355 A.2d 324
Superior Court of Connecticut, Litchfield County.

Peter A. REILLY

v.

STATE of Connecticut*.

* Given the extensive national and state notoriety of this case, the State v. Anonymous title which might otherwise have been substituted here, has not been used.

No. 024981. March 25, 1976.

Petition was filed for new trial in homicide case. The Superior Court Litchfield County, Speziale, J., held that on motion for new trial in homicide case, under circumstances of case, including seriousness of charges, newly discovered evidence consisting of fingerprint, retracted statement, evidence as to timing sequence, testimony of psychiatrist as to defendant's confessions and admissions and testimony of forensic medicine expert as to possibility of victim's blood on defendant's clothes, established that a grave injustice had been done and that upon a new trial it was more than likely that a different result would be reached thus requiring grant of new trial, notwithstanding defendant's failure to exercise due diligence in the discovery of only a part of the newly discovered evidence.

Petition for new trial granted and new trial ordered.

Attorneys and Law Firms

****327** ***349** T. F. Gilroy Daly, Robert M. Hartwell, Fairfield, and John Fiore, Norwalk, for plaintiff.
John F. Bianchi, State's Atty., Robert E. Beach, Jr., office of the Chief State's Atty., and Joseph J. Gallicchio, Sp. Asst. State's Atty., for the state.

Opinion

SPEZIALE, Judge.

On September 29, 1973, Peter A. Reilly, the plaintiff in this action, was arrested and charged with the brutal slaying of his mother. In ***350** November of 1973, a grand jury indicted him for the crime of murder, charging that 'at the town of Canaan, on the 28th day of September, 1973, the said Peter A. Reilly, with intent to cause the death of Barbara Gibbons of Canaan, did cause the death of Barbara Gibbons, by slashing her throat, breaking bones in her body and inflicting stab wounds all in violation of Section 53a-54 of the General Statutes of Connecticut.' After a lengthy trial to the jury, on April 12, 1974, the plaintiff was found guilty of the crime of manslaughter in the first degree. On May 24, 1974, he was sentenced by the court (Speziale, j.) for a term of not less than six nor more than sixteen years at the Connecticut correctional institution at Somers. In the instant case he has brought a petition for a new trial in three counts pursuant to General Statutes s 52-270 and requests that a new trial be ordered.

The criminal prosecution of the plaintiff arose out of the violent death of his mother, Barbara Gibbons, in Canaan, Connecticut on the evening of Friday, September 28, 1973. On that evening, upon returning home from a teen center meeting, the plaintiff maintains that he discovered his mother on the floor of her bedroom, covered with blood and having difficulty breathing. Subsequent to his alleged discovery, the plaintiff placed several phone calls. He first called the Meyer E. Madow residence. He spoke with Marion Madow and asked that Meyer Madow come to the Gibbons residence with his Canaan ambulance. He then called Dr. Carl Bornemann's house and spoke with Jessica Bornemann. Finally the plaintiff called the Sharon Hospital. The Sharon Hospital notified the state police. Trooper Bruce McCafferty, who arrived at the scene within a few minutes, at 10:02 p. m., testified that the victim had blood on her body and that he was unable to feel a pulse in her left wrist.

***351** The victim was lying on her back with a white 'T' undershirt pushed up over her exposed breasts and around her neck, and over the undershirt was an unbuttoned and open blue shirt which partly covered her abdomen. There was no further clothing on her body. Her legs were widely separated exposing her external genitalia. She had been battered and stabbed many times. It was a gory scene, with much blood on the victim's body and in the area surrounding the body. Ernest M. Izumi, deputy state medical examiner, testified that the cause of death was exsanguination of blood due to wounds in the neck and body caused by a sharp object and asphyxiation due to aspiration of blood. Ernest Izumi testified that the autopsy revealed the following injuries concerning Barbara Gibbons: ****328** defense stab would through her right hand, blow to her elbow, blow to her face which broke her nose, a minor brain contusion, at least two slashes of her throat which severed her jugular vein, multiple stab wounds in the lower back, a gash wound in her abdomen, three broken ribs, a deep penetration of her vagina with an unknown object, and two broken femurs.

After the state police arrived on the scene, the plaintiff remained in effective custody. At about 11:10 p. m. Trooper McCafferty obtained a statement from the plaintiff to the effect that when he left the teen center meeting he gave John Sochocki a ride home and then drove straight to his home, arriving there between 9:50 and 9:55 p. m. It was then that he discovered Barbara Gibbons lying on the floor of the bedroom, made several phone calls, moved his car away from the front of the house, and awaited the ambulance.

After the plaintiff gave the statement to Trooper McCafferty, Lieutenant James Shay conducted a strip search of the plaintiff which revealed no blood ***352** on the plaintiff's clothes or body. Lieutenant Shay then ordered that the plaintiff be transported to Troop B, North Canaan, and that order was carried out at about 1:40 a. m. on September 29, 1973.

Lieutenant Shay interrogated the plaintiff at state police Troop B in North Canaan from about 6 to 8 a. m. The plaintiff was then transported to Troop H, Hartford, for the purpose of taking a polygraph test, which he had requested. The polygraph test was administered and the interrogation continued at Troop H over a period of time in excess of six hours. During the course of that interrogation the plaintiff made certain confessions. He was then placed under arrest for the crime of murder.

At the original trial, the prosecution relied on the confessions made by the plaintiff during his interrogation and on certain other admissions. The prosecution offered certain medical testimony and laboratory evidence, including the testimony of Ernest Izumi, who testified, inter alia, that the plaintiff could have inflicted all of the injuries on the victim without being contaminated by her blood. The prosecution also established that the plaintiff and his mother sometimes quarreled. The plaintiff's apparent lack of grief was developed through several witnesses. The time sequence of the events of that evening, from the time the teen center meeting adjourned at approximately 9:15 p. m. until the time the state police arrived at the Gibbons residence at 10:02 p. m., was not clearly established. There was testimony that the phone call placed by the plaintiff to the Sharon Hospital was received at approximately 9:40 p. m. and that the state police received an emergency call regarding Barbara Gibbons from the Sharon Hospital at 9:58 p. m.

The defense case in the original trial included the plaintiff's testimony on his own behalf substantiating ***353** his statement given to Trooper McCafferty at the scene and also the testimony of several witnesses who saw him at the site of the teen center meeting after 9:30 p. m. on that night. Further, the defense introduced the testimony of John Sochocki,[1] then fifteen years of age, who stated that after leaving the site of the meeting at about 9:40 p. m. the plaintiff drove him home and he arrived home at 9:45 p. m. Joanne H. Mulhern testified that Reilly was wearing the same clothes at Troop B as she had seen him wearing the night before at the teen center meeting. Concerning the defense case at the original trial, it is important to note at this point the complete lack of any medical testimony to rebut Ernest Izumi's very damaging evidence, i. e., that the plaintiff could have inflicted all of the injuries on the victim without being contaminated by her blood, and also the total absence of any psychiatric ****329** testimony to explain the reasons for the plaintiff's confessions to the state police.

1 He is now deceased as a result of a drowning accident during the summer of 1975.

Section 52-270 of the General Statutes provides: 'The superior court or the court of common pleas may grant a new trial of any cause that may come before it, for mispleading, the discovery of new evidence or want of actual notice of the suit to

any defendant or of a reasonable opportunity to appear and defend, when a just defense in whole or part existed, or for other reasonable cause, according to the usual rules in such cases.'

This petition for a new trial is in three counts. In the first and third counts, the plaintiff relies on alleged newly discovered evidence as the basis for granting him a new trial. In the second count, the plaintiff alleges that the state failed to provide him with certain exculpatory information and material, *354 including statements, records, tangible evidence, and documents, which he claims deprived him of a trial in accordance with due process of law.

1 2 The plaintiff has the burden of proving all the controverted allegations of his complaint. Link v. State, 114 Conn. 102, 107, 157 A. 867. The state left the plaintiff to his proof of the allegations of the second count. This court finds that the plaintiff has failed to sustain his burden of proof on the second count of the petition. The plaintiff has not proved that the state withheld exculpatory material from the defense at his original trial. At the trial the defense filed motions for disclosure and production which were answered by the state. At no time during the course of that trial did the defense raise the issue of noncompliance with its motions for disclosure and production. Since the plaintiff has failed to pursue in his brief his claims under the second count, it is apparent that he has abandoned his claims thereunder.

It is clear to the court that prior to and during the trial the state's attorney carried out his duties in accordance with the highest traditions of his office, and that, within the limits of his responsibilities, he made every effort to be fair to the plaintiff.

As to the first and third counts of the petition, the rules for granting a new trial on the basis of newly discovered evidence are well established. 'The plaintiff has the burden of proving that the evidence was in fact newly discovered; that it would be material to the issue on a new trial; that it could not have been discovered and produced on the former trial by the exercise of due diligence; that it is not merely cumulative; and that it is likely to produce a different result in a new trial. Pass v. Pass, 152 Conn. 508, 511, 208 A.2d 753; *355 Taborsky v. State, 142 Conn. 619, 623, 116 A.2d 433; Krooner v. State, 137 Conn. 58, 60, 75 A.2d 51; Hamlin v. State, 48 Conn. 92, 93.' Moynahan v. State, 31 Conn.Sup. 296, 297, 329 A.2d 619, 620.

3 Newly discovered evidence which would be material to the issue at a new trial is any such evidence which goes to the merits of the charge against the plaintiff or helps establish a meritorious defense which was not presented at the original trial.

4 The due diligence requirement has been interpreted to mean that a new trial will not be granted 'if the new evidence relied upon could have been known with reasonable diligence.' White v. Avery, 81 Conn. 325, 328, 70 A. 1065, 1066; Salinardi v. State, 124 Conn. 670, 672, 2 A.2d 212. Nevertheless, '(t)he question of due diligence is in all cases to be determined upon consideration of all the circumstances of the case.' Andersen v. State, 43 Conn. 514, 517.

5 6 7 8 The evidence cannot be 'merely cumulative.' The modification of the word 'cumulative' by the word 'merely' must be noted. Merely cumulative evidence would be newly discovered evidence of 'the jury same fact, and the same attending **330 circumstances, testified to upon the former trial, and . . . of the very same nature as that before offered in proof of that same fact.' Hart v. Brainerd, 68 Conn. 50, 54, 35 A. 776, 777; Apter v. Jordan, 94 Conn. 139, 141-42, 108 A. 548. Furthermore, 'evidence which brings to light some new and independent truth of a different character, although it tend (sic) to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule.' Waller v. Graves, 20 Conn. 305, 310; Link v. State, 114 Conn. 102, 107-108, 157 A. 867; Andersen v. State, supra, 519. Finally, even cumulative evidence can be grounds for a new trial if it 'appears reasonably certain that injustice has been done in the judgment rendered and that the result of a new trial will probably be different.' Pass v. Pass, 152 Conn. 508, 512, 208 A.2d 753, 755.

*356 9 10 In determining whether a new trial should be granted 'the primary test is whether an injustice was done and whether it is probable that on a new trial a different result would be reached.' Taborsky v. State, 142 Conn. 619, 623, 116 A.2d 433, 435; Dortch v. State, 142 Conn. 18, 21, 110 A.2d 471; Smith v. State, 141 Conn. 202, 208, 104 A.2d 761. 'The burden of proving the probability of a different result is upon the plaintiff, and in determining that issue the trial court exercises a discretion which cannot be reviewed unless its discretionary power has been abused.' Taborsky v. State, supra; State v. Goldberger, 118 Conn. 444, 457, 173 A. 216.

11 The function of a court at a hearing for a new trial is to determine whether the evidence presented at the hearing considered with the evidence presented at the original trial warrants the granting of a new trial. That determination is within the sound discretion of the court. Pass v. Pass, supra, 152 Conn. 510, 208 A.2d 753; Krooner v. State, 137 Conn. 58, 62, 75 A.2d 51; Gannon v. State, 75 Conn. 576, 578-79, 54 A. 199. This court is in an advantageous position to determine whether the plaintiff has sustained his burden of proof. By virtue of having presided at the plaintiff's original trial, this court is able to consider more than merely a cold printed record of the former proceeding. In fact, this court is able to rely on its personal observation of the witnesses and their demeanor and conduct in the courtroom and on the witness stand, their testimony, and the voluminous record of that proceeding, of which the court has taken judicial notice. Consequently, the court, in the exercise of its discretion, has drawn upon its extensive knowledge of the plaintiff's case in reaching this decision.

After a long and deliberate study of all of the transcripts of the original trial and the instant proceeding, together with the pleadings and exhibits ***357** in both cases, this court concludes that an injustice has been done and that the result of a new trial would probably be different.

The evidence presented by the plaintiff at this hearing appears to the court to have been offered for four purposes. These are: (1) to establish the existence of a potential suspect or suspects other than the plaintiff; (2) to establish a precise time sequence of the events of the evening of September 28, 1973; (3) to refute and explain the validity of the plaintiff's confessions and admissions; and (4) to refute the testimony of Ernest Izumi. The unusual and bizarre nature of the facts and circumstances of this case have been kept in mind in the consideration of this petition for a new trial.

I

At this hearing the plaintiff brought out, through Sergeant Gerald F. Pennington of the state police, that a previously unidentified fingerprint found at the murder scene had been identified as of January, 1976, while this hearing was in progress, as that of Timothy A. Parmalee. That fingerprint had been found on the back screen door of the Gibbons residence and was described at ****331** the original trial as an identifiable but unidentified fingerprint. During the course of this hearing the state conceded that the fingerprint is that of Timothy Parmalee and that it is, indeed, newly discovered since there was no way to identify it before or during the plaintiff's trial. The court ruled at that time that the identified fingerprint is newly discovered evidence and was not discoverable during or prior to the original trial by the exercise of due diligence.

In connection with the newly discovered fingerprint this court has considered the testimony of Sandra Ashner. Both her testimony and the identification of the fingerprint raise the issue of the ***358** possibility of a new suspect or suspects in the killing of Barbara Gibbons. More specifically, that evidence focuses on Timothy Parmalee and his brother Michael as possible suspects.

Sandra Ashner testified at this hearing that on the night of September 28, 1973, Michael C. Parmalee departed from the trailer where they were living, that he did not sleep with her that night, and that he was not present the next morning when she woke up at approximately 7:30 a. m. She also testified that Michael Parmalee did not return to the trailer until 8:30 or 9 a. m. and that, thereafter, he was unable to sleep at night because he was upset, shaking, and nervous. As a result of his unusual behavior Ashner moved out. That testimony amounted to a retraction of an unsworn statement given by Ashner to the state police on October 7, 1973, during the course of their investigation of the Gibbons death. In that statement Ashner had supported Michael Parmalee's alibi for the night of September 28, 1973, by stating that he had spent the entire night with her in the trailer, which was located within walking distance of the Gibbons residence.

Sandra Ashner did not testify at the original trial, and neither the plaintiff nor his counsel was aware of the existence of her statement concerning Michael Parmalee at the time of that trial. It was not until April of 1975 that Ashner indicated that her statement of October 7, 1973, was false. She testified at this hearing that she had lied to the state police because she had a little child and didn't want to get involved. Her testimony is newly discovered evidence and was not discoverable by due diligence during or prior to the original trial. The facts withheld by Ashner could not have been discovered with due diligence since the plaintiff did not know at the time of that trial of her statement to the police ***359** of October 7, 1973. The Ashner retraction

in April, 1975, introduced for the first time a suspect other than the plaintiff, thereby opening an avenue of investigation which was not available to the defense at the original trial, namely, the possible involvement of Michael Parmalee in the death of Barbara Gibbons. The issue of Michael Parmalee's possible involvement is newly discovered evidence since it was not apparent until April of 1975 when Ashner retracted her statement of October 7, 1973.

12 Michael Parmalee's possible involvement and the identification of the unidentified fingerprint as that of Timothy Parmalee, Michael's brother, raise the issue of the possibility of a new, legitimate suspect or suspects in the death of Barbara Gibbons. That issue is clearly material and relevant to the plaintiff's defense on a new trial. The interjection of a new fingerprint and a suspect or suspects other than the plaintiff is not in any way cumulative. That evidence is of a completely different character from that offered at the plaintiff's original trial.

13 It is obvious that newly discovered evidence can logically and reasonably lead to other evidence, not necessarily new, which would then take on new dimensions and importance. Therefore, any relevant and material evidence which logically and reasonably flows from the Ashner retraction and the identification of the fingerprint which establish the possibility of a new suspect or suspects must be taken into ****332** consideration by this court. That would include the evidence which was presented at his hearing in an attempt to establish motives on the part of Michael Parmalee and Timothy Parmalee, i. e., the animosity between the victim and Michael Parmalee, the possible robbery of the victim by Timothy Parmalee, and the fact that both of them had not been allowed in the Gibbons house since the spring of 1973. Neither the identity of the fingerprint ***360** nor the existence of motives on the part of Michael and Timothy Parmalee would have been discovered but for Ashner's retraction.

14 As to the Ashner retraction and the newly identified fingerprint, the state has argued that a different result would not be likely at a new trial. The state asserts that Ashner is not a credible witness. Her credibility, however, is not for this court to determine. Concerning the issue of credibility, this court must decide only whether there is a 'reasonable certainty that the evidence will be admitted at the new trial (and) also a reasonable probability that the jury will accept it.' Smith v. State, 141 Conn. 202, 216, 104 A.2d 761, 767 (opinion of O'Sullivan, J., dissenting). It is up to the jury at the new trial to weigh Ashner's credibility.

The state has also argued that the fingerprinting was more valuable to the plaintiff's defense when it was identifiable but unidentified. At the trial the defense brought out the unidentified fingerprint and attempted to show that the motive for the killing was robbery and that the killer left by the back door, which was found partly open, leaving his fingerprint on the rear screen door. The state's argument that the 'mystery killer' theory provided the plaintiff with a better refense than one based on the identified fingerprint is not persuasive. The point that real live people make better suspects than fictitious or unidentified persons does not have to be belabored. It is extremely significant that the fingerprint has been identified as that of Timothy Parmalee, Michael Parmalee's brother.

At the plaintiff's trial all of the fingerprints found at the scene of the crime, except the identifiable but unidentified fingerprint on the rear screen door, were identified as those of the plaintiff, the victim, and others who had admittedly been at the scene ***361** on the night of the crime or the following day. There was also an identifiable but unidentified partial palm print found on the front screen door, which remains unidentified. At this hearing, Sergeant Pennington testified that it is reasonably possible that Timothy Parmalee's print was left on the rear screen door on the night of September 28, 1973. He also testified that it is reasonably probable that the hand of Timothy Parmalee made certain other marks on that door. Those were a smudged area to the right of the identified Parmalee fingerprint and some partial ridge structures, not identifiable to the left of the identified fingerprint. The jury on a new trial could very well accept and give credence to a theory that the fingerprint was left by Timothy Parmalee on the night of Barbara Gibbons' death.

This court must not lose sight of the fact that to convict Peter A. Reilly the jury had to believe and find that he was guilty beyond a reasonable doubt. The unusual circumstances of this complicated and bizarre case explain why the jury at the original trial must have had great difficulty in arriving at their verdict. It was only after two days with more than fifteen hours of deliberation, after large segments of the testimony were read back to them, and after the court supplementally charged them with a modified version of the 'Chip Smith' charge;[2] ****333** State v. Smith, 49 Conn. 376, 386; that the jury returned a guilty verdict.

2 On April 12, 1974, at 2:39 p. m., the court summoned the jury and addressed them as follows:

> 'All right, ladies and gentlemen, you have been deliberating for some time in this case, and I want to address you briefly at this time.
> 'I kept all of you here until about 10:40 p. m. last evening, and it is now about nineteen minutes to 3:00 (p. m.); and, first of all, let me assure you, ladies and gentlemen, that I have no criticism to make of the length of time that you have been in conference. In fact, it indicates the earnestness with which you are considering the matter. However, I feel it is my duty to give you ladies and gentlemen whatever aid I can in assisting you in arriving at a verdict, if you are having a problem.
> 'Although the verdict to which each juror agrees must, of course, be his own conclusion and not a mere acquiescence in the conclusions of his fellows, and although each juror has the right and duty to retain his own opinion, yet, in order to bring twelve minds to a unanimous result, each juror should examine with candor the questions submitted to them with due regard and deference to the opinions of each other, bearing in mind that the other jurors have heard the same evidence with the same attention and with equal desire to arrive at the truth, and under the sanction of the same oath.
> 'I want you to bear that in mind, ladies and gentlemen, and I am going to ask you to return to the jury room.'
> The jury then retired at 2:43 p. m., and reached a unanimous decision at 3:09 p. m.

***362** **15** The court believes that an injustice was done in that Peter A. Reilly was convicted without having the benefit at his original trial of exploring and fully presenting the avenue of defense raised by the Ashner retraction and the identification of the fingerprint. In this court's view, there is a reasonable certainty that this evidence would be admitted at a new trial and it is reasonably probable that on a new trial the jury would reach a different result. Smith v. State, 141 Conn. 202, 208, 104 A.2d 761; Salinardi v. State, 124 Conn. 670, 672, 2 A.2d 212.

II

At the plaintiff's original trial, the state's first witness was Barbara G. Fenn, the night supervisor, who was on duty on the evening in question at the Sharon Hospital emergency room. She testified that she spoke with the plaintiff about Barbara Gibbons' condition at approximately 9:40 p. m. The defense did not establish a different time sequence for the evening of September 28. In fact, the testimony of Marion Madow, one of the main defense witnesses, confirmed Barbara Fenn's testimony as to the approximate 9:40 p. m. time. Marion Madow testified at the original trial that she received the plaintiff's call during a certain scene in the movie ***363** 'Kelley's Heroes' which she had been viewing on television. The only other times which were established at the trial were the 9:58 p. m. call to the state police and the arrival of the police at the scene at 10:02 p. m.

The state contended at the original trial that the plaintiff had the opportunity to commit the crime, as well as to wash, change out of his clothes and into a fresh set of clothing, and then dispose of the blood-stained clothing down the road from the Gibbons residence between the time he arrived home from the teen center meeting and the time the state police arrived at the scene at 10:02 p. m. In order to convict the plaintiff, the jury had to believe beyond a reasonable doubt that the plaintiff has sufficient time to perform those acts. Time was a key factor, essential to the commission of the crime.

It was affirmatively established at this hearing, through the testimony of Michael Marden, director of prime time feature films for CBS Television, that the scene Marion Madow described at both the trial and this hearing was transmitted at 9:50:10 p. m. (nine hours, fifty minutes, and ten seconds p. m.). He also testified that it could not have been shown by the local television station any earlier than 9:50:10 p. m. Therefore, the plaintiff could not have telephoned Marion Madow before that time. The fixing of the exact time of the plaintiff's phone call to the Madow residence is newly discovered evidence; and this court finds that under the circumstances the failure to discover that ****334** fact at the original trial cannot be ascribed to any lack of due diligence of the plaintiff. At the original trial, Marion Madow testified that the plaintiff called between 9:40 and 9:50 p. m. Since her testimony was consistent with Barbara Fenn's testimony that she ***364** spoke with the plaintiff at approximately 9:40 p. m., there would have been no reason for defense counsel, in the diligent preparation of the plaintiff's case, to investigate that issue further. Although theoretically discoverable prior to or during the plaintiff's original trial, the discovery of the actual broadcast time of a specifically identified scene in a television program goes beyond the scope of reasonable due diligence, particularly since the plaintiff knew that Barbara Fenn and Marion Madow agreed on the time of the call. Furthermore, that newly discovered fact is not merely cumulative within the rule established by the cases. Pass v. Pass, 152 Conn. 508, 512, 208 A.2d 753; Apter v. Jordan, 94 Conn. 139, 142-43, 108 A. 548. It is a distinct fact which raised the possibility of a completely

new time sequence for the events of the evening of September 28, 1973. As such it is material to the issue on a new trial because time was of the essence as to the plaintiff's ability to commit the crime.

As a result of the discovery of the exact time of the call to the Madow residence, the plaintiff made further inquiry regarding the time sequence of the events of the evening of September 28, 1973. A significant portion of the testimony presented at this hearing was introduced to establish a more precise time sequence. Dr. Frank Lovallo testified that the victim called him that very evening between 9:20 and 9:40 p. m., establishing that she was alive after the plaintiff's arrival at the teen center meeting. The Reverend Peter L. Dakers, Father Paul Halovatch, and others testified about the time when the plaintiff departed the church building where the teen center meeting was held. Their testimony places the plaintiff's departure between 9:40 and 9:45 p. m. Judy MacNeil, John Sochocki's aunt, testified that Sochocki, whom the plaintiff had driven home, had entered the house at 9:45 p. m. and ***365** that she heard a car outside the house immediately prior to that time. Trooper James T. Mulhern testified at this hearing that he and Lieutenant Shay had timed the drive from a point near John Sochocki's house to the victim's house and that it would take at least five and twenty-nine seconds. Jessica Bornemann, who received the plaintiff's second phone call after the 9:50:10 p. m. call to the Madows, testified that she spoke with the plaintiff for two or three minutes. The Bornemann call had to have been placed after the call to the Madows since the plaintiff told Jessica Bornemann that he had already telephoned for an ambulance. The third call was to the Sharon Hospital and was received by two individuals, one of whom, Barbara Fenn, spoke at some length with the plaintiff. Evidence was introduced to establish that Barbara Fenn's recollection that she spoke to the plaintiff at approximately 9:40 p. m. had to be incorrect, and Barbara Fenn admitted on cross-examination that the call could have been received later. Elizabeth Swart, the switchboard operator at the Sharon Hospital who took the incoming call from the plaintiff, logged the call in at approximately 10 p. m. Furthermore, Paul W. Sternlof, testified that it would not be appropriate for a supervisory nurse, such as Barbara Fenn, to receive an emergency call at 9:40 p. m. and not to notify the state police until 9:58 p. m. and not to notify the state police until 9:58 p. m. unless such delay could be justified by a major problem in the hospital. Sternlof also testified that no incident of that magnitude occurred in the Sharon Hospital on the night of September 28, 1973.

The plaintiff argues that that evidence when viewed in the light of Michael Marden's testimony is newly discovered and material to the issue of whether he had sufficient time to commit the alleged ***366** crime and other acts. He asserts that a different time sequence could raise a reasonable ****335** doubt in the minds of the jurors on a new trial which would produce a different result.

The new time sequence relied upon by the plaintiff places his arrival home at approximately 9:50 p. m. At the original trial, the plaintiff's arrival home was indicated to be approximately 9:40 p. m. It is reasonably certain that a jury would accept the new time sequence evidence. In addition to Michael Marden's testimony placing the call to the Madows no earlier than 9:50:10 p. m., the other evidence independently supports a factual conclusion that the plaintiff arrived home at approximately 9:50 p. m. The testimony established that the plaintiff left the church building with John Sochocki at approximately 9:40 to 9:45 p. m. And that Sochocki arrived home at 9:45 p. m. The trip from near Sochocki's home to the Gibbons home, according to state police testimony, took approximately five minutes and twenty-nine seconds. The jury could reasonably infer, therefore, that the plaintiff arrived home at approximately 9:50 p. m. After the plaintiff telephoned the Madow residence, which took about a minute, he phoned the Bornemann residence in order to speak with Carl Bornemann. Jessica Bornemann testified that she spoke to the plaintiff for two or three minutes. From this, the jury could reasonably infer that the plaintiff placed his call to the Sharon Hospital at approximately 9:53 to 9:54 p. m. During that call the plaintiff spoke with both Elizabeth Swart and Barbara Fenn, and he spoke with Barbara Fenn at some length. If the phone call lasted several minutes, which can be reasonably inferred from the testimony, then the 9:58 p. m. phone call to the state police was placed almost immediately after the plaintiff's call to the hospital was completed.

***367** The witnesses who testified at this hearing regarding a new time sequence were available to testify at the original trial. Some, in fact, did testify at that trial. Nevertheless, the testimony of those various witnesses relating to the sequence of events on the night of the crime is either at variance with their original testimony or suggests that some witnesses were mistaken in their testimony. It cannot be said that the failure to establish an exact time sequence through those witnesses at the original trial amounted to a lack of due diligence on the plaintiff's part. The evidence introduced which tends to establish a new and more precise time sequence is similar to the evidence which was only discoverable as a result of the Ashner retraction and the identification of the fingerprint. The establishment of the exact time of the television sequence testified to by Marion Madow,

which this court finds was not discoverable by due diligence, opened an avenue of investigation which was not apparent at the original trial. A new time sequence is not only material but crucial to the issue of whether the plaintiff committed the crime. An injustice was done the plaintiff since he was convicted without an opportunity to frame a defense based on the new time sequence evidence.

16 **17** Although the testimony of the witnesses other than Michael Marden may be somewhat cumulative, and although some of the time sequence evidence was introduced for the purpose of impeaching the credibility of Barbara Fenn, it appears reasonably certain to this court that that evidence together with the testimony of Michael Marden would raise a reasonable doubt in the minds of a jury that the plaintiff had committed the crime and is therefore likely to produce a different result upon a new trial. When it appears that an injustice has been done in the judgment rendered and that the result of a new ***368** trial will probably be different, the prohibitions against granting a new trial on the basis of cumulative or impeaching evidence are not applicable. Pass v. Pass, 152 Conn. 508, 512, 208 A.2d 753; Krooner v. State, 137 Conn. 58, 67, 75 A.2d 51; Gonirenki v. American Steel & Wire Co., 106 Conn. 1, 12, 137 A. 26; ****336** Apter v. Jordan, 94 Conn. 139, 142-43, 108 A. 548; Husted v. Mead, 58 Conn. 55, 61, 19 A. 233.

III

After the state presented its evidence at this hearing, it requested the court to take judicial notice of the entire record of the plaintiff's original trial and the court did so. At that point the plaintiff requested that he be allowed to offer the testimony of Herbert Spiegel, a psychiatrist, to refute the validity of the plaintiff's confessions and admissions which were part of the record of the former proceeding. The court overruled the state's objections and allowed Spiegel to testify.

This court was highly impressed by Spiegel's credentials[3] and his testimony, as well as his demeanor, candor, and frankness on the stand, and his ability to comprehend and answer questions clearly and ***369** unequivocally. To analyze the plaintiff's confessions and admissions, Spiegel employed a new profile test that measures the ability of people to concentrate under given test conditions. Although that test had been in development over a period of eight years, it was first accepted in the medical community after the publication of an article by Professor Ernest Hilgard in the February, 1975, issue of Annals of Psychology. Spiegel was personally involved in the development of that test as principal investigator. On the basis of the profile test, Spiegel concluded that the plaintiff's confessions and admissions were obtained by either coercion or deception, given the plaintiff's personality and his susceptibility to influence by persons in positions of authority. In his testimony, Spiegel characterized the plaintiff as 'a somewhat immature young man who has a serious deficit in his ability to identify who he is as a person. . . . As a result of this, he had difficulty in integrating his concept of self, and at the same time, has confusion and difficulty and a poor ability to integrate his conceptions of others; and this combination of being so terribly uncertain about who he is as a person and who he is relating to, especially people in authority, leads to a great deal of confusion and, certainly, a great deal of difficulty in trying to withstand any efforts at interrogation and to make critical judgments about the difference between a statement and an assertion or a question . . .. (H)e can easily be confused; and he most certainly can easily accept as a fact something that he knows nothing about.'

3 Herbert Spiegel is an associate clinical professor of psychiatry at the Columbia University College of Physicians and Surgeons. He is also associated with Presbyterian Hospital at Columbia as well as St. Luke's Hospital in New York City. In 1946, Spiegel was certified by examination by the American Board of Psychiatry. He did his undergraduate studies at the University of Maryland and then attended the University of Maryland Medical School. Spiegel trained in general medicine at St. Francis Hospital at the University of Pittsburgh and studied psychiatry at St. Elizabeth's Hospital in Washington, D.C. He had his training in psychoanalysis at the William Allenson White Institute in New York. Spiegel has engaged in the private practice of psychiatry since 1940. He has taught and lectured at numerous medical schools including the University of Chicago, Emory University, Cornell, New York University, Harvard, Yale, the University of Pennsylvania, Stanford University, and the University of Rome. He has also guest lectured at a course at New York University Law School which deals with the quality of confessions obtained by police interrogation and the psychological factors that have to be taken into account when evaluating such confessions.

Although the plaintiff concedes that psychiatric testimony was available to him at his original trial, he argues that since the new scientific method utilized by Spiegel was unavailable to him at that time, the testimony of Spiegel is newly discovered

evidence. The plaintiff's argument is persuasive. Furthermore, *370 since the method of analysis was not available at the time of the plaintiff's trial, no amount of due diligence could have discovered it.

**337 The state argues that psychiatric testimony was available to the plaintiff at and prior to the trial, that Spiegel's testimony is merely cumulative to the argument made to the jury by the plaintiff's defense counsel, and that the testimony is not likely to produce a different result upon a new trial. In support of its argument, the state relies on Krooner v. State, 137 Conn. 58, 68, 75 A.2d 51, in which the court held that the psychiatric opinions of two doctors based on more complete data than were available at the original trial was merely cumulative and would not be likely to produce a different result upon a new trial. The instant case differs in a significant aspect from Krooner, in that in Krooner there was psychiatric testimony at the original trial, while at the plaintiff's trial there was no psychiatric testimony. It may have been a lack of due diligence not to have had any psychiatric testimony at the original trial. See Part IV, infra. Even if there had been such testimony, however, there could not have been any analysis based upon the test utilized by Spiegel since it was not accepted by the medical community until after the plaintiff's trial. Here, the newly discovered evidence presented by Spiegel is clearly not cumulative since the issue of the plaintiff's mental state when he made the confessions and admissions was not raised at his original trial. The defense counsel's rhetoric in argument to the jury is obviously not evidence, has no probative value, and, therefore, is not testimony which may fall within the proscription of the rule against cumulative evidence.

Spiegel's testimony is relevant and material to the nature, weight, and admissibility of the plaintiff's confessions and admissions. Those were a *371 critical part of the state's case against the plaintiff. Certainly the state's reliance on the confessions and admissions was valid and this court has found no impropriety on the part of the state police in obtaining them during the extended interrogation. The confessions were ruled legally valid by two judges prior to their admission at the plaintiff's original trial.[4] The state police were engaged in investigating a brutal and violent slaying. They were justified in considering the plaintiff as a suspect and questioning him at length because of many factors, including his uncertainty, his vacillation, his claim that his mother was breathing when he arrived home and other behavior, such as his request for a polygraph test.

4 A pretrial defense motion to suppress the confessions was denied by Superior Court Judge Anthony J. Armentano on February 12, 1974, and this court later ruled them admissible at the original trial.

18 Nevertheless, this court believes that an injustice was done the plaintiff at his original trial because of the absence of any expert testimony to raise the issue of the reliability of the plaintiff's confessions and admissions. The confessions and admissions went totally unexplained except in the testimony of the plaintiff himself. Since the confessions and admissions were an important element of the state's case against the plaintiff, it is reasonably probable that a jury would accept Spiegel's testimony and that such testimony would probably lead to a different result upon a new trial.

IV

At a hearing on a petition for a new trial based on newly discovered evidence, it is important for the court to 'determine whether the new evidence is such that it is likely to reverse the result, so that, for lack of it, (at the original trial) an injustice has probably been done.' Salinardi v. State, 124 Conn. 670, 672, 2 A.2d 212, 213; *372 Gannon v. State, 75 Conn. 576, 578, 54 A. 199. The Supreme Court of this state has held that in certain cases involving newly discovered evidence there may be a less rigid application of the rules for granting a new trial. Taborsky v. State, 142 Conn. 619, 116 A.2d 433; Andersen v. State, 43 Conn. 514. In Taborsky and Andersen, the plaintiffs petitioning for new trials had **338 been convicted of murder in the first degree, a capital offense. The newly discovered evidence presented in those cases was of such a character as to raise a doubt in the court's mind that the convictions would stand upon a new trial. As a result, in each case the court relaxed the requirement that the evidence must be such that it could not have been discovered by due diligence at the time of or prior to the original trial and granted new trials to the plaintiffs. In both Taborsky and Andersen the court expressed its concern that a human life was at stake.

19 In this court's opinion, an underlying principle of Taborsky and Andersen is that in certain serious criminal cases, if it appears to the court that evidence which is adduced at the hearing on the petition for a new trial could have a persuasive impact on a jury and 'might well be 'sufficient to turn the cause in favor of the applicant.' Apter v. Jordan, 94 Conn. 139, 141, 108

A. 548, 549, quoting from 1 Swift's Digest 786'; Taborsky v. State, supra, 142 Conn. 631, 116 A.2d 438; an injustice would be done to the plaintiff if a new trial is not granted, even if all the traditional criteria for granting a new trial on the basis of newly discovered evidence are not satisfied. In such cases the court should grant a new trial when it is apparent that a grave injustice has been done and that the result at a new trial would probably be different.

In considering the failure to exercise due diligence in the discovery of only part of the newly discovered evidence, application of the principle of Taborsky and Andersen is particularly appropriate ***373** in this case. The plaintiff was eighteen years old when he was accused of the crime of murdering his mother. He had no previous criminal record. He was indicted and prosecuted for the crime of murder, the most serious crime in this state. His conviction is likely to have a serious and lasting impact on the rest of his adult life.

The plaintiff's youthfulness, immaturity, and inexperience may have made it difficult for him properly to assist in the investigation of this case and the preparation of his defense. Therefore, certain aspects of his defense that may have been properly developed through the exercise of due diligence may have been overlooked or their importance unappreciated by the plaintiff and his counsel at the original trial. See Andersen v. State, supra, 518. The court must note, however, that the defense's failure to present any psychiatric testimony to explain and refute the plaintiff's confessions and admissions, although a favorable psychological report was available to it, and also its failure to offer any medical testimony to rebut the very damaging testimony of Ernest Izumi clearly demonstrate a lack of due diligence. Those two serious omissions created gaps in the defense and it is likely that the plaintiff was unable to perceive those gaps because of his immaturity and inexperience.

Those ommissions have been rectified upon this hearing for a new trial by the testimony of Drs. Herbert Spiegel and Milton Helpern. The importance of Spiegel's testimony to refute the plaintiff's confessions and admissions has already been discussed. See Part III, supra. This court has ruled that Spiegel's testimony satisfied the criteria for a new trial on the basis of newly discovered evidence because the profile test upon which Spiegel based his analysis of the plaintiff's confessions and admissions was not accepted in the medical community ***374** until after the plaintiff's trial. Nevertheless, the defense could have called expert witnesses at the original trial to testify about the plaintiff's personality. Moreover, at this hearing it was established that the plaintiff had been interviewed and tested by a clinical psychologist during the original trial. Certainly, the testimony of that psychologist, as well as the testimony of a psychiatrist or psychiatrists who could have interviewed the plaintiff, should have been presented at the plaintiff's original trial. That is borne out ****339** by Spiegel's testimony that he reviewed the psychologist's report after he had reached a diagnosis of the plaintiff's personality and that the report confirmed and in no way altered his judgment.

Milton Helpern,[5] a nationally known expert in the field of forensic medicine, testified on behalf of the plaintiff. He was called primarily to refute the testimony of Ernest Izumi at the original trial. In response to certain hypothetical questions posed by the plaintiff, Helpern testified that it would have been physically impossible for the plaintiff to have committed the crime, either under the original time sequence or the time sequence established by the newly discovered evidence, without being contaminated by the victim's blood.[6] The strip search of ***375** the plaintiff did not reveal any blood on the plaintiff or his clothing, nor was there any evidence of blood in the drains of the house or in the septic tank system. Helpern's testimony controverts that of Izumi at the plaintiff's trial that it was possible for the plaintiff to have committed the crime without being contaminated by the victim's blood. Izumi's testimony at the original trial was damaging to the plaintiff's case and could have materially contributed to the plaintiff's conviction. In fact, the jury, in the course of its deliberations, requested that certain portions of Izumi's testimony be read back to it. The absence of any evidence to controvert Izumi's testimony at the original trial was a serious omission on the part of the defense. Helpern's testimony is clearly material to the issue of whether the plaintiff committed the crime.

5 Milton Helpern is emeritus professor of forensic medicine at New York University School of Medicine, retired chief medical examiner of New York City, emeritus professor of pathology at Cornell University Medical College, and is certified in anatomic pathology, and forensic pathology by the American Board of Pathology.

6 Helpern's opinion was that 'it is not possible to say with any degree of precision how long it would take to inflict these injuries; but, again, in view of the location of the body at the scene and nature of the multiple injuries, both blunt force, stabbing and cutting on both sides of the body, including the head and extremities, front and back and genitalia, it is reasonable to conclude that the

> infliction of such injuries would contaminate the assailant and his clothing with blood, especially since the body would have to be turned over. One would reasonably expect that such injuries would contaminate the assailant and his clothing which would be readily evident, if he was examined after he was taken into custody.'

20 Helpern's testimony is also not merely cumulative within the meaning of the rule because it is of a materially different character than the testimony of Izumi. Finally, although a new trial will ordinarily not be granted on the basis of discrediting or impeaching testimony; Smith v. State, 139 Conn. 249, 251, 104 A. 761; that 'prohibition is not applicable, where, as here, the impeaching testimony is of such importance that it appears reasonably certain that an injustice has been done and that the result of a new trial would probably be different. Husted v. Mead, (58 Conn. 55), 64, 19 A. 233; Apter v. Jordan, (94 Conn. 139), 143, 108 A. (548) 550.' Taborsky v. State, 142 Conn. 619, 632, 116 A.2d 433, 439.

21 After reviewing the testimony of Helpern and Spiegel, the court is convinced that an injustice was done Peter A. Reilly because he was convicted without having the benefit of that type of testimony at his original trial. Although there was a lack of due diligence in obtaining that type of testimony, the seriousness of the charges against the plaintiff and this court's finding that an injustice has been ***376** done to the plaintiff necessitate a relaxation of the rigid rules in considering the failure to exercise due diligence in the discovery of only part of the newly discovered evidence.

' **22** A new trial will not be denied the plaintiff because of his failure to exercise due diligence in the discovery of only part of the newly discovered evidence, when the remainder, which he could not ****340** possibly have discovered, is of such great moment.' Taborsky v. State, supra, 632-33, 116 A.2d 439. The testimony of Helpern and Spiegel as well as the other evidence, which this court has determined does satisfy the traditional criteria for granting a new trial on the basis of newly discovered evidence, are reasonably certain to be admitted into evidence upon a new trial and are reasonably likely to produce a different result upon that trial.

23 **24** In conclusion, this court is mindful of the unusual, bizarre, and complicated nature of the facts and circumstances of this case. The proceedings before this court, both at the original trial and at this hearing, have been long, arduous, and complex. This court has virtually lived with all of the many and varied aspects of this case for over two years, and is very much aware of its grave responsibility to exercise cautiously the awesome power of the court to grant or deny this petition for a new trial. It is well established that sound public policy requires that all litigation come to an end at some point, and in that connection our Connecticut Supreme Court has said 'that the maxim 'interest reipublicae up sit finis litium' is one of the 'embodiments of wisdom and justice.'[7] The weight and significance of that consideration, however, pale quickly and it must give way when a court determines that an injustice has been done. Our statute which provides the remedy of a new trial is designed to correct serious ***377** miscarriages of justice. This court concludes that the purpose of that statute would be thwarted if the conviction of Peter A. Reilly were allowed to stand. For the reasons previously set forth in this opinion, it is readily apparent that a grave injustice has been done and that upon a new trial it is more than likely that a different result will be reached.

7 See Stocking v. Ives, 156 Conn. 70, 73, 238 A.2d 421, 423, and cases cited therein.

The plaintiff has sustained his burden of proof on the first and third counts of his petition.

Accordingly, the petition for a new trial is granted and a new trial is hereby ordered.

Parallel Citations

355 A.2d 324

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THE HOUR - May 31, 1977 page 4

Attorney Interviews Polygraph Expert in Reilly Investigation

HARTFORD, Conn. (UPI) -
Special State's Attorney Paul J. McQuillan says he has interviewed nationally known polygraph expert Richard O. Arther of New York in connection with the grand jury inestigation of the Peter A. Reilly case.

Arther trained Connecticut state police in the use of lie detectors.

Reilly was given a lie detector test during more than eight hours of interrogation at state police headquarters on Sept. 29, 1973.

His mother, Barbara Gibbons, was murdered in their Falls Village home the previous night.

State police said it was during the lie detector test and questioning Reilly said he thought he had killed his mother. Reilly later denied this was true.

http://news.google.com/newspapers?id=bxEiAAAAIBAJ&sjid=-nMFAAAAIBAJ&pg=3050%2C1922819

The Day - Eastern Connecticut's Newspaper

March 13, 1978

Woman Released by police following lie detector test

HARTFORD (AP) - State police gave a woman who claimed she had new information about the slaying of Barbara Gibbons, the mother of Peter A. Reilly, a lie detector test and found her story did not check out, a report published Sunday said.

The Hartford Courant quoted an unidentified source regarding the woman, who had been held in protective custody. She has been released, the newspaper reported.

The unidentified woman had phoned Reilly two months ago and said she had information about the person who killed his mother. Reilly referred her to priate detective James Conway of Vernon.

The newspaper quoted a source which said that the woman had been taken to the Bethany state police barracks Friday evening. She underwent preliminary questioning for two hours before the Saturday polygraph test, the published report said.

The source said the woman said state police asked her questions including, "Why did you go to Peter Reilly? Why did you go to Conway? Why didn't you go to the police?"

"She thought the questions were a little antagonistic," according to the source in tThe Courant's account.

The source said the woman was not expecting the questioning and "broke down and cried," the Courant reported.

The Courant reported Friday that the woman was placed in state police protectie custody Thursday after she said she was afraid of being harmed. The protectie custody was arranged by Litchfield County State's Attorney Dennis A. Santore.

http://www.people.com/people/archive/article/0,,20079233,00.html

May 11, 1981 Vol. 15 No. 18

The Truth About Lie Detectors, Says David Lykken, Is That They Can't Detect a Lie

By Linda Witt

Every year at least one million Americans undergo a lie detector test, and the number is steadily rising. Polygraph results are cited increasingly, and not just in the courts. Officials from government agencies as well as banks, department stores and fast-food chains are using lie detectors to screen job applicants or uncover theft by employees. The only catch, says David T. Lykken, 52, author of the recently published book A Tremor in the Blood, is that polygraph tests don't work. The innocent will fail them 50 percent of the time. Thousands of people, he says, are being refused employment, fired from their jobs and, in some cases, sent to prison—without having committed any crime. A psychiatry and psychology professor at the University of Minnesota who has studied lie detectors for over two decades, Lykken talked with PEOPLE's Linda Witt in his Minneapolis office about the evils of the polygraph.

Why are you against lie detector tests?

Because there is no such thing as a lie detector. A machine—or test—known as a polygraph picks up your emotional reactions to questions, measuring breathing, sweating responses and blood pressure. The examiner uses this information and other subjective evaluations for a diagnosis of what he thinks is truthful or deceptive.

Is this physical evidence conclusive?

The most any examiner can infer is whether or not one question is more disturbing than another—but not why. About 90 percent of the damaging reports made to employers are based not on physiological reactions but on the examiner's assumptions, or on incriminating confessions made during an interview. This subjectivity is part of the reason why the detectors are accepted as evidence in criminal cases in only about 20 states, and then only when both sides agree in advance.

How does the machine work?

Two soft rubber belts are strapped around you—one around the stomach, the other around the chest. Wires are fastened to the ends of two of your fingers. And a blood pressure cuff is wrapped around your arm.

Is there a specific physiological "symptom" of lying?

Absolutely not.

Can the experience of the test itself induce stress signals on the charts?

Yes. It's easy to make people frightened and angry. But the machine cannot tell if one person is angry, another frightened, or whether one or both are being deceptive. Statistics show tests are heavily biased against the innocent. If you've ever had the experience of denying a false accusation and still feeling guilty, you can understand. Wouldn't your palms sweat if you were suspected of murder? Ironically, the true criminal may be so accustomed to the psychodynamics of lying and denial that he can fool the examiner more easily.

How reliable are the tests?

Half of innocent people fail them. You'd do as well flipping a coin. In particular, people with strong consciences and religious beliefs can be easily made to feel guilt and anxiety.

Who is officially qualified to give lie detector tests?

In most states, anyone who passes the typical six-week polygraph course. Yet these inexperienced, untutored people are asked to make difficult judgments that may be literally matters of life or death. Polygraph expertise is touted as science, yet only about 10 of the thousands of practicing examiners are Ph.D.s in psychology, and few could meet the requirements for any of my basic courses.

Can a person refuse to take a polygraph?

Yes. Legally neither an employer nor the police can force you to take a lie detector test. The problem is that many people may then associate refusal to take the test with actual guilt.

Why do employers use polygraphs?

To solve thefts, mainly. They are also used in evaluating job applicants.

Would a "lie box" have helped the Washington Post deal with its reporter who won her Pulitzer for a made-up story and had been hired on a phony résumé?

Giving her a lie detector test might have led her to confess her misdeeds earlier, but if it didn't produce a confession, the test results would be ambiguous at best.

Have innocent employees been fired after failing polygraphs?

Yes, and in increasing numbers. In one case, a Detroit woman was awarded $100,000 from the Kresge stores. But there are tragedies—I will testify soon for the widow and young son of a highly decorated ex-Marine who killed himself after innocently failing a test.

Has anyone been wrongly convicted after failing a polygraph?

It's too common. Peter Reilly, then an 18-year-old from Canaan, Conn., was convicted of murdering his mother largely because he failed a lie detector test. Peter was persuaded that the polygraph showed he had killed her, even though he had no memory of it. Peter had strong physiological reactions to questions like "Peter, did you hurt your mother?" and "Can you remember stomping on her legs?" His eventual confession was meaningless. His conviction was later overturned because vital evidence had been withheld from the defense.

Is design of the questions a problem?

The Floyd Fay case in Ohio can be used as an example of how dumb they can be. Fay failed a lie detector test and was convicted of murder. But he had volunteered to take the test because he knew he was innocent. Typically, he was asked relevant questions like "Did you do it?" along with control questions like "Is today Tuesday?" Because Fay responded more strongly to the "Did you do it?" questions than to "controls," he failed. He served two years in prison before the real killers were found.

Can you outwit the lie detector machine?

Yes. While in prison Fay read an article of mine that said you could make the polygraph needles jump during the control questions by biting your tongue or rubbing your foot against a nail hidden in your shoes. Fay claims he taught the techniques to 27 prisoners who were in trouble over rules. All had told Fay they were guilty, yet 23 beat the test. Anything that produces tension during a question—even tightening your fanny muscles—will make the needles dance.

Are there other polygraph abuses?

Yes. In many parts of the country rape complainants undergo polygraph tests before they can file charges. I find this particularly distressing. How could such a victim, even while telling the truth, not react violently to the relevant questions?

Why do we believe in polygraphs?

I don't know exactly. The lie detector is almost exclusively an American artifact. Many Europeans have never heard of it. Americans are hooked on the mystique of science and technology—an aura exploited by advocates of the devices. There is nothing scientific about them. We began romanticizing the "lie box" in the '20s and '30s as we became aware of the horrors of the third degree and police brutality. The lie detector seemed clean in comparison to hitting someone with a rubber hose. And as a matter of fact, if that is the alternative, I prefer the polygraph.

Does it have any valid uses?

The Los Angeles police are able to get a 30 to 40 percent confession rate by using the polygraph. If lie detectors help close the books on some of the cases in cities with big crime problems like L.A., I'm all for them. I've seen cops grab a gullible guy fleeing the scene of a crime and wrap a cord from the squad car radio around his wrist and tell him it's a lie detector. I put myself in the cop's shoes. So he's got this guy by ruse—of course, the confession must be verified by other means, but at least he's got him.

Isn't this contradictory—they're good if they can scare the guilty, but evil when they scare the innocent?

I'm sensitive to civil liberties, but a person can make a fetish out of civil liberties and forget the police have a serious, difficult job to do—as long as they don't violate rights.

Should lie detectors be banned?

I'd like to think one could impeach the lie detector simply by unmasking its mystery. The lie detector has no more place in the courts or in business than a psychic or tarot cards.

6

Internalized False Confessions

Saul M. Kassin
Williams College

As I wrote this chapter, my attention was drawn to a courtroom in South Carolina, where 41-year-old Billy Wayne Cope was just convicted for the rape and murder of his 12-year-old daughter Amanda. Cope awoke one morning to find the oldest of his three daughters face down, cold and lifeless in her bed. It looked as if she had been strangled to death. Cope's wife worked the night shift, so she was not home. Immediately he called 911, but when the police arrived they treated him more like a suspect than a grief-stricken father. Based on an erroneous first impression that there was no sign of a forced entry and belief that Cope showed "too little emotion," the police interviewed him twice, sent him to the hospital for a physical examination, and then took him to the station for questioning that would begin late at night and extend into the early morning.

For more than 24 hours, Cope vehemently asserted his innocence despite persistent charges and accusations (e.g., "I swear before God, standing right here . . . I did not do anything to my daughter"). During that time, he waived his rights, volunteered to be examined, and five times offered to take a polygraph test: "So you have faith in the polygraph test?" he was asked. "Yes," he replied. The next morning, after spending the night in jail, without food or drink, bewildered, still separated from family and friends, and without counsel, Cope was administered a polygraph test by a police examiner who reported to him that he failed (in fact, a leading researcher who later scored the charts indicated that Cope had actually passed). Devastated by the result, Cope wondered aloud if a person could commit such a heinous act without knowing it—an idea suggested to him the previous night by his interrogators. According to the examiner, Cope broke down and admitted that "I must have done it." He then allegedly followed this admission with a full narrative story of how he molested and strangled his daughter, cleaned up, and went back to sleep.

Cope spent the next two and half days in jail, alone, still lacking contact with family, friends, or an attorney. He then handwrote a second confession in which he said that he had sexually assaulted and killed Amanda within the context of a dream. At that point, the police took him back to the house, where he reenacted on videotape—and in vivid and gruesome detail—how he had awakened in the middle of the night, molested and

killed Amanda while in a dissociated state, suddenly realized what he had done, went back to sleep, forgot what had occurred the next morning, then once again recalled his actions. This reenactment was followed by a fourth, even more detailed, confession typed by one of the detectives and signed by Cope.

Serving as an expert witness for the defense in this case, I believed that Cope's confessions were taken under highly stressful circumstances, that police investigators used interrogation tactics that put innocent people at risk, and that Cope's statements were filled with contradictions and factual errors. None of this meant that Cope was innocent or that his confessions were false. Shortly thereafter, however, DNA tests revealed that the donor of the semen and saliva found on Amanda's dead body was not Cope but a sex offender, who was new to the neighborhood, and who had broken into other homes, raping and killing other girls in the same way. One would surmise from this DNA exoneration that Billy Wayne Cope would have been released from jail, freed, and compensated. Yet just hours after the DNA results were received, the police told Cope's wife in an egregious lie that the semen was her husband's, wired her, and sent her to jail to try to get her husband to confess again, which he did not (she died of surgery complications shortly thereafter, believing that the semen was her husband's). When the DNA was later matched to James Sanders, a serial offender, the prosecutor—armed with a police-induced confession that now did not match the facts of the crime, and lacking any evidence whatsoever of a link between the two men—charged Cope with conspiracy, arguing that he had pimped his daughter out to Sanders. The only additional evidence at trial was presented by a female friend of Cope's late wife who was corresponding with the defendant. She presented two confessional notes allegedly received shortly before trial that Cope had sent to her from jail. But Cope denied writing these notes, which were penned on paper he had no access to and in a handwriting that was likely not his own. As for the witness, she had once before been charged with forgery in another matter. In short, there was no evidence of Cope's involvement other than his original confessions. Yet after only five hours of deliberation, a South Carolina jury voted to convict him.

In criminal justice, confession evidence is a prosecutor's most potent weapon—so much so, as one prominent legal scholar put it, that its introduction makes other aspects of a trial "superfluous" (McCormick, 1972, p. 316). Confessions play a vital role in law enforcement and crime control. They are also a recurring source of controversy, however, in large part because people sometimes confess to crimes they did not commit, only to be exonerated later (Drizin & Leo, 2004; Gross, Jacoby, Matheson, Montgomery, & Patel, 2004; Gudjonsson, 2003; Kassin, 1997a; Leo & Ofshe, 1998; Scheck, Neufeld, & Dwyer, 2000). Confessions are proved false when it is later discovered that no crime was committed (e.g., the presumed murder victim is found alive); when extrinsic evidence shows that the confessor could not have committed the crime (e.g., he or she was demonstrably elsewhere at the time or too young to have produced the semen found on the victim); when the real perpetrator, having no connection to the defendant, is apprehended and inculpated in the crime (e.g., by guilty knowledge, ballistics, or physical evidence); or when scientific evidence affirmatively establishes the confessor's innocence (e.g., he or she is excluded by DNA test results on semen, blood, hair, or saliva).

Indeed, as the post-conviction DNA exoneration numbers accumulate, research shows that 15–25% of cases had included confessions in evidence (www.innocenceproject.org/). [AQ1]

False confessions arise in different ways and for different reasons. By reviewing the wrongful convictions that have stained the pages of American legal history, and by drawing on social-psychological theories of social influence, Kassin and Wrightsman (1985) introduced a taxonomy of false confessions that distinguished among three types: voluntary, coerced-compliant, and coerced-internalized (see Kassin, 1997a; Wrightsman & Kassin, 1993). *Voluntary* false confessions are self-incriminating statements that are offered to police without external pressure. Coerced-*compliant* false confessions are those in which a suspect confesses to police in order to escape an aversive interrogation, avoid an explicit or implied threat, or gain a promised or implied reward. This type of confession is a mere act of public compliance by a suspect who knows that he or she is innocent but is highly stressed and comes to decide that confession is more cost-beneficial than denial, at least in the short term. Finally, coerced-*internalized* false confessions are statements made by an innocent but vulnerable person who, as a result of exposure to highly suggestive and misleading interrogation tactics, comes to believe that he or she may have committed the crime—a belief that is sometimes supplemented by false memories. Over the years, this classification scheme has provided a useful heuristic framework for the study and analysis of false confessions and has been adopted, critiqued, and refined by others (Conte, 2000; Gudjonsson, 1992, 2003; Inbau, Reid, Buckley, & Jayne, 2001; Kassin, 1997a; Kassin & Gudjonsson, 2004; Lassiter, 2004; McCann, 1998; Ofshe & Leo, 1997).

Uniquely, confessions are incriminating statements made by crime witnesses who are not bystanders or victims but alleged perpetrators. Common sense tells us that regular eyewitness can make mistakes but that innocent people do not confess to crimes they did not commit. For this reason, there is little, and I would argue insufficient, systemic concern about the reliability of the memories that these latter witnesses report. This chapter focuses on the internalized types of false confessions, those characterized by a change in the suspect's beliefs and sometimes accompanied by the formation of false memories that support those beliefs. To understand the nature of these false confessions, how they occur and why, it is important to examine some documented cases to see what they have in common, describe the methods of police interrogation that induced these confessions, review basic theories of social influence effects on cognition that are of relevance to the problem, and describe forensically specific studies of the factors that put innocent people at risk.

THE WAREHOUSE OF INTERNALIZED FALSE CONFESSIONS

In looking at cases that involve possibly internalized false confessions, it is important to realize that proof consists of some combination of a suspect's self-reports; background information about the suspect, sometimes including his or her criminal background, IQ, and personality test scores; police reports that describe what the suspect said and did

during interviews and interrogations; audiotapes and videotapes of the process, if available; and a body of extrinsic evidence indicating the confessor's guilt or innocence. When it comes to the question of internalization in these cases, the depth of the belief change may be a matter of dispute. For example, Ofshe and Leo (1997) have questioned whether an innocent confessor's acceptance of responsibility is ever fully or permanently internalized. Instead they describe the effect as temporary, unstable, and situationally adaptive and the confessor as "neither certain of his innocence nor of his culpability" (p. 209). This difference of opinion raises a question that resembles prior debates among cognitive researchers over whether misleading post-event information overwrites and alters a witness's memory for the event (e.g., Loftus, Miller, & Burns, 1978; Belli, Lindsay, Gales, & McCarthy, 1994; Weingardt, Loftus, & Lindsay, 1995) or merely coexists in storage with an intact and still retrievable memory (e.g., Dodson & Reisberg, 1991; McCloskey & Zaragoza, 1985).

Although the case study approach is inherently limited, making it impossible to measure or secure behavioral proof of internalization, I believe that this criticism is misplaced (see also Kassin & Gudjonsson, 2004). Certainly in the internalized false confession cases that have been identified, the beliefs that are formed appear to be more temporary than permanent, and the cognitive product is more one of uncertainty and inference than of full-fledged acceptance and internalization. In some cases, these newly formed beliefs are buttressed by false memories of varying detail, but in other cases they are not. Nevertheless, as will become evident shortly, some degree of acceptance was evident in numerous cases—as when false confessor Paul Ingram was "brainwashed" into thinking that he had committed horrific acts of sexual violence as part of a satanic cult (see Nathan & Snedeker, 1995; Ofshe & Watters, 1994; Wright, 1994). More important, albeit on a lesser scale, this phenomenon was also observed in a controlled laboratory experiment, which is later described in greater detail (Kassin & Kiechel, 1996). This type of internalization also bears close resemblance to well-documented suggestibility effects in children (Bruck & Ceci, 1999; Ceci & Bruck, 1995), the misinformation effects produced under hypnosis (McConkey & Sheehan, 1995), the creation of false memories for words in a list (Roediger & McDermott, 1995) and autobiographical experiences that did not occur (Loftus, 1997), the "thought reform" effects of indoctrination in prisoners of war (Lifton, 1956; Schein, Schneier, & Barker, 1961), and the so-called recovery of false trauma memories in psychotherapy patients (de Rivera, 1997). In the interrogation room, the typical result is a detailed confession not only of what occurred—but when, where, how, with whom, and even why.

At the time that Kassin and Wrightsman (1985) identified and defined coerced-internalized false confessions, very little systematic research had been published on misinformation effects—and there was nothing on the creation of false autobiographical memories. The science offered little guidance. In his typically precocious manner, Munsterberg (1908) long ago wrote about a Salem witch confession involving "illusions of memory" in which "a split-off second personality began to form itself with its own connected life story built up from the absurd superstitions which had been suggested to her through the hypnotising examinations" (p. 147). After reading through a number of more recent cases, however, we noticed that this process by which innocent people come

to accept blame for crimes they did not commit followed a predictable course, as if it was scripted. Indeed, Gudjonsson and MacKeith (1982) suggested that this type of confession was the product of "memory distrust syndrome," a form of source amnesia in which people develop a profound distrust of their memory, rendering them vulnerable to influence from external cues and suggestions.

The South Carolina trial of Billy Wayne Cope clearly depicted the process. Even if one were to argue in the absence of supportive evidence that Cope had conspired to invite his daughter's rape and murder, his confessions—which tell stories about his own actions, which did not occur, while omitting all mention of an intruder—were factually incorrect. Yet after suffering through a highly aggressive interrogation and a night alone in jail, and following false feedback about a failed polygraph, Cope became confused, lost confidence in his own memory, wondered about a possible blackout, and concluded that "I must have done it." From there, he constructed a vividly detailed confession that fit the facts of the crime scene as the police knew them to be at the time (e.g., "Amanda was asleep on her stomach . . . I started strangling her with my hands . . . Then I fixed the doors in Amanda's bedroom so that they would lock.").

Numerous other stories illustrate this phenomenon. In a classic case, 18-year-old Peter Reilly returned to his Connecticut home one night to find that his mother had been murdered. Reilly immediately called the police but was suspected of matricide. After gaining his trust, one detective told Reilly that he failed a lie-detector test, which was not true, and which indicated that he was guilty despite his lack of a conscious recollection. After hours of relentless interrogation, Reilly underwent a chilling transformation—from denial through confusion, self-doubt, and conversion ("Well, it really looks like I did it"), followed by the utterance of a full written confession ("I remember slashing once at my mother's throat with a straight razor I used for model airplanes . . . I also remember jumping on my mother's legs."). Two years later, independent evidence regarding the timeline revealed that Reilly could not have committed the murder, and that the confession even he came to believe was false. Reilly was released from prison and was never retried (Barthel, 1976; Connery, 1977).

In a third case, Paul Ingram—a religious Christian, and a deputy sheriff in Olympia, Washington—was accused of raping his daughter, sex abuse, and satanic cult crimes that included the slaughter of newborn babies. After two dozen interrogations, which extended for 5 months, Ingram was detained, hypnotized, provided graphic crime details, and told by a police psychologist that sex offenders typically repress their offenses. At one point, he was urged by his pastor to confess. Ingram eventually "recalled" his crimes, pled guilty, and served his full sentence of 20 years in prison until he was released in 2003. Yet there was no physical evidence to prove that some of the crimes to which he confessed had even occurred. Serving as a consultant for the state in this case, Ofshe (1992) concluded that Ingram was "brainwashed" into thinking he was part of a satanic cult. To demonstrate Ingram's potential for suggestibility, Ofshe manufactured a phony crime. Ingram denied the new charge at first, but after 24 hours he submitted a full confession—and embellished the story. This case is fully described in three books: *Remembering Satan* (Wright, 1994), *Making Monsters* (Ofshe & Watters, 1994), and *Satan's Silence* (Nathan & Snedeker, 1995). [AQ2]

In a fourth case, in California, 14-year-old Michael Crowe—and then his friend, Joshua Treadway—confessed to the stabbing death of Michael's younger sister Stephanie. At first, Michael vehemently denied the charge. Eventually, however, Michael conceded that he was involved: "I'm not sure how I did it. All I know is I did it." This change in belief followed from three separate, highly charged interrogation sessions during which Michael was told that his hair was found in Stephanie's grasp, that her blood was in his bedroom, that all means of entry to the house were locked, and that he had failed a voice stress lie test—all claims that were false. Failing to recall the crime, Michael was persuaded that he had a split personality, that "good Michael" blocked out the incident, and that he could imagine how "bad Michael" had killed her. The charges against the boys were later dropped when Richard Tuite, a drifter who had a history of violence and who was prowling the area that night, was found with Stephanie's blood on his clothing. Tuite was eventually prosecuted and convicted (Drizin & Colgan, 2004).

SOCIAL INFLUENCES OF INTERROGATION

To understand the inducement to confess, it is necessary to know what methods of social influence are used in the interrogation room. Techniques vary and are described in the manuals that are available to train law enforcement professionals. The most popular of these manuals is Inbau, Reid, Buckley, and Jayne's (2001) *Criminal Interrogation and Confessions*, which was first published in 1962, is now in its fourth edition, and forms the basis for the popular Reid technique.

According to Inbau et al. (2001), police begin a two-staged process with an open, nonconfrontational *interview* designed to determine whether the suspect is telling the truth or lying and, hence, whether or not to proceed to *interrogation*. Despite substantial evidence to the contrary (see Meissner & Kassin, 2002; Vrij, 2000), investigators are trained in this method to believe that they can make judgments of truth and deception at high levels of accuracy by analyzing the suspect's verbal and nonverbal behavior. Thus, it is clear that interrogation is by definition a guilt-presumptive process, a theory-driven social interaction led by an authority figure that has already formed a strong a priori belief, confidently held but often erroneous, that the suspect is guilty. As in other domains of social interaction, this presumption of guilt paves the way for a range of cognitive and behavioral confirmation effects (Kassin, Goldstein, & Savitsky, 2003).

As for the interrogation itself, Inbau et al. advise police to conduct the questioning in a special room at the station that is small, barely furnished, and soundproof. The goal is to isolate the suspect, denying access to familiar people and places, in order to increase the incentive to escape and to insulate the suspect from outside sources of information and support. Against this physical backdrop, the Reid approach to interrogation is a multistep procedure that begins when a detective confronts the suspect with a strong and unwavering assertion of guilt. This confrontational phase may last from minutes to several hours until the suspect falls into a state of despair. As part of this process, investigators are trained to interrupt all efforts at denial, label the suspect a liar, overcome all objections, and refuse to allow the suspect to mount a defense. This confrontational

phase may even be bolstered by the insinuation or outright presentation of incontrovertible evidence, which may or may not be true—a tactic that significantly increases compliance (e.g., Kassin & Kiechel, 1996). As the stress of interrogation intensifies, and as the beleaguered suspect comes to realize that denial does not provide a means of escape, detectives begin to develop scripted themes designed to help psychologically justify, minimize, or excuse the crime charged. Showing sympathy and understanding, and urging the suspect to cooperate, detectives offer moral justification and a face-saving alternative construal of the alleged guilty act (e.g., suggesting to the suspect that he or she was intoxicated, peer pressured, provoked, or acting in self-defense, or that his or her actions were accidental). Using these minimization techniques, detectives imply that the suspect's alleged actions were morally defensible, which encourages confession by the implication that leniency may be forthcoming (Kassin & McNall, 1991; Russano, Meissner, Narchet, & Kassin, in press). [AQ3]

Conceptually, this multistep procedure is designed to get suspects to incriminate themselves by increasing the anxiety associated with denial, breaking them down into a state of despair, and minimizing the perceived consequences of confession. In this way, confession appears as a rational, cost-effective means of escape. The detective thus gets the suspect to make a simple admission, then to recount the details of the crime, ultimately converting that statement into a full written confession. It is clear that these methods are used with some frequency. John E. Reid and Associates report that they have trained more than 150,000 law enforcement professionals in seminars on interviewing and interrogation (www.reid.com/index.html). Leo (1996) observed 182 videotaped and live interrogations at three police departments in California, in which 64% of suspects made self-incriminating statements. He found that the detectives used a mean of 5.62 different techniques per interrogation and that those described above were particularly common.

THE PROCESS OF INTERNALIZATION

The cases described earlier and others illustrate that there is a predictable, if not scripted, process that gives rise to internalized false confessions. In one form or another, the process contains five components: (1) There is a suspect who is rendered highly vulnerable to manipulation as a function of dispositional characteristics (e.g., young, naïve, mentally retarded, suggestible, or otherwise impaired) and there are more transient factors associated with the crime, custody, and interrogation (e.g., extreme stress, feelings of isolation, sleep deprivation, the influence of drugs). (2) Knowingly or unknowingly, the police confront the suspect with false but allegedly objective and incontrovertible evidence of his or her involvement—evidence in the form of a failed polygraph, an eyewitness, a fingerprint, a shoeprint, or a DNA sample. (3) Often with guidance from police, the suspect reconciles his or her lack of memory with the alleged evidence by presuming that he or she had blacked out, dissociated, repressed, or otherwise failed to recollect the event. (4) The suspect makes a tentative admission of guilt, typically using a language of inference rather than of direct experience (e.g., "I guess I did it," "I may

have done it," or "I must have done it" rather than "I did it"). and (5) The suspect may convert the simple admission into a fully detailed confession in which confabulations of memory originate from his or her exposure to secondhand sources of information (e.g., leading questions, overheard conversations, crime scene photos, and visits to the crime scene), often facilitated by various imaginational exercises (e.g., "Think hard about how you would have done it.").

Focusing on how police have persuaded innocent suspects to accept responsibility for a crime they did not commit and cannot recall, Ofshe (1989) identified a number of common interrogation tactics, such as exhibiting strong and unwavering certainty about suspect's guilt, isolating the suspect from all familiar social contacts and outside sources of information, conducting sessions that are lengthy and emotionally intense, presenting false but allegedly incontrovertible proof of the suspect's guilt, offering the suspect a ready physical or psychological explanation for why he or she does not remember the crime, and applying implicit and explicit pressure on the suspect, in the form of promises and threats, to comply with the demand for a confession.

As profound a form of influence as this seems, the construction of an internalized false confession may not be unique. Reviewing de Rivera's (1997) analysis of people who recover false memories from childhood only later to retract these reports, Kassin (1997b) likened this process of police interrogation to that of the recovery of false memories of childhood abuse in psychotherapy patients. In both situations, an authority figure claims, often with certainty, to have privileged insight into the individual's past; the individual is in a heightened state of weakness and malleability; all interactions between the expert and individual occur within a private, highly insulated setting devoid of external social or reality cues; and the expert ultimately convinces the person to accept a negative and painful self-insight by citing objective symptoms of this truth and invoking such concepts as dissociation, repression, alcoholic blackout, or multiple personality disorder (for related analyses, see Kopelman, 1999; Ost, Costall, & Bull, 2001).

Over the years, two conceptually distinct models—one focusing on self-perception and the other on the misattributions that result from faulty source monitoring—have been proposed to explain how people might come to believe that they were involved in a crime or some other act they did not commit. In the same year that the United States Supreme Court referred to modern police interrogations as "inherently coercive," Bem (1966) theorized that false confessions may result from a process of self-perception. Bem's self-perception theory states that to the extent that internal states are weak or difficult to interpret, people infer what they think or how they feel by observing their own behavior and the situation in which that behavior took place. Interested in the criminal-forensic implications of "when saying is believing," Bem suggested that making a false confession could distort a person's recall of his or her own behavior if that confession is emitted in the presence of cues that are normally associated with telling the truth. To demonstrate, Bem had subjects in a laboratory experiment perform a task that required them to cross out some words but not others from a master list. To establish two colored lights as discriminative stimuli, one for truths and the other for lies, he then asked subjects general questions about themselves and instructed them to answer truthfully when the room was illuminated by a green light and to lie in the presence of an

amber-colored light. Next, the experimenter announced several words taken from the initial task. After some words, he instructed subjects to lie and after others to tell the truth about whether they had previously crossed the word out—again, while in the presence of a green or amber light. In a third and final phase, subjects were asked for each word to recall whether they actually had or had not crossed it out. The result was that false statements made in the presence of a truth light produced more errors in the recall of actual performance than did false statements made in the presence of the lie light or none at all. Under conditions normally associated with truth telling, subjects thus came to believe the lies they had been induced to tell.

Pondering the implications for criminal justice, Bem (1967) noted that "a physical or emotional rubber hose never convinced anyone of anything" and that "saying becomes believing only when we feel the presence of truth, and certainly only when a minimum of inducement and the mildest and most subtle forms of coercion are used" (pp. 23–24). It is important not to generalize without disclaimer from Bem's laboratory experiment to real-life police interrogations. Still, case studies and anecdotal reports indicate the existence of internalized confessions, and self-perception theory provides one possible explanation for the first phase of this phenomenon, the formation of a false belief. For example, Driver (1968) described a common tactic in which police ask the suspect to repeat his or her story over and over again and suggested that "If duped into playing the part of the criminal in an imaginary sociodrama, the suspect may come to believe that he was the central actor in the crime" (p. 53). Such a transformation in self-perception appears to have afflicted 13-year-old Jerry Pacek, who in 1958 confessed to and reenacted for police a woman's murder that he did not commit. When asked to recount the experience more than 30 years later, "Jerry said he confessed so many times, to so many people, his memory of what happened that week is just a blur" (Fisher, 1996, p. 187). [AQ4]

Focusing more on consciousness and memory, Foster (1969) likened the process of interrogation to hypnosis, suggesting that it can produce a "trance-like state of heightened suggestibility" so that "truth and falsehood become hopelessly confused in the suspect's mind" (pp. 690–691). Consistent with this notion, Weinstein, Abrams, and Gibbons (1970) found that hypnotized subjects in whom a false sense of guilt was induced were less able than others to pass a polygraph-based lie detector test. Within a contemporary framework that takes into account the confusion that plagues internalized false confessors, Henkel and Coffman (2004) recently argued that the reality-distorting processes of police interrogation provide fertile ground for source-monitoring confusion and the formation of internalized false confessions. According to this account, a suspect who cannot recall the details of having committed a crime but has access to information about it faces a cognitive source-monitoring dilemma: to differentiate between memories that arise from direct personal experience and those that emanate from his or her own thoughts, dreams, and imagination exercises, or from external but secondhand sources of information (e.g., leading questions, overheard conversations, photographs of the victim, or live visits to the crime scene).

A source-monitoring framework focuses on how people make attributions for the sources, contexts, or origins of their own memories (see Johnson, Hashtroudi, & Lindsay, 1993). As reviewed by Henkel and Coffman (2004), research has shown that real or

imagined objects, actions, or events are sometimes misattributed in context to direct perception or experience—and that this source confusion is most likely to occur when the imagined material is plausible, vivid, easy to imagine, the subject of repetition, and similar to objects, actions, or events previously experienced. This problem is evident in eyewitness situations in which an innocent person, familiar looking because he or she was seen in one situation (e.g., in prior mug shots; present as a bystander), is later confused in a witness's memory and "transferred" to another situation, say the crime scene, only to be mistakenly identified as the criminal in a lineup (Ross, Ceci, Dunning, & Toglia, 1994).

Of relevance to the internalized false confessions that sometimes emerge during interrogation, research alluded to earlier in this section indicates the profound biasing effects on autobiographical memory of exposure to photographs of nonwitnessed events (Koutsaal, Schacter, Johnson, & Galluccio, 1999; Lindsay, Hagen, Read, Wade, & Garry, 2004), verbal misinformation (Loftus & Hoffman, 1989), reports of co-witnesses (Gabbert, Memon, & Allan, 2003), imaginational exercises (Mazzoni & Memon, 2003; Thomas & Loftus, 2002), dream interpretation (Mazzoni, Loftus, & Seitz, 1999), and sheer repetition (Begg, Anis, & Farinacci, 1992). All of these biasing techniques inflate the likelihood of illusory recollections compared with that found in appropriate control conditions. Indeed, *imagination inflation* is the descriptive term that has been coined to refer to increased levels of false memories following the use of imaginational exercises (Garry, Manning, Loftus, & Sherman, 1996). Interestingly, too, research shows that people are particularly susceptible to misinformation effects when the scenes they are trying to recall are negative and highly emotional (Porter, Spencer, & Birt, 2003). In short, there is reason to believe that innocent people under the influence of police interrogation are often at risk for source confusion and the formation of false memories.

INTERNALIZED FALSE CONFESSIONS IN THE LABORATORY

Until recently, there was no empirical evidence for this phenomenon. To be sure, eyewitness researchers had found that misleading post-event information can alter actual or reported memories of *observed* events (e.g., Loftus et al., 1978; McCloskey & Zaragoza, 1985)—an effect that is particularly potent in preschool children (Ceci, Ross, & Toglia, 1987; Ceci & Bruck, 1995) and adults under hypnosis (e.g., Dinges et al., 1992; Sheehan, Statham, & Jamieson, 1991). Other studies indicate that it is possible to spontaneously produce false "recollections" of words in a list (e.g., Roediger & McDermott, 1995) and implant isolated childhood experiences that were supposedly forgotten or repressed (Hyman, Husband, & Billings, 1995)—like being lost in a shopping mall (Loftus, 1993). But can people's memory for their own *actions* similarly be altered? Can people be induced to accept guilt for outcomes they did not produce?

As noted earlier, the cases involving internalized false confessions appear to have had two factors in common: an innocent person whose memory is rendered vulnerable to manipulation and the presentation of false evidence. Kassin and Kiechel (1996) thus developed a laboratory paradigm designed to test the hypothesis that the presentation of

false evidence can lead individuals who are vulnerable to confess to a prohibited act they did not commit, to internalize responsibility for that act, and to confabulate details consistent with that belief. Two subjects per session participated in this experiment (actually there was only one subject and a confederate). The confederate was to read a list of letters and the subject was to type these letters as quickly as possible on the keyboard of a personal computer. Before the session began, subjects were warned not to press the ALT key positioned near the space bar or else the computer would malfunction and data would be lost. After 60 seconds, the computer supposedly crashed, at which point a distraught experimenter accused the subject of hitting the forbidden key. All subjects were innocent and all initially denied the charge.

In each session, the subject's vulnerability was manipulated by varying the pace of the task, fast or slow. The second factor was the presentation of false evidence in the form of a confederate who told the experimenter that she did or did not witness the subject hitting the forbidden key. Three levels of influence were then assessed. To elicit *compliance*, the experimenter quickly handwrote a confession and prodded subjects to sign it. To measure *internalization*, he recorded the way subjects privately described the experience when away from the experimenter. As subjects left the lab, they met a waiting subject, actually a second confederate, who presumably overheard the commotion. This confederate asked what happened. The subject's reply was then coded for whether he or she accepted the blame for what happened (e.g., "I hit a key I wasn't supposed to and broke the computer."). Finally, although the session appeared to be over, the experimenter brought subjects back into the lab, re-read the letters they typed, and asked if they could reconstruct how and when they hit the ALT key. This was used to probe for evidence of *confabulation*, to see if subjects would concoct details to fit their newly formed belief (e.g., "Yes, here, I hit it with the side of my hand right after you called out the 'A'."). Afterward, subjects were carefully debriefed about the study—its purpose, the hypothesis, and the need for the use of deception.

Overall, 69% of all subjects signed the confession, 28% internalized guilt, and 9% manufactured details to support their newly created false beliefs. More important were the effects of the independent variables. In the baseline slow pace/no witness group, 35% of subjects signed the confession but none exhibited internalization or confabulation. Yet in the fast pace/witness group all subjects signed the confession, 65% internalized guilt, and 35% concocted supportive details. In short, people were induced to confess and internalize guilt for an outcome they did not produce. In some cases they even went on to support that newly created belief of *what* they did with a false memory of *how* they did it. As predicted, the risk is increased both by personal vulnerability and the presentation of false evidence, a trick often used by police and sanctioned by the courts. Indeed, in *Frazier v. Cupp* (1969), the U.S. Supreme Court considered a case in which police told the defendant that the person who provided his alibi had confessed, which [AQ5] was false, and it refused to exclude the resulting confession. Since that time the Court has repeatedly declined to reconsider the issue (Magid, 2001).

Follow-up studies using variants of this computer crash paradigm have replicated and extended this effect. In an experiment conducted in the Netherlands, Horselenberg, Merckelbach, and Josephs (2003) accused college students of crashing a computer by

hitting a prohibited key and obtained even higher rates of compliant false confessions, internalization, and confabulation—even when the subjects were led to believe that confession would bear a financial consequence. Redlich and Goodman (2003) also obtained high rates of compliance in this paradigm despite leading subjects to believe that they would have to return for 10 hours without compensation to reenter the lost data. Demonstrating an important limitation of this effect, Klaver, Gordon, and Lee (2003) found that the false confession rate declined from 59% when subjects were accused of hitting the ALT key, as in the original study, to 13% when they were accused of hitting the less plausible Esc key. Focusing on individual differences in vulnerability, other researchers observed particularly high false confession rates in response to false evidence among stress-induced males (Forrest, Wadkins, & Miller, 2002) and among juveniles, 12 to 16 years old, who are more vulnerable to the effect than adults (Redlich & Goodman, 2003).

It is clear that some people are dispositionally more vulnerable than others to make and internalize false confessions under interrogative pressure. To assess individual differences in this type of vulnerability to interrogation, Gudjonsson (1984) devised a memory-related instrument. Known as the Gudjonsson Suggestibility Scale (two parallel forms were created, GSS 1 and GSS 2), the test involves reading a narrative paragraph to a subject, who then free-recalls the story, immediately and after a brief delay, and then answers 20 memory questions—including 15 that are subtly misleading. After receiving feedback indicating that he or she had made several errors, the subject is then retested, presumably for the purpose of obtaining a higher level of accuracy. Through this test-retest paradigm, researchers can measure the extent to which subjects exhibit a general *shift* in memory as well as a tendency to *yield* to misleading questions in the first and second tests. Added together, these two scores are used to determine a subject's *Total Suggestibility* (see Gudjonsson, 1997). Indeed, Scullin and Ceci (2001) created a similar video-based test to measure individual differences in suggestibility among preschool children.

As a general rule, individuals who score high on interrogative suggestibility also tend to exhibit poor memories, high levels of general anxiety, low self-esteem, and a lack of assertiveness. Among crime suspects, "alleged false confessors" (those who confessed to police but later retracted the statements) obtained higher scores, and "resistors" (those who maintained their innocence throughout interrogation) obtained low scores relative to the general population (Gudjonsson, 1991). Research also shows that suggestibility scores on the GSS increase as a function of prolonged sleep deprivation, a state that often plagues suspects who are detained and questioned late at night (Blagrove, 1996), and as a function of alcohol withdrawal, also a common problem in criminal justice (Gudjonsson, Hannesdottir, Petursson, & Bjornsson, 2002). As for a link between suggestibility and internalization, Sigurdsson and Gudjonsson (2001) compared personality test scores of prison inmates who self-reported that they had confessed falsely to police with those of other prison inmates. They found that those who seemed to have internalized guilt, at least in part, were significantly more suggestible, as measured by the GSS.

[AQ6]

Finally, it is important to distinguish among the possible cognitive outcomes of this social influence-based process of internalization. Right from the start, Kassin and

Wrightsman (1985) had defined internalized false confessions as those in which the suspect comes to believe at some varying level of certainty and for some varying period of time that he or she is guilty, and that this false belief may or may not be accompanied by an alteration in memory. A perusal of internalized false confession cases supports the conclusion that police-induced changes in a suspect's beliefs are more common and not necessarily followed by changes in his or her memories.

This is an important distinction. Noting that people hold many autobiographical beliefs for events that they cannot recall, Scoboria, Mazzoni, Kirsch, and Relyea (2004) proposed that plausibility, belief, and memory represented a series of nested effects related to autobiographical accounts—that an event must be seen as plausible before it is believed and that it must be believed before it can generate a memory. To test this hypothesis, these investigators compiled a list of 10 childhood events that varied in their plausibility (e.g., getting lost in a mall, losing a toy, having a tooth extracted, getting abducted by a UFO). For each question, subjects rated how plausible it is that this event occurred to them before the age of six, the strength of their belief that it occurred, and their memory of that occurrence. On average, plausibility ratings were higher than belief ratings, which, in turn, were higher than memory ratings. More to the point, memories were nested within beliefs, and beliefs were nested within perceptions of plausibility. The relevance of this nesting hypothesis to the manifestations of internalized false confessions is clear. In the original computer crash study described earlier, Kassin and Kiechel (1996) found that more subjects signed a false confession (compliance) than believed they were guilty of hitting the prohibited ALT key (internalization)—and only a subset of those who believed they were guilty also generated false memories of how they did it (confabulation).

PROSPECTS AND PROPOSED SOLUTIONS

As DNA exonerations accumulate, raising serious and fundamental concerns about the reliability of police-induced confessions, it is necessary that police, prosecutors, defense lawyers, judges, and juries learn how to better assess this evidence. Kassin, Meissner, and Norwick (in press) videotaped male prison inmates confessing to the crimes for which they were incarcerated and concocting false confessions to crimes they did not commit. Neither college students nor police investigators were able to distinguish significantly between the true and false confessions. Archival analyses show that confessions tend to overwhelm alibis and other evidence of innocence, resulting in a chain of adverse legal consequences (Leo & Ofshe, 1998; Drizin & Leo, 2004). Indeed, some prosecutors will refuse to admit innocence in the presence of a confession even after DNA tests appear to exonerate the confessor. This is what happened in the tragic conviction of Billy Wayne Cope described earlier. Grief stricken and subjected to relentless interrogation, Cope confessed to the rape and murder of his daughter after he was told that he failed a polygraph he trusted. Afterward, DNA tests showed that the semen taken from the victim belonged to a serial sex offender, not to Cope. Rather than drop

[AQ7]

the charges, however, the prosecutor took Cope to trial, persuaded a jury to convict him of conspiracy, and stated to the press afterward that "the verdict vindicated police" (Dys & Pettibon, 2004).

The problem in judging police-induced confessions, including those that ultimately prove to be false, is that the statements typically contain vivid and accurate details about the crime. To a naïve observer, false confessions appear voluntary and accurate and to be the product of personal experience. As a matter of speculation, one might expect that judges and juries would be fooled more by internalized false confessions than by compliant false confessions because they are not retracted quickly or with confidence and because they result from a deeper, more profound, less intuitive form of social influence.

There are two policy implications that follow from the problems that arise from internalized false confessions. The first concerns the interrogation practice of lying to suspects about the evidence, a form of trickery that is permissible (*Frazier v. Cupp*, 1969) and is frequently used (Leo, 1996). Laboratory experiments have shown that the presentation of false evidence increases the risk that innocent people, particularly those vulnerable to manipulation, will confess to acts they did not commit and even at times internalize blame for outcomes they did not produce (Kassin & Kiechel, 1996; Horselenberg et al., 2003; Redlich & Goodman, 2003). In light of this research as well as numerous false confession cases in which the presentation of false evidence was implicated (as when Billy Wayne Cope was told that he failed the polygraph, feedback that led him to question his own memory), the courts should revisit their approval of this interrogation practice, realizing the ways in which deception increases the risk of false confessions.

A second implication concerns the full videotaping of interrogations. For judges, juries, and other decision makers, evaluating a confession should involve a three-pronged analysis. The first prong is to consider the conditions under which the suspect confessed and the extent to which coercive social influence techniques were used. The second is to consider whether the confession contains details that are accurate in relation to verifiable facts of the crime. An overlooked but necessary third prong concerns a requirement of *attribution* for the source of those details. A confession can prove guilt if and only if it contains information knowable only to a perpetrator that was not derivable from pictures, leading questions, and other secondhand sources. To accurately judge the probative value of confessions, then, fact finders must have access to a videotape recording of the entire interview and interrogation in order to assess voluntariness and trace the origin or source of accurate details.

Currently, only four states (Minnesota, Alaska, Illinois, Maine) have videotaping requirements. In many other police departments, however, the practice is conducted on a voluntary basis. Several years ago, a National Institute of Justice study revealed that many police and sheriff's departments conducted their own videotape interrogations and that the vast majority found the practice to be useful (Geller, 1993). More recently, Sullivan (2004) interviewed officials from 238 police and sheriff's departments in 38 states who voluntarily recorded custodial interrogations and found that they enthusiastically favored the practice. Among the self-reported benefits cited are that recording permits detectives to focus on the suspect rather than taking copious notes; that it in-

creases accountability; that it provides an instant replay of the suspect's statement, often revealing information that was initially overlooked; that it enables a more objective and accurate record than does a reliance on memory; and that it reduces the amount of time detectives spend in court defending their interrogation conduct. For these reasons, a mandatory videotaping requirement has many advocates among legal scholars, social scientists, and law enforcement professionals (Drizin & Colgan, 2001; Drizin & Leo, 2004; Gudjonsson, 2003; Kassin, 2004; Slobogin, 2003).

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http://falseconfessions.org/false-confessions-happen

False Confessions Happen

While the notion that someone would confess to a crime he or she did not commit may seem counterintuitive to casual observers, the reality is that false confessions occur regularly. According to the Innocence Project, of the 258 DNA exonerations they have handled to date, 25% have involved a false confession. If 10% of the two million men and women imprisoned in the United States are innocent, as is estimated by the Department of Justice, then we can extrapolate that as many as 50,000 of their convictions involved false confessions.

False confessions devastate lives, destroy cases and keep the true perpetrators of terrible crimes from being brought to justice.

How False Confessions Happen

A look at the interrogation techniques police are trained to use on suspects helps explain how confessions can be coerced from the innocent as well as the guilty.

According to the textbook "*Criminal Interrogation and Confession,"* which is known as the interrogator's bible, a successful interrogation begins with isolating the suspect in the proverbial bare interrogation room:

The principal psychological factor contributing to a successful interrogation is privacy being alone with the person under investigation.... [I]n his own home, (the suspect) may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions within the walls of his home. Moreover, his family and other friends are nearby, their presence lending moral support....In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.□

In the article "True Crimes, False Confessions", false confession expert Professor Saul Kassin of Williams College (with co-author Gisli H. Gudjonsson), takes the reader through the nine-step process devised by the textbook's author, John E. Reid, showing how, after isolating the suspect, the interrogator:

1. "confronts the suspect with unwavering assertions of guilt.
2. develops 'themes' that psychologically justify or excuse the crime.
3. interrupts all efforts at denial and defense.
4. overcomes the suspect's factual, moral and emotional objections.
5. ensures that the passive suspect does not withdraw.
6. shows sympathy and understanding and urges the suspect to cooperate.
7. offers a face-saving alternative construal of the alleged guilty act.

8. gets the suspect to recount the details of his or her crime.
9. converts the latter statement into a full written or oral confession."

These tactics are described by false-confession experts as powerfully coercive behavioral techniques that are proven effective on the innocent as well as the guilty. In "Why Do People Confess to Crimes They Did Not Commit?" Prof. Steven Drizin explains how the tactics yield a confession, true or false:

"These tactics are designed to destroy the suspect's confidence that he will emerge from the interrogation without being harmed and to make the suspect think that he is powerless to bring an end to the interrogation unless he confesses.

"Once the suspect is on the brink of hopelessness, the interrogator engages in tactics designed to persuade the suspect that the benefits of confessing outweigh the costs of continued resistance and denial. Here, the interrogator makes offers to the suspect, ranging from low-end inducements like appeals to the suspect's conscience ("the truth will set you free") or religious beliefs ("God will forgive you"), to suggestions that the confession will be treated more favorably by those in the system with the power to determine his fate ("judges react more favorably to remorseful defendants"), to the more coercive inducements which expressly or by implication promise leniency or threaten harm. These "minimization" tactics suggest to the suspect two scenarios of how the crime was committed, one which is premeditated or cold-blooded, the other which is morally or legally justifiable (it was an accident, self-defense, or impulsive) and urge the suspect to choose the lesser of two evils. If a suspect claims he has no memory of the crime, the interrogator often suggests that the suspect committed the crime during a blackout or under the influence of drugs or alcohol. These tactics build upon one another and are rehashed again and again throughout the interrogation until a suspect breaks down and says 'I did it.'"

Many casual observers of the criminal justice system are surprised to learn that it is perfectly legal for police to lie to suspects. In the Peter Reilly case mentioned above, police lied to the teenager that he had failed a lie-detector test. Applying relentless pressure, police were able to convince Reilly that he was guilty despite his having no conscious memory of murdering his mother. The courts have signed off on this tactic, apparently considering these lies small and inconsequential in the greater scheme of things.

Everyone is Susceptible, Some are More Vulnerable

According to Drizin, juveniles are among the most vulnerable to these techniques. "Juveniles are, of course, less mature than adults and have less life experience on which to draw. They may also be more compliant, especially when pressured by adult authority figures. Juveniles are thus less equipped to cope with stressful police interrogation and less likely to possess the psychological resources to resist the pressures of accusatorial police questioning." In a study Drizin did with Richard Leo, juveniles were disproportionately represented among the false confessors, and the majority of juvenile

false confessors were between the ages of 14 and 17, the age range in which many alleged juvenile offenders are tried as adults.

Martin Tankleff had just turned 17, when he found his mother brutally murdered and his father clinging to life after being attacked. After calling 911, he was immediately taken to police headquarters and underwent harsh interrogation by homicide investigators. He was told that his hair was found in his mother's dead fingers and that his father awoke from his coma to identify young Martin as his attacker. Although he was never Mirandized and maintained his innocence, police finally convinced Marty that he must have blacked out. Confused and scared, Marty came to believe his interrogators that he blacked out and committed the crime.Â Although not one bit of forensic evidence linked Marty to the crime scene, he was convicted and sentenced to fifty years in prison. After serving close to 18 yeas, his conviction was finally overturned in 2007. (see www.Martytankleff.org)

Mentally Handicapped people with lower IQs are also more susceptible than others to being persuaded they are guilty; they also often want to please authoritative figures and may confess because they believe that is what they are supposed to do. In the well documented West Memphis 3 Case in Arkansas (www.Freewestmemphis3.org) Jessie Misskelley, Jr., 16 years old and mentally disabled with an IQ of 67 at the time of the murders, was convicted of a triple murder based solely on a confession that, like most false statements, failed to match crime scene evidence. In his so-called confession, he made incriminating statements that placed him with the three murdered children at 9:00 am on the day of the murders. The problem with this statement was that the victims were actually in school during that time. The West Memphis police, unhappy with Jessie's statement, continued to suggest Jessie admit to his involvement at times more closely associated with estimated time of death. He finally agreed to his interrogators prompting until they were satisfied when he answered that he and his co-defendants were with the children in the evening. Never mind that he and his friends had strong alibis for their whereabouts that evening. Misskelley's false confession was also used to convict Jason Baldwin, sentenced to life without parole, and Damien Echols, who is currently on death row in Arkansas. (FalseConfessions.org is advocating for a new trial for West Memphis 3.)

The case of Doug Warnery is also very infromative on this issue as is that of Earl Washington, who,after two days of questioning, confessed to five different murders, four of which were not believed. The authorites chose to beleive the fifth confession, of which he was convcited of murder and sentenced to death. At one point he came within 9 days of execution.