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Judicial Reports: The Price of Admission

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Increasing evidence of wrongful convictions is focusing attention on new corners of the criminal justice system. One area is confessions. How should judges weigh competing claims about the viability of such admissions?

In January 1990, after six hours of interrogation during which he was given no food and was told he had failed a polygraph test, 16-year-old Jeffrey Deskovic of Peekskill confessed to raping and murdering his classmate Angela Correa. Though the DNA presented at trial did not match Deskovic's, the jury believed the prosecution's theory that it simply came from earlier, consensual sex with an unknown partner.

The jury convicted Deskovic, and his confession was the principal evidence against him.

Sixteen years later, a new DNA test showed that the semen found in Correa's body came from Steven Cunningham, a convicted murderer whose DNA had been added to New York's database in the years since Deskovic's conviction. In November 2006, Deskovic's indictment was dismissed. Cunningham later confessed to raping and killing Correa.

Former New York Supreme Court Justice Leslie Crocker Snyder (who returned to private practice after a failed bid for Manhattan District Attorney in 2005) helped a legal team analyze Deskovic's case file last year. Their goal was to determine how things had gone so hideously awry. She described the experience as "overwhelming."

"The whole thing was just absolutely shocking," Crocker Snyder said in a telephone interview. "You know [what happened] in your head, but when you feel it so viscerally, page after page, it really gets to you."

It got to Crocker Snyder so much that she dropped her support for the death penalty (in favor of a "100 percent" commitment to life-without-parole alternative sentencing).

But a bigger question looms. When a confession is the principle evidence at trial, how should a judge gauge its viability?

NO ANOMALY

Deskovic's case was no anomaly. According to the Innocence Project, of the 213 post-conviction DNA exonerations recorded nationwide since 1989, fully a quarter of them have involved verifiably false confessions or false self-incriminating statements.

As hard evidence of this problem accumulates, so does the demand for an explanation of its origins. Research psychologist Dr. Saul Kassin of the John Jay College of Criminal Justice, who has been studying the phenomenon for decades, says researchers were first called on to testify in court about false confessions in the 1980s. Today, lawyers defending clients in cases where a confession is the principle evidence against them often try to include such testimony.

New York judges have hesitated to allow it. Crocker Snyder explained: "I think judges are very concerned, if something isn't established. You don't want to give the jury something that is junk science."

New York's Unified Court System uses a two-pronged test for judging the admissibility of novel expertise, based on the U.S. Supreme Court's 1923 ruling in *Frye vs. US.*

First, parties offering the testimony must demonstrate that the potential witness is truly an expert. Second, they must show that the theory, process, and methods used by the witness are generally accepted by the "relevant scientific community." (In addition, experts can only testify about subjects that are beyond the everyday knowledge and experience of the average juror.)

THE ORT PRECEDENT

There is only one published New York decision in which a judge laid out his reasons for allowing such testimony. And in the words of the (now-retired) judge in question, Nassau County Court's Victor Ort*, People vs. John Kogut* "was anything but a normal case."

Convicted of rape and murder in 1986 (a few years before DNA testing was routinely used in New York trials), Kogut was in prison for nearly two decades, until a DNA test lead to his release.

The rape conviction was overturned, but the DNA from the crime scene did not match any in the State's database. Kogut's confession still linked him to the murder, and the Nassau DA took another shot at prosecuting him for it, on the theory that there had been no rape and that the DNA recovered from the victim came from earlier, consensual sex with an unknown partner.

Kogut elected to waive his right to a jury, and in September 2005, after a defense presentation that included the Dr. Kassin's expert testimony, Judge Ort found him not guilty.

Why did Ort admit Kassin's testimony?

"One of the biggest factors was that it's not a defense tactic exclusively," he said.

For instance, he explained, it might prove useful to prosecutors called upon to prove charges against someone accused of a crime to which someone else had confessed.

Besides the new DNA evidence, there was conclusive proof that the two cops who conducted the original investigation had planted evidence to incriminate Kogut. And, in the years between Kogut's conviction and exoneration, the same two officers had been shown to have taken false confessions in two entirely separate cases.

Along with the facts of the case are the facts of Judge Ort's personal experience.

In 1987, a panel of the judges from the Appellate Division, Second Department, ruled in *People vs. Madison* that police are allowed to lie to suspects during interrogations. At the time the case was under deliberation, Ort was employed as a Law Secretary to Judge James F. Niehoff. Though Niehoff wasn't among the judges who decided Madison, Ort said that the ruling made a strong impression, drawing to his attention exactly what the subject of an interrogation — and potential later defendant — was up against.

CONFESSION THEORY

The police interrogations that precede most false confessions are central to most experts' theories.

The basic thrust of the argument is that interrogations are designed to result in confessions, and under certain conditions, such as isolation or exhaustion, some people will be susceptible to admitting to crimes of which they are innocent. Experts also agree that police tactics like lying about evidence and implying that confessions will result in leniency play a role, as do the age, intelligence, and personality of the subject of an interrogation.

(For a glimpse at an interrogation so out of line that the Appellate Division, First Department reversed the judge's decision not to suppress the resulting confession, see today's *Reversal Report*.)

Kassin and other experts stress that they do not testify about the validity of an individual defendant's confession. Rather, they attempt to explain the factors that might cause such self-destructive behavior. After hearing Kassin's testimony, Ort decided that "jurors have to know that there's such a thing as a false confession." (He did not at the time of the hearing know that Kogut would elect a bench trial.)

The paradox is that jurors do know about false confessions — which was exactly the reason that Suffolk County Court Judge C. Randall Hinrichs gave in his January 24, 2008 decision for refusing to allow so much as a *Frye* hearing in *People vs. Tracy Crews*.

Because New York's Criminal Jury Instructions remind jurors that they should use their everyday judgment to evaluate the truth of testimony, and because they are told that police are allowed to lie during interrogations, Hinrichs decided that jurors are equipped to decide whether a confession was false.

As Southern District Judge Paul A. Crotty put it in a 2007 refusal to admit expert testimony on confessions "Whatever may be true of law enforcement tactics in general, the particular tactic alleged . . . is hardly one of Byzantine complexity. Its workings upon the mind of [the defendant] are well within the jury's comprehension."

Obviously, the experts disagree with him.

"Personally, I find that there's almost nothing less intuitive than false confessions," said Dr. Kassin. "People can more readily understand why someone would commit suicide than falsely confess to a crime they didn't commit," he said.

Unless judges and jurors truly understand the nuances of interrogation, he and other experts say, they are not equipped to evaluate whether a specific person's confession might be false.

Sociologist Dr. Richard Ofshe, also a premier expert in the field of police interrogations and the study of false confessions, is used to dealing with skeptical judges. One question that he is always asked at pretrial hearing, he says, is what percentage of convictions are false.

The answer is simple: No one knows. But, says Ofshe, "Every study has found that false confessions are a major contributor, and that's all we need to know. What does it matter if it's one-half of one percent?"

What does matter is whether judges believe that the science of false confessions is solid enough to be presented to a jury.

Supreme Court Justice Priscilla Hall of Kings County will be making this call for the second time in four years in the near future. At issue will be the *Frye* hearing testimony of Dr. Michael Welner, whom the prosecution has called on to rebut an expert that defense lawyer Amy Rameau would like to call at the trial of a client charged with first-degree rape.

Rameau says that the case against her client, who is mentally retarded and was 18 when he confessed to the crime, would be weak if the confession were in doubt. Importantly, a medical exam of the alleged victim showed no evidence that she had had sex with Rameau's client. Moreover, 35 percent of the false confessions that were catalogued in the Innocence Project's study of DNA exonerations were made by suspects who were developmentally disabled or 18 and under at the time of interrogation. Rameau's

client falls into both of those categories.

In 2004's *People vs. Ragsdale*, Justice Hill disallowed the defense's expert on confessions after a *Frye* hearing in which Dr. Welner also served as the prosecution's witness, writing in her decision that the defense expert had failed to make it clear that there was a defined scientific community to which his research was relevant. Rameau, who is relying a different expert than the one proffered in *Ragsdale*, hopes that things will be different this time around.

"I don't think the judge is going to hang her hat on the same . . . excuse again," Rameau said.

For his part, Judge Ort stressed that although he believes in the science and has no regrets about his decision to allow Dr. Kassin's testimony in *Kogut*, "I hope I made it plain in my decision that this is not for everybody. . . . You can't look at the decision outside the context of the case," he said. "It was an amazing thing when the DNA evidence came out. It was terrific, it was a great case, I loved every minute of it. [But] don't get down on judges that don't go my way in normal cases."

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