

## **ADMISSIBILITY AND USE AT TRIAL OF FALSE-CONFESSION EXPERT TESTIMONY**

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So your client gave a statement to law enforcement, admitting to some or all of what he is accused. He tells you that the admissions are false and they were the result of psychological strain and police pressure. He is willing to testify at a motion to suppress and trial that he felt tricked, coerced or confused. He said something that was not true in the hopes he would receive some benefit or as simply surrender to the inevitable. However, you listen to what he has to say, you review his statement and the surrounding facts and circumstances and you do not have a suppression issue that you think will succeed; or you have already argued the motion and lost.

You are now headed into a trial in which your sole chance of winning is convincing a jury, against its shared common life experience, that your client admitted to something he did not do. Your only tools are the say-so of the accused and your closing argument regarding how the police handled the matter. What do you do? You owe it to your client to retain a forensic psychologist who is well versed in the specialized area of false confessions, to aid you in trial preparation and to testify at trial to aid the jury in determining whether the circumstances surrounding the admission indicate it was not freely and voluntarily made, such that they should disregard it in its entirety.<sup>iii</sup>

The concept of the false confession phenomenon is hardly a new or novel one. Courts once admitted confessions regardless of how they were obtained; they were automatic proof of guilt. In the 18<sup>th</sup> and 19<sup>th</sup> centuries, the courts began excluding confessions obtained through physical coercion, altogether, on the grounds they were unreliable.<sup>iv</sup> American court decisions in the 20<sup>th</sup> century began to increasingly look at the issue of voluntariness using considerations other than brute physical coercion. In *Chambers v. Florida*, the Supreme Court held that a week-long pattern of relentless questioning of young, black suspects, without benefit of counsel, constituted a violation that would make “due process of law a meaningless symbol.”<sup>v</sup>

Likewise, in *Haynes v. State of Washington*, the Supreme Court held that a pattern of threats and inducements rendered a confession involuntary and therefore inadmissible instead of letting the jury pass on the reliability of the statement.<sup>vi</sup> Of course, the *Miranda* decision itself is as much a comment on the relative powerlessness of a criminal suspect, who must at least be informed he has other options but to confess in order for a confession to have any reliability, as it is a clarification of the meaning of the 5<sup>th</sup> and 6<sup>th</sup> Amendments.

It is axiomatic that someone who is being physically tortured, for instance, will almost always eventually admit to anything his tormentor requires of him. It is the inherent unreliability of coerced statements that led our courts to start requiring that confessions

be voluntary and not the product of “compulsion or inducement of any sort.”<sup>vii</sup> The primary focus was not on the inherent wrongfulness of the often brutal conduct, but the lack of certainty that the resulting statement was reliable; as a freely and voluntarily made statement against interest is automatically assumed to be reliable enough to be admitted over a hearsay objection.<sup>viii</sup>

So how does a criminal defendant who claims false confession prove the falsehood, absent the obvious and flagrant tactics: physical force, isolation, multi-day interrogations without sleep, etc., of the past? This is where the science of psychology comes into play, requiring a close working relationship between the doctor and counsel. Psychologists have produced a lot of groundbreaking research and studies in the area of false confessions regarding which suspects are most vulnerable to police pressure and which police tactics lead to greater risk of false confessions. Much of this is laid out in a manual by the second author (GD).<sup>ix</sup>

Although everyone acknowledged that false confessions occurred (with the exception of some prosecutors and law enforcement officers), no one knew how often they occurred and without proven cases of false confession it was difficult to work backward and study what circumstances led to them. The advent of DNA analysis and the work of the Innocence Project<sup>x</sup> changed all that. There are now hundreds of undisputed cases of wrongful convictions, and we can learn from what went wrong in those cases. Notably, false confessions have contributed to approximately 30% of the wrongful convictions in the Innocence Project’s database.<sup>xi</sup>

A practitioner with expertise in this area has long been useful to a criminal defense attorney who seeks to exclude a defendant’s admission from trial on the grounds it was obtained in violation of the due process clause.<sup>xii</sup> In pretrial motions, of course, an expert can apply the facts of the case to his knowledge, his experience, and the literature in his field, to come to a definitive conclusion about the issue at hand. However, the focus of this article deals with the use of this type of expert to challenge the reliability of a confession when the issue is before a jury.

In some cases, the best way to utilize the expert is to educate the jury on the solid science behind the phenomenon of false confessions, without mentioning the defendant in the present case at all. The expert can help the jury understand how to identify people who are more at risk for false-confession, and police tactics that lead to an increased likelihood of false confessions. There are two primary reasons it is sometimes best not to have the expert evaluate your client.<sup>xiii</sup>

The first reason is strategic and practical. When you obtain an expert to evaluate your client, the expert will form opinions that may or may not help with your defense. If the expert does not evaluate the client and therefore forms no opinions in the case, you can retain the most credible expert available. It is recommended you retain a doctor who has testified extensively for both sides in criminal proceedings, has obvious expertise (publications, prior testimony, etc.) regarding interrogations and confessions and if possible has worked with police agencies. An expert like that will obviously bear a lot of

weight with a jury but, just as obviously, will not be one who will just tell you what you want to hear. In a case where the expert has not evaluated your client, you should file a motion *in limine* to prohibit the State from asking the expert whether he has interviewed your client, as it would be outside the scope of the testimony on direct and may confuse, mislead or prejudice the jury.

The second reason is legal. Generally, the trial court has broad discretion on determining the subject on which an expert may testify.<sup>xiv</sup> Furthermore, in some instances an expert may be able to render an opinion as to an ultimate issue of fact. However, that opinion is inadmissible if it also applies the facts to a legal standard to be determined by the jury.<sup>xv</sup> Although we often refer to juries as “fact finders” and juries are even instructed it is their job to determine facts and the court’s job to decide which laws apply, juries are, all the time, tasked with making legal determinations. Furthermore, the courts have specifically held that the determination of the voluntariness (and thus reliability) of a confession, is to be initially made by the trial court but “ultimately determined by the jury” as a “mixed question of law and fact.”<sup>xvi</sup> For these reasons it is best to keep your expert out of this territory, when using him at trial.

Furthermore, by confining your expert’s testimony to this area you place the State on the horns of a dilemma. The State may move *in limine* to exclude the testimony of your expert if he intends to opine on the ultimate legal determination to be made by the jury, but if you proffer that you intend only to give the jury the knowledge it needs to make its decision, then a subsequent State objection on relevance (absent case-specific opinion testimony) will fail as it is clear that this testimony is admissible in that capacity, based on the foregoing authority. The State simply cannot have it both ways.

The seminal Federal decision in regard to the use of a false-confession expert, to aid a jury in trial is *US v. Hall*.<sup>xvii</sup> In that case the Third Circuit held that a false-confession expert’s testimony would pass a *Daubert*<sup>xviii</sup> test and be useful to the jury in enlightening it that false confessions exist, that they have been studied and that there are ways to identify when they may have occurred, while the jury still has the option to decide whether false-confession has occurred or it can proceed with, “the more commonplace explanation that the confession was true.”<sup>xix</sup>

Florida’s Fourth District Court of Appeals adopted the reasoning from *Hall* in *Beltran v. State* to hold that false-confession testimony *could* be admitted in a motion to suppress hearing. Despite its skepticism about this type of testimony, “We would reiterate that this opinion, with its comments concerning ‘false confession’ testimony should *not* be construed as any approval of the admission of such evidence in any case,” the Court held that the bar to admissibility was not the relevance of the testimony, in any motion to suppress, but that Beltran had not contended that his confession was false.<sup>xx</sup> This last part of the holding is important as it establishes a predicate that the defense must make some showing of false-confession in order to call its expert. In most cases this would obviously necessitate the calling of the client to repudiate his confession (This would be true at trial. At a motion to suppress, an assertion in the body of the motion should be sufficient).

Five years later, after years of high profile DNA exonerations, the First District Court of Appeals approved of *Hall* and reversed a conviction based on a trial court's failure to admit proffered false-confession testimony before a jury, in *Boyer v. State*.<sup>xxi</sup> While reiterating the assertion from *Hall* that a jury was free to not apply the expert's testimony and apply the common sense, all confessions are true, approach, the *Boyer* Court said, "Because in this case, as in *Hall*, Dr. Ofshe's testimony 'went to the heart' of Appellant's defense, its exclusion cannot be considered harmless beyond a reasonable doubt."<sup>xxii</sup>

It should be noted that the authors do not contend that these cases stand for the proposition that you cannot ask your expert to opine as to whether certain police tactics used in your case are identifiable as tactics that could lead to false-confession (certainly short of asking for an opinion on the veracity of the statement); however, this opens up dangerous areas of cross examination, for the reasons stated above, about other areas of police conduct and behavior by your client that are not indicative of a danger of false-confession. You do not have this problem if you do not ask your expert to comment on anything that specifically happened in your case.

So, if you establish some evidence that your client's confession was false, you can admit the expert testimony, to aid your jury; and if the trial court does not admit it, proffer it and buy yourself a second trial. By presenting the expert's testimony only as a broad and detailed historical breakdown of the science, you give the tools to the jury that it will need to decide on the reliability of the confession in your case. When it is presented this way, the expert can easily parry such inevitable cross examination questions as "you were paid by the defense to testify here today?" with "Yes, but my testimony would have been the same if you had called me as a witness."

After presenting the expert's credentials, qualifications, and experience, the direct examination of the expert proceeds in two stages. First, the expert presents a brief summary of what is known about false confessions, how to prevent them, and how to conduct an interrogation so that if a false confession were obtained it would be recognizable as such. The content of this stage will be relatively consistent from case to case, gradually evolving as research progresses. The impact of this testimony will be strongest in cases where the police have used sloppy and/or coercive tactics to extract a confession. Examples include these: deception (lies or exaggeration) by the police, failure to record the entire interaction, contamination of the suspect's mind by the presentation of crime-scene details during questioning, maximization (exaggerating the amount of evidence or the certainty of the evidence against the suspect), minimization (suggesting or implying that less punishment will ensue if the suspect confesses), and forced choice (we know you did it, we just need to know why<sup>xxiii</sup>). The presence of any of these factors in a particular case is a good reason to obtain an expert to testify at trial.<sup>xxiv</sup>

The second (optional)<sup>xxv</sup> stage consists of questions developed for the specific case, based on the expert's analysis of police procedures in the case at hand. An example from a recent case is that, when Miranda rights were read to the suspect, the suspect asked a

question. Instead of answering the question, the detective told the suspect to raise his right hand and swear to tell the truth, the whole truth, and nothing but the truth. At trial, the defense attorney can elicit from the expert the fact that this procedure specifically violates recommendations in the most commonly used police interrogation manual (because it is inherently coercive)<sup>xxvi</sup>: “[Having already established that the expert has studied police interrogation manuals] Doctor, are you aware of recommendations in police interrogation manuals regarding ‘swearing in’ a suspect? ... Tell us about that.”

If you have presented the expert’s testimony as a true aid to the jury on the existence of false confessions and on how to identify them (and it has been admitted by the trial court for this purpose) it is then up to you to compare the facts of your case, in your closing argument, to the history and science the jury has learned from the expert. If, for example, minimization and a forced-choice scenario are two strong factors in your case, you would point to the portions of your client’s statement where those tactics were used and remind the jury of the fact they lead to a risk of an unreliable result. Even if you do not intend to ask your expert to interview your client and to opine about the actual tactics used in your case, you should review your client’s statement with your expert so you can prepare to focus more on the current science regarding relevant tactics from your case during direct examination. The fact that false confessions happen and that certain police tactics lead to a greater likelihood of them cannot be refuted. You owe it to your client to retain an expert in this field if this is the defense you intend to present.<sup>xxvii</sup>

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<sup>iii</sup> Fla. Std. Jury Instr. 3.9(e)

<sup>iv</sup> Conti, Richard P., *The Psychology of False Confessions*, *The Journal of Credibility Assessment and Witness Psychology* 1999, Vol. 2, No. 1, 14-36

<sup>v</sup> *Chambers v. Florida*, 309 U.S. 227, 60 S.Ct. 472, 479

<sup>vi</sup> *Haynes v. State of Washington*, 373 U.S. 503, 83 S.Ct. 1336

<sup>vii</sup> *Wilson v. United States*, 162 U.S. 613, 623, 16 S.Ct. 895

<sup>viii</sup> § 90.804(2)c, Fla. Stat. (2005)

<sup>ix</sup> DeClue, G. 2005. *Interrogations and Disputed Confessions: A Manual for Practice*, Sarasota, FL: Professional Resource Press.

<sup>x</sup> <http://www.innocenceproject.org/>, <http://www.floridainnocence.org/>

<sup>xi</sup> This is higher than prior figures, due to several recent exonerations in cases involving false confessions, largely from the Chicago area. Newirth, K. *Bringing Science into the Courtroom: An Attorney’s Perspective*, Presentation at American Psychology-Law Society Annual Convention, March 16, 2012, in San Juan, Puerto Rico.

<sup>xii</sup> See, e.g., *Ross v. State*, 45 So.3d 403, 433-434 (Fla. 2010) (in which the testimony of one of the second author is drawn from extensively in the Court’s reversal of the trial court’s denial of a motion to suppress a confession)

<sup>xiii</sup> If the defendant is vulnerable to police interrogation in some way (e.g., low IQ, mental illness, highly suggestible) you’ll need to present evidence of that at trial. A psychological evaluation may be essential in such cases (and if you don’t have your client evaluated, you might miss an important vulnerability). If you do get a psychologist to evaluate your client for vulnerabilities to police pressure, there are advantages to having that evaluation done by a different expert than the one who will testify about confession issues (if that’s possible and practical).

<sup>xiv</sup> *Town of Palm Beach v. Palm Beach County*, 460 So.2d 879, 882 (Fla. 1984)

<sup>xv</sup> *Ruth v. State*, 610 So.2d 9, 11 (Fla. 2d DCA 1992)

<sup>xvi</sup> *Whitfield v. State*, 479 So.2d 208, 213 (Fla. 4<sup>th</sup> DCA 1985)

<sup>xvii</sup> *US v. Hall*, 93 F.3d 1337 (U.S. Ct. App. 3<sup>rd</sup> Cir 1996)

<sup>xviii</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469

<sup>xix</sup> *Hall at 1345*.

<sup>xx</sup> *Beltran v. State*, 700 So.2d 132 (Fla. 4<sup>th</sup> DCA 1997)

<sup>xxi</sup> *Boyer v. State*, 825 So.2d 418 (Fla. 1<sup>st</sup> DCA 2002)

<sup>xxii</sup> *Id at 420*.

<sup>xxiii</sup> A heavy-handed version: “We already know you did it. There is absolutely no doubt. We’re just trying to establish why. Either you’re a stone-cold psychopathic killer, or you’re just a guy who made a mistake. The jury is going to see LOTS of evidence that proves you did it. We’re not even telling you about some of the evidence, and it’s absolutely certain that you did it. No doubt at all. This is your one chance to say that it was an accident, or self-defense, or whatever. If you don’t admit it and explain it now, we’ll tell

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the prosecutor that you wouldn't cooperate, and the jury will no doubt conclude that you're a stone-cold killer (or child molester, etc.)."

<sup>xxiv</sup> The expert can also describe typical differences between investigative interviews of witnesses versus interrogations of suspects. Although police generally describe both processes as efforts to get to the truth, it is much more common for police to lie to a suspect, and even to encourage a suspect to make false or partly-false statements, during a guilt-presumptive interrogation. In practice, interrogators' goal of obtaining a confession can trump the goal of seeking the truth.

<sup>xxv</sup> The defense attorney needs to decide whether advantages from this approach outweigh possible disadvantages of opening up the expert to cross-examination.

<sup>xxvi</sup> Two points about this example: First, although the coercive (bullying) actions by the police do not directly illuminate whether it was a true or false confession, such actions help the jury to understand why your client would confess even if he is not guilty. Second, it is recommended that you introduce the witness as an expert in "the psychology of interrogations and confessions" rather than "false confessions" to more properly set the stage for the testimony.

<sup>xxvii</sup> It should also be kept in mind that since most prosecutors are unfamiliar with this type of testimony and generally view a confession case as rock-solid, simply retaining the expert and getting a favorable ruling on admissibility might cause the State to reconsider its plea offer.