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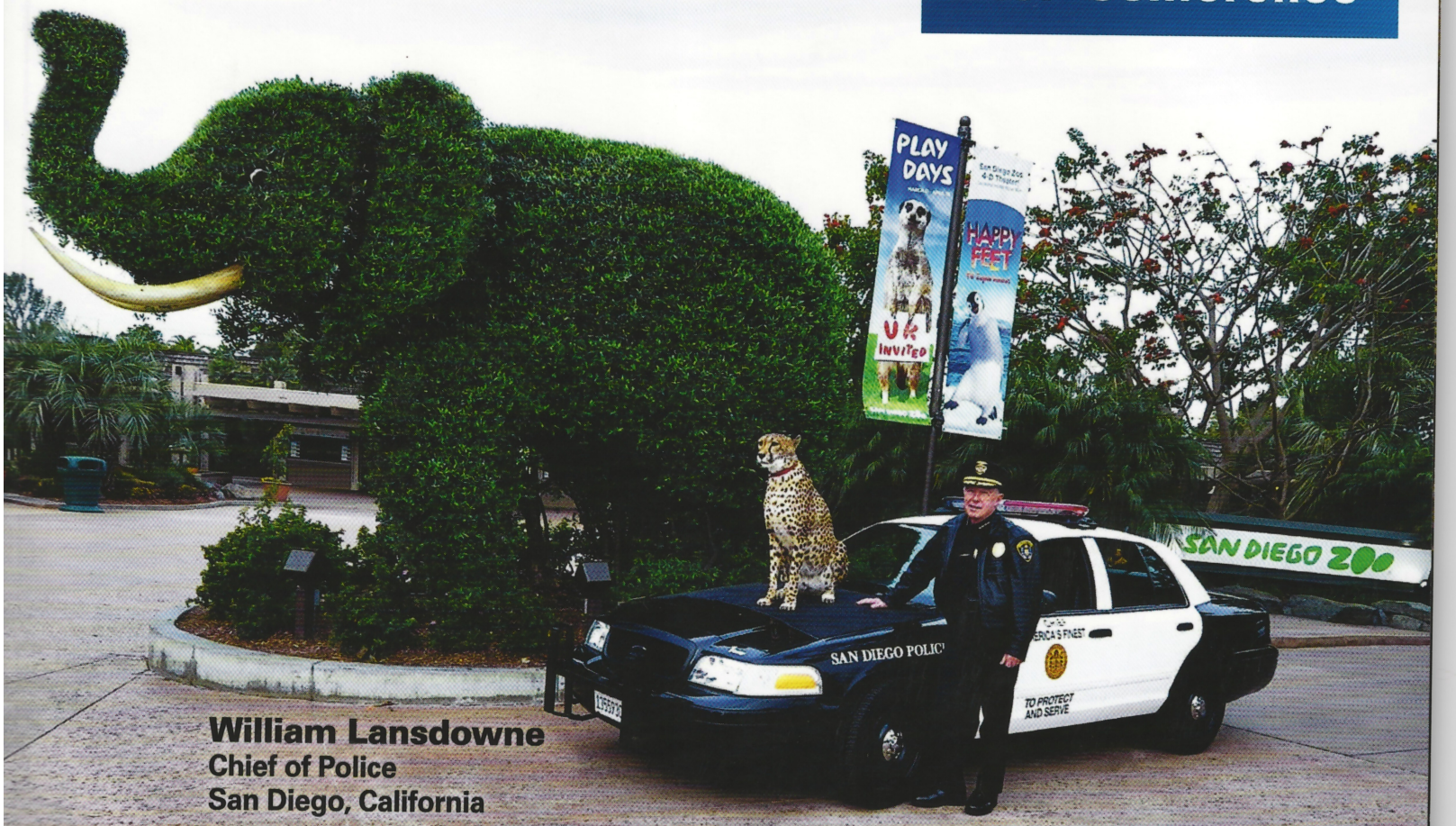

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INTERROGATIONS 2013:

Safeguarding against False Confessions

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Editor's Note: Addressing factors that can lead to wrongful convictions, such as false confessions, is a presidential priority for IACP President Walter A. McNeil. Over the past decade, the issue of wrongful convictions has been identified as a critical problem in the U.S. justice system. While a very small percentage of all convictions are in fact wrongful, the damage to the wrongly accused, convicted, and incarcerated is irreversible. In late August, the IACP cohosted the National Summit on Wrongful Convictions with the Bureau of Justice Assistance, National Institute of Justice, and Office for Victims of Crime.

Historically, there has been considerable debate about the causes of wrongful convictions, in part because there was not full agreement about whether the defendants were truly innocent. To learn from cases of wrongful convictions, it is important to identify cases where there is now wide agreement that the persons are actually innocent. Here, the focus is on cases where people were exonerated based on post-conviction DNA tests.

Law enforcement can learn from what went wrong in these cases. Recently, Professor Brandon Garrett focused on confession statements obtained from suspects in police custody, all of whom were convicted and subsequently exonerated. He wondered what the content of the false confession statements would show:

> *Forty of the first 250 DNA exoneration cases (16 percent) involved a false confession. I wondered what people who we now know are innocent reportedly said when they confessed. I used the trial transcripts to find out what was said during interrogations and how the confessions were described and litigated at trial. When I began this process, I expected to see confessions without much information. An innocent person might be able to say, "I did it," but obviously could not say what exactly he did, since he was not there at the crime scene. I knew it was possible that a confession could be contaminated if police prompted the suspect on how the crime happened, and I thought that I might find a handful of cases where this had happened. . . . To my great surprise, when I analyzed these case materials I found that not just a few, but almost all, of these exonerees' confessions were contaminated. I sought out trial materials and court records for all 40 exonerees who falsely confessed, and I was able to obtain them for all 40. I also located the text of written confession statements for most of these exonerees. All of those records provided a rich source of material. All but 2 of the 40 exonerees studied told police much more than just "I did it." Instead, police said that these innocent people gave rich, detailed, and accurate information about the crime, including what police described as "inside information" that only the true culprit could have known.*[1]

In considering all the information available, Garrett concludes that the most likely way that these innocent suspects learned so-called inside information was from the police who interrogated them. Law enforcement can fix that.

Learning from Wrongful Convictions

Now that we know that false confession statements can appear convincing. It may be impossible to be confident in the reliability of a police-induced confession statement unless it is independently corroborated. Until the details of a confession statement are independently corroborated, law enforcement professionals should be just as skeptical as they would be if the person claimed someone else committed a crime or if someone simply walked into a police station and said, "I killed somebody." With rare exceptions, a person who voluntarily confesses to a crime should be able to provide details that not only sound convincing but that independently match facts that show guilty knowledge. As Jim Trainum, a former homicide detective and the former head of the Washington, D.C., Metropolitan Police Department's Violent Crime Case Review Project, puts it,

> *Sometimes you get a confession in my department, and it doesn't fit. It doesn't make sense. And I tell them, if this guy came in your office and said, "I was a witness and this is what I saw," you'd throw him out . . . . But because he said "I did it and this is what I did," all critical thinking goes out the window.*[2]

As these undisputed cases of false confessions are analyzed, we are seeing wide agreement among professors, expert witnesses, and police trainers regarding safeguards necessary to create a record that would enhance everyone's ability to consider whether a suspect's confession statement shows guilty knowledge. The safeguards are neither complicated nor burdensome, and they are already increasingly used by detectives when interrogating suspects. Table 1 illustrates this agreement regarding necessary safeguards.

Professor Garrett's findings—that when people falsely confess, they often provide convincing-sounding details that they likely learned during the process of interrogation—should be given careful consideration by every police interrogator. Fortunately, we have a set of procedural safeguards that have wide agreement among professors, expert witnesses, and police trainers.

Notably, these safeguards do not limit the techniques that police can use in an interrogation. For example, police might choose to mention some case facts to the suspect as long as they steer clear of

the specific list of facts they set aside before commencing the interrogation. The recording will show which facts the police mentioned so that reiteration of them by the suspect will not be misinterpreted as showing guilty knowledge.

A Real-Life Example

Because these safeguards do not limit the techniques that police can use in an interrogation, they do not actually guard against false or coerced confessions. Rather, they reduce an innocent suspect's ability to provide a convincing-sounding confession statement and they increase everyone's ability to recognize when a confession statement just does not fit the facts of the case. Detective Jim Trainum provides an example from his experience.

> *In 1994, I was working on one of my first cases, a fairly high-profile case, and I obtained a false confession. But of course I didn't know it was false at the time. [The suspect] had failed both a polygraph and voice stress test. She had no signs of mental illness and had a perfectly normal IQ. We were pretty convinced of her guilt, until we later found out that her alibi, which she failed to present us, was pretty unshakeable.*
>
> *It caused me to take pause. Voice stress tests are [inauthentic], but later on, she had flunked that full-fledged polygraph and she was of sound mind. Anybody [like her] who gets involved in street stuff and all that is going to have their issues, but she had no obvious mental health issues and was of above-average intelligence. And we didn't yell, we didn't scream, we didn't say "we're going to put you in jail for life." We insinuated that it was in her best interest to tell us what we wanted to hear, that the short-term benefits outweighed the long-term consequences.*
>
> *It wasn't until years later when I started to read about false confessions that I read about*

Table 1: Necessary Safeguards

Expert Witnesses' Recommendations	Safeguards	Page Number*
When possible, police should complete as much investigation as possible before interrogating a suspect.	"One basic principle to which there must be full adherence is that the interrogation of suspects should follow, and not precede, an investigation conducted to the full extent permissible by the allowable time and circumstances of the particular case. The authors suggest, therefore, that a good guideline to follow is 'investigate before you interrogate.'"	18
Police should develop the details of the accusation/crime from physical evidence, victim's statements, witnesses' statements, and so forth.	"Prior to an interview, and preferably before any contact with the suspect, the investigator should attempt to become thoroughly familiar with all the known facts and circumstances of the offense."	10
Police should set the list aside, and avoid mentioning any of those details to the suspect at any time.	"Upon arriving at a crime scene, the lead investigator should decide and document on the case folder what information will be kept secret."	355
Electronically record the entire interrogation, beginning as close to initial contact as possible, and continuing well after the suspect makes admissions (if he or she does).	"Everything should be recorded, from the time the suspect is given *Miranda* rights to the conclusion of his confession."	51
If the suspect makes admissions, elicit a detailed post-admission narrative (who, what, when, where, and how), taking special care not to suggest any details to the suspect.	"After a suspect has related a general acknowledgment of guilt, the investigator should return to the beginning of the crime and attempt to develop information that can be corroborated by further investigation. He should seek from the suspect full details of the crime and also information about his subsequent activities. What should be sought particularly are facts that would only be known by the guilty person (for example, information regarding the location of the murder weapon or the stolen goods, the means of entry into the building, the type of accelerant used to start the fire, and the type of clothing on the victim, etc.)."	306
After the interrogation has concluded, continue the investigation to seek additional details of the accusation/crime. Do the facts independently corroborate the confession statement?	"The best type of corroboration is in the form of new evidence that was not known before the confession, but yet could be later substantiated. Prior to conducting the interrogation, the investigator should consider what types of independent corroborative information should be sought. Examples include the present location of a murder weapon or the suspect's bloody clothing, where stolen goods were fenced, and who the suspect talked to about the commission of his crime."	306
Carefully consider whether independently derived details of the accusation/crime match the details provided in the suspect's confession statement.	"A confession that contains no corroborative information, beyond merely accepting personal responsibility for committing the crime, suggests the possibility that improper inducements were used to elicit the confession and the confession may well be false."	367

**Source for Safeguards:* Fred E. Inbau et al., *Criminal Interrogation and Confessions* (Burlington, Mass.: Jones and Bartlett Learning, 2011).

the stuff that I had done. So I just became an advocate of interrogation reform, of videotaping interrogations from start to finish because I think those could prevent false confessions. I think those could allow you to go back and review the entire process. And I've always been an advocate of fixing bad police practices. I still believe in identification as an important tool, but if they've shown that eyewitness identification is a problem, let's find a better way of doing it. If you choose to use interrogation techniques, the techniques should be under extraordinary scrutiny.

In our case, we had unintentionally fed her almost the entire case over a several hour period. And Kimberly—the [suspect]—she would guess. She would guess a lot. And sometimes the guesses were right. And we wouldn't see the ones that weren't because "she was being evasive" or "she was protecting someone." So that's how we wrote that off.... But fortunately, we had accidentally let the tape continue to run, and we captured the whole thing on video. But if we hadn't had that video, we never would have been able to go back years later and catch our mistakes. It went right over our heads....

I actually went to a seminar on law enforcement control and avoiding wrongful convictions, and the presenter used a phrase that I think all law enforcement officers should use: The right guy, the right way. Once we think we got the right guy, and we start cheating on the right way, that's when we get the wrongful convictions....

You know, the biggest misconception about wrongful convictions is that they don't happen, that there are so many checks and balances that it's impossible to happen. And the biggest misconception about false confessions is that you have to be crazy to confess to something you didn't commit.[3]

Safeguarding against Contamination

These safeguards can be understood within the context of contamination and chain of custody. Prior to interrogation, a guilty suspect has knowledge of details that an innocent suspect would not have. After an interrogation, when police decide whether to make an arrest and curtail the investigation, when prosecutors decide whether to file charges, and when a judge or jury decides whether a person is guilty beyond a reasonable doubt, the presence or absence of guilty knowledge is a crucial consideration. This is comparable to DNA or other physical evidence in that it is important to avoid contamination of the evidence and to document the chain of custody.

Maintaining the chain of custody is vital for any type of evidence.... Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary when identifying, collecting, and preserving DNA evidence. DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case.[4]

Law enforcement professionals recognize that DNA can provide powerful evidence and that with great power comes great responsibility. Police personnel must avoid contamination of the evidence and must carefully document the chain of custody of the evidence. If a police officer inadvertently contaminates a biological sample, records can document that the officer was near the crime scene and the presence of the officer's DNA can be explained and excluded.

Interrogations also can provide powerful evidence. With interrogations, the contamination issue is whether the police (inadvertently) contaminate the suspect's mind during the process. If the safeguards discussed earlier are employed during interrogation, a solid evidentiary record is obtained, allowing proper scrutiny by the police, the prosecutor, the judge, and the jury. With interrogation evidence, if proper safeguards are not used, it becomes impossible to identify which details of the suspect's statements were provided by the police and which, if any, actually show guilty knowledge.

Summary

DNA evidence can provide convincing evidence of a person's presence at a crime scene—but only if all involved—law enforcement, judges, and juries—can be certain that the DNA sample really came from the crime scene. Similarly, a detailed confession statement can provide convincing evidence of guilt, but only if all involved know that those details originated from the suspect, not from the police doing the interrogation.

Learning from known cases of false confessions, analysts have identified safeguards that can protect against contamination and that can enhance recognition of a false confession if one is elicited. These safeguards are already routinely used by many detectives and should become standard practice in police interrogations. In all police interrogations, police should

1. Investigate before they interrogate.
   a. Develop the details of the accusation or crime from physical evidence, the victim's statement, the witnesses' statements, and so forth
   b. Make a substantial, written list of key details that are not publicly available and would be difficult or impossible for a noninvolved person to guess.
   c. Set the list aside and avoid mentioning any of those details to the suspect at any time.
2. Electronically record the entire interrogation, beginning as close to initial contact as possible and continuing well after the suspect makes admissions (if he or she does).
3. If the suspect makes admissions, elicit a detailed post-admission narrative (who, what, when, where, and how), taking special care not to suggest any details to the suspect.
4. After the interrogation has concluded, continue the investigation to seek additional details of the accusation or the crime. Do the facts independently corroborate the confession statement?
5. Carefully consider whether independently derived details of the accusation or the crime match the details provided in the suspect's confession statement.

Police interrogators are uniquely situated to employ the safeguards outlined above. Failure to do so is a hallmark of unfairness and will be given considerable weight as juries decide whether a confession statement is convincing evidence of guilt and as judges consider the totality of the circumstances in deciding whether a particular confession was coerced. In contrast, when police scrupulously follow these safeguards and are neutral professional fact gatherers, if the suspect confesses and provides genuine guilty knowledge, the confession statement can provide very powerful evidence of the suspect's guilt. ❖

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Notes:

[1]Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Cambridge, Mass.: Harvard University Press, 2011), 18–19; and Garrett, "The Substance of False Confessions," *Stanford Law Review* 62, no. 4 (2010): 1051–1119, http://www.stanfordlawreview.org/sites/default/files/articles/Garrett.pdf (accessed August 24, 2012). In Garrett's study, each of the 40 suspects confessed, contributing to conviction.

[2]As told to Rachel Cicurel, "Jim Trainum," Mid-Atlantic Innocence Project, http://www.exonerate.org/in-their-words/james-trainum/ (accessed August 24, 2012). Detective Trainum received the 2010 Champion of Justice award from The Innocence Network in April 2010. See http://www.innocenceproject.org/Content/Innocence_Networks_Champion_of_Justice_Helps_Prevent_Wrongful_Convictions.php (accessed August 24, 2012).

[3]Ibid.

[4]"DNA Evidence: Basics of Identifying, Gathering, and Transporting," National Institute of Justice, http://www.nij.gov/topics/forensics/evidence/dna/basics/identifying-to-transporting.htm (accessed August 24, 2012).