to Mental Health Facility and Additional Statements as to Cause of Death by Albany Medical

After he has signed the statement, Mr. Thomas says that he feels "real bad" and like he could jump off a bridge.[87] He explains that he feels bad because his son was in his care and he needs help.[88] The officers offer to take him to a crisis unit at the hospital.[89] Mr. Thomas replies that if his son dies he might jump off a

---

83 A2926:17-18.

84 A3159:11-3160:3.

85 A2911-A2912; A2915-A2917.

86 A2921:7-13.

87 A2936:14-21.

88 A2937-A2938.

89 A2939:16-18.

bridge,[90] and that he feels like his world is over.[91] The officers question him more about the circumstances of the accidental bumping of the child's head against the crib, and then agree to take to him to talk to someone.[92] At around 2:15 a.m. on Monday, the officers commit him as an involuntary patient of a secure psychiatric ward.[93] According to a nurse at the hospital, he was depressed while he was there, and wanted to leave to go see his son at Albany Medical.[94]

Meanwhile, the police interview one of the treating physicians, and obtain a statement from him to the effect that Matthew "had a subdural hematoma on his head," and is now brain-dead. (There is no reference to a skull fracture, x-ray or CT scan.) The physician's statement refers to a "family history," about which he was apparently informed. (The only known family history did not involve any documented child abuse involving shaken baby syndrome or evidence such as bruises or broken bones.) The physician's statement further describes that Matthew Thomas had "brain swelling" that could not have been caused by a mere bumping of the head. It states, "The injury that Mathew suffered is typical of high impact injury or severe acceleration/deceleration. This type of injury can be

---

90 A2939:22-23.

91 A2940:2.

92 A2947:3-6.

93 App. Div. at 5.

94 A1816:9-A1817:22.

caused by very violent shaking or shaking and forced against a hard object. . . there needs to be severe acceleration prior to striking the hard object."[95]

Mr. Thomas is released into the custody of the police officers at around 5:45 p.m. on Monday evening.[96] While he was at the hospital he had slept intermittently, for less than two hours.[97]

D. Second Statement of Adrian Thomas and Deception about Saving His Son's Life if He Confesses

Returning Mr. Thomas to the same interrogation room, Sgt. Mason resumes the interrogation alone. He begins with friendly questions about Mr. Thomas's background, eliciting information about the family's money problems and difficulties in his relationship with his wife. Sgt. Mason tells him that he will not be arrested that night, and gives him a second Miranda warning.[98] As Mr. Thomas is listening to the warning and after he signs it, he says, "I feel not safe,"[99] referring to issues with his wife's family. Following a discussion of what Mr. Thomas might do, and how the officers might help him feel safe,[100] Sgt. Mason commences a new strategy to induce Mr. Thomas to confess: a prayer for a miracle to help

---

95 A223.

96 App. Div. at 5.

97 App. Div. at 9-10, n. 6.

98 A2954:15-A2956:20.

99 A2956:22.

100 A2962:9-2963:9.

Matthew Thomas, lying in the hospital "with severe injuries."[101] At this point, Sgt. Mason was aware that the child's skull was not fractured and that he was brain-dead.[102] As Mr. Thomas moans that "this is messed up," he has done nothing, he cannot go see his baby, and everyone is after him, Sgt. Mason assures him that he is there to help him.[103] Then, imploring Mr. Thomas to tell "the truth," he interrupts another retelling of the head bump in the crib with a reminder of the prayer for a miracle and adds that Mr. Thomas is being "judged by God."[104] Next, Mr. Thomas retells the story of what happened over the weekend.[105] Mr. Thomas expresses concern about his children being taken by CPS, and being divided up. Sgt. Mason assures him that he thinks the head-bumping was not intentional.[106]

At this point, Sgt. Mason expands on a theme from the prior night that would explain violence to a child. Purporting to confide his own frustration when he was out of work with an injury, Sgt. Mason tells Mr. Thomas about the pressure that builds up and makes a man angry. He assures Mr. Thomas that he is not going to jail and then informs him that someone has told him that Mr. Thomas bumped

---

101 A2963:12-18.

102 A1162

103 A2963:19-A2964:10.

104 A2969:8-21.

105 A2970-A2983.

106 A2984:15-16.

Matthew's head on Sunday morning.[107] This begins the major theme of the second session: Sgt. Mason says that he needs to know whether the child's head was bumped on Sunday morning because "the doctors are trying to save your son's life and they need to have time frames."[108] Even though he is aware that the child will not live, Sgt. Mason says that the information is necessary so that the hospital can provide better care: "We're trying to keep Matthew alive."[109] With this, Mr. Thomas agrees to "think back."[110] To encourage him, Sgt. Mason tells him the "good news" that there was no skull fracture,[111] and that he is "half-way there."[112] As Mr. Thomas tries to think about what may have happened on Sunday morning, Sgt. Mason tells him that "You ain't got a lot of time. You ain't got a lot of time. They trying to save your son's life right now."[113] He directs Mr. Thomas to look into his eyes and says hypnotically, "I can see it in your eyes. You want to talk about it. You ain't got to be nervous any more. I'm here to help you. You ain't got to be nervous. I want to make this better for you man."[114]

---

107 A2990:9-11.

108 A2990:18-20.

109 A2992:1-8.

110 A2991:23.

111 A2992:17-23.

112 A2993:16-22.

113 A2997:7-9.

114 A2997:12-17.

Following this appeal, Mr. Thomas does not blurt out a clear, believable admission. Instead, as if in a dream, he expresses what may have happened when he panicked on Sunday morning, speculating that he may have grabbed the child the wrong way.[115] Sgt. Mason helps Mr. Thomas develop a version of the events on Sunday morning that could explain the baby's injuries. He continues to assure Mr. Thomas that he will not be arrested and that an admission (*e.g.,* that he "smacked" the baby's head on the railing of the crib) could save his child's life:

> You ain't going to jail tonight you don't have to worry about that all right? . . . That's not one of our priorities to put you in jail tonight. . . Our priority tonight is to find out what happened because right now your son is still alive and we want to give the doctors every bit of information we can to make sure your son stays alive, all right?[116]

He suggests that maybe "after you put the baby in the crib and smacked his head up against the side of the crib," then his wife performed CPR.[117] When Mr. Thomas does not agree to the story, Sgt. Mason berates him ("I thought you wanted to make peace with God man"[118]), and urges him to retrieve a repressed memory.[119] When Mr. Thomas does not adopt a scenario that he shook the child or

---

115 A2997:18-20.

116 A3006: 2-10.

117 A3006: 18 –A3007:17.

118 A3007:23-A3008-1.

119 A3008:17-3009:10.

the child's head hit the floor, Sgt. Mason says, "You don't seem like you want to save your baby's life right now."[120]

Playing on the Thomas' marital difficulties, Sgt. Mason says that confessing will give Mr. Thomas a chance to show that "you're a man." Indeed, Sgt. Mason would tell his wife that "Adrian stood up like a man" and did the right thing.[121] As Mr. Thomas struggles to recall what might have happened on Sunday morning to cause his child's head injury, Sgt. Mason assures him that "you've got a chance to make peace right now and make things better."

Despite the psychological pressure, Mr. Thomas continues for some time to assert that he is not lying about what happened. The response by Sgt. Mason is to urge him again to dredge up "repressed" memories.[122] And this:

> What's going to happen if my phone rings right now and it's the doctors from Albany Medical Center and they say Sergeant Mason, I've got bad news. Matthew did not make it. What's going to happen? I'm going to say damn we were close to finding out what happened to this child all right, and you're procrastinating, you're putting it off you're putting it off because you're afraid. You ain't got to be afraid any more man, all right. You ain't got to be afraid.[123]

---

120 A3010:7-11.

121 A3011:6-15.

122 A3014:15-17.

123 A3015:7-16.

Mr. Thomas is "scared" by this turn in the questioning, and Sgt. Mason says he will "tone it down."[124] Soon after this, Mr. Thomas says that he "might have bumped" his son's head on Sunday morning.[125] He then agrees with Sgt. Mason that he may have dropped him, adding that it was by accident.[126] When Sgt. Mason asks him whether the accidental dropping of the child caused the head injury, he responds, "I think so."[127] As Sgt. Mason assures him that he is "a good man," Mr. Thomas sobs.[128]

The accidental bumping and dropping does not sufficiently explain the child's medical emergency, however, because Mr. Thomas describes it as having happened *after* the child had trouble breathing. Sgt. Mason uses the ploy of falsely telling Mr. Thomas that his wife has said that the child "was okay before you put him in that crib,"[129] and that he had thrown "that baby in that crib like a rag doll."[130] This ploy has no effect on Mr. Thomas because he finds it plausible that his wife and her family are trying to blame him.

---

124 A3016:1-4.

125 A3017:16.

126 A3018:15-21.

127 A3021:20-A3022:5.

128 A3022:6-8.

129 A3044:9-10.

130 A3045:8-10.

Sgt. Mason tells Mr. Thomas that he has given the hospital the "updated information."[131] He adds that the only explanation for Matthew's condition is a head injury, and that the child had no other medical problems:

> They told me that that they checked your son's lungs, they did x-rays, they did EKGs, they did every kind of test that you could imagine on the head, on the chest, on the legs, on the arms, all over your son, and they said that the only injury they could find was the injury to the head.[132]

In a continuing effort to get Mr. Thomas to confess that the child was fine before he threw him into the crib, Sgt. Mason continues to pretend that the hospital needs to know the order of events in order to treat Matthew.[133] Playing on Mr. Thomas's lack of medical training, Sgt. Mason alludes to medical tests that do not support Mr. Thomas's claim that the child had difficulty breathing before the head bump,[134] and says that the order of events "is important stuff for them to try to save your son."[135] "These doctors are geniuses," he says, and they have supposedly told Sgt. Mason that the child was not having trouble breathing before a head injury.[136]

---

131 A3052:19-21.

132 A3059:21-A3060:4.

133 A3063:5-11.

134 A3064:9-13.

135 A3064:20-21

136 A3065:4-17.

When Mr. Thomas continues to insist that the breathing difficulty preceded the head bump, Sgt. Mason responds, "You're proving the medical world wrong."[137]

Sgt. Mason tells Mr. Thomas that if he tells him 100% of the truth, he will "sleep peacefully."[138] The "truth" would supposedly prevent Mr. Thomas from thinking of himself as a "killer":

> What's easier to deal with, all right, a year from now, all right, is it going to be easy for you deal with man, last year I hurt my son real bad, but he's still alive. That's going to be difficult to deal with but you can deal with that. And a year from now, when you've got to tell somebody yeah man, I hurt my son real bad and I killed him; is that going to be easy to deal with?

Sgt. Mason claims to want to "make sure it don't get to that point"—that Mr. Thomas is considered a "killer."[139] At this point, Mr. Thomas mentions a third instance of head bumping, on Saturday night, when he recalls bumping his own head into his son's head.[140] Following an explanation of this third incident, Sgt. Mason elicits from Mr. Thomas an admission that he feels responsible for his son's injury and prepares a written statement, which Mr. Thomas reads and signs.[141] At

---

137 A3068:23. Ironically, it is Sgt. Mason who is actually defying the medical world, with his theory that the systemic failure of Matthew's organs could only have been caused by a traumatic head injury, even though the cause had been diagnosed as sepsis by the physician at Samaritan, and there was no evidence of a skull fracture, bruises or bleeding.

138 A3086:18-22; A3088:1-2

139 A3094:9-10.

140 A3094:19-20.

141 A3168-18.

this point, Mr. Thomas infers that he has admitted enough to be criminally prosecuted, and asks about "the next step."[142]

E. Third Statement of Adrian Thomas and Police Demonstration of How Matthew Thomas was Forcefully Thrown

The final stage of the interrogation commences with the entrance of a second police officer. Sgt. Colaneri, who been watching the interrogation. Sgt. Colaneri, purporting to be familiar with head injuries, tells Mr. Thomas that the version of events in the second statement is not consistent with the x-rays.[143] Sgt. Colaneri tells Sgt. Mason that Mr. Thomas is a "liar," since the doctor has told him that the child's head injury was caused by "acceleration and then a sudden deceleration" so rapid that it was as if he had been in a car accident.[144] As Mr. Thomas steadfastly asserts that he has done nothing, Sgt. Mason changes his tone and approach when Sgt. Colaneri leaves the room, accusing Mr. Thomas of lying to him, and embarrassing him in front of Sgt. Colaneri.[145] Sgt. Mason pretends that he has protected Mr. Thomas from the Chief of Police who wanted to arrest him.[146]

Mr. Thomas responds that he is not lying ("God's honest truth"). Sgt. Mason then tells him that Matthew's head is hugely swollen, as a result of "severe

---

142 A3170:4-5.

143 A3170:15-22. In fact, it was consistent with the X-rays, since they did not indicate any skull fracture. A3170:15-A3171:1

144 A3173:8-13.

145 A3175:13-15.

146 A3174:15-19.

acceleration deceleration." Sgt. Mason demonstrates how a light dropping of his binder on the desk could not have been the way it happened:[147]

> It ain't whoops. It can't happen that way. There's no way in hell it can happen that way. The doctor said the only way this injury happened is severe acceleration and severe deceleration.

Sgt. Mason says that "it's a lot worse than you're making it out to be," and tells him that he is "looking down because you're lying to me and you know it."[148] Again, Mr. Thomas denies that he threw his baby against the wall.

Sgt. Mason then acts out for Mr. Thomas how he envisions the head injury to have occurred. Grabbing his notebook binder from the floor, Sgt. Mason motions with his hands and the binder what sudden acceleration and deceleration would require, heaving the binder on the desk and floor, as he says:

> Adrian, maybe you did not throw the baby against the wall, maybe you took that baby and went like that and threw it in the crib. [*first demonstration*] Maybe you did that. Maybe it wasn't five or six inches. Maybe you threw it like that. Maybe it was five or six feet. Maybe when that baby was crying that night you picked that baby up and you slammed like that on the bed. [*second demonstration*] That could do it. That's a severe acceleration bang stop suddenly, severe deceleration is that what happened? [*third demonstration*]

---

147 A3175:17-A3176:11.

148 In keeping with the belief of many police detectives that they can discern when subjects are lying, is reliance on certain "tells," such as "looking down." There is no evidence that this is in fact the case. *See* Kassin et al., *Police-Induced Confessions: Risk and Recommendations, 34 L. HUM. BEHAV.1* at 6 (2010); Vrij et al., *Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection*, 11 Psychol. Sci. Pub. Int. 89, 101, 102 (2010); Kassin et al., *"I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211, 216 (2005) (overall accuracy rate for participants who reviewed taped confessions was "nonsignificant relative to chance").

Mr. Thomas's reaction is "That's intentional. I didn't do nothing intentional to my baby." [149] Sgt. Mason tells him that it would not be intentional, that it could happen if he were depressed. He tells Mr. Thomas that there is evidence he suffers from depression because of his visit to the hospital that day: "They got medical records up at the hospital and you admitted to someone that you was thinking about jumping off a bridge." Sgt. Mason demonstrates how depression, marital problems and the baby crying could have built to a crescendo of frustration, forcefully throwing down the binder for a fourth time.[150] Mr. Thomas again responds, "That was intentional though."[151]

Mr. Thomas continues to insist that he did nothing intentional to his baby, though he admits that he did cause the baby's injuries.[152] He succumbs, however, to a trick question: "When you threw the baby on the bed Saturday night was it intentional or was it an accident?" He answers that it was an accident. Sgt. Mason then asks, "So you threw the baby on the bed Saturday night?" to which Mr. Thomas answers "yes."[153]

---

149 A3177:1-13.

150 A3178: 7:23.

151 A3179:5.

152 A3177:12-13; A3178:6; A3179:5-13.

153 A3180:2-4

Sgt. Mason then hands Mr. Thomas the binders and tells him to show how he "threw him on the bed."[154] Mr. Thomas tosses the binder, saying, "That's intentional." Sgt. Mason tells him that he did it harder than that: "That's not severe acceleration. The doctor said it was severe. It's consistent with a 60 mile per hour crash." Mr. Thomas throws the binder harder the second time. Sgt. Mason tells him, "You're afraid I'm going to come after you for that. I'm not. I'm pissed because you lied to me Adrian." Mr. Thomas then states, "I'm being railroaded like I threw the baby against the wall."[155]

In the final phase of the interrogation Sgt. Mason repeats the theme of Mr. Thomas's frustrations, and accuses him of covering up and lying, while assuring him that he is Mr. Thomas's "only hope." In a full-court press, Sgt. Mason sets forth a number of reasons that Mr. Thomas should tell him the "truth": Sgt. Mason will talk to the District Attorney for him;[156] the information will keep his son alive;[157] and his wife may forgive him if "you're a man and step up."[158] After this lengthy explanation, Mr. Thomas says "Okay."[159] He then says that he was in an arguments with his wife on Wednesday and Thursday and threw his baby on both

---

154 A3180:16-21.

155 A3181:21-22. (This is not transcribed accurately.)

156 A3189:2-6, and 15-22.

157 A3189:7-10.

158 A3189:10-13. (Pages 240 and 241 are out of sequence in the appendix.)

159 A3189:23.

days.[160] At first, he denies having thrown him down on either Friday or Saturday, but Sgt. Mason tells him that "something had to happen Saturday." Mr. Thomas then says that he did it on Saturday as well.[161]

Sgt. Mason asks Mr. Thomas to act out throwing the baby on the bed for a third time. He tells Mr. Thomas exactly what he should be thinking about as he builds up to throwing down the binder:

> Hold that like you hold that baby, okay and start thinking about them negative things that your wife said to you, all right, start thinking about them kids crying all day and all night in your ear, your mother-in-law nagging you and your wife calling you a loser, all right, and let that aggression build up and show me how you threw Matthew on your bed, all right. Don't try to sugar coat it and make it like it wasn't that bad. Show me how hard you threw him on that bed.

This time, Mr. Thomas throws the binder down in the same manner that Sgt. Mason had earlier,[162] even as continues to insist that he had not meant to do it, and "He never fell on the floor."[163]

He expresses shame at "just coming out telling you I did something like that,"[164] and says he feels "like a fool."[165] Even as he explains that "I never meant

---

160 A3188:19-21

161 A3191:3-17.

162 A3195:9-20.

163 A3196:20.

164 A3206:9-12.

165 A3212:8-9.

to bump his head on the crib" (reverting to his original explanation),[166] Sgt. Mason is writing out the third and final statement for his signature.

ARGUMENT

I. THE LEGAL FRAMEWORK FOR ANALYZING DISPUTE CONFESSIONS AS TO THEIR VOLUNTARINESS AND RELIABILITY

This Court has been aware of the connection between coercive interrogation techniques and false confessions for at least a century. *See, e.g., People v. Buffom*, 214 N.Y. 53 (1915) ("The annals of criminal jurisprudence . . . abound in cases of false confessions induced by the hope of escape from punishment or the mitigation of punishment or of some other benefit to be gained by the confessing party"). Certainly, the connection between false confessions and coercive interrogations involving physical violence has long been recognized. *Stein v. New York*, 346 U.S. 156, 182 (1953) ("The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.") But the deeply troubling phenomenon of false confessions following police-dominated interrogations is not limited to physical or extreme psychological pressures, as the U.S. Supreme Court

166 A3238:14-21.

recently recognized in *Corley v. United States*, 556 U.S. 303 (2009) ("[T]here is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed, *see, e.g.*, Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N. C. L. Rev. 891, 906-907 (2004)") and *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011) (same).

In light of the persistent—and intolerable—incidence of wrongful convictions involving false confessions, the Innocence Network urges this Court to focus lower courts and law enforcement officials on the longstanding, existing guidance under the Due Process clause of the U.S. Constitution and C.P.L.R. 60.45 as to the permissible limitations on interrogation techniques for confessions that can be admitted into evidence against a defendant in a criminal trial. The Innocence Network's plea does not arise from a concern with the concept of an individual's will being "overborne," or even the principle (while obvious) that U.S. citizens have a Fifth Amendment right to refrain from self-incrimination.

Rather, the Innocence Network is committed to reducing the number of wrongful convictions, and confessions extorted by means of oppressive psychological tactics have been shown *in hindsight* to be false in too many instances. From the perspective of the *present* (rather than hindsight), coerced confessions are fundamentally unreliable. We suggest a means, in Section 75-75

infra, to test a disputed confession for signs that it is not contaminated and has sufficient indicia of reliability to be heard by the jury. There is nothing novel about the test we propose. In fact, law enforcement officers apply the very same factors in assessing the reliability of confession evidence.

A. The "Voluntariness" Standard Under the Due Process Clause of the U.S. Constitution

In the 1936 case of *Brown v. Mississippi*, the U.S. Supreme Court reversed the convictions of three black tenant farmers whose confessions were the result of physical torture, establishing the Fourteenth Amendment's Due Process clause as the constitutional test for assessing the admissibility of confessions in state cases. 297 U.S. 278 (1936) After *Brown*, trial judges in New York have had to apply a federal due process standard when evaluating the admissibility of confession evidence.

The Supreme Court has relied on different and sometimes conflicting rationales in the decades since *Brown* for excluding coerced confessions, including to promote reliability in the trial process; that courts should only admit confessions into evidence that were the product of a free and independent will; and to deter offensive police behavior. As the Supreme Court explained these three rationales in *Jackson v. Denno* 378 U.S. 368, 385-386 (1964):

> It is now inescapably clear that the *Fourteenth Amendment* forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed

> coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," *Blackburn v. Alabama, 361 U.S. 199, 206-207*, and because of "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York, 360 U.S. 315, 320-321*.

The Court has found certain police interrogation methods—including physical force, threats of harm or punishment, lengthy or incommunicado questioning, solitary confinement, denial of food or sleep, and promises of leniency—as presumptively coercive and therefore unconstitutional. The Court has also considered an individual suspect's personal characteristics, such as age, intelligence, education, mental stability, and prior contact with law enforcement, in determining whether a confession was voluntary. The voluntariness test under the Due Process clause balances whether the police interrogation techniques, in interaction with the subject's susceptibilities, render a confession involuntary, on a case-by-case basis.

In recognition that an entirely false or unreliable confession could, logically, be considered voluntary under this standard, the Court held in *Rogers v. Richmond*, that a confession's admissibility must be determined by whether the police interrogation methods were such "as to overbear [petitioner's] will to resist and bring about confessions not freely self-determined—a question to be answered

with complete disregard of whether or not petitioner in fact spoke the truth." 365 U.S. at 544. The "overbearing of the will" standard is now the primary consideration of the Due Process voluntariness test.

In *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), the Supreme Court explained the "inherently compelling pressures" in "incommunicado" police interrogations, leaving undisturbed the law on involuntary or coerced confessions, even as it announced an exclusionary rule intended to address the incommunicado aspect.[167] *See, e.g., Dickerson v. United States*, 530 U.S. 428, 435 (2000) ("We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily"); *Yarborough v. Alvarado*, 541 U.S. 652, 667-668 (2004) (comparing the objective Miranda custody inquiry with the voluntariness inquiry -- whether the defendant's will was overborne -- "a question that logically can depend on 'the characteristics of the accused") .[168]

---

167 Clearly Miranda warnings have not brought an end to the "evils" of incommunicado interrogations. In 1984, the Supreme Court observed (in the context of extending Miranda to traffic misdemeanors) that "we have no doubt. . . the police behave responsibly and do not deliberately exert pressures upon the suspect to confess against his will." *Berkemer v. McCarty*, 468 U.S. 420, 434 (1984). The Court also observed that "cases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled" despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Id*. at 433, n. 20. This optimistic view has proven wrong (although many courts do find that many confessions were voluntary), and as the number of videotaped interrogations increases, the number of confessions found to be involuntary may well increase.

168 For a multi-state collection of cases on the voluntariness standard, *see* Marcus, Paul, "*It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions,* 40 Val. U.L. Rev. 601 (2006).

Since it did not have the important opportunity afforded this Court—to examine a videotape of an actual interrogation—the Supreme Court turned in *Miranda* to police manuals, including Inbau & Reid, *Criminal Interrogations and Confessions* (1962), to understand what happens behind the closed doors of interrogation rooms:

> To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and, from outward appearance, to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

(Citations omitted). 384 U.S. at 450. The Court did not disguise its contempt for these tactics: "Even without employing brutality, the 'third degree' or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty, and trades on the weakness of individuals." *Id*. at 456. Police-dominated interrogation can "undermine the individual's will to resist and…compel him to speak where he would not otherwise do so freely." *Ibid*.

Indeed, the Court used this analogy to make obvious the compelled nature of police-dominated interrogations:

> Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient "witnesses," keep her secluded there for hours while they make insistent demands, weary her with contradictions of her assertions that she wants to leave her money to Elizabeth, and finally induce her to execute the will in their favor.

Id. at 426, n.26. Three aspects of this scenario point to its persuasive effect on the subject: (1) she is isolated in a "carefully designed room," without access to advice or support from others; (2) she is kept there for an indeterminate number of hours; and (3) she is bullied with demands and contradictions by two people who want her to change her mind. The "totality of these circumstances" is obviously coercive, and gives rise to "evils." Alone, each circumstance may be insufficient to cause a confession to be deemed coercive, but in combination they have that effect.

In *People v. Anderson*, 42 N.Y.2d 35, 39 (1977), this Court applied the Due Process voluntariness test to a 19-hour interrogation in a room with chairs and a table but no telephone or means of communication with the outside world. The defendant was deprived of sleep and questioned continuously, without the support of any friends or family. The Court held that considering the "totality of the circumstances," the People had not proved beyond a reasonable doubt that the defendant's will had not been overborne. The standards of "totality of the

circumstances" and "overbearing of the will" announced in *Anderson,* continue to be used by courts in assessing Due Process voluntariness.

B. The Broader "Voluntariness" Standard of New York C.P.L.R. 60.45

New York C.P.L.R. 60.45, provides, *inter alia*, that a confession, admission or other statement is "involuntarily made" by a defendant when it is obtained from him:

> By any person by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement; or
>
> By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him:
>
> > by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself; or
> >
> > in violation of such rights as the defendant may derive from the constitution of this state or of the United States.

This statute both incorporates and supplements the "voluntariness" standard developed under the Due Process Clause of the U.S. Constitution, and explicitly addresses the risk of false confessions. Specifically, C.P.L.R. 60.45(b)(i) defines as involuntary the use of an interrogation technique (a "promise or statement of fact") that creates the risk of a false confession.

Threats and promises of leniency plainly fall within that category. To use a simple analogy, if a police officer tells someone stopped for speeding that she will not get a ticket if she admits that she was driving 20 miles per hour over the speed limit but was not aware she was speeding, and then writes out a ticket after she admits that she was driving 20 miles per hour over the speed limit, there would be no assurance that the admission elicited by the trick was in the least bit trustworthy, and the evidence at any trial as to her travel speed must be a radar gun and not the admission obtained by a false promise of leniency.

The standard for coercion often misused under C.P.L.R. 60.45 has posed too high a hurdle for those challenging confessions since it has been read to require only a superficial review of the physical aspects of the interrogation and no analysis at all of the psychological techniques and *Warney* type manipulation that can rise to false confessions. Of the ten New York false confessors exonerated by DNA evidence, not one had his confession suppressed under C.P.L.R. 60.45, yet in nine of the ten cases, the police contaminated the confessions, rendering them unreliable under C.P.L.R. 60.45 (b)(i). The trial court and Appellate Court decisions here exemplify that problem. Indeed, even the detectives themselves, who boldly asserted that there is no "law" against "lying", reflect a diminished appreciation of the statutory commands set forth in C.P.L.R. 60.45.

The case of Jeffrey Deskovic provides a shocking example of a coerced confession in New York that was admitted into evidence despite Rule 60.45.[169] Deskovic was a 16-year-old high school student in Peekskill, New York, who matched the supposed profile of the person who raped and killed his classmate, Angela Correa. A suspect because of his supposedly inappropriate reaction to the crime, as well as the profiling, Deskovic agreed to take a polygraph examination. Over the eight hours following the exam, he was grilled by the polygrapher and a police detective, in a session that was not recorded. According to Deskovic, they told him he had failed the polygraph test, that all the evidence conclusively established his guilt, that if he did not confess he would go to prison, and that if he did confess, he could get psychological treatment, and go home. He eventually started telling the police an incriminating story, at first in the third person. By the end of the interrogation, he was curled up under the table in a fetal position, sobbing uncontrollably.

The Deskovic case also shows the powerful effect that unreliable confessions have on a trial, if it is admitted into evidence. Angela Correa was attacked on her way home from school, raped and murdered. Semen was recovered at autopsy. Deskovic was indicted for the rape and murder before his DNA was compared to the DNA profile of the semen recovered from the victim.

---

169 Leo, Richard A. and Drizin, Steven A., *The Three Errors: Pathways to False Confession and Wrongful Conviction, in Police Interrogations & False Confessions* (1st ed. 2012).

When the results came back, excluding Deskovic as the source of the semen, rather than dismiss the case against him, the prosecutors and police simply changed their theory, suggesting, without a scintilla of evidence, that the semen must have been from a consensual partner (even though there was no evidence of a consensual sexual act.) The prosecution relied solely on the confession, which they considered incriminating because they believed that Deskovic had told them information that only the perpetrator could have known. In summation, the prosecutor argued that Deskovic had admitted to striking the victim with a "heavy bottle," and a Gatorade cap later found at the crime scene showed that he had non-public knowledge. Deskovic was convicted and sentenced to 15 years to life. After he had lost his appeals, the Innocence Project took on his case and brought to light DNA evidence reflecting the identity of the real killer, who confessed. Science prevailed where the law had failed.

Trial courts must understand that the reliability analysis under C.P.L.R. 60.45 requires an understanding of the psychological techniques that can manipulate a suspect and lead to false confessions. A case also involving the death of a lethargic and feverish child under the care of a defendant, and interrogation techniques remarkably similar to those used by Sgt. Mason, *Aleman v. Village of Hanover Park*, 662 F.3d 897, 906-907 (7th Cir.) (Posner, J.), *cert. denied*, 2012

U.S. LEXIS 4869 (2012), provides a model for the kind of analysis trial courts should be engaging in.

A day-care home provider had tried to revive with a gentle shaking and CPR an 11-month old child who had collapsed. He agreed to go to the police station for questioning and was subject to interrogation for four hours by an officer named Micci, as follows:

> During the interrogation Micci repeatedly told Aleman that he'd talked to three doctors and all had told him that Joshua had been shaken in such a way that he would have become unresponsive (unconscious) immediately, meaning that Aleman's shaking must have caused Joshua's injury, since Joshua was sluggish but conscious when he arrived at Aleman's home that morning. This account of what the doctors had said was a lie, but it elicited from Aleman the statement that "I know in my heart that if the only way to cause [the injuries] is to shake that baby, then, when I shook that baby, I hurt that baby . . . . I admit it. I did shake the baby too hard." Yet intermittently throughout the protracted interrogation he continued to deny, and express disbelief, that he could have caused the injury.

As Judge Posner explained:

> In this case a false statement did destroy the information required for a rational choice. Not being a medical expert, Aleman could not contradict what was represented to him as settled medical opinion. He had shaken Joshua, albeit gently; but if medical opinion excluded any other possible cause of the child's death, then, gentle as the shaking was, and innocently intended, it *must* have been the cause of death. Aleman had no rational basis, given his ignorance of medical science, to deny that he had to have been the cause.

And:

> [A] trick that is as likely to induce a false as a true confession renders a confession inadmissible because of its unreliability even if its

> voluntariness is conceded. If a question has only two answers--*A* and *B*--and you tell the respondent that the answer is not *A*, and he has no basis for doubting you, then he is compelled by logic to "confess" that the answer is *B*.

662 F.3d at 906-07. (citations omitted.) That was the "vise" that the police placed Aleman in, and that was the identical vise the police placed Adrian Thomas in when they convinced him that his son had died because of an injury he caused, and since it could not have been accidental, he *must* have caused his son's death by forcefully throwing him onto the bed. This trick was as likely to induce a false statement as a true one, and the resulting "confession" is not reliable. Aleman was far more fortunate Thomas in that the prosecution was dropped before trial. (The *Aleman* decision concerns a damages suit against the police officers for false arrest.)

With the steady drumbeat of exonerations of persons wrongfully convicted, a large number of whom falsely confessed, the extent to which coerced confessions are unreliable is both knowable and "revolting to the sense of justice." *Brown v. Miss.* at 286. If courts continue to read the reliability component out of C.P.L.R. 60.45, unreliable confessions will continue to be admitted into evidence, and this state's abysmal record of wrongful convictions based on false confessions will continue to grow. The time has come to put an end to the pernicious practice of obtaining and admitting into evidence coerced, unreliable confessions.

II. THE INTERROGATION OF ADRIAN THOMAS PRODUCED A COERCED AND UNRELIABLE CONFESSION

With these principles in mind, together with the record of false confessions in DNA exoneration cases, we turn to an analysis of the Adrian Thomas interrogation.

A. The Excessive, Indeterminate Length of the Incommunicado Interrogation

Adrian Thomas was cut off from the outside world for over 24 hours and interrogated for two sessions totaling over nine hours, separated by a 15-hour break when he was committed to a mental hospital.

As this Court observed last term, coercion "involves the physical, cognitive and emotional depletion of the interrogation subject." *People v. Guilford*, 21 N.Y.3d 205, 209 (2013). Even without physical abuse, it is "an anathema to any truly adversarial system of justice" to obtain a conviction "by means demonstrably hazardous to the truth" *Id.* at 215. A key feature of coercive interrogations is that they proceed without any announced time for ending. The police convey the idea that they have all the time in the world to wait for the "truth," as the suspect becomes tired and eager to leave. This Court explained the coercive effect of apparently interminable interrogations in *People v. Anderson*, a case in which the defendant was detained for 19 hours without probable cause that he had committed a crime:

> The entire atmosphere was one strange to the defendant. As hour after hour dragged on, almost inevitably it had to take on an air of hostility. None but the police, their image permeated with the authority of the State, were admitted to plaintiff's presence. In particular, there were no friendly or familiar figures to bolster his morale. No time for his release was ever suggested. In the face of such not so subtle pressures, elementary principles of psychology tell us that Anderson, unconsciously at least, had to feel that the police had the right to hold him as they were doing, that he would be regarded as recalcitrant if he failed to answer their questions, that they had all the time in the world to query him and that, if he was to be freed, it would be when his answers had satisfied them.

In *Anderson*, this Court wisely declined to announce a bright-line rule as to the actual length of an investigation. 42 N.Y.2d at 39 ("[C]onsidering the variety of techniques that may suggest themselves to interrogators, it may be undesirable to prescribe inflexible and all-inclusive limitations in advance to guide interrogating law enforcement officials on all occasions.") Granted, the length of the interrogation in *Anderson* serves as a benchmark where it is *exceeded*, as it was in *Guilford*, 21 N.Y.3d at 212 (finding actual coercion with respect to an interrogation was twice as long as that in *Anderson).* But that 19 hours is too long does not mean that nine hours is not too long; the duration of the interrogation is one of the contributors to the "totality of the circumstances."

Indeed, courts have found confessions to be coerced when the interrogation is significantly less than nine hours long. *See, e.g., People v. DeJesus*, 63 A.D.2d 148 (1st Dep't 1978) (coercive interrogation began at 12:30 a.m. and concluded one hour later). *People v. Zimmer*, 68 Misc.2d 1067, 1072 *aff'd*, 40 AD2d 955)

("Where there is a question of the mental or emotional condition of a defendant, custodial interrogation for four hours has been held to render a defendant incapable of voluntarily, knowingly and intelligently waiving his constitutional rights. If there is a possibility that the defendant was incapacitated, any confession is not admissible"); *People v Leonard*, 59 A.D.2d 1 (2d Dep't 1977). Likewise, in *Spano v. New York*, 360 U.S. 315 (1959), the Supreme Court found a confession to have been coerced that followed eight hours of interrogation by a prosecutor skilled in asking leading questions. The interrogation began in the early evening and "did not bear fruit until the not-too-early morning." As the Court observed, "In such circumstances, slowly mounting fatigue does, and is calculated to, play its part." 360 U.S. at 322.

The actual number of hours a suspect is interrogated is less significant than the psychological impact of enduring a process that seems endless from the suspect's perspective. Thus in *Haynes v. Washington*, where defendant was denied contact with the outside world for 16 hours and questioned at various points, the Court found:

> Here, as in *Lynumn, supra*, the petitioner was alone in the hands of the police, with no one to advise or aid him, and he had "no reason not to believe that the police had ample power to carry out their threats," *372* U.S., at 534, to continue, for a much longer period if need be, the incommunicado detention -- as in fact was actually done.

373 U.S. at 514. This technique is coercive: "Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family, Haynes understandably chose to make and sign the damning written statement." This is an "unfair and inherently coercive context." *Id.*

B. The Threat to Pick Up Wilhemina Hicks for Questioning

Toward the end of the first session of the interrogation, the police officers told Mr. Thomas that they were going to the hospital to "go pick your wife up"[170] and "probably going to scoop your wife out."[171] At the same time, they pressed on him the "accident" scenario and told him that he would be able to go home soon if he admitted to accidently harming his child. Immediately after that, for the first time that night, Mr. Thomas admitted that he might have bumped his child's head while lowering him in to the crib, albeit accidentally, and signed a statement admitting to three incidents which might have caused his child's injuries.

The court below found that the "focus on Hicks' potential culpability was reasonable and did not overbear his will or coerce his subsequent confession some 19 hours later." The premise for this finding is that Mr. Thomas initially admitted only to *accidentally* injuring the child, so therefore any pressure to elicit this initial admission is irrelevant. (Presumably the only pressure that would matter under

---

170 A2909:3-4

171 A2909:12-13.

this line of thinking was the "good cop/bad cop" routine that preceded the third statement and the full-court press that followed, with Sgt. Mason asking him, among other things, if he wanted to be considered a "killer" a year hence.) The finding that the threat to bring in Ms. Hicks was not coercive ignores both the standard methodology used by police officers to extract confessions and relevant precedent.[172]

As to the court's mistaken premise that the only meaningful admission occurred at the end of the second session, it is standard practice for an interrogator to work a recalcitrant suspect by offering an excuse for conduct that the police believe is far more serious than they let on. Indeed, the Supreme Court explained the tactic in *Miranda*, giving an example from Inbau and Reid of how to elicit a confession of self-defense from a suspect suspected of a revenge murder: the police supply all the details for the innocent explanation of the shooting, and when the suspect agrees (putting the gun in his hand and agreeing that he pulled the trigger), the police then refer to circumstantial evidence that negates the self-defense explanation. "This should enable him to secure the entire story." 484 U.S. at 451-52. In other words, the ostensibly innocent admission is a crucial step in a multi-step process of extracting a confession to a criminal act. In the case of

---

[172] The only case cited in the decision to support the finding that the threat did not overbear Mr. Thomas's will is not on point. *People v. Lyons*, 4 A.D 3d, 549 (3d Dep't 2004), concerns not a threat to bring a wife in for questioning, but rather an assertion by the questioning detective that "everything would be alright if defendant told the truth."

Adrian Thomas, when he agreed to the accidental scenarios, he also agreed that he had caused his child's current state, a major concession, both in terms of his legal exposure and his own (precarious) mental state.

As to the law, courts have found confessions to be coerced, and therefore not admissible as evidence under the Due Process Clause, when police officers have threatened to harm a loved one in some way, including by threatening to bring a suspect's wife in for questioning. In *Rogers v. Richmond*, an Assistant Chief of Police (named Eagan) had resorted to that tactic after six hours of fruitless questioning, pretending,

> in petitioner's hearing, to place a telephone call to police officers [and] directing them to stand in readiness to bring in petitioner's wife for questioning. After the passage of approximately one hour, during which petitioner remained silent, Chief Eagan indicated that he was about to have petitioner's wife taken into custody. At this point petitioner announced his willingness to confess and did confess in a statement which was taken down in shorthand by an official court reporter.

Richmond 365 U.S. at 537. The defendant testified at the Huntley hearing that the police chief had actually threatened to bring in his wife for questioning, and "told him that he would be 'less than a man' if he failed to confess and thereby caused her to be taken into custody. According to petitioner his wife suffered from arthritis, and he confessed to spare her being transported to the scene of the interrogation." *Id.* On this record, the Court, in an opinion written by Justice Frankfurter, held that the trial judge had erroneously found the confession

voluntary on the basis of considerations that undermined its validity (*i.e.* that the artifice or deception would likely induce a true confession). *Id*., at 743-44.

The Supreme Court's decision in *Lynumn* also found a Due Process violation by means of a threat concerning a family member. When the police were interrogating the defendant in her apartment, they noticed children's clothing and learned that she was on ADC assistance. A police officer told her that "if we took her into the station and charged her with the offense, that the ADC would be cut off, also she would probably lose custody of her children." 372 U.S. at 533. The court held:

> It is thus abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not "cooperate." These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly "set her up." There was no friend or adviser to whom she might turn. She had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats. We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced."

372 U.S. at 534.

A third Supreme Court case on this point, *Spano,* involved a threat to harm children, in this case the children of a close friend. In the face of the suspect's repeated and insistent refusal to answer questions without a lawyer (the case is pre-*Miranda*), the police used the suspect's friend (a junior police officer) to engage in

subterfuge: the friend convinced the suspect that the friend's job was in jeopardy because of a telephone call that he had had with the suspect the day before. Finally, persuaded by the false story that his friend's wife and children would be destitute if he did not cooperate, the suspect gave in to his "friend's" entreaties. The Court held, "We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused . . . ." 360 U.S. at 323.

Courts have also found that such an implied threat makes a confession inadmissible under C.P.L.R. 60.45. Either subsection (2)(a) or 2(b)(i) might apply to a threat concerning a family member, as "undue pressure" that impairs the subject's mental ability to make a decision whether or not to give a statement (subsection (2)(a)), or as a "statement of fact" that creates a substantial risk that the subject might falsely incriminate himself. Both these provisions incorporate the important concepts that are borne out by the scientific research on interrogation techniques: that they deprive subjects of "rational choice," and that they can result in false confessions.

In *People v. Helstrom*, 50 A.D.2d 685 (3d Dep't 1975), a burglary suspect would not talk to the police without a lawyer present. The police told him that they would search his apartment, and that if any stolen property was found they would arrest the woman he lived with. However, if the defendant talked, it would not be necessary to search the apartment and arrest her. The defendant then gave two

incriminating statements, which were suppressed. On appeal, the Appellate Division sustained the suppression order, holding that, "Under such circumstances, it is clear that the statements were elicited by means of coercion and were therefore properly suppressed (*Miranda v Arizona,* 384 U.S. 436; C.P.L.R. 710.20, subd 3; C.P.L.R. 60.45)." (This was the easier of the two issues the appellate court addressed.)

A police strategy in *People v. Keene*, 148 A.D.2d 977 (4th Dep't 1989),[173] found to be coercive is actually shocking. A burglary suspect was arrested in his car with his young son and wife, who was over seven months pregnant. After receiving a Miranda warning and refusing to give any statements, the suspect was shown (through a one-way mirror) his wife being vigorously interrogated. He then saw CPS take his child from his wife. Soon thereafter,

> [D]efendant's wife was transported by ambulance to a hospital after she complained that she was experiencing labor pains. A police officer told defendant that if he agreed to cooperate and admit to the burglaries, he would charge defendant's wife with a misdemeanor and give her an appearance ticket so she would not have to go to jail. Defendant then gave the police a statement which is the subject of the suppression hearing.

148 A.D.2d at 978. The court held that under the facts of the case, the defendant's will was overborne by the combined promise and threat and the confession should

---

[173] The decision below cites *Keene* as a "cf" without distinguishing it.

have been suppressed (even if the police actually performed their promise of not bringing in the defendant's wife).

C. Promises of Leniency and the "Accident" Scenario

The pretense that Sgt. Mason wanted to "help" Mr. Thomas to "help himself" was itself unfair and coercive. This was no casual offer of assistance and support, but one repeated relentlessly throughout the interrogation. In the one-on-one session leading up to the second statement, the offer of help took the form of praying with Mr. Thomas, and feigning concern for his marital difficulties and unemployment, among other things. Then, after he and Sgt. Colaneri played "good cop/bad cop," Sgt. Mason used the friendship ploy to make Mr. Thomas feel guilty by betraying the supposed friendship. After this, Sgt. Mason lied to Mr. Thomas that "I am your only hope now," and pretended that he would protect Mr. Thomas from the District Attorney. This escalating pretense of friendship and support eventually had its intended effect.

The case of Frank Sterling shows how the police can coerce a false confession by feigning to help a compliant suspect.[174] Investigating a cold case of a brutal murder several years earlier, the police focused on a suspect who had a watertight alibi rather than someone else who gave a false alibi and years later was proven by DNA to be the actual killer. Investigators approached Sterling as he

[174] http://www.innocenceproject.org/Content/Frank_Sterling.php

returned from a 36-hour trucking job. He agreed to an interview at the police station, which began in the afternoon and continued overnight into the following morning. Sterling maintained his innocence, while saying he had trouble remembering. The interrogation included several highly suggestive methods, including hypnosis and the suggestion of details. At one point, the officers showed crime scene photos to Sterling to "help him remember." The officers had Sterling lay on the floor with his feet up on a chair and his eyes closed. As they rubbed his back, the interrogators insisted that Sterling had committed the murder, and shared key details with him. One of the officers told Sterling that he would feel better if he let out his anger towards the victim, telling him that the victim "deserved what she got," and insisted that "we're here for you, we still care for you."

Finally, after more than eight hours at the police station, Sterling tightened up, began to shake, and blurted out, "I did it, I need help." At this point, the officers demanded a videotaped confession and an exhausted Sterling complied. His confession included numerous inconsistencies, including the incorrect location of the crime scene on a map. Sterling also could not describe what he had supposedly done with the BB gun, and where or how many times he had shot the victim. Despite his immediate recantation of the confession, he was charged with murder, convicted, and served more than 17 years in New York prisons. DNA testing obtained by the Innocence Project led to his exoneration in 2010.

Under C.P.L.R. 60.45, courts have found that promises of leniency resulted in inadmissible confessions. So, for example, in *People v. Crosby*, 180 Misc.2d 43 (Nassau Co. 1999), written statements were suppressed under C.P.L.R. 60.45 because three women suspected of shoplifting were told that if they signed statements admitting to shoplifting they would be released, but they were instead detained and arrested after they signed the statements. Similarly, in *People v. Urowsky*, 89 A.D.2d 520 (1st Dep't 1982), admissions were excluded under C.P.L.R. 60.45 when a police officer had first told a detainee that he would be let go if he showed the officers where to find drugs.

Confessions have also been excluded under C.P.L.R. 60.45 when offers of help were made in extended interrogations. For example, in *People v. DeJesus*, 63 A.D.2d 148, 154 (1st Dep't 1978), the following statements by an Assistant District Attorney were found to violate C.P.L.R. 60.45:

> The only way you can help yourself is if you tell me who the other guy who was involved. Otherwise you are going to take the whole blow for this. If you cooperate, tell me what I want to know, who the other guy was I can help you out. You would be helping yourself if you tell me who the other guy was that you were with you would be helping yourself out. I told you if you tell me who the other guy was I'll give you a break otherwise you are going to get hit for the whole murder and that's life imprisonment. And finally, I am telling you straight. That's all I can tell you. You're not talking about 2 years 3 years in jail something like that (you just did 2 years, right?) I'm talking about life. You're a young fellow how old are you 21? You've got a lot of life ahead of you. It's your choice. You can spend it all in jail or you can help yourself.

DeJesus, 63 A.D.2d at 154.

Likewise, in *People v. Bay*, 76 A.D.2d 592, 596 (1st Dep't 1980), *aff'd*, 67 N.Y.2d 787 (1985), a confession to murder secured following six hours of interrogation was found inadmissible pursuant to C.P.L.R. 60.45, where the police persuaded the defendant that they had conclusive evidence that he had committed murder but,

> They were convinced that he was not a bad man who had done this terrible thing maliciously. They believed that the defendant must have been sick when this occurred and that it may well have occurred during the course of a blackout, accounting for his inability to remember the events. They thought he required treatment. The view was expressed that he should not go to jail and on one occasion indeed he was told that he would not go to jail.

76 A.D.2d at 596. The court held that the confession should have been suppressed, finding that the exhortations to confess "were accompanied by a sustained effort to persuade the defendant that he would be helped significantly if he confessed, with the clear implication that otherwise he would be viewed as a bad person who had acted maliciously and treated accordingly." 76 A.D.2d at 600.

D. The Ruse that Mr. Thomas Might Save the Life of a Brain-Dead Child by Confessing to Injuring Him

The police officers obviously did not feel friendly to Mr. Thomas, did not want to help him, and actually believed that he murdered his child, despite their repeated assurances to the contrary. They tried various other evidence ploys that did not work, such as the false statements that his wife and daughter both saw him

throw the child on the bed. The main deception in this case, however, relates to Matthew Thomas's medical condition, namely:

- Matthew did not have trouble breathing on Sunday morning;[175]
- X-rays showed that he had a skull fracture (Sgt. Colaneri repeats this misinformation after it has been corrected by the doctor).
- He had a chance of recovering;
- Information as to the type and timing of a (theoretical) head injury could save his life;
- There was an urgent need for this information;
- Sgt. Colaneri was an expert in head injuries and knew that Mr. Thomas's statements did not explain the injury;
- Sgt. Colaneri was in constant communication with the doctors.

These misrepresentations are coupled with Sgt. Mason's non-stop hectoring ("You don't seem like you want to save your baby's life right now"[176]) and insistence that Mr. Thomas could not be telling the truth about what had happened since the doctors knew the real truth ("You're proving the medical world wrong"[177]). This elaborate evidence ploy culminates with Sgt. Mason's suggestion that if the child is saved (as a result of information provided by his father), then Mr. Thomas will not be "a killer." He can save himself, in other words, as well as his son.

---

175 Mr. Thomas sees through this deception and recommends that the police listen to a tape of the 911 call. A3070:19-19.

176 A3010:7-11.

177 A3068:23.

This cynical strategy played upon the vulnerabilities inherent in the interrogation of a parent whose child is in critical condition and whose other children have been taken from him by CPS. First, the police took advantage of Mr. Thomas's isolation from friends and family to persuade him that they were his friend and wanted to help him. Second, the police took advantage of the emotional instability of a parent who has been told that there is a 99% chance his four-month-old baby will die. Third, the police took advantage of Mr. Thomas's lack of medical knowledge generally, as well as his lack of information about his son's condition. Finally, the police took advantage of his lack of legal expertise (and a lawyer for that matter) to persuade him that by adopting their version of the "truth" that he would be treated more leniently than if he continued to deny responsibility. These four related aspects of the interrogation together were unlawfully deceptive and resulted in an unreliable and inadmissible confession.

It is permissible, as so-called "mere deception," for police to misrepresent certain facts, such as the fact that a victim has died[178] or that another suspect has confessed.[179] Therefore, the police were arguably under no obligation to tell Mr.

---

178 *People v. Pereira*, 26 N.Y.2d 265, 269 (1970) (Where defendants not told that a victim had died, and though they might be identified by the victim, "No contention is made, however, nor is there evidence that any promise or threat was made to appellant, and the law is well settled that in the absence of such factors mere deception is not enough").

179 *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) ("The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the 'totality of the circumstances")

Thomas that his child was brain-dead and would not survive. Deception crosses the line from "mere deception" to impermissible coercion when it is combined with a promise or threat, or other coercive technique that together deprive one of the ability to make a rational decision or induce a potentially false confession. In that case, deception is a violation of Due Process (where the will is overborne) or C.P.L.R. 60.45 (where there is no possibility of rational decision-making or it could lead to a false confession). *See e.g., People v. Tarsia*, 50 N.Y.2d 1, 12 (1980) (finding confession voluntary where defendant *not* told that voice-stress test was omniscient and police officers did *not* "browbeat Tarsia with accusations of untruthfulness").

Long ago, this Court made clear that manipulative deception of the kind used in the Thomas interrogation cannot be tolerated. In *People v. Leyra*, 302 N.Y. 353 (1951), a case that pre-dates the widespread use by trained police officers of sophisticated psychological tools, this Court had the opportunity to analyze the transcript of an interrogation of a man suspected of killing his parents.[180] The examiner was a psychologist acting on behalf of the police, and in that respect the case is distinguishable from the Adrian Thomas interrogation, where a police detective used psychological tactics. But in other respects, the psychological

[180] The transcript is attached as an exhibit to *Leyra v. Denno*, 347 U.S. 556 (1951).

tactics used in the interrogation are similar. The psychologist in *Leyra*, among other things:

- Played upon the defendant's fears and hopes;
- Told him that it was to his benefit to recollect thoughts;
- Told him "we'll help," and "we'll play ball with you;"
- Minimized the homicides by telling him they were done in a fit of temper;
- Told him, "Morally you are not to be condemned;"
- Commanded the defendant to look at him; and
- Suggested to the defendant what to say.

302 N.Y. at 363.

This Court held that the statement should have been excluded as a matter of law, stating:

> [T]his interview was a subtle intrusion upon the rights of defendant and was tantamount to a form of mental coercion, which, despite the good faith of the prosecution, we may not countenance here. No such intrusion may be sanctioned in a system of law which is based upon the presumption of innocence, surrounded by the constitutional safeguards afforded to every individual.

Noting that "an involuntary confession is by its very nature evidence of nothing," 302 N.Y. at 364, this Court observed,

> Torture of the mind is just as contrary to inherent fairness and basic justice as torture of the body. . . .[H]ere was a deliberate attempt to extract a confession through the ceaseless pressure of a skillful psychiatrist by his peculiar technique, claiming to be defendant's doctor, promising to help him, giving assurances and at the same time conducting an unrelenting interrogation of the exhausted accused.

Id. at 364-365.

When this Court took a more limited view of deception on one occasion,[181] the finding was reversed in a habeas appeal. *Everett v. Murphy*, 329 F.2d 68 (2d Cir. 1964). Days after a man died from a head trauma, the police questioned a former employee of the victim (who had pawned the victim's watch). The police officer told the defendant that the victim (Finocchiaro) was not badly hurt and the police officer would help the defendant if he told the truth. When the defendant denied the assault, the police pretended to go speak with the victim, and then returned with the false information that the victim had identified the defendant as his assailant. This Court erroneously found the ensuing confession to be voluntary (and distinguishable from *Leyra*, discussed below) as "deception alone." The Second Circuit disagreed, finding that the confession followed deception and false promises of assistance should he confess:

> The deception of Everett as to Finocchiaro's survival of the attack might be ignored if it stood alone. However, here it was used to make more plausible the promise of assistance to induce confession. A confession induced by police falsely promising assistance on a charge far less serious than the police knew would actually be brought is not to be considered a voluntary confession.

3249 F.2d at 70. (Citations omitted) In short, the combination of lies told to Mr. Thomas during the second session was not "mere deception."

---

[181] *People v. Everett*, 10 N.Y.2d 500 (1962).

The medical emergency ruse is similar to the evidence ploy of a supposedly infallible lie detector, a tactic which this Court referred as "egregious" in *People v. Tarsia*. Both unfairly take advantage of the subject's ignorance about science. Thus, in *People v. Zimmer*, 68 Misc.2d 1067, *aff'd*, 40 AD2d 955 (4th Dep't. 1979), a confession was found to have been coerced when the defendant was repeatedly told by the examiner that a polygraph test revealed her untruthfulness and that its results could be used against her. As in this case, the defendant in *Zimmer* was suspected of deliberately causing injuries that resulted in the death of a child. After a sleepless night, she agreed to take the polygraph test, and spent a number of hours alone with the examiner or by herself in a small room at the police station. Following the test, when she was emotionally upset, the police accused her of lying, over the course of four hours. The court found the confession was not admissible, observing, "She was alone, bewildered, with no one to advise her what to do next, except Investigator Scott insisting she had lied. The interview with Investigator Scott lasted nearly three hours. The defendant had, in effect, been under police control for over three hours."

Likewise, in *People v. Leonard*, 59 A.D.2d 1(2d Dep't 1977), a polygraph was misused to extract a confession. There, the examiner professed to be concerned with helping the defendant, conveyed to him the impression that the machine was infallible and knew the truth "just like [you] and God," and detectives

assured him that the machine had proved he had "lied" and that the examiner would so testify. (Cited in *People Tarsia,* 50 N.Y.2d at 11.)

E. Contamination

Police are well aware of the phenomenon of false confessions. They know that the best way to assess the reliability of a suspect's general acknowledgement of guilt is to have the suspect provide a detailed narrative in which he provides facts about the crime that only the perpetrator would know. Specifically, three procedures are to be followed to assess the reliability of any confession. First, certain details about the crime scene are to be held back from the press and public, so that when a suspect volunteers them they will be powerful evidence that the confession is true and reliable. This is what Reid *et al.* call "dependent corroboration. [182] Second, police are trained to avoid feeding the details of the commission of the crime to the suspect during the interrogation in order to prevent contaminating the confession. Third, the most convincing evidence that a confession is reliable is "independent corroboration" – evidence that the police did not know about prior to the confession.

Many false confessions have the ring of truth because the defendants have been fed non-public details of the crime by the police. Police "contamination," either deliberate or accidental, is highly detrimental since the level of accurate

---

[182] http://www.reid.com/educational_info/r_tips.html?serial=3258095019989437

detail in contaminated confessions has led many juries to find false confessions believable. Contamination occurs when suspects are told confidential information during the course of an interrogation resulting in a speciously persuasive confession. While contamination should not occur, because it destroys a key indication of reliability, it happened in nine out of ten false confession cases in New York studied by Professor Brandon Garrett.[183] And of the 38 cases Professor Garrett studied nationwide, 36 false confessions were the product of police contamination.[184]

As noted above, the case of Douglas Warney, who had a history of delusions, an eighth-grade education and advanced AIDS, provides an example of a convincing, detailed confession that was contaminated by information supplied by the police. Warney initially told the detective that he had stabbed the victim once. The detective, aware that there were multiple stab wounds, subsequently asked Warney, "how many times did you stab him." Warney's confession also contained the detail that the victim had been cooking chicken. In the closing argument, the prosecutor told the jury, "The [d]efendant says he's cooking dinner, and he's particular about it, cooking chicken. . . . Now, who could possibly know [those] things if you hadn't been inside [that] house, inside that kitchen?" In his

183 *Supra*, n. 13.

184 *Id.*

concurring opinion in *Warney v. State of New York,* 16 N.Y.3d at 438, Judge Smith asked the same question:

> How indeed could he have known all these facts? It is hard to imagine an answer other than that he learned them from the police. In short, the details set forth in Warney's 41-page statement of his claim, with 58 pages of annexed exhibits, point strongly to the conclusion that the police took advantage of Warney's mental frailties to manipulate him into giving a confession that contained seemingly powerful evidence corroborating its truthfulness—when in fact, the police knew, the corroboration was worthless.

After he was exonerated by DNA evidence, Warney stated that he was told by the interrogator many details, including what was cooking in the hot pot.[185] See *Warney v. State of New York*, 16 N.Y.3d at 438-439, Smith, J. concurring ("a confession cannot fairly be called 'uncoerced' that results from the sort of calculated manipulation that appears to be present here--even if the police did not actually beat or torture the confessor, or threaten to do so.")

In this case, the police manufactured a confession that matched what the doctor told them about the nature of Matthew's injury, shaping Mr. Thomas's story to conform to that information: that his head had been slammed forcefully against something hard. They told Mr. Thomas that there was "old blood" in Matthew's brain from an earlier injury and that he had a fractured skull and subdural hematoma caused by extremely sudden acceleration and deceleration. The police rejected all of Mr. Thomas's statements that did not conform to what they believed

185 *Id.*

to be the nature and cause of Mathew's injury, eventually coaxing from his mouth the story they were determined to hear.

Contamination produced the most dramatic – and bewildering – event in the interrogation, when Sgt. Mason slammed his binder onto the desk to demonstrate how the baby was slammed onto the floor from a height of five or six feet. After a torrent of minimizing assurances (post-partum depression, frustration from the baby crying and that it was not intentional), and a manipulative leading question ("When you threw the baby on the bed Saturday night was it intentional?"), Sgt. Mason orders Mr. Thomas to throw down the binder. This evidence (to the extent it is evidence of anything) is further contaminated when Mr. Thomas is ordered to conform the demonstration with what the doctor said caused the injury:

> Adrian, Adrian, you did it harder than that. That's not severe acceleration. The doctor said it was severe. It's consistent with a 60 mile per hour crash. Now pick that up and show me how you threw that baby on the bed.

To induce Mr. Thomas to throw the binder more forcefully, he tells Mr. Thomas his "negative thoughts" at the time he supposedly threw his baby: his children crying all night, his mother-in-law nagging, and his wife calling him a loser, as his aggression builds.

The worthlessness of the physical demonstration as evidence is revealed by Mr. Thomas's words afterward, "I'm being railroaded." As he protests, "I never meant to do this," he reverts to his own understanding of how he may have injured

Matthew's head: "Honest to God I did bump his head and I did fall back on his head." Those words, which have nothing to do with slamming an infant on the ground, are his original story of what happened, and actually have the ring of truth.

If this Court simply follows the clear mandate of C.P.L.R. 60.45, the manipulation of Adrian Thomas is palpable. The Troy police made statements of fact, "which statement[s] creates a substantial risk that the defendant might falsely incriminate himself."

III. WHEN A DISPUTED CONFESSION IS ADMITTED INTO EVIDENCE, EXPERT TESTIMONY ON FALSE CONFESSIONS MUST BE ALLOWED AS A NECESSARY SAFEGUARD TO PREVENT WRONGFUL CONVICTIONS

The large number of DNA exonerations featuring false confessions points to the compelling need for additional safeguards to prevent wrongful convictions, just as it has pointed to the need for experts on the unreliability of eyewitness identifications. First, in *People v. LeGrand*, and again in *People v. Santiago*, 17 N.Y.3d 661, 669 (2011), both involving the unreliability of eyewitness identifications, this Court recognized the need for this safeguard. A unanimous Court in *Santiago*, 17 N.Y.3d at 669, tied the need for expert testimony on eyewitness identifications to the problem of wrongful convictions:

> Because mistaken eyewitness identifications play a significant role in many wrongful convictions, and expert testimony on the subject of eyewitness recognition memory can educate a jury concerning the circumstances in which an eyewitness is more likely to make such mistakes, "courts are encouraged . . . in appropriate cases" to grant

> defendants' motions to admit expert testimony on this subject (*People v. Drake, 7 N.Y.3d 28, 31*, citing *People v. Young, 7 N.Y.3d 40*, 576 [2006]).

When a disputed confession is the only evidence against a defendant in a murder case, the need for expert testimony on false confessions is as acute—if not more so—as the need for eyewitness experts. The science on police interrogations and false confessions is as widely accepted as the science on eyewitness identifications, and as equally (if not more so) "beyond the ken" of the average juror.

Like eyewitness identifications, confession evidence is deeply believable by juries, even when there are indications that the confession is coerced.[186] As Justice William Brennan recognized in his dissent in *Colorado v. Connelly*, "no other class of evidence is so profoundly prejudicial." Once a confession is admitted into evidence, jurors seem to care little whether the confession was the product of hours of coercive interrogation, taken from a vulnerable suspect, filled with errors and contradictions, or is uncorroborated. As Justice Brennan observed, "[T]riers of fact accord confessions such heavy weight in their determinations that 'the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is

---

[186] Kassin, Saul M. & Neumann, Katherine, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis,* 21 L. & Hum. Behavior 5, 470 (1997).

obtained.'" *Connelly*, 479 U.S. at 183. Indeed, in the Drizin and Leo study, 81% of the false confessors who chose to take their cases to trial were convicted.[187]

The false confessions of the five young men in the Central Park jogger case provide a stark example of the power of confession evidence. The case of the "Central Park Five" also shows the tragic impact of confessions on the criminal justice system, and resulting years wasted in prison by the innocent.

To repeat the now-familiar facts,[188] a female jogger was brutally attacked and raped in New York's Central Park, recovering with no memory of the assault. The police immediately focused on a group of African-American and Latino youths who were in police custody for a series of other attacks that happened in the park that night. After prolonged periods of police interrogation, five teenagers between 14 and 16 years of age —Yusef Salaam, Kevin Richardson, Antron McCray, Raymond Santana and Korey Wise—confessed to involvement in the attack and rape. Their confessions differed in the time, location, and description of details but were nevertheless presented as evidence against the Central Park Five in two separate criminal trials. All five teenagers were convicted of charges stemming from the attack.

---

187 Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* at 891.

188 http://www.innocenceproject.org/Content/Korey_Wise.php (Last visited Nov. 20, 2013)

In early 2002, Matias Reyes, a convicted murderer and rapist, admitted that he alone was responsible for the attack on the Central Park jogger. Reyes had already committed another rape near Central Park days earlier in 1989, using the same *modus operandi*, and had identifying facial characteristics. Although the police had Reyes's name on file, they failed to connect Reyes to the rape and assault of the Central Park jogger. Eventually, the evidence from the crime was subjected to DNA testing and the DNA profile obtained from the rape kit matched the profile of Reyes. Also, DNA testing on the hairs found on one of the defendants revealed that the hairs were not related to the victim or the crime. Further testing on hairs found on the victim also matched Reyes. The evidence corroborated Reyes's confession to the crime and is consistent with the other crimes committed by Reyes, who is currently serving a life sentence for those crimes. On December 19, 2002, on the recommendation of the Manhattan District Attorney, the convictions of the five men were overturned.

Confession evidence is so powerful because the idea of confessing to a crime is so counterintuitive, so against one's self-interest, that jurors cannot ever imagine that they themselves would falsely confess to a crime they did not commit, especially a murder and even more especially the murder of a loved one. Even if jurors can understand conceptually that false confessions happen to other people, their belief that it would never happen to *them* makes it extremely difficult for

them to conclude that the defendant sitting at counsel table falsely confessed. Jurors may "know that false confession exist" but that knowledge does not help them overcome the three aspects of the human condition that are present in every wrongful conviction based on false confession: fundamental attribution error, tunnel vision, and confirmation bias.

The "fundamental attribution error," or the tendency for people to view human behavior as voluntary, causes them to discount the social circumstances and context in which confessions occur and instead to attribute a false confession to personality factors of the confessor.[189] Research indicates that people under-estimate the extent to which their own behavior might be shaped by strong situational pressures.[190] Their belief that anyone who confesses to a crime must be guilty leads to "tunnel vision," meaning that the more the suspect denies a crime, the more likely that jurors are to believe he is guilty. Similarly, "confirmation bias" causes them to discount evidence of innocence or to manipulate it to fit within their own pre-conceived notions of the suspect's guilt. Experts are needed to help jurors take off these blinders.

Watching a videotape of an interrogation does not appear to mitigate the effect of these powerful psychological forces. A recent study—the first to use

---

189 *See* Kassin & Gudjonsson, *The Psychology of Confession Evidence* at 59 (noting a "voluminous body of research" on the subject).

190 Zimbardo, Philip G., *The Lucifer Effect: Understanding How Good People Turn Evil* (New York 2007).

videotaped interrogations instead of trial transcripts—bears this out. Researchers hypothesized that jurors shown coercive interrogations —those with maximization and minimization techniques—would lead mock jurors to be less confident in their guilty verdicts. But the opposite occurred. When they actually saw the videotape they were *more* confident in their assessments of the suspect's guilt.[191] The videotape seems to have confirmed their sense that the pressure of manipulation caused a *true* confession to emerge. This insight has powerful meaning in the context of the Adrian Thomas interrogation: showing the jurors the videotape, without the benefit of expert testimony, may well have confirmed jurors' misconceptions, rather than taken off their blinders.

Experts are also needed to discuss the phenomenon of contamination.[192] Jurors need to be educated on some of the subtle ways in which police feed facts to suspects, *e.g.,* by disclosing information and asking leading questions. There is no reason to believe that jurors watching a videotape from beginning to end will understand on their own the extent to which police officers contaminated the confession. Experts can provide a context in which to evaluate the reliability of a confession and, by slowing down the action on the tape and highlighting instances

---

191 http://www.forensicpsychologyunbound.ws/OAJFP/Volume_5__2013_files/Garofalo%202013.pdf (Last visited Nov. 20, 2013)

192 Garrett, Brandon L. *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010)

of contamination, show that the confession is more the product of fact feeding by the police than something that originated in the mind of the suspect.

A. The Science on Police Interrogation Methods and False Confessions Satisfies the Requirements of *Frye*

The role of the trial court is to conduct a careful analysis of whether expert testimony will aid the jury in its truth-finding mission. While the decision whether to admit expert testimony is committed primarily to the sound discretion of the trial court, the exercise of discretion must be based on a legally sufficient rationale. When discretion is exercised without regard for the proper legal standard, there is reversible error. Here, the trial judge erred by applying his own personal judgment as to whether the subject of expert testimony was sufficiently reliable, rather than applying the standard of *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

Under *Frye*, expert testimony on scientific evidence is considered reliable when the scientific principles on which it is based are "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye* holds that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs" (*Frye, 293 F at 1014*). It "emphasizes 'counting scientists' votes, rather than on verifying the soundness of a scientific conclusion" (*People v. Wesley,* 83 NY2d. 417, 439 [citation omitted]

[Kaye, Ch. J., concurring])". *Parker v. Mobil Oil Corp*., 71 N.Y.3d 434, 447 (2006).

While giving lip service to *Frye*, the trial court chose to make its own determination of reliability instead of assessing whether the proffered scientific principles were "generally accepted by social scientists and psychologists working in the field," *People v. LeGrand*, 8 N.Y.3d at 458. Without any analysis or citations, the trial court found that there is "vigorous debate" and "significant disagreement" in the scientific community, and that the "anecdotal evidence presented at the hearing has not yet developed into a reliable body of scientific research." The trial court then critiqued the scientific research on grounds that have nothing to do with whether it is "generally accepted by social scientists and psychologists working in the field." Instead, the trial court complained of a lack of empirical data, the size of statistical samplings, the absence of a lie detector, and the failure to establish a causal connection. In other words, he substituted his skepticism about the scientific research for that of social scientists and psychologists working in the field.

The proper *Frye* analysis, as applied in *LeGrand*, would turn on whether there are findings based on "sound, generally accepted experimentation techniques and theories, published in scholarly journals and subjected to peer review" that "have over the years gained acceptance within the scientific community." The

science on police interrogations and false confessions meets the standard of *LeGrand*. As the *amicus curiae* brief to be submitted in this case by the American Psychological Association will explain in detail, the reliability of social-science research is established through various, sometimes overlapping factors. These include: consistency with related research, the use of accepted research methods, critical peer review in the relevant scientific community, publication in respected journals, and general acceptance in the field. False-confession research satisfies these criteria. In addition, a White Paper published by the American Psychology-Law Society, a division of the APA, "Police-Induced Confessions: Risk Factors and Recommendations," summarizes the extensive body of research on police practices, relevant principles of psychology, and forensic studies involving an array of empirical methodologies. This article, by recognized academics in their field, was placed into evidence at the Frye hearing in this case.

We urge the Court to follow the precedent of *People v. LeGrand*, in which it set a uniform statewide policy on the aspects of eyewitness unreliability that it found were generally accepted. *LeGrand* provides an important procedural safeguard with respect to one of the main causes of wrongful convictions. A ruling in this case that would prevent trial courts from excluding experts on false confessions on *Frye* grounds would provide an equally important procedural safeguard with respect to the leading cause of wrongful convictions.

B. Studies on Police Interrogations and False Confessions are "Beyond the Ken" of the Jury

In addition to the requirement that it satisfy *Frye*, expert testimony must also be "beyond the ken of the typical juror" to be admissible. *People* v. *Diaz*, 20 N.Y.3d 569, 575 (2013); *De Long* v. *Erie County*, 60 N.Y.2d 296, 307 (1983) ("The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror"). In other words, expert testimony should aid the jury in examining an issue that requires professional or technical knowledge. *Diaz*, 20 N.Y.3d at 575 (testimony by prosecution expert on sexual abusers' practice of "grooming" of children held properly admitted). As this Court explained in *LeGrand*, the trial court should consider whether jurors' "'day-to-day experience, their common observation and their knowledge,' would benefit from the specialized knowledge of an expert witness." 8 N.Y.3d at 455 (internal citations omitted).

That jurors may have experiences or knowledge relevant to the subject of expert testimony does not mean that they have "professional or technical" knowledge of certain aspects of that experience. So, for example, in *DeLong v. Erie County, 60 n.Y. 2d 269 (1983)*, involving an economist's testimony on the value of services provided by homemakers, this Court observed, "Undoubtedly most jurors have at least a general awareness of the various services performed by

a housewife. It is doubtful, however, that they are equally knowledgeable with respect to the monetary equivalent of those services." *Id*. at 307. Similarly, in *Selkowitz v. County of Nassau*, 45 N.Y.2d 9, 102 (1978), this Court sustained the admission of testimony of a police captain on emergency traffic procedures and proper police conduct in a high-speed chase, even though the average juror "is quite familiar with the everyday rules of the road."

Likewise, in *People v. Cronin*, 60 N.Y.2d 430, 433 (1983), involving whether an intoxicated person could form the requisite criminal intent, this Court held that jurors' personal experience of intoxication was beside the point; the forensic psychiatrist skilled in drug and alcohol abuse who was proffered as an expert in *Cronin* had knowledge beyond the ken of the average juror. *Cronin* discredited the claim that expert testimony would usurp the role of the jury. In *People v. Lee*, 96 N.Y. 2d 157 (2001), involving a carjacking, this Court applied *Cronin* and similar cases to expert testimony relating to the reliability of eyewitness observation and identification. In a well-reasoned opinion, this Court advised that "courts should be wary not to exclude such testimony merely because, to some degree, it invades the jury's province," and acknowledged that such expert testimony is "a kind of authorized encroachment" on the "jury's otherwise exclusive province which is to draw 'conclusions from the facts.'" *Id*. at 162, citing *People v. Jones*, 73 N.Y.2d 427, 430-431 (1989) (expert in chemistry and

controlled substance testified for the prosecution in drug case). Accordingly, *Lee* held:

> Despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.

Id.

Five years later, this Court followed *Lee* in *People v. Young*, 7 N.Y 3d 40 (2006), a home invasion case. While concluding that the trial court had not abused its discretion in excluding expert testimony on factors affecting the reliability of eyewitness identifications, this Court, in an opinion by Judge Smith, quoted *Lee* ("although 'jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror'") and found that the expert could tell the jury something that jurors would not ordinarily be expected to know. *Id*. at 44. Likewise, in *People v. Abney*, 13 N.Y.3d 251, 268 (2009), this Court found that the counterintuitive principles of witness confidence "places then beyond the ken of the average juror."

The courts below erred in holding that the proffered expert testimony did not "concern a subject matter outside of the ken on the average juror." In his *Frye* decision, the trial judge found that the proffered testimony concerned a subject

matter that was not outside the ken of the average juror. He found that average people are aware that people "may state something that isn't true or admit to doing something that he or she did not actually do." Indeed, the court found, false confessions are "reported in the media and addressed in popular culture."[193] People also understand that when "certain pressures are put on a person," that person might admit to something that isn't actually true. The Appellate Division agreed, without any analysis that the subject matter of the proffered testimony was not outside the ken of the average juror. (Of course, the proffered testimony was not that people sometimes lie when pressured, but was to provide a framework for understanding the argument that a man falsely confessed after nine hours of intense interrogation to hurling his four-month old baby on the ground on three separate days.)

To the contrary, there is a voluminous body of psychological research showing that people find it very hard to accept that a sane adult would falsely confess to a felony.[194] In one study, an overwhelming majority of surrogate jurors (91.3 %) stated that they did not believe that they themselves would ever confess to

---

193 A2367.

194 *See* Chojnacki, Danielle E.et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. at 3-4 (2008) (survey results show that "the body of knowledge on false confessions is . . . well outside of the common knowledge of jury-eligible citizens" (emphasis omitted)); Kassin & Gudjonsson, *The Psychology of Confession Evidence*, 5 PSYCHOL. SCI. PUB. INT. 33, 59 (2004) (a "voluminous" body of psychological research shows that people generally do not account for situational pressures when evaluating behavior).

a crime they did not commit.[195] The percentage was even higher (93.3%) for serious crimes such as rape or murder.[196] The largest study of proven false confessions revealed that 80% of them occurred in murder cases[197]— crimes that can result in life imprisonment, the ultimate abrogation of self-interest. Experts can tell jurors that although false confessions make up 25% of the DNA exonerations, they make up a substantial majority of all cases in which DNA has exonerated a suspect of a murder. And experts can inform jurors that there are numerous documented cases of people who falsely confess to killing their loved ones, including mothers and fathers who falsely confess to killing their children, children who falsely confess to killing their parents siblings who falsely confess to killing other siblings.

Two cases outside of New York involve fathers who falsely confessed to killing their children. Jerry Hobbs spent five years in jail in Illinois awaiting trial for the murder of his daughter and another young girl. Shortly after alerting police in 2005 that he had discovered their bodies, Hobbs was subjected to a marathon interrogation and provided a written confession. A year after the crime, investigators learned that DNA testing on semen from one victim's body pointed to

---

195 Costanza Mark, et al.., *Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony*, 7 J. OF EMPIRICAL LEGAL STUDIES, 231-247 (2010).

196 *Id.*

197 Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* at 944.

another unknown man. Subsequently, the DNA profile from the crime scene implicated a serial rapist and charges were dropped against Hobbs. Another Illinois father, Kevin Fox, spent eight months in jail after he falsely confessed to the brutal murder of his three-year old daughter. He was later cleared by DNA evidence that proved that another man killed his daughter.[198] Another false confession involving a child is closer to the facts of this case, because the child had actually died of natural causes. Christina Mason confessed to letting another woman inject her three-month-old baby with heroin and cocaine to make the baby stop crying. An autopsy, however, showed no such drugs in the baby's body and the medical examiner concluded that the likely cause of death was a viral infection or pneumonia. [199] It is highly unlikely that the average juror is aware of these unusual—but relevant—cases.

Expert testimony about false confessions also helps jurors evaluate the reliability of a confession by informing them of the risk factors that have been

---

198 *Innocence Project of Florida*, Plain Error, Posts Tagged "Kevin Fox" (July 14, 2010, 9:55 PM) http://floridainnocence.org/content/?tag=kevin-fox ("Having just lost his 3-year-old daughter to a brutal ordeal of sexual assault and murder, he found himself sitting in a 'small, windowless room' with the police threatening that they would 'arrange for inmates to rape him in jail.'" According to further records, the detectives "screamed at him, showed him a picture of his daughter, bound and gagged with duct tape, and told him that his wife was planning to divorce him." This went on for 14 hours. Fox gave up and went along with the police's hypothetical insisting that his daughter had died in an accident, thinking that, clearly, they would see that the hypothetical and the actual evidence coming from the incident did not fit together.")

199 Leo, Richard A. and Ofshe, Richard J., "*The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*," 88 J. Crim. L. & Criminology 429, 450 (1998).

shown to yield a false confession, including standard interrogation tactics police use to elicit confessions known as the "Reid Technique," named after John E. Reid, and taught in police academies and training sessions, [200] The Reid Technique was developed in the 1940's, and explained in a manual in the 1960s, Inbau & Reid, *Criminal Interrogations and Confessions*, that remains the basic text in the field. The purpose of interrogation using the Reid Technique is to elicit incriminating statements, admissions, and perhaps a full confession from a person whom the police believe to be guilty. The Reid Technique uses scientifically based positive and negative incentives, known as "minimization" and "maximization," which are highly effective at overcoming a suspect's reluctance to make admissions.[201] For "minimizing" a crime, the ostensibly friendly interrogator provides the suspect with an excuse to make it seem normal, such as a spontaneous accident or self-defense. Suspects perceive minimization as an implied promise of

---

200 Kassin, Saul M., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW HUM. BEHAV. 381, 383 (2007). Kassin, Saul M., Meissner, Richard A., Richman, Christian A., Colwell, Kimberly D., Leach, Lori H., Leo, Richard A., Meissner, Christian A., Richman, Kimberly D., Colwell, Lori H., Leach, Amy-May & LaFon, Dana, *The Psychology of Confession Evidence,* 52 AM. PSYCHOLOGY 221, 221-224 (1997).

201 *See* Kassin et al., *Police-Induced Confessions* at 27-30; Davis & Leo, *Commentary: Overcoming Judicial Preferences for Person- Versus Situation-Based Analyses of Interrogation- Induced Confessions*, 38 J. AM. ACAD. PSYCHIATRY L. 187, 188 (2010); *see also* Kassin, *A Critical Appraisal of Modern Police Interrogations*, in *Investigative Interviewing* 207-228 (Williamson ed., 2006).

leniency.[202] In one study tripled the number of false confessions.[203] Researchers have systematically observed these factors—about which jurors typically have little knowledge—and studied their effects.[204]

One risk factor that has been shown to lead to false confessions is the presentation of false evidence of a suspect's culpability. Evidence ploys (*e.g.,* an eyewitness has positively identified you) can substantially alter "people's … perceptions, beliefs, motivations, emotions, attitudes, … self-assessments, and even certain physiological outcomes. . . and can put innocents at risk to confess by leading them to feel trapped by the inevitability of evidence against them."[205] Studies have demonstrated the risk of a false confession from such evidence ploys.[206]

---

202 *See Kassin* & McNall, *Police Interrogations and Confessions*, 15 LAW & HUM. BEHAV. 233, 234-235 (1991).

203 Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 485 (2005).

204 *See, e.g.*, Gudjonsson, G., *The Psychology of Interrogations and Confessions* 141-151 (2003); *Kassin* et al., *Police Interviewing and Interrogation*, 31 LAW & HUM. BEHAV. 381, 389-390 (2007); Kassin et al., *Police-Induced Confessions* at 27-30; Gudjonsson & Pearse, *Suspect Interviews and False Confessions*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 33, 33-37 (2011)

205 *See* Kassin et al., *Police-Induced Confessions* at 28

206 See, e.g., Redlich & Goodman, *Taking Responsibility for an Act Not Committed: Influence of Age and Suggestibility*, 27 LAW & HUM. Behav. 141, 151 (2003).

Another risk factor for false confessions is the length of the interrogation. While most interrogations are under two hours, [207] "average length of interrogation in 44 proven false confession cases was 16.3 hours, and the median … was twelve hours."[208] Interrogations that exceed six hours have been found as inherently problematic.[209] Also, personality traits may render certain individuals particularly susceptible to interrogative pressure.[210] Compliant individuals tend to be conflict-avoidant, acquiescent, and eager to please authority figures. Individuals who are highly suggestible tend to internalize and repeat back information that is suggested to them, and also tend to have poor memories, higher levels of anxiety, and tend to be less assertive.[211] The typical juror is not aware of the risk that these tactics and factors will yield a false confession.

Expert testimony on these tactics and risk factors advances the truth-seeking process. As Leo and Drizin explains, "Although the phenomenon of . . . false confessions is [sic] counterintuitive, it can be easily understood once the techniques, logic, and effect of modern interrogation are methodically analyzed

---

207 *See* Leo, Richard, *Inside the Interrogation Room* 86 J. CRIM. L. CRIMINOLOGY 1, 279 (Winter 1996) (Table 6).

208 Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* at 948

209 *See* Blair, J.P., *A Test of the Unusual False Confession Perspective: Using Cases of Proven False Confessions*, 41 CRIM. L. BULL. 127, 135 (2005).

210 S*ee* Gudjonsson, G., *The Psychology of Interrogations and Confessions* at 51-52 (citing studies).

211 *See generally* Gudjonsson, *The Psychology of Interrogations and Confessions* 370-376 (2003).

and explained." [212] With this body of knowledge, a jury is far better equipped to evaluate confession evidence.

A separate important area on which expert testimony is needed in false confession cases involves "contamination." Contamination can be so insidious that the police themselves might not be aware they are doing, with the result that they credit a false confidence only because it contains information that they inadvertently fed to the subject. Americans learned about the unconscious phenomenon of contamination when a retired detective named Jim Trainum reviewed an old case file on a woman who had confessed to killing a man but was not charged because she had a strong alibi. He suspected that she had gotten away with murder because of the insider things she knew about the victim, such as that he was wearing his wedding ring and where his credit card had been used. When he looked back at the file he learned that the interrogation had accidentally been videotaped. To his surprise, he found that the tape showed exactly how an innocent person could have known the insider deals: they had shown her the credit card slips, and a crime scene photograph that showed a wedding ring![213]

---

212 Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* at 917-18; Iris Blandón-Gitlin et al., *Jurors Believe Interrogation Tactics Are Not Likely To Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?,17* PSYCHOL. CRIM. & L. 1-22 (2010)

213 Dwyer, Jim, *After Baby Hope Confession, Assessing the Value of Taped Confessions* (N.Y. Times Oct. 24, 2013)

In his proffer, Dr. Ofshe used the recording of the interrogation to explain the social psychology involved and to point to specific tactics and how they influenced Mr. Thomas's decision to confess. Dr. Ofshe was prepared and ready to point to specific examples of police contamination that undermined the reliability of the confession. He was going to testify about situational factors that "the relevant scientific community considers to be associated with false confessions," information that was clearly beyond the ken of the average juror. His testimony went to the heart of the case and was essential to the defense, since the disputed confession was the only evidence presented to the jury that (a) a crime had occurred and (b) Mr. Thomas had committed it.

IV. THIS COURT SHOULD REQUIRE THE VIDEOTAPING OF COMPLETE INTERROGATIONS IN ORDER THAT COURTS CAN ADEQUATELY ASSESS VOLUNTARINESS AND RELIABILITY.

The videotape in the Adrian Thomas case provides crucial evidence for assessing whether under the totality of the circumstances his will was overborne, or statements were made that could have caused him to falsely incriminate himself. Without the videotape, the only evidence of what happened in that interrogation would have been the written statements, the self-serving statements of the police officers at the Huntley hearing, and Mr. Thomas's undocumented (and also self-

serving) recollection.[214] Without the videotape, a court would never learn, among things:

- The number of times Mr. Thomas said that he had done nothing intentional to hurt his baby;
- The number of times Sgt. Mason assured him if it was an accident, he could go home;
- The false claims of wanting to help Mr. Thomas and sympathizing with him;
- The way the police cut him off when he tried to tell what happened;
- The insults and attacks on his value as a husband and father;
- The escalating and emotional language used by the police in describing what a father did to his infant, from "dropping" him, to "throwing him," to" slamming" him;
- The details provided as to when the incidents must have happened, the height from which he threw the baby, and the side of the head that hit the crib; and

The excuses they gave him as to why he would have done this terrible thing. With the videotape, this Court can assess the reliability of the confession and see that all the incriminating details were provided to Mr. Thomas by Sgt. Mason.

A complete interrogation record enables meaningful reliability review and could help to prevent the problem of confession contamination. Police should be required to "record the entire interrogation so that the trial judge can determine

---

214 *See, e.g., Bedessie,* 19 N.Y.3d at 151, 155 (detective testified that the defendant immediately volunteered incriminating statements in a one-hour interview, and defendant testified that the interview was twice as long, that the detective used trickery, and that he scripted her confession).

whether police contamination has occurred" and the judge can then "analyze whether the suspect could have gained knowledge of key details from facts released to the public by the media."[215] If police disclose facts during a recorded interrogation, then any contamination of the confession is documented.

To illustrate, Professor Brandon L. Garrett, in *The Substance of False Confessions*[216] provides an example of a compliant suspect who was taped as he learned, and then incorporated into his confession, a crucial detail, how a murder was committed:

> The police determined that the bindings used to secure [the victim's] hands had been cut from the venetian blinds in the sunroom. . . It was obvious from the recording of the interrogation that Vasquez had no idea what was used to bind and murder the victim:
>
> Det. 1: Did she tell you to tie her hands behind her back?
>
> Vasquez: Ah, if she did, I did.
>
> Det. 2: Whatcha use?
>
> Vasquez: The ropes?
>
> Det. 2: No, not the ropes. Watcha use?
>
> Vasquez: Only my belt.
>
> Det. 2: No, not your belt . . . . Remember being out in the sunroom, the room that sits out to the back of the house? . . . and what did you cut down? To use?

---

215 *See* Leo et al., *supra* note 43, at 523; *see also* Drizin, Steven A. & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 339-41 (2001).

216 Garrett, *The Substance of False Confessions,* 62 STAN. L. REV. 1051 (2010).

Vasquez: That, uh, clothesline?

Det. 2: No, it wasn't a clothesline, it was something like a clothesline. What was it? By the window? Think about the Venetian blinds, David. Remember cutting the Venetian blind cords?

Vasquez: Ah, it's the same as rope?

Det. 2: Yeah.

Det. 1: Okay, now tell us how it went, David--tell us how you did it.

Vasquez: She told me to grab the knife, and, and, stab her, that's all.

Det. 2: (voice raised) David, no, David.

Vasquez: If it did happen, and I did it, and my fingerprints were on it . . .

Det. 2: (slamming his hand on the table and yelling) You hung her!

Vasquez: What?

Det. 2: You hung her!

Videotaping is becoming more widespread, giving courts a window into the interrogation room,[217] and perhaps curbing improper interrogation techniques. Still, many (if not most) interrogations in New York are not recorded,[218] or if they are, only the culmination of the interrogation is recorded, and the crucial period

---

[217] In September 2012, New York City Police Commissioner Raymond Kelly reported that the city would begin video recording criminal interrogations. As an expansion of the NYPD's 2010 pilot program, every precinct in the city was to begin recording entire interrogations in murder, assault and sexual assault cases. In New York, a bill, A.4721/S.1267, was introduced that would create a rebuttable presumption that custodial confessions are inadmissible unless recorded. This bill was held in committee in April 2013.

[218] Recent news stories concerning the suspect in the "Baby Hope" murder indicate that the program is not yet fully implemented. McKinley, James, *Confession in 'Baby Hope' Killing Was Taped, but the Interrogation Was Not* (N.Y. Times Oct. 23, 2013)

leading up to a confession is not recorded. This patchwork of practices across the state leads to inconsistent and unfair standards, both for the conduct of interrogations, and for determining admissibility. It should not be the case that a person interrogated in one county or city has the benefit of judicial review of a videotape, while a person in another place does not. Neither should it be the case that police departments can have dramatically different practices with respect to interrogations, refraining from coercive techniques only in jurisdictions that videotape.

We urge this Court, in keeping with its responsibility for the fair administration of justice in this state, to follow the example of the high courts in Alaska, Iowa, Massachusetts, Minnesota, New Hampshire and New Jersey, and to establish a uniform policy requiring and setting procedural standards for statewide videotaping of custodial interrogations.[219] Videotaping interrogations will improve the credibility and reliability of authentic confessions, while allowing

---

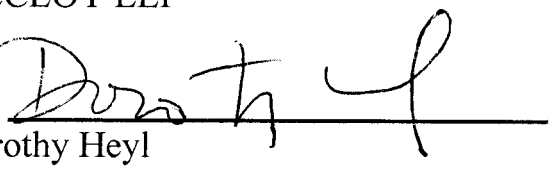
[219] Statewide reform would bring New York State in line with Connecticut, Illinois, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Wisconsin, and the District of Columbia, which all have enacted legislation requiring the recording of custodial interrogations. the requirement of recording an entire custodial interrogation has now been endorsed by hundreds of police departments around the United States. *See* Sullivan, Thomas P., "*Police Experiences with Recording Custodial Interrogation*," Nw. U. Sch. of Law, Center on Wrongful Convictions, Special Report No. 1 (2004). Approximately 840 jurisdictions have voluntarily adopted recording policies. http://www.innocenceproject.org/fix/False-Confessions.php (Last visited Nov. 20, 2013).

prosecutors, defense attorneys and courts to assess claims of coercion and unreliability with the benefit of objective evidence.

CONCLUSION

For the reasons stated herein, the Innocence Network urges this Court to reverse the conviction of Adrian Thomas, and to use this case as a vehicle for limiting the manifest harm from involuntary and unreliable confessions in the ways set forth above.

MILBANK, TWEED, HADLEY &
MCCLOY LLP

By: 
Dorothy Heyl
LaTonya Brooks
1 Chase Manhattan Plaza
New York, NY 10005
(212)530-5088
Counsel for *Amicus Curiae*
The Innocence Network