

CONFESSIONS

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CHAPTER 13

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CONFESSIONS

This paper will partially break from prior papers on confessions. It starts with recent changes in confession law, then moves to a short section about dealing with confessions once they are admitted, then the third section (historically the first in other papers) on the basics of confession law and ending with a set of references you can tear out and take with you.

For the almost thirty-five years I've practiced and taught, I've written in a practical form. Even when I was Editor-in Chief for *Voice for the Defense*, I tried to focus more on plainly written information and ideas that practicing lawyers could use immediately. Sometimes that was simply information, such as the reference list below; other times it is what I call "tools" – a practice, a procedure or just a simple question you could take away from a conference and use the next Monday in a hearing or trial. The reference list is a readily available set of "tools" you could use this weekend to find answers and cases that could help you initiate an attack or respond to one concerning a confession or an admission. Additionally, I have no intention of re-inventing the "confession paper" wheel that has been re-invented a thousand times before. I am reusing (with his permission) the basics on confessions on which Scott Durfee¹ wrote so well in the recent past for this conference (2003).

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CONFESSIONS

WHAT'S HOT IN CONFESSION LAW

- *MISSOURI v SEIBERT*, ___ U.S. ____; 124 S.Ct. 2601 (2004).

The “Question-First” doctrine, how the Court dealt with an apparent nationally taught police technique of interrogating with no *Miranda* warnings first, then “Mirandizing” the defendant and re-questioning, using the answers in the first interrogation as leverage to get the same answer, this time in the supposedly legal or protected interrogation.

The Supreme Court decided one important confession case this term. In *Missouri v Seibert*, ___ U.S. ____; 124 S.Ct. 2601 (2004), the Court held that where the interrogating officer intentionally withheld *Miranda* warnings until he got a confession, took a short break, then came back, “Mirandized” the defendant and got her to repeat the unwarned confession from a few minutes earlier; neither confession was admissible.

The *Seibert* case may be one of those “tip of the iceberg” cases. If it is, then it is probably more critical to prosecutors than to defense attorneys. All prosecutors need to immediately determine if law enforcement agencies within their jurisdictions have policies such as the one in *Seibert*. If so, they need to stop the practice immediately or run the risk of losing an important case.² For defense lawyers, there is now no excuse for any criminal defense lawyer to be ignorant of local law enforcement policies for obtaining confessions. Find out if there is a policy such as the one in *Seibert* or if this “procedure”, regardless of its institutionalization, was used in your case. If so, you may have a new tool to suppress confessions.³

² The plurality opinion has a wealth of resources that everyone should “cut and paste” as references for future confession issues. But prosecutors especially should look at pp. 2608-2609, where Justice Souter noted that the “question-first” policy was taught nationally and used in many departments. He also cites a number of authorities on interrogation techniques who disagree with the “question-first” policy. Police officers are not going to read this opinion, so it is up to prosecutors to determine if it is being used and if so, what steps should be taken to either continue the policy (bad idea) on the theory that most defense lawyers will never hear of *Seibert* or to change the policy (good idea because it is the more consistent approach to assuring that justice is done) to comply with *Seibert*.

³ It should be noted that in survey after survey for the past twenty years of both police chiefs and prosecutors’ offices, the giving of *Miranda* warnings is consistently supported. These surveys are often done because politicians

In *Seibert*, a home was burned to conceal what the defendant thought might look to authorities like neglect of a child who had died from cerebral palsy. The scheme also included intentionally killing a mentally retarded child who lived with the family, but making it look like an accidental death in the fire. Ms. Seibert was charged with the murder of the mentally retarded 18 year old that died in the fire. She was questioned according to a policy which the officers confirmed under oath. Ms. Seibert was awakened at the hospital where she was staying with one of the other children, also a co-conspirator in the fire, who was injured in the blaze. She was then questioned without being “Mirandized” until a confession was obtained. A twenty minute coffee and cigarette break was then given. She was then brought back, “Mirandized” and the confession was now obtained again, this time under seemingly legal circumstances.

The Court termed this policy of with holding *Miranda* warnings, interrogating, then “Mirandizing” and re-obtaining the confession or admission as “question-first policy.” The Court had to distinguish another mid-interrogation *Miranda* warning case, *Oregon v. Elstead*, 470 U.S. 298 (1985).⁴ In *Elstead*, the officer briefly questioned the defendant at home, and then took the Elstead to the station where the warnings were given and the confession obtained. The distinction between the two cases is stark; in *Elstead*, the failure to “Mirandize” was inadvertent and both the lapse of time and the change of location before the “Mirandized” interrogation took place was enough to allow the Court to believe that the *Miranda* warnings given at the station were effective. In *Seibert*, the entire policy was designed to emasculate the *Miranda* warnings. Thus, the Court goes back to *Miranda* to analyze if this “question-first” policy was designed to “disable [an individual] from making a free and rational choice” about speaking.” *Seibert* at 2609, citing *Miranda v. Arizona*, 384 U.S. 436, 464-465 (1966). Ultimately, it is this “design” aspect of the

believe the abolition of *Miranda* is a good political issue. Unfortunately for them their natural allies disagree. This points out the underlying truth about *Miranda* and interrogations – it’s the technique, not the warnings that is important. Thus, those who know best do not believe *Miranda* warnings hinder the obtaining of confessions and admissions. In fact, many of those surveyed believe the warnings help law enforcement because it gives the citizen being questioned a false sense of fairness and objectivity on the part of the interrogator. Therefore, the citizen mistakenly forgoes the protections of the *Miranda* warning in favor of relying on a person he or she perceives to be “playing by the rules” with respect to them. It is ironic that no matter how hard some politicians try, they simply cannot make *Miranda* into the hot button issue it is not. In short, *Miranda* helps law enforcement more than it hurts.

⁴ See p. __, *infra*.

“question-first” policy which doomed the admissibility of the confessions in *Seibert*.

Here is a list from Justice Souter’s plurality opinion that should be considered when you have a midstream *Miranda* warnings case:

- ✓ The completeness and detail of the questions and answers in the first round of interrogation;
- ✓ The overlapping content of the two statements;
- ✓ The timing and setting of the first and the second;
- ✓ The continuity of police personnel; and
- ✓ The degree to which the interrogator’s questions treated the second round as continuous with the first.

Seibert at 2612. If you are faced with a *Seibert*-like confession or admission, these questions will be very helpful in determining if the statement is admissible. If you are faced with a confession, never take it face value, not if you are a prosecutor or a defense lawyers. The question is how this confession came into being. That’s where you want to go, to find out how the sausage was made. This will lead you into the “question first” doctrine if it was used and it will also lead you to methodologies such as the Reid Technique© if that was used. Only after you have done this are you close to being able to make a decision about whether or not to go to trial on a “confessions” case.

Finally, *Seibert* does not turn on the fact that the “question-first” policy appeared to be nation-wide and was taught by at least one national police school. It will be enough that it was “designed” to negate the knowledge intended to be given to a suspect by the *Miranda* warnings. Therefore, a rogue officer, acting purely on instinct and alone could violate *Seibert* if the intent was to circumvent the intended effect of *Miranda*. The national aspect of the “question first” policy is important to make prosecutors ask a few questions around their station houses to see if their departments routinely use this now outlawed practice.

- *Michael Scott v. State of Texas*, ___ SW3d ___; 2005 WL 670544 (Tex. App. – Austin 2005).

The harmless error doctrine has reached either its zenith or its nadir, depending on your view of the outcome of the case. The case is the “Yogurt Shop” capital murder case of Michael Scott in Austin. *Michael Scott v. State of Texas*, ___ SW3d ___; 2005 WL 670544 (Tex. App. – Austin 2005). There’s no writ history yet, but there will be **[CAVEAT]**, the *Scott* case is not about the admissibility of Scott’s 20+-hour

confession; but about the effect of the erroneous admission of a highly redacted confession of his co-defendant.⁵ All of us face this situation more than we would like – the government offering someone else’s statement against the defendant. The *Scott* case has all the cites you need to do your own analysis. For prosecutors, it is important to note how the Travis County prosecutors redacted the co-defendant’s statement to try to get around the then unknown *Crawford* case.] The determinative issue in this case involves the admissibility of the cleaned-up confession of one co-conspirator, Robert Springsteen, against another co-conspirator, Mr. Scott. The case was tried before *Crawford v. Washington*, 541 U.S. 36 (2004), thus the admissibility of Springsteen’s statements was controlled by *Ohio v. Roberts*, 448 U.S. 56 (1980), which was specifically overruled by *Crawford*. *Roberts* was the case that institutionalized the “indicia of reliability” factors used for decades to determine the admissibility of hearsay statements. (Remember, we discussed how confessions and admission in Texas were controlled by Texas’ law. *Crawford* is just one of those examples which teach all of us to parallel our objections – cite both state and federal authorities.) *Crawford* overruled *Roberts* and simply said that in most cases no amount of “indicia of reliability” will suffice if what the defendant wants is his right to confrontation under the sixth amendment. The Third Court, in a lengthy opinion, strictly applied *Crawford*. It said the following:

We believe *Crawford* means what it says: [HN14] statements made during police interrogations are testimonial, and like other testimonial statements, they are admissible under the Sixth amendment only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine.

The prosecutors in the *Scott* case had carefully redacted Springsteen’s “confession” down to a mere five paragraphs. The objective of the redactions was to admit only Springsteen’s statements against himself and then offer them only to corroborate Michael Scott’s own statements. This redaction effort by the prosecutors was critical to the appellate outcome because there was no physical evidence linking anyone to the crime of killing four young teenage girls in Austin in 1991, then burning their bodies to cover up the crime.

⁵ Robert Springsteen, one of Scott’s three co-defendant’s (of the other two, one was never indicted and one has yet to be tried), was convicted of capital murder and given death. His sentence was overturned because he was a juvenile at the time of the murders.

If you read the *Scott* case, you will educate yourself on the application of the “darling” of appellate theories in Texas today – the harmless error doctrine – in one of the most difficult cases in which to apply it. In addition, you will see it applied in one of the states, and the nations, most controversial murder cases. This is a case worth following. A PDR is almost assured and federal litigation is sure to follow. *Scott* pushes the harmless error doctrine to its limits. In the end, *Scott* may turn on a self-inflicted wound by Texas’ appellate courts in their now inexplicable defiance of federal legal structure. This constant nose-thumbing at a greater power has resulted in the dramatic fall in credibility of our courts in the eyes of the highest court in the land.

- *Cross v. State*, 144 SW3d 521 (Tex. Crim. App. 2004).

Edwards v. Arizona, 451 U.S. 477 (1981) is still good law, however, a defendant by his subsequent interaction with police, can override the protections provided him under the *Edwards’* doctrine and make otherwise inadmissible statements admissible. Given the behavior in *Cross*, the outcome is not surprising and though it is a case of first impression, it is not one that marks a deviation from norms in this area.

The defendant in *Cross* was arrested by Officer A and immediately invoked his right to counsel under *Edwards*. He then voluntarily reached out to Officer B, stating that he would not talk to the patrol officer but he did want to speak with the detective. The detective who was booking him then checked with his supervisor who told him that if the defendant had invoked his *Edwards’* rights, he could “uninvoke” them. Officer B, the detective, stated that the defendant, *Cross*, had initiated this conversations about speaking with the detective but not the patrol officer. As extra precaution, the detective “re-Mirandized” *Cross* who then gave the detective (Officer B) his first written statement. Three days later, the same detective again approached *Cross* and told him that after speaking with the victim, his first written statement didn’t add up and he wanted to get a second one. He was again “Mirandized” and gave a second written statement. It is this second statement, the one that is the product of the officer’s approach to *Cross*, whose admissibility was contested.

Edwards is still the strongest remaining protection against having statements and confessions introduced against a defendant. Law enforcement officers who do not respect the *Edwards’* doctrine still run the risk of having the fruits of their labors kept out of the trial. However, you don’t have to be a lawyer to understand that, exactly as the detective’s supervising officer stated, he can “uninvoke” his *Edwards’* rights. The

Court adopts the two-step process of “uninvoking” *Edwards* which was approved by the United States Supreme Court in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). Once it is established that the suspect invoked his right to counsel, the state then has to show that the defendant initiated the further communication and that after that, he validly waived his right to counsel contained in the *Miranda* warnings. *Cross* was before the court on the state’s PDR, having lost in the COA.

It’s not difficult to see where the Court went on this one, and for the right reasons. The key is not that the detective approached *Cross* after three days to ask for the second written statement and only took it after he was “Mirandized” for a third time. The key is that *Cross* had completed his “uninvoking” process of the *Edwards’* rights which he had so carefully invoked with the arresting officer when he asked to speak with the detective, the detective agreed, then “re-Mirandized” him and *Cross* gave him the first statement. After that, the second approach three days later was covered by the officer’s careful invocation of the *Bradshaw* exception to *Edwards*. Therefore, there was nothing wrong with the approach three days later because *Cross* had already backed away from *Edwards* in the only way the courts can legally recognize it, by initiating the conversation with law enforcement and then being “re-Mirandized.”

In the final analysis, though the Court says this is a case of first impression in Texas, it does not break any new particularly new or shocking ground.

- *Manns v. State*, 122 S.W.3d 171 (Tex. Crim. App. 2003).

This case tries to shed light on two doctrines: what constitutes state action or under color of state law for purposes of suppressing an admission made to a third party, in this case a jailhouse snitch; and, the older doctrine of giving great credence to the findings and conclusions of the trial court.

In *Manns*, a long-time jailhouse snitch gave testimony about the defendant’s knowledge of the caliber of weapon used to commit a capital murder. Although the testimony in the trial court was disputed about whether or not Boone, the snitch, was acting as an agent of the district attorney’s office; in the end the trial court ruled that he was not. Because of this ruling, the admission was admitted.

The first doctrine invoked by the Court is to give great weight to the findings and conclusions of the trial court. *Guzman v. State*, 995 S.W.2d 85 (Tex. Crim. App. 1997). Unlike the “harmless error” doctrine, this doctrine, also heavily relied upon by this Court of Criminal Appeals, does not always favor the government. *E.g.*, *Thompson v. State*, 153 S.W.3d 416 (Tex. Crim. App. 2005).

Of more importance to this paper is the reasoning on whether Broome was a state agent and the case law cited in the opinion where other courts have found error in third-party statements or ruled the statement admissible for some reason. The analysis starts with the *Massiah* case, which the Court seems to cast some doubt upon because the Supreme Court did not delve into “why” *Massiah*’s co-defendant as a government agent. *Manns* at 178; *Massiah v. United States*, 377 U.S. 201 (1964). In *Massiah*, the defendant was already indicted and represented by counsel when the FBI asked the co-defendant to install a wire in his car and surreptitiously record *Massiah*. The Court found that the government had “deliberately elicited” information from the defendant by wiring the co-defendant’s car for the express purpose of intercepting the conversation, which they simultaneously monitored. In *United States v. Henry*, 447 U.S. 264 (1980), the Supreme Court again assumed government action where an FBI paid informant was used, but was specifically told not to initiate conversations about *Henry*’s charges. Again, as in *Massiah*, the Court found a violation of the *Henry*’s sixth amendment protections of right to counsel. The next Supreme Court case the Court discusses is *Maine v. Moulton*, 423 U.S. 159 (1985). Again, this is a surreptitious recording case where law enforcement wired the co-defendant. By failing to reveal his new status to his co-defendant, the Court said that *Moulton*’s sixth amendment right to counsel was violated. The Court of Criminal Appeals characterizes *Moulton* as adding little to this line of cases other than clarifying that an informant doesn’t have to be paid, that any type of *quid pro quo* arrangement would suffice to bring the actor under color of state law.

Finally, the Court discussed *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). *Kuhlmann* is a major deviation from the *Massiah* line of cases in that a jailhouse informant, who the Supreme Court conceded was a government agent and who the government had purposefully placed with the defendant in jail, merely overheard incriminating statements and reported them to law enforcement. *Kuhlmann* distinguished itself from *Massiah* by stating that the exclusionary purpose was aimed at the secret nature of the interrogations “by investigatory techniques.” *Kuhlmann* at 459; *Manns* at 180.

The Court then goes through three Texas cases with differing results.⁶ The Court sums these cases up saying that the cases support the proposition that “an inmate must at least act pursuant to an agreement with

or instructions from government officials before he will be deemed a government agent for *Sixth Amendment* right to counsel purposes.” *Manns* at 182. It is instructive that, at least in *Macias*, the defense relied on article 38.22 and not the Sixth Amendment as the basis for the claim. Although Judge Cochran indicated that both claims would be treated the same, it is clear that good Texas’ lawyers always plead both constitutional and statutory grounds. (See, *Crawford v. Washington*, 541 U.S. 36 (2004), for a vivid example of what could happen to a defendant who failed to pursue a Sixth Amendment claim in favor of a mere hearsay objection.)

Finally, the Court’s ruling in *Manns* turns on the factual findings of the trial court. Even if those findings are troubling to some, they mean that in this case; there simply was no violation of either 38.22 or the Sixth Amendment. There is also no mention of a violation of 38.23, the Texas statutory exclusionary rule, which is clearly broader than the judicially mandated federal exclusionary rule. For instance, in the *Massiah* line of cases cited by the *Manns*’ court, the monitoring of the wired conversations is most likely a violation of both federal and state (Texas) wire-tapping laws. A failure to plead 38.23 might result in a *Kuhlmann* type decision, depending on the degree of investigatory technique being exploited, but if the exploitation were relatively benign; 38.23 might be the only way to establish error.

WHAT TO DO WHEN THE CONFESSION IS ADMITTED

- Methods of Questioning⁷

When faced with an interrogation/confession issue, see if you can determine if a recognized technique was used. One method, the Reid Technique®, is noted briefly here and a cite is included in references. To say it is controversial is to understate

⁶ *Macias v. State*, 733 S.W.2d 192 (Tex. Crim. App. 1987); *Westbrook v. State*, 29 S.W.3d 103 (Tex. Crim. App. 2000); and *Thompson v. State*, 93 S.W. 3d 16 (Tex. Crim. App. 2001).

⁷ To my knowledge, this topic has not been included in previous papers on Confessions. “Confession” papers generally deal with issues of admissibility, not what to do with the confession once it is admitted. Since most confessions are admitted, defense lawyers and prosecutors need to know how to deal with what is going to part of the trial. It is consistent with the “fear list” that the Criminal Defense Clinic at the University of Texas School of Law has taught its students for 31 years – identify that which terrifies you, write it down and then deal with it. If you don’t, it will come up in trial and you will be unprepared to deal with it. The Court of Criminal Appeals may well find that your unprepared behavior (defense lawyer) was “harmless.” Make no mistake; no one else will believe that. Everyone else will believe you blew it.

the issue. It is also very effective in obtaining confessions.

In the hands of a skilled defense lawyer, the interrogator can be made to look bad before the jury for using the Reid Technique®. The web site even posts critiques of the method and reports from users of positive results. Prosecutors need to know this too for the following reason. A good defense lawyer is not going to tip his or her hand to you in a Motion to Suppress the statement that at trial, one of the issues is going to be the methodology itself, its design, how it “tricks” people into saying things, etc. Therefore, if you haven’t dug down deeply enough to know if the agency with which you are dealing and more importantly, the individual(s) who interrogated the defendant used a particular technique, you are going to be at the mercy of the defense lawyer; a situation in which no self-respecting prosecutor ever wants to be in.

The reference at the end of this paper is the Reid Technique® website, so it is supportive of the method. But it does include criticisms. I suggest you “Google” the Reid Technique®, or any other method of interrogation, to see what else you come up with.

- **Inducements**

Finally, it is important to focus once more on what to do when the confession/admission is actually placed before the jury. What works with juries other than questioning about the method? One aspect of confession law that has always bothered jurors is when law officers lie to a citizen. It is probably that this simply hits too close to the bone for some citizens who see either themselves or someone they love in the same situation, being induced with false statements to say something. Prosecutors who are not prepared for this type of cross-examination may lose a case; not just because the jury rejects the product of the interrogation but because they hold it against the government for acting that way in the first place. One argument that will not work for juries is to tell them that the courts have said that is legal to tell a suspect a “lie” about the evidence. It is going to have to be said in more human terms if the message is going to be received. The recent North Carolina Law Review article on false confessions, cited at the end of this paper, might give you some assistance as well as the web site on the Reid Technique®.

This is the legal line in the sand – that police and prosecutors can “lie” to a suspect about the evidence but cannot make promises to the person in return for the statement. The typical permissible lies are that the police “found your fingerprints” or “your DNA” or “your co-defendant is in there spilling his guts to us.”

While these are allowed, it is not permitted to promise a legal result or outcome in return for a statement.

THE BASICS

A "confession" is a "voluntary declaration by one person to another that the declarant has committed a crime." *Terry v. State*, 420 S.W.2d 945, 947 (Tex. Crim. App. 1967).

An "admission," on the other hand, acknowledges some particular fact or circumstance (and not the whole charge) and indicates a consciousness of guilt that tends to connect the accused with the crime charged and to incriminate him. In other words, an admission acknowledges only some particular fact or circumstance, pertinent to the issues and tending to prove guilt in connection with other circumstances, while a confession covers the whole transaction and admits guilt. *Creel v. State*, 710 S.W.2d 120, 130 (Tex. App.–San Antonio 1986), *aff'd* 754 S.W.2d 205 (Tex. Crim. App. 1988).

There are essentially five relevant issues when evaluating the legality of a confession to be admitted into evidence at a criminal trial:

1. Was the confession the product of interrogation by a state actor?
2. Was the person in custody?
3. Was the person appropriately warned of his or her statutory and constitutional rights?
4. Did the person make a knowing, voluntary and intelligent waiver of those rights?
5. Was the confession truly voluntary?

➤ **WAS THE STATEMENT THE PRODUCT OF INTERROGATION BY A STATE ACTOR?**

○ **Interrogation**

The term "interrogation" refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police know are reasonably likely to elicit an incriminating response from the suspect.⁸ The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Rhode*

⁸ See the caveat in fn. __, *infra*.

Island v. Innis, 446 U.S. 291, 300-02, 100 S.Ct. 1682, 1689-90 (1980). Offhand remarks, not designed to elicit any kind of response, do not constitute interrogation. *Id.* at 303, 100 S.Ct. at 1690; *Janecka v. State*, 739 S.W.2d 813, 828-29 (Tex. Crim. App. 1987). For reviews of whether particular conduct was "interrogation," the Court of Criminal Appeals has suggested that the guiding principle should be protection of the defendant from government officials using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. *Jones v. State*, 742 S.W.2d 398, 407 (Tex. Crim. App. 1987).

Examples:

- No interrogation where inmate fills out a request to be placed in isolation for his own safety and, when asked why he feared for his safety, explains that he had "killed a Mexican Mafia family member." *Esparza v. State*, 2003 WL 21282765 (Tex. Crim. App., June 4, 2003) (unpublished).
- Police telling a suspect that "the person in the other car died" is not "idle chatter," but instead is the equivalent of interrogation. *Climmer v. State*, 645 S.W.2d 918, 920 (Tex. App.–Fort Worth 1983, no pet.)
- Request for a consent to search does not constitute interrogation. *Jones v. State*, 7 S.W.3d 172, 174 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd).
- Defendant's statement to officer in response to question, "What happened?" given after receiving his *Miranda* warnings, was not product of custodial interrogation, despite fact that defendant was detained at the time, because officer did not ask question that he thought would produce incriminating testimony. *Garcia v. State*, 901 S.W.2d 724, 730 (Tex. App.–Houston [14th Dist.] 1995, no pet.)⁹

⁹ Though *Garcia* is still good law, all lawyers should be cautioned not to lean too heavily on the "subjective intent" of the officer aspect. See, *Missouri v. Seibert*, ___ U.S. ___, 124 S.Ct. 2601, 2617-2618 (2004), Justice O'Connor, in her dissent, agrees with the aspect of the plurality decision that the subjective intent of the officer cannot be part of the equation of determining if the confession was voluntarily given. The question "What happened?" from a police officer to a suspect who is clearly in custody is hardly an idle question. But the Court in *Garcia* found that the defendant was "detained," not in custody, so this "holding" may actually be *dicta* to the case. From a common sense point of view, if *Garcia* actually stood for the principle that this question, asked by a law enforcement officer to a suspect in custody, it would have two results: first, the exception would gobble up the rule and second, it is judicially unmanageable. On this particular point of a suspects response to the question "What happened?" *Garcia*

- No interrogation when officer said "Happy birthday!" to arrestee and arrestee responded that he should not have been working on his birthday. *Murray v. State*, 864 S.W.2d 111, 114 (Tex. App.–Texarkana 1993, pet. ref'd)
- No interrogation in requiring defendant to fill out "Request to Use the Law Library" form because defendant initiated contact that led to incriminating information when he requested to use library, and county jail authorities had no indication that they knew, or had any reason to know, that defendant would fill out the form with incriminating information. *Watson v. State*, 885 S.W.2d 222, 234 (Tex. App.–Fort Worth 1994), *rev'd on other grounds*, No. 1208-94 (Tex. Crim. App., Jan. 11, 1995), *aff'd on remand*, 917 S.W.2d 65 (Tex. App.–Fort Worth 1996, pet. ref'd).
- No interrogation when defendant volunteered information regarding a third party who had the "pistol and the money." *Donaldson v. State*, 651 S.W.2d 29, 30 (Tex. App. – Dallas 1983, pet. ref'd).
- No interrogation when defendant, who was getting dressed after arrest, picked up shirt and said, "It's got blood on it. I want to get a clean one." *Earnhart v. State*, 582 S.W.2d 444, 448 (Tex. Crim. App. 1979).
- No interrogation when officer asked the defendant who was under arrest "what happened?" and the defendant responded "I cut the boys," because officer's question was not leading or suggestive. *Miles v. State*, 488 S.W.2d 790, 792 (Tex. Crim. App. 1972).

➤ State Action

"Custodial interrogation" means "questioning initiated by *law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. at 444, 86 S.Ct. at 1612 (1966) [emphasis added]; *Oregon v. Mathiason*, 429 U.S. 492, 494, 97 S.Ct. 711, 713 (1977).

Traditionally, statements made as a product of custodial interrogation are subject to suppression only if the persons eliciting the information are law enforcement officers. However, the careful practitioner should not concede the unique scope of protections accorded a defendant under Section 2 of Article 38.22, which requires the defendant to receive the statutory warnings from "the person to whom the statement is made" (rather than just "law enforcement officers"), and Article 38.23, which states that evidence

pushes the facts about as far as they can go and invites judicial arbitrariness.

obtained by "an officer or other person" in violation of law is inadmissible. *See, e.g., State v. Johnson*, 939 S.W.2d 586, 587 (Tex. Crim. App. 1996):

No doubt, the plain language of art. 38.23 supports the conclusion that the unlawful or unconstitutional actions of *all* people, governmental and private alike, fall under the purview of Texas' exclusionary rule. . . . The reference to an officer or other person has appeared in the statute since the original enactment in 1925 and always has been thought to mean what it says – that is, to include everybody within the scope of its exclusionary sanction.

As such, defense counsel should argue that custodial statements obtained when "a person" has interrogated an individual in custody are likewise suppressible. *Cf. Samuel v. State*, 688 S.W.2d 492, 493-96 (Tex. Crim. App. 1985) (upholding exclusion under Article 38.23 of defendant's post-arrest failure to proclaim innocence after citizen's arrest).

Article 18.16 of the Texas Code of Criminal Procedure, "Preventing the Consequences of Theft", is one of two statutes (Article 14.01 being the other) which authorizes "citizen arrests." Although there is no significant case law under 18.16, it is nonetheless a very useful statute for criminal lawyers, especially in a shoplifting case. The first fact you need to determine is whether the security guard who detained/arrested your client was an off-duty police officer or non-law enforcement (see, TEX. CODE CRIM. APP. Art. 2.12 for definitions of law enforcement officers). 18.16 only applies to the latter. It still has broad application in these case and the strictures of 18.16 are routinely violated. Thus, when the security guard takes a person to the store's "offices", a private area, and proceeds to take a statement, obtain consent, get a waiver to hold the store harmless, etc., it may all be done in violation of 18.16 and should be excluded either under that statute alone or in combination with article 38.23, the statutory exclusionary rule.

Note, however, that at least one appellate court has been reluctant to require suppression of evidence under Article 38.23 where such suppression does not further the purposes of the exclusionary rule. *See, e.g., Lane v. State*, 951 S.W.2d 242, 243 (Tex. App.–Austin 1997, no pet.) ("Article 38.23(a) may not be invoked for statutory violations unrelated to the purpose of the exclusionary rule."); *accord Watson v. State*, 10 S.W.3d 782, 783 (Tex. App.–Austin 2000, no pet.)

Other examples of third-party questioning:

- Statements made to a nurse not result of custodial interrogation. *Arnold v. State*, 659 S.W.2d 45, 48 (Tex. App. – Houston [14th Dist.] 1983, no pet.)

- Statement made to a fellow jail inmate held admissible because the fellow inmate was not "acting as an agent of law enforcement personnel at the time he received this confession." *Lalande v. State*, 651 S.W.2d 402 (Tex. App. – El Paso 1983), *affirmed on other grounds*, 676 S.W.2d 115 (Tex. Crim. App. 1984); *Chambliss v. State*, 647 S.W.2d 257, 262 (Tex. Crim. App. 1983).
- Oral statement made in response to a question asked by defendant's father held admissible because father not acting at the request of the police. *Inman v. State*, 683 S.W.2d 40, 42 (Tex. App.–Eastland 1984, no pet.); *see also De Leon v. State*, 201 S.W.2d 816, 818 (Tex. Crim. App. 1947) (confession to friend); *Beck v. State*, 681 S.W.2d 825, 828 (Tex. App. – Houston [14th Dist.] 1984), *conviction aff'd*, 712 S.W.2d 745 (Tex. Crim. App. 1986) (confession to uncle).

➤ Questioning by Foreign Jurisdiction

Miranda does not generally apply to confessions taken by foreign nationals, unless the circumstances surrounding the confession shock the conscience of an American court; or American law enforcement personnel participate in the foreign interrogation or if the foreign authorities are acting as agents for their American counterparts. *See Alvarado v. State*, 853 S.W.2d 17, 21-22 (Tex. Crim. App. 1991).

If *Miranda* and other constitutional standards are met, the law that governs the admissibility of adult confessions made to authorities from another state or the federal government after September 1, 2001 is Article 38.22, Section 8:

Notwithstanding any other provision of this article, a written, oral, or sign language statement of an accused made as a result of a custodial interrogation is admissible against the accused in a criminal proceeding in this state if:

- (1) the statement was obtained in another state and was obtained in compliance with the laws of that state or this state; or
- (2) the statement was obtained by a federal law enforcement officer in this state or another state and was obtained in compliance with the laws of the United States.

Pre-2001 adult confessions are governed by the following cases:

- **Oral confessions** – Article 38.22, Section 3, requires that oral statements must be recorded before used against a defendant, and requires the courts to strictly construe these requirements. As such, an unrecorded oral statement taken in another state is governed by the strict Texas requirements and is inadmissible. *Davidson v. State*, 25 S.W.3d 183, 185-86 (Tex. Crim. App. 2000); *see also Goldberg v. State*, 95 S.W.3d 345, 382 (Tex. App.–Houston [1st Dist.] 2002, pet. pending) (finding *Davidson* error in admission of oral statement to German authority, but finding admission harmless).
- **Written confessions** – Article 38.22, Section 2, does not hold written statements to the same strict compliance standards; thus, substantial compliance by the foreign jurisdiction is sufficient to make the written statement admissible in a Texas proceeding. *See Nonn v. State*, 41 S.W.3d 677, 679 (Tex. Crim. App. 2001).

Out of state juvenile confessions are governed by Title 3 of the Family Code, not Article 38.22. *Vega v. State*, 84 S.W.3d 613 (Tex. Crim. App. 2002). In *Vega*, a juvenile defendant fled to Illinois, was arrested, and gave Chicago police a statement that was taken in compliance with Illinois law, but *not* in compliance with Texas law regarding confessions for juveniles. The Court observed that while the statement was obtained in violation of Texas law, exclusion of the statement would not have a deterrent effect on the arresting officers: "Illinois police will continue to comply with their own laws and procedures." *Id.* at 619. The Court thus remanded the case to the Court of Appeals to determine whether the violation of Texas law required suppression of the written statement given the general "fairness" purpose served by Title 3. *Id.*

➤ WAS THE PERSON IN CUSTODY?

A person is in "custody" only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest. The "reasonable person" standard presupposes an *innocent* person. Moreover, the subjective intent of law enforcement officials to arrest is irrelevant unless that intent is somehow communicated or otherwise manifested to the suspect. *Dowhitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996). This is an entirely objective analysis. *Stansbury v. California*, 511 U.S. 318, 323, 114 S.Ct. 1526 (1994).¹⁰

The *Dowhitt* court observed that the determination of custody must be made on an *ad hoc* basis, after considering all of the objective circumstances. Stationhouse questioning does not, in and of itself, constitute custody. It is quite common for police to ask a person to come to the station to "answer some question." This is routinely considered voluntary on the part of the citizen who shows up. Similarly, a traffic stop does not constitute "custody" for *Miranda* purposes. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984). However, the mere fact that an interrogation begins as non-custodial does not prevent custody from arising later; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation. *Id.* at 255.

In *Dowhitt*, the Court identified four general situations which may constitute custody:

- When the suspect is physically deprived of his freedom of action in any significant way;
- When a law enforcement officer tells the suspect that he cannot leave;
- When law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and
- When there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.

Concerning the first through third situations, the restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention. Concerning the fourth situation, the officers' knowledge of probable cause must be manifested to the suspect, and a reasonable person would believe that he is under restraint to the degree associated with an arrest. *Dowhitt*, 931 S.W.2d at 255.

In a recent unpublished opinion – *Esparza v. State*, 2003 WL 21282765 (Tex. Crim. App., June 4, 2003) – Justice Cochran suggests that there may be some instances in which incarceration may not be "custody" for *Miranda* purposes, particularly when there is no "additional restraint, not normally encountered in prison life, [that] is imposed upon [the inmate] by investigators." *See Esparza*, slip op. at 2 n.2 (quoting Laurie Magid, *Questioning the Question-Proof Inmate: Defining Miranda Custody for Incarcerated Suspects*, 58 OHIO ST. L.J. 883 (1997)). *Esparza* is a very limited fact situation, however, it is important as a guide to the direction in which the Court

¹⁰ It inconsistent to have a subjective test, that considers what the officer was thinking, to determine if a confession was voluntary, *see fn. __, supra*; and an objective test that

excludes the intent of the officer to determine if the defendant was in custody. In both cases, the defendant cannot act upon the subjective intent of the officer. Both tests should be objective.

of Criminal Appeals wants to go with questions of scope on interrogation, custody the application of *Miranda*.

The requirement for custody is very important because interrogation by a state actor in a non-custodial setting produces *admissible* statements. Examples:

- General questioning by probation officer not custodial interrogation. *Payne v. State*, 579 S.W.2d 932, 933-34 (Tex. Crim. App. 1979); *see also Marcum v. State*, 983 S.W.2d 762, 766 (Tex. App. – Houston [14th Dist.] 1998, pet. ref'd) (statement to polygraph examiner).
- Statement in hospital to child protective worker not custodial interrogation. *Davis v. State*, 687 S.W.2d 78, 81 (Tex. App.–Austin 1985, pet. ref'd).

➤ **WAS THE PERSON APPROPRIATELY WARNED OF HIS OR HER CONSTITUTIONAL AND STATUTORY RIGHTS?**

▪ **Generally**

It is critical that Texas lawyers understand that most Texas cases are not decided on federal constitutional grounds, because those grounds are incorporated in our statutory scheme, particularly Articles 38.21-38.23 of the code of Criminal Procedure.

In order to be admissible, a confession must be "voluntary," or must not arise from the presumptively coercive nature of custody. In order to assure that this does not happen, the Supreme Court has insisted that the state agent warn the person regarding his constitutional rights, including the Fifth Amendment rights not to incriminate himself and to counsel. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). The duty to admonish also extends to interviews and evaluations by court-appointed psychiatrists and psychologists. *See Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866 (1981). Before any confession will be admitted, a person must knowingly, voluntarily, and intelligently waive these rights. *Id.* at 475, 86 S.Ct. at 1628.

Texas law provides a similar constitutional underpinning to the necessity for *Miranda* warnings. Article 1, Section 19, of the Texas Constitution states:

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.

Moreover, the Texas Code of Criminal Procedure, Article 38.21, disallows the admission of involuntary statements:

A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed.

The rules referenced in Article 38.21 are contained in Article 15.17 (warnings by magistrate) and Article 38.22, § 2 (warnings required before any oral or written confession), both of which require admonishment to a suspect in custody that:

- (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
- (2) any statement he makes may be used as evidence against him in court;
- (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
- (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
- (5) he has the right to terminate the interview at any time.

Section 1 of Article 38.22 requires that a custodial confession either be signed by the accused, be made by the accused in his own handwriting, or be marked by the suspect and witnessed a non-police witness. In all instances, the accused must have been warned of his rights and voluntarily and knowingly waived those rights prior to making the statement.

In the alternative, Section 3 of Article 38.22 permits electronically recording the statement. The electronic recording alternative also requires that the accused be advised of and then knowingly and voluntarily waive her rights. In addition, Section 3 requires that the recording device be capable of making an accurate recording and competently operated, that the voices on the recording be identified, and that the accused be provided a copy of the recording at least twenty days before its use in any proceeding. In *Sells v. State*, 121 S.W.3d 748 (Tex. Crim. App. 2003), the Court of Criminal Appeals held that the twenty-day rule applies with equal force to pretrial proceedings, as well as trial proceedings. *Id.*, at 760-764. The Court held the failure to provide the copy to be harmless error, however. *Id.*, at 765.

With respect to written statements, substantial compliance with the requirements of Article 38.22 is sufficient to permit admission of the confession. *See, e.g., Cockrell v. State*, 933 S.W.2d 73, 91 (Tex. Crim.

App. 1996) (affirming admission of confession despite admonishment that it could be used against him "at trial"); *Nonn v. State*, 41 S.W.3d 677, 679 (Tex. Crim. App. 2001).

➤ Delay in Advising of Rights

In *Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661 (1991), the United States Supreme Court held that it was reasonable to hold a suspect for a full forty-eight hours without being advised of his charges or rights. Under Texas law, Article 15.17 of the Code of Criminal Procedure requires that an accused be brought before a magistrate without unnecessary delay.

Absent a showing of a causal connection between the failure to take an accused before a magistrate and the defendant's confession, however, the validity of a confession is not affected for failure to comply with the statute. See *Boyd v. State*, 811 S.W.2d 105, 124 (Tex. Crim. App. 1991). Additionally, a violation of the requirement that a defendant be taken before a magistrate without delay will not invalidate a confession which was voluntarily given after a defendant received his *Miranda* rights. *Id.* at 125.

➤ DID THE PERSON MAKE A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF THOSE RIGHTS?

○ Generally

A defendant may waive his *Miranda* rights provided the waiver is made voluntarily, knowingly, and intelligently. *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986). The burden is on the prosecution to demonstrate that the defendant waived his rights voluntarily, knowingly, and intelligently. *Robinson v. State*, 851 S.W.2d 216, 223 (Tex. Crim. App. 1991). Such waiver must be proven by a preponderance of the evidence. *Id.* (citing *Colorado v. Connelly*, 479 U.S. 157, 168, 107 S.Ct. 515, 522 (1986)). Only if the totality of circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Moran*, 475 U.S. at 421, 106 S.Ct. at 1141; see also *Franks v. State*, 90 S.W.3d 771, 785 (Tex. App.-Fort Worth 2002) (good discussion of mental impairment as factor in assessing validity of waiver).

Under Texas law, the face of the written confession must contain a written waiver, and an oral waiver must be contained on electronically recorded confessions. See Sections 2(b) and 3(a)(2) of Article 38.22. With respect to electronically recorded confessions, however, Texas law does not require that the recording contain an *express* waiver of rights, so long as the rights are properly administered, the

defendant appears to understand the rights, and the confession then follows. See *Rocha v. State*, 16 S.W.3d 1, 12 (Tex. Crim. App. 2000); *Etheridge v. State*, 903 S.W.2d 1, 16 (Tex. Crim. App. 1994), *cert. denied*, 516 U.S. 920, 116 S.Ct. 314 (1995); *Barefield v. State*, 784 S.W.2d 38, 40-41 (Tex. Crim. App. 1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3256 (1990). Moreover, Texas law does not require the police to inform the defendant that his confession is being tape-recorded. *Moore v. State*, 882 S.W.2d 844 (Tex. Crim. App. 1994). Also, note that statements made to undercover officers, even while in custody, do not implicate *Miranda*. *Illinois v. Perkins*, 496 U.S. 292, 300, 110 S.Ct. 2394, 2399 (1990).

○ Post-Waiver Invocation of Rights

A suspect must unambiguously assert his rights before law enforcement must honor the invocation of rights by ceasing questioning. Thereafter, failure to stop questioning renders subsequent statements generally inadmissible. *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321 (1975). The admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored. *Id.* at 103-104, 96 S.Ct. at 321. In *Mosley*, the Supreme Court found the following factors important to this analysis: (1) whether the suspect was informed of his right to remain silent prior to the initial questioning; (2) whether the suspect was informed of his right to remain silent prior to the subsequent questioning; (3) the length of time between initial questioning and subsequent questioning; (4) whether the subsequent questioning focused on a different crime; and (5) whether police honored the suspect's initial invocation of the right to remain silent. *Id.* at 104-105, 96 S.Ct. at 327. Thus *Mosley* created an ad hoc test in which "courts must evaluate the facts of each case to determine if the resumption of police interrogation was consistent with scrupulous observance of the right to cut off questioning." *United States v. Alvarado-Saldivar*, 62 F.3d 697, 699 (5th Cir.1995).

The right to remain silent can be invoked by remaining silent or affirmatively stating that one wishes to invoke that right. *Watson v. State*, 762 S.W.2d 591, 596-99 (Tex. Crim. App. 1988). Also, stating that one didn't see how he could assist officers or writing that the individual has nothing else to say, invokes the right. *Murphy v. State*, 766 S.W.2d 246, 249 (Tex. Crim. App. 1989); *Autry v. State*, 626 S.W.2d 758 (Tex. Crim. App. 1982). Counsel may also invoke her client's Fifth Amendment right to counsel, on behalf of the client when the attorney-client relationship exists. *Janecka v. State*, 739 S.W.2d 813, 828 (Tex. Crim. App. 1987).

Similarly, when an individual invokes his right to counsel, all questioning must cease and the individual cannot waive his right to counsel thereafter, unless it is in the presence of his lawyer. *Murphy v. State*, 801 S.W.2d 917, 919 (Tex. Crim. App. 1991); *Minnick v. Mississippi*, 498 U.S. 146, 153, 111 S.Ct. 486, 491 (1990). However, police can continue to question an individual where an ambiguous request for counsel has been made or where the only purpose of the questioning is to clarify an equivocal invocation of the right to counsel. *Jamail v. State*, 787 S.W.2d 372, 377 (Tex. Crim. App. 1990). Moreover, a suspect's invocation of his Fifth Amendment right to silence concerning custodial questioning about one crime does not bar officers from later reinitiating custodial questioning on an unrelated crime. *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321(1975) (admissibility of custodial statement obtained after an arrestee has invoked his *Miranda* rights to remain silent depends on whether his "right to cut off questioning" was scrupulously honored; exercise of right to terminate interrogation does not prohibit all further questioning by police officers on all subjects for all time).

Invocation of one's right to counsel or to remain silent is also inadmissible. *Hardie v. State*, 807 S.W.2d 319, 322 (Tex. Crim. App. 1991) (invocation of right to counsel); *Waldo v. State*, 746 S.W.2d 750, 755 (Tex. Crim. App. 1988) (invocation of right to silence). Be forewarned, however, that the Court has signaled that pre-*Miranda* silence may be commented on as substantive evidence of the defendant's guilt:

The prosecutor in this case believed that because appellee was not under custodial interrogation, the evidence was admissible. This was a legitimate view of the law as interpreted by some federal courts, including the Fifth Circuit. ... Given that the law on this constitutional issue had not been addressed by the United States Supreme Court or by this Court, and in view of the split among the federal courts of appeals, the prosecutor did not disregard a "risk" that a mistrial would be "required" or even that a mistrial would be "reasonably certain" to occur. Neither could the prosecutor have intended to induce a mistrial, given the fact that such evidence has not been held inadmissible by this Court, and has indeed been held admissible by the Fifth Circuit and some of the other federal courts.

State v. Lee, 15 S.W.3d 921, 925-26 (Tex. Crim. App. 2000); see also *Waldo*, 746 S.W.2d at 755 (holding in dicta that "[p]rearrest silence is a constitutionally permissible area of inquiry").

o **Right to Counsel**

Statements taken from a person when his right to counsel has attached is inadmissible unless an express waiver of the right to counsel is made. *Massiah v. United States*, 377 U.S. 201 (1964). In Texas, this waiver can only be effective if made in the presence of counsel. See *Holloway v. State*, 780 S.W.2d 787, 795 (1989) (where a relationship between the accused and his attorney is established after the Sixth Amendment has become applicable, the Sixth Amendment precludes dissolution of that relationship in the absence of counsel).

The Sixth Amendment right to counsel does not attach until initiation of formal proceedings, whether by way of formal charge, preliminary hearing, indictment, information or arraignment. *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882 (1973). It also attaches for eyewitness identification procedures. *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951 (1967).

The Sixth Amendment is not violated, however, by the questioning by foreign police of an indicted defendant outside the presence of his attorney, unless the circumstances surrounding the confession shock the conscience of an American court; or American law enforcement personnel participate in the foreign interrogation or if the foreign authorities are acting as agents for their American counterparts. *Goldberg v. State*, 95 S.W.3d 345, 382 (Tex. App.—Houston [1st Dist.] 2002, pet. pending).

➤ **WAS THE CONFESSION TRULY VOLUNTARY?**

o **Voluntariness Generally**

The test for determining whether a confession was made voluntarily is well established: the totality of the circumstances surrounding the making of the confession must be examined to determine whether the confession was "the product of an essentially free and unconstrained choice by its maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041(1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860 (1961)); accord *Haynes v. Washington*, 373 U.S. 503, 513-14, 83 S.Ct. 1336, (1963); *State v. Terrazas*, 4 S.W.3d 720, 723 (Tex. Crim. App. 1999); *Griffin v. State*, 765 S.W.2d 422, 428 (Tex. Crim. App. 1989); *Creager v. State*, 952 S.W.2d 852, 855 (Tex. Crim. App. 1997). Conversely, a statement is involuntary "only if there was official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker." *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex.

Crim. App. 1995); *accord Colorado v. Connelly*, 479 U.S. 157, 164, 107 S.Ct. 515 (1986) ("Absent [coercive] police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.")

o **Coercion**

Police misconduct violates concepts of fundamental fairness. The leading case on police coercion under the Due Process Clause is *Brown v. Mississippi*, 297 U.S. 278 (1936). In *Brown*, the defendant had been twice hung from a tree, whipped and whipped again, and continually whipped until he confessed. Moreover, taking advantage of a defendant's frailties may also be deemed by a court to be violative of the Due Process Clause. In *United States v. Koch*, 552 F.2d 1216 (7th Cir. 1977), for example, officers who were aware of the suspect's claustrophobia and suicidal tendencies, kept Koch in a six foot by eight foot cell, thus invalidating his subsequent confession. Other methods of inherently coercive techniques include: long periods of being held incommunicado, *Ziang Sung Wan v. United States*, 266 U.S. 1 (1924); relay questioning, in which unremitting pressure is kept on the defendant by relay interrogation teams, *Ashcroft v. Tennessee*, 322 U.S. 143 (1944); intermittent and systematic questioning, *Chambers v. Florida*, 309 U.S. 227 (1940); questioning in isolation in a deserted location, *White v. Texas*, 310 U.S. 530 (1940); or being moved from jail room to jail room being questioned by numerous persons, *Mort v. Texas*, 316 U.S. 547 (1942).

Actual violence provides the only exception to the requirement that government action provide the coercion because actual violence renders a statement inherently unreliable:

When [physical violence or the threat of it] is present, there is no need to weigh or measure its effects on the well of the individual victim. The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality is too untrustworthy to be received as evidence of guilt.

Stein v. New York, 346 U.S. 156, 182 (1953); *see also United States v. Murphy*, 763 F.2d 202, 207-08 (6th Cir. 1985) (holding confession obtained by fear of police dog involuntary).

The use of a person's religious convictions to elicit a confession may be deemed to be coercive in nature. In *State v. Nelson*, 748 P.2d 865 (Hawaii 1987), the police officer counseled the suspect in a phone harassment case. The Court found that the officer's religious counseling was coercive. *See also Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 176 (1966). The dividing line between when deception is coercive and when it is not is determined on the basis of whether the deception is likely to elicit untrue statements from a suspect. Telling a suspect untruths about his case tends to be accepted. But if the falsehood overbears the will of the suspect, it will render the confession involuntary. *See Lymines v. Illinois*, 372 U.S. 528, 83 S.Ct. 917 (1963); *Spano v. New York*, 360 U.S. 315, 79 S.Ct. 1202 (1959).

o **Prior Illegal Conduct – Cat Out of the Bag Theory**

In *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285 (1985), the Court held that an initial, unwarned inculpatory statement does not bar the admissibility of a warned confession made shortly thereafter. The Court noted that it "has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver." *Elstad*, 105 S.Ct. at 1295; *see also United States v. Bayer*, 331 U.S. 532, 540-41, 67 S.Ct. 1394 (1947) ("[T]his Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."); *In re R.J.H.*, 79 S.W.3d 1, 6-9 (Tex. 2002) (good discussion of "cat out of the bag" and voluntariness in juvenile confession proceedings); *Griffin v. State*, 765 S.W.2d 422, 431 (Tex. Crim. App. 1989) (juvenile's confession not involuntary and inadmissible merely because she had made an earlier statement at a time when she was not given admonishments by a magistrate as required by the Family Code); *Bell v. State*, 724 S.W.2d 780, 788 (Tex. Crim. App. 1986); *Sterling v. State*, 800 S.W.2d 513, 519-20 (Tex. Crim. App. 1984).

o **Direct Promises**

Confessions are also deemed to be coerced if they are made in light of an implied promise or threat. The leading case is *Bram v. United States*, 168 U.S. 532 (1897), in which the Supreme Court stated that a voluntary confession is "not obtained by any direct or implied promises, however slight."

Generally, the promise must be made or sanctioned by a state actor. To render a confession involuntary for purposes of Article 38.21, promises

must be positive, *i.e.*, of some benefit to the declarant, made or sanctioned by a person in authority, and of such a character as would likely influence the accused to speak untruthfully. *Long v. State*, 823 S.W.2d 259, 277 (Tex. Crim. App. 1991), *cert. denied*, 505 U.S. 1224, 112 S.Ct. 3042 (1992); *Fisher v. State*, 379 S.W.2d 900 (Tex. Crim. App. 1964).

In *Janecka v. State*, 937 S.W.2d 456, 466 (Tex. Crim. App. 1996), the Court of Criminal Appeals held that any alleged promises made by a third-party documentarian did not render the recorded statement involuntary because the documentarian was not a "person in authority" and did not make promises that would have prompted a confession.

➤ RIGHT TO HEARING

Article 38.22, Section 6, sets out the procedures for litigating voluntariness claims in "all cases where a question is raised as to the voluntariness of a statement of an accused." This statute tracks the procedures mandated by the United States Supreme Court and Texas Court of Criminal Appeals in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 1780-88 (1964), and *Lopez v. State*, 384 S.W.2d 345, 347 (Tex. Crim. App. 1964).

The typical scenario for litigating voluntariness questions usually involves a defendant presenting evidence that the police used unconstitutional methods to obtain a confession with the prosecution controverting this evidence with evidence that the police used constitutional methods to obtain the confession. *See, e.g., Alvarado v. State*, 912 S.W.2d 199, 210-11 (Tex. Crim. App. 1995) (defendant testified pretrial that police coerced his confession which the police denied). If a defendant testifies pretrial, the scope of cross-examination is limited to the issue of voluntariness, and the fact that the defendant testifies pretrial does not compel him to take the stand at the trial on the merits. *State v. Terrazas*, 4 S.W.3d 720, 725 n.3 (Tex. Crim. App. 1999).

When a defendant presents evidence raising a voluntariness question, the prosecution must controvert that evidence and prove voluntariness by a preponderance of the evidence. *See Alvarado*, 912 S.W.2d at 211; *Muniz v. State*, 851 S.W.2d 238, 252 (Tex. Crim. App.), *cert. denied*, 510 U.S. 837, 114 S.Ct. 116 (1993) (prosecution need not rebut defendant's "assertions" but only controvert them). However, the prosecution is not put to this burden unless a defendant presents evidence that raises a voluntariness question. *See Article 38.22, Section 6* (not applicable unless "a question is raised as to the voluntariness of a statement"); *Romero v. State*, 800 S.W.2d 539, 544 fn. 7 (Tex. Crim. App. 1990) ("voluntariness must be put in issue by facts before it

is an issue"); *Dunn v. State*, 721 S.W.2d 325, 336 (Tex. Crim. App. 1986); *compare Article 38.22, Section 7* (trial court not required to submit voluntariness question to jury unless "issue is raised by the evidence").

Hearings on the voluntariness of confessions may not be conducted on paper by the filing of affidavits or other written pleadings but must be conducted in a live hearing. *Garcia v. State*, 15 S.W.3d 533 (Tex. Crim. App. 2000).

The legislature has specifically authorized "paper hearings" in a limited number of contexts. That the legislature has used language which specifically authorizes such a procedure in one specific setting (e.g., habeas hearings pursuant to Tex. Code Crim. Proc. art. 11.07), but has omitted such language in another (e.g., hearings pursuant to Tex. Code Crim. Proc. art. 38.22), suggests that the legislature did not intend for such a procedure to be used in the latter setting; if the legislature had so intended, it would likely have said so specifically, as it did in the former setting. The legislature did not use language permitting use of affidavits in Tex. Code Crim. Proc. art. 38.22, and, therefore, we must assume that "paper hearings" are not approved in that setting.

Garcia, 15 S.W.3d at 536.

The trial court has the duty, even in the absence of a specific request for a hearing, to respond when an issue is raised concerning the voluntariness of a confession by holding a hearing and making express findings of fact and conclusions of law on the issue. *McNeill v. State*, 650 S.W.2d 405, 407 (Tex. Crim. App. 1983). The failure of the court to make a determination of voluntariness outside the presence of the jury is reversible error. *Madden v. State*, 691 S.W.2d 688, 690-91 (Tex. Crim. App. 1985); *McNeill*, 650 S.W.2d at 408.

To raise an issue regarding the voluntariness of a confession requires that some evidence must be presented to the jury that the confession was not given voluntarily. *Hernandez v. State*, 819 S.W.2d 806, 812 (Tex. Crim. App. 1991). If there is no evidence raising the issue, an accused is not entitled to a jury charge on the matter. *Id.* If, however, there is evidence presented at trial that raises a factual dispute over whether a defendant's written statement was voluntary, he is entitled to an instruction in the jury charge advising the jury generally on the law pertaining to such statement. *Dinkins v. State*, 894 S.W.2d 330, 353 (Tex. Crim. App. 1995).

REFERENCES

DIX AND DAWSON, *TEXAS PRACTICE*, Vol. 41 “Confessions” (West 2001 ed.). This is the “Bible” for Texas practitioners. Unfortunately, if you live outside a metropolitan area, it may not be readily available. If there was one set of books I could buy as a Texas criminal law practitioner, this would be it. Worth every cent.

McCormick Blackwell and Blackwell, *Texas Practice Series*, “Criminal Forms and Trial Manual”. (West 2004 ed.). The best and most consistent of the “forms” books. It’s greatest strength is that like “Dix and Dawson”, it’s accepted by almost every Texas court as gospel, even though it is a secondary source.

Grimes, *Criminal Law Outline, Supreme Court Term 2003-2004*, the National Judicial College (31st ed., 2004). Published each year and contains only US Supreme Court decisions in synopsis form under a myriad of different topics. Maybe the “handiest” of all criminal law books because it can get you started in an instant.

TEXAS CODE OF CRIMINAL PROCEDURE, Arts. 38.21, 38.22 & 38.23

38.21 STATEMENT

A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed

38.22 WHEN STATEMENTS MAY BE USED

Sec. 1. In this article, a written statement of an accused means a statement signed by the accused or a statement made by the accused in his own handwriting or, if the accused is unable to write, a statement bearing his mark, when the mark has been witnessed by a person other than a peace officer.

Sec. 2. No written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:

(a) the accused, prior to making the statement, either received from a magistrate the warning provided in [Article 15.17](#) of this code or received from the person to whom the statement is made a warning that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

(2) any statement he makes may be used as evidence against him in court;

(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview at any time; and

(b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

Sec. 3. (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:

(1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement;

(2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;

(3) the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;

(4) all voices on the recording are identified; and

(5) not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article.

(b) Every electronic recording of any statement made by an accused during a custodial interrogation must be preserved until such time as the defendant's conviction for any offense relating thereto is final, all direct appeals there from are exhausted, or the prosecution of such offenses is barred by law.

(c) Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.

- (d) If the accused is a deaf person, the accused's statement under Section 2 or Section 3(a) of this article is not admissible against the accused unless the warning in Section 2 of this article is interpreted to the deaf person by an interpreter who is qualified and sworn as provided in [Article 38.31](#) of this code.
- (e) The courts of this state shall strictly construe Subsection (a) of this section and may not interpret Subsection (a) as making admissible a statement unless all requirements of the subsection have been satisfied by the state, except that:
- (1) only voices that are material are identified; and
 - (2) the accused was given the warning in Subsection (a) of Section 2 above or its fully effective equivalent.

Sec. 4. When any statement, the admissibility of which is covered by this article, is sought to be used in connection with an official proceeding, any person who swears falsely to facts and circumstances which, if true, would render the statement admissible under this article is presumed to have acted with intent to deceive and with knowledge of the statement's meaning for the purpose of prosecution for aggravated perjury under [Section 37.03 of the Penal Code](#). No person prosecuted under this subsection shall be eligible for probation.

Sec. 5. Nothing in this article precludes the admission of a statement made by the accused in open court at his trial, before a grand jury, or at an examining trial in compliance with [Articles 16.03](#) and [16.04](#) of this code, or of a statement that is the *res gestae* of the arrest or of the offense, or of a statement that does not stem from custodial interrogation, or of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness, or of any other statement that may be admissible under law.

Sec. 6. In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions. If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed among the papers of the cause. Such order shall not be exhibited to the jury nor the finding thereof made known to the jury in any manner. Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury

and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof. In any case where a motion to suppress the statement has been filed and evidence has been submitted to the court on this issue, the court within its discretion may reconsider such evidence in his finding that the statement was voluntarily made and the same evidence submitted to the court at the hearing on the motion to suppress shall be made a part of the record the same as if it were being presented at the time of trial. However, the state or the defendant shall be entitled to present any new evidence on the issue of the voluntariness of the statement prior to the court's final ruling and order stating its findings.

Sec. 7. When the issue is raised by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to such statement.

Sec. 8. Notwithstanding any other provision of this article, a written, oral, or sign language statement of an accused made as a result of a custodial interrogation is admissible against the accused in a criminal proceeding in this state if:

- (1) the statement was obtained in another state and was obtained in compliance with the laws of that state or this state; or
- (2) the statement was obtained by a federal law enforcement officer in this state or another state and was obtained in compliance with the laws of the United States.

38.23 EVIDENCE NOT TO BE USED

- (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of **Texas**, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

- (b) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.

TDCAA, TCDLA & NACDL. These three on-line professional associations maintain motions and brief banks that are available to members only. They also

offer listserves where you can post a question and usually get an immediate response.¹¹ Many lawyers who have found themselves in a pinch have posted a question for a brief on a subject and gotten exactly what they need in a form that can be adapted to their client's use in a few minutes. If you are a prosecutor in a bigger office, then your office will maintain a collection of motions and responses that have been successfully used in the past. If you are in a rural prosecutor's office, you need to cultivate a friend in the nearest metropolitan DA's office so you can tap that resource.

Texas Criminal Defense Lawyers Association web site. <http://tcdla.org/>

Texas District and County Attorneys Association web site, <http://tdcaa.com/>

National Association of Criminal Defense Lawyers Association web site, <http://www.criminaljustice.org/>

“Reid Technique”© – www.reid.com/ John Reid's “Technique” is one of the most popular, most taught and often most controversial methods of interrogation out there. Once you understand how it works, you will recognize it immediately. Remember, for both sides, admissibility is only a preliminary issue. If the confession or admission comes in, push hard to see the interrogation. Prosecutors may want to try to keep the “interrogation” from the jury while defense lawyers may want it in on the theory that the jury needs to see how the sausage was made. Some of the most skillful courtroom fights today are fought not over the admissibility of the confession, but the methods used to extract it. Some jurors are very offended by “Reid” and other lawful tactics, such as being able to legally lie to a defendant about evidence (but not make promises or legal misrepresentations). It takes a well-prepared prosecutor to defend against this type of attack, but it can be done.

Missouri v. Seibert, ___ U.S. ___; 124 S.Ct. 2601 (2004). *Miranda* warnings given mid-interrogation, after being intentionally withheld during initial interrogation where defendant gave unwarned confession, were ineffective, thus confession repeated after warnings were given was inadmissible at trial. See pp. _____, for a good listing of resources on

interrogation techniques. The best are listed, so I will not repeat them.

Tarleton Law Library On-line. Here is a resource about which many Texas lawyers are simply unaware. The University of Texas School of Law's library is on-line. You can access it by cutting and pasting this link into your browser -- <http://tallons.law.utexas.edu/> Once you locate a book or article, depending on its availability, you may be able to have it sent to you or you may be able to find it in one of the new databases (other than Westlaw or Lexis/Nexus) where many essential treatises are being scanned and made available to the public for a fee that's much better than West.

The Sullivan Report – Thomas P. Sullivan is a former United States Attorney for the Northern District of Illinois and is a partner at Jenner & Block, LLP in Chicago. He was part of the Ryan Commission which declared a moratorium on executions in Illinois. His report is specifically on police interrogations. It is full of extremely useful information and links to other resources. There was also a minority report, not included in this paper, arguing that only the “confession” part of a defendant's statement should be recorded, not the “interrogation” part. For those of you who believe this is a good idea, start with this link and see if you can't find the minority report. At the end of the Sullivan Report is proposed legislation mandating the recording of both the interrogation and confession portions of a suspect's statement to law enforcement. <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf> You will find additional valuable information by inputting {“Sullivan report” “police interrogations”} into a Google search engine.

“The Problem with False Confessions in the Post-DNA World” 82 N.C. L. Rev. 891 (2004), Dirzen & Leo. The best article yet on why we are finding more and more false confessions in DNA based exonerations.

CONCLUSION

There is a lurking danger to prosecutors in the post-DNA world – that jurors will lose faith in confessions unless they are somehow recorded, preferably by video. That is not to say that the odds do not still favor the prosecution in a confession case where the defendant's statement is introduced solely through the testimony of a police officer. The combination of a still strong belief in the credibility of a non-recorded confession combined with the failure of many defense lawyers to take on the credibility of the confession they cannot keep out of the trial means that in the average, old fashioned confessions case, the prosecution should still win. But these courses are never about winning cases by default; rather they are

¹¹ Or you can just call John Bradley, the DA of Williamson County. He knows everything and doesn't mind sharing. I'm teasing a bit here, but John really is encyclopedic in his knowledge of law and procedure and he regularly weighs in on TDCAA's listserv.

about looking down the road or around the corner to see what's coming and to be prepared for it. For the defense lawyer, it means capitalizing on the emotions generated by "false confession" stories and working hard at cross examinations of police officers and other to underscore that they could have brought a more reliable product to the jury and simply chose not to do so. For the prosecutor it probably means stressing the importance of visually recording both the interrogation and confession. This will meet resistance from both some prosecutors' offices and from law enforcement. It should be overcome. The argument that recording the interrogation simply loads up the defense lawyers guns is, in today's world, merely choosing between different types of ammunition. The better defense lawyers are going to attack the failure to record, combine it with the implied intention of government agents, characterize the efforts of law enforcement to get the jurors to believe the confession as "trust me I'm the government" based evidence and in the end, co-opt the very thing Texas prosecutors have successfully relied on for the past twenty years – conservative juries. A study by prosecutors of the "Yogurt Shop" murder cases and their elaborate recorded confessions by the Austin Police Department may be a prime example of how the rights of the accused were meticulously protected and the cases were still won. Top tier prosecutors already know the trial tactic of not running away from "bad" portions of a visually recorded interrogation. Rather, they adopt or incorporate the behavior into the theory of their case, they repeat the bad portions of the visual enough times during the trial that it loses its magic and robs the defense lawyer of his thunder. (Inoculation Theory.)

The answer to the confession dilemma is video recording the entire process. To old line prosecutors this may seem ridiculous. Others may view it as counter-intuitive, which it is. Today, many metropolitan police departments in Texas routinely record interrogations in major crimes cases. In the long run that practice will not result in fewer convictions, but it will result in a higher degree of confidence by the public in those convictions. Until that time,