

Wisconsin Criminal Justice Study Commission

Summary of Commission meeting held on 2/23/06 at Marquette University in Milwaukee, WI.

Present for Commission meeting: Kelli Thompson, Dan Blinka, Thomas Hammer, Penny Beerntsen, Keith Findley, Michael Smith, Fred Fleishauer, Bob Donohoo, Gerry Mowris, Nanette Hegerty, Ken Hammond, Scott Horne, Jerry Buting, Emily Mueller, Mike Malmstadt, John Charewicz, Floyd Peters, Noble Wray, Steve Glynn

Not Present: Suzanne O'Neill, Gerard Randall, Walter Dickey, Dan Bach, Enrique Figueroa, Cheri Maples, Bill Grosshans,

Chaired by: Mike Malmstadt

Staffed by: Byron Lichstein

Malmstadt opened the meeting by introducing the first presenter, Joseph Buckley, the president of Reid & Associates.

Buckley began by explaining that the "Reid technique" is the preeminent method for police interviewing in the U.S. (1-2). Reid & Associates has trained over 16,000 individuals, and does 6 or more training programs a year in Wisconsin.

Buckley said that the Reid technique is a two-step process. The first part is a non-accusatory interview, designed to elicit the "who, what, when, where, and why" of the case by asking a series of non-threatening questions. The purpose of the interview is also to allow the interviewer to evaluate the suspect's truthfulness by analyzing the suspect's verbal answers and nonverbal behavior (2). (For instance, as to verbal answers, interviewers are taught that, when asked "What should happen to someone who commits this kind of crime?," an innocent person will answer that the person should be punished severely, while a guilty person will search for reasons that severe punishment might not be warranted. As to non-verbal behavior, interviewers are taught to analyze "behavioral symptoms," such as posture, gestures, and body language). During the interview, the suspect does most of the talking.

Buckley then described the second stage of the Reid technique, the interrogation. The interrogation is the opposite of the interview, because it is accusatory and because the interviewer, not the suspect, does almost all the talking. In interrogation, the interviewer begins by stating that he/she is absolutely certain that the suspect committed the crime, and the interviewer offers the suspect psychological justifications for having committed the crime (justifications that lessen the suspect's degree of culpability).

Buckley then showed a videotape of an interview (3), and then a videotape of an interrogation (4).

Buckley explained that, when a suspect denies committing the crime during interrogation, interrogators are taught to discourage denials and not allow the suspect to finish them (5). (Buckley said that innocent people will be much more forceful with their denials than guilty people.)

Buckley also described the "alternative question method" (5-6). This is when the interrogator gives the suspect two choices about why the suspect committed the crime, such as "Jim, did you plan on doing this for a long time, or is it just something that happened on the spur of the moment?" (6). Buckley said that a third choice (that the suspect did not commit the crime at all) is always implicit.

Buckley said the police sometimes get into trouble applying the alternative question method by using it improperly. This can occur when the alternative question explicitly conveys a threat of punishment or a promise of leniency. Buckley said that the Reid technique teaches interrogators not to talk explicitly about punishment or leniency, because those possibilities will be implicit in the context of the interrogation and will therefore be on the suspect's mind anyway.

Buckley also noted that the Reid technique has a link on its website about false confessions (7). Buckley said that most false confession cases involve juveniles, mentally impaired people, or illegal police practices.

Malmstadt then introduced the next presenter, Richard Leo, a professor of psychology and criminology at the University of California-Irvine (7).

Leo explained that he has spent a large part of his career researching false confessions. Leo said that the goal of false confession research is to get more true confessions and fewer false confessions.

Leo noted that approximately 20 to 25% of the 174 DNA exonerations involved false admissions or false confessions. He noted that convicting someone based on a false confession is a multi-step process, beginning with the police mis-classifying an innocent person as guilty, followed by the interviewer eliciting an incriminating statement from the person, followed by transforming the admission into a persuasive narrative that convinces a prosecutor and ultimately a judge or jury that the person is guilty (9).

Leo began by discussing the first of these steps—misclassifying innocent people as guilty (10). He said that interrogators are taught to act as human lie detectors, by looking for behavioral symptoms that are supposed to be indicative of truth telling. Leo said that the Reid technique claims that its investigators achieve 85% accuracy at discerning truth-telling based on behavioral symptoms. Leo said that empirical scientific research contradicts this claim, showing that people are not capable of detecting truth-telling at levels significantly better than chance. Leo said that this research demonstrates that the behavioral cues relied on by the Reid technique are not indicative of truth-telling, but are instead symptoms of stress manifested both by people who are telling the truth and by people who are lying (10). Leo said that, based on this research, police should be

encouraged to move away from relying on behavior analysis to determine whether someone is telling the truth.

Leo then summarized the psychological process employed by the Reid technique as, first, convincing the suspect that he is caught and that his situation is hopeless (often by presenting false evidence), and, second, offering the suspect inducements, or “motivators,” which are reasons why the person is better off confessing. Leo said that this psychological interrogation process can work very effectively on guilty people, but it can also work effectively on innocent people (12).

Leo said that there are different kinds of false confessions by innocent people (12). One kind is when an innocent person confesses, but knows all along that they are falsely confessing. This occurs because the person wants to escape the pressures of the situation or believes that he/she will be able to prove his/her innocence later on. Another kind of false confession is called an “internalized” or “persuaded” false confession, in which the suspect comes to believe that he must have committed the crime but does not remember doing so (many of these kind of false confessions involved drug addicts and alcoholics) (13).

Leo then discussed commonalities in the false confession cases (13). He said most of the false confession cases involve a presumption of guilt on the part of the interrogator, in which the goal of the interrogation is to elicit an admission and the method of interrogation leave little room for considering the possibility that the suspect’s denials are true. Leo noted that the presumption of guilt is especially dangerous if it is based on behavior symptom analysis, which, as he described earlier, is an unreliable method.

Leo said that another commonality in the false confession cases is the use of false evidence (14). (Leo noted that the research community is divided on whether police should be allowed to use false evidence).

Leo said that another commonality in the false confession cases is some form of inducement, where the suspect is presented with some benefit of confessing (15). Leo said that, although Reid & Associates tell interrogators not to *explicitly* offer promises or threats concerning punishment, many of the themes and alternative choices taught to interrogators *implicitly* convey threats or promises. Leo suggested that one potential reform is limiting the kind of themes and alternative choices that are permissible, in order to limit the amount of threats and promises that are implicitly conveyed.

Leo then responded to Buckley's comment that false confessions are driven largely by individual vulnerabilities. He said that a basic principle of social psychology is that the more coercive and draining an activity is, the less individual personality matters in explaining the outcome of the activity. Thus, Leo suggested that, as an interrogation becomes longer and more coercive, the individual vulnerabilities of the person being interrogated matter less in explaining why a false confession occurred (15-16).

Malmstadt then introduced the next presenter, Ken Hammond, the Director of Law Enforcement Education at the Wisconsin Department of Justice. (Before his presentation, Hammond provided a number of handouts that he discussed during his presentation).

Hammond described the training currently being conducted by the Wisconsin Attorney General's Office on the topic of electronic recording and police interviewing. Hammond explained that the AG has implemented a model policy on electronic recording and conducted training sessions around the state on some of the issues raised by recording. That training included presentations by Neil Nelson, a commander with the St. Paul Police Department, who has developed a method for suspect interviewing in the post-electronic recording world.

Hammond then described Nelson's technique (17). Hammond said that Nelson emphasizes the interviewer's role as an impartial gatherer of facts. In this role, the interviewer should look for and explore provable lies. Hammond also explained that Nelson emphasizes softening the police presence, softening the adversarial nature of the interview, and respecting the anxiety of the suspect. (Therefore, Hammond said that Nelson's method departs somewhat from other models of interrogation). Hammond also noted that, with electronic recording, interviewers need to be more careful about their conduct because that conduct will be memorialized forever, but he added that electronic recording has the potential to restore the public's trust in law enforcement (18). Hammond said that Nelson has been very well-received in Wisconsin, in part because his approach is viewed as law enforcement friendly (19).

Hammond said that, in Nelson's experience, electronic recording has been the "best tool ever shoved down law enforcement's throat" (17).

Hammond then described the Attorney General's model policy on electronic recording (18). Hammond walked the commission members through the various documents in the model policy binder and the various elements of the Attorney General's training program (19).

Malmstadt then introduced the next presenter, Steve Drizin, the Director of the Center on Wrongful Convictions at Northwestern University Law School. Drizin began by discussing a document from 2001 that described Reid & Associates' approach to interrogating juveniles. According to Drizin, the document contained a number of fundamental misconceptions about juveniles: 1) the document stated that children are increasingly involved in more serious crimes (Drizin said that national crime statistics did not support this claim), 2) the document stated that children are more resilient than adults in telling and maintaining lies (Drizin said that the opposite is true), 3) the document stated that children have a mature understanding of the lenient consequences of the juvenile justice system and are therefore more likely to lie about their crimes (Drizin said that, on the contrary, the lenient consequences in the juvenile justice system are often used effectively by law enforcement to convince juveniles to confess) (21).

Drizin then discussed a number of empirical facts about juveniles that render them vulnerable to false confessions (22). He said that children are less able to understand their Miranda rights, which results in them waiving their Miranda rights 95% of the time. (Drizin applauded Reid & Associates new, more thorough approach to explaining Miranda rights to children, and he suggested that Wisconsin police might want to adopt that approach). Drizin said that children are more impulsive than adults, less capable of understanding the long-term consequences of their actions (and therefore more inclined toward immediate gratification), and more compliant with authority figures than adults. This means that the accusatory, guilt-presumptive, inducement-offering practices promoted by some interrogation techniques are likely to be very powerful when used on children (22).

Drizin said that the alternative question method, promoted by the Reid technique, should not be used on children and adolescents because, when presented with two forced choices, children will choose one or the other even if neither is correct.

Drizin said that, overall, the commission should grapple with the issue of whether confrontational interrogation techniques play well on tape, and particularly whether they play well on tape when used on children (23).

Drizin also noted problems with the "post-admission narrative" (the portion of an interview, after an admission, when police try to establish the suspect's knowledge of the details of the crime). He said that police officers, after obtaining an admission, often fail to get the suspect to freely narrate the details of the event, and instead taint the narrative by feeding the suspect the details police want to elicit (23-24). This is problematic because it can make the confession appear credible when in fact it is not, and because it can spoil the opportunity to elicit previously unknown information from the suspect (28). Drizin said that courts, in evaluating the reliability of confessions, should focus on whether a suspect's confession provides details previously unknown to the police. Drizin said that courts should evaluate the reliability of confessions before the confessions reach juries, because once a confession reaches a jury it is almost certain to result in a conviction, whether it is a reliable confession or not (28-29).

Drizin showed two videotapes of interrogations of juveniles and briefly discussed the tapes (24-28).

Malmstadt then began a discussion among the Commission members (29).

Buckley agreed with Leo and Drizin that obtaining a non-leading, post-admission narrative is important in evaluating the reliability of a confession (29). However, he noted that even with a true confession the narrative will leave details out because suspects will not disclose everything.

In response to a question from Horne, Buckley also stated that Reid & Associates is cognizant of the fact that juveniles can be more susceptible to persuasive techniques than adults (29-30).

Buting asked Drizin to elaborate on the factors a judge should consider in conducting a pre-trial reliability hearing for a confession (31). Drizin said courts should consider 1) whether the confession fits with the objectively knowable facts of the crime, 2) whether the confession contains non-public details that would be known only by the police or the true perpetrator, and 3) whether the confession led police to information they didn't already know.

Leo added that the current legal doctrines concerning confessions—primarily Miranda and voluntariness—are irrelevant to reliability (32). Because of the failure of these existing legal doctrines, Leo and Drizin are trying to get courts to bring reliability back into the evaluation of whether a confession should be admissible.

Malmstadt asked how many of the documented false confessions are recorded, and he suggested that Leo and Drizin's reliability approach could only be implemented with an electronic recording (32). Leo agreed.

Drizin said that he did not believe electronic recording is a panacea for the false confession problem, because electronic recording may only provide an opportunity for prosecutors, defense attorneys, judges, and juries prevent a false confession from leading to a wrongful conviction (32). He said the underlying problem of false confessions needs to be addressed through changes in interrogation techniques and changes in the length of interrogations.

Findley expressed concerns about "guilt-presumptive" interrogation techniques, because they encourage police to engage in "tunnel vision," a process that causes police to prematurely focus on the wrong suspect and then filter all other evidence through the lens of guilt. He noted examples of non-guilt presumptive approaches (including Neil Nelson as well the concept of "investigative interviewing" used in Great Britain), and he asked whether confrontational tactics that employ deception are actually necessary to obtain confessions (34).

Buckley responded that he did not believe lying about evidence is necessary. He said he thinks it is legitimate to "bait" a suspect about evidence, by implying that when the results of forensic testing come back they *will be* inculpatory (34-35).

Buckley also responded to Leo's discussion that people are poor lie detectors. He criticized some of the empirical research, noting that he did not believe the findings apply to the real world, and he stated that Reid & Associates' own research, which found an 85% accuracy rate for investigators' lie-detection abilities, is more applicable to the real world (35). (Leo again responded to this point on 38).

The presenters agreed that the answer to Findley's question (whether accusatorial, guilt-presuming tactics are necessary to obtain confessions, or whether other less risky methods are equally effective) is "we don't know," in part because accusatorial, guilt-

presuming techniques have been predominant for approximately 70 years, which means we lack a standard of comparison (35).

Leo said that he thinks the Reid Technique needs to change, and he described several alternative interrogation techniques that are not guilt-presumptive and accusatory. He noted a book on the English approach to interviewing (*Investigative Interviewing* by Tom Williamson), as well as Neil Nelson and another American approach pioneered by a researcher named Paul Ekman.

Buting expressed doubts about whether electronic recording will prevent jurors from convicting people who falsely confess. He said he doubts that many jurors would react negatively to the use of accusatory, deceptive techniques (39).

Blinka said that the concern about false confessions may also reflect a lack of faith that the trial and plea negotiation processes are accurately sifting the guilty from the innocent (39).

Smith expressed concern about the Reid standard for determining when to shift from an interview to an interrogation. He said that, given the enormous consequences of a confession, the decision to shift into the confession-driven interrogation should be given careful consideration (40-41). Buckley said that the standard is subjective and depends on the interrogator's impression of the suspect's truthfulness. Malmstadt agreed that the standard may be too subjective, because it may encourage police to proceed to the interrogation on a hunch rather than first checking out other potential leads (43).

Hegerty expressed concern that, if we change the interrogation techniques that police have been using for many years, it may reduce the system's ability to convict the guilty (44). Findley said that it is his understanding that in England, where accusatory interrogation techniques are not used, the confession rate is unaffected. Glynn asked whether any country has outlawed deception in interrogation. (Buckley noted again that Reid & Associates does not believe deception is necessary)(46). Glynn said that, in his experience, deception is used regularly (47). Leo said England and Iceland do not use accusatory techniques and have outlawed deception, but confession rates have not gone down. Findley added that Neil Nelson would agree on that point.

Several of the members stated that it might be beneficial for the commission to study the issue of whether accusatory interrogation techniques and deception affect the rate of confessions. (The members noted that this would be possible now that Wisconsin has mandated electronic recording) (45). The members agreed that it would be beneficial for Wisconsin authorities to preserve the recordings and make them available for study, although there are cost issues to doing so (48).

Glynn asked the law enforcement representatives to comment on how frequently deception is used and what kinds of deception are used (49). Hegerty said that deception is used regularly. She added that she thinks it's very beneficial and would not want to be prohibited from using it (49 the 50).

Fleishauer suggested the commission might want to consider a limit on the length of interrogation (50). Donohoo stated that with some defendants a long interrogation is necessary and will not lead to a false confession. Hegerty said that interrogation is too fact-specific to set a general time limit for all interrogations (51). Fleishauer said that, although it might sometimes be necessary to conduct a lengthy interrogation, it might be possible to set an upper time limit on how long is appropriate. Blinka said that lengthy interrogations raise the question of how well suspects understand their Miranda rights, because you would think that a suspect who denies for a long period of time would eventually tell the police that he no longer wants to talk to them (51). Leo agreed that Miranda is not an effective deterrent against false confessions. Blinka said that the effect of Miranda was to remove any remaining potency from the voluntariness test, because after Miranda almost nothing could result in the confession being deemed involuntary (51 to 52). Blinka said that the two legal doctrines, Miranda and the voluntariness test, interact in a manner that renders Sixth amendment rights inadequate (51-52).

Leo suggested that the commission needs to move beyond Miranda (53). He suggested that the commission should consider the fact that interrogation is important and legitimate, but that it should be conducted in accordance with best practice guidelines geared toward eliciting as many true confessions and as few false confessions as possible (54).

Donohoo said that the general public would definitely approve of the use of deception if it led to the discovery of important evidence (55). Malmstadt said that, if that's the case, why not have a rule of admissibility that allows deception only if it leads to good evidence. Donohoo agreed that the idea would be worth pursuing. Donohoo added that current Wisconsin case law supports the idea that such a reliability test already exists, because a case called *State v. Moss*, 267 Wis. 772, allows courts to exclude confession evidence under the rules of evidence if it is unreliable (56-57).

Smith asked whether making all confessions inadmissible would be a good idea (58). Drizin said that he would be afraid that too many cases would be impossible to prosecute because the confession is often the only evidence. Smith asked how frequently this would occur. Hegerty and Donohoo both argued that making confessions inadmissible would risk losing too many convictions of the guilty (59).

Malmstadt said that he sensed there is some consensus in the commission around devising some kind of pretrial reliability test (59). Buting said he had some doubts about the idea because he feared that it would become nothing more than a rubber stamp finding that the confession was reliable enough to reach the jury (60). He also said that bringing reliability back in might result in the voluntariness test losing any remaining potency. Fleishauer expressed concerns that the reliability test might invade the province of the jury. He also expressed concern that if you condition admissibility on the use of deception, you create such large disincentives to using deception that you prevent police from using it in circumstances in which it might be the only effective method (60).

Malmstadt said that, even with electronic recording, not all interaction between the police and suspects will be recorded, and it will therefore be impossible to know for sure whether the police communicated information about the crime to the suspect. This will make it difficult to know whether the suspect's confession actually led the police to evidence they did not already know about (61). Glynn agreed with Malmstadt's concern. Donohoo and Malmstadt discussed methods for addressing this problem (62).

Mowris said that he thinks the average citizen is bothered by the fact that police are allowed to lie to suspects, while citizens are not allowed to lie to police (64). Buckley said that he believes jurors are not bothered by the fact that police are allowed to lie.

Leo said that, although he is open to the argument that deception is necessary, deception should not be used on suspects for whom the only reason the police feel the person is guilty is behavioral symptom analysis (65). Leo said that every false confession case featured deception by police (66). Donohoo disagreed, stating that Milwaukee has had several false confession cases that involve vulnerable adults confessing without much police involvement. He asked whether the commission should consider a way to help police identify such vulnerable people. He asked how many false confessions have occurred in Wisconsin as a result of police interrogation, and he suggested that the number is very low, so low that, although he supports the idea of implementing a new reliability test, he does not believe that a drastic change in police interrogation techniques is called for (67-68).

Leo reiterated his belief that deception should only be used when there is some reasoned basis to believe the suspect is guilty. Hegerty said the police never interrogate someone without having a reason to believe the person is guilty (69).

Buting said that, in a case where the evidence of guilt is rather thin, it seems risky to use deception because you may elicit a false confession (71). He said it seems difficult to draw a line about how strong the evidence must be before deception is allowed. Hegerty questioned the possibility of being able to draw that line.

Mueller said that the balancing test concerning the use of deception is very difficult, because the police have a legitimate interest in trying to elicit confessions in cases in which no other evidence can be obtained, but these are the same cases in which the person being interrogated may be innocent (74). Malmstadt and Hegerty returned to this point on 76-77.

Wray said that he had some doubts about the reliability test, because he believes it might be difficult to write a bright line test that adequately accounts for all the circumstances encountered in the field (75). He said he thought it might be more appropriate to help police deal with the problem on the front end. Smith agreed that this might be approached through the police managerial structure. Leo agreed with attempting to find a method for limiting deception on the front end (to situations in which its use is justified by some reasoned basis) and then implementing a corroboration requirement on the back end (77).

Leo then suggested a rule that interrogations should last no more than four hours (as suggested in Reid & Associates' book) (77). Charewicz said this would not work because suspects would simply wait out the police until the four hours expired. Leo disagreed, noting that if a suspect wanted to end the interrogation at any point he/she could invoke Miranda.

Leo said that he thinks the commission needs to consider some bright line rules. He agreed that the reliability test for admissibility is a good idea (78). Donohoo said that the reliability test could be done in a way that it would not require judges to throw out confessions in situations in which the defendant was obviously guilty (79).

The members suggested that Byron draft two reliability tests: 1) a test that makes confession evidence inadmissible in some circumstances in which deception is used but fails to lead to corroborative evidence, 2) a test that bans deception outright.

Drizin said that the first test could create a presumption of inadmissibility when deception is used, but the prosecution could rebut the presumption by coming forward with evidence of reliability (80). He suggested that the burden on the prosecution for evidence of reliability be a "preponderance of evidence."

The members then discussed whether the admissibility test should also have a provision concerning the length of the interrogation (80-81). Leo, Glynn, and Drizin suggested that we could draft a rule making confession evidence presumptively inadmissible if an interrogation lasted more than four hours, but that police could rebut the presumption by showing the need for a longer interrogation (81). Drizin questioned whether the time provision would include time periods in which the interrogators left the room, or if it would only include periods of uninterrupted interrogation (82). Malmstadt expressed a concern that police are already under a time crunch because of the requirement to bring suspects before a judge in 48 hours, so putting more time limits makes the police's job even more difficult (83).

Wray said he didn't think a bright line rule as to time would be appropriate because the circumstances of interrogations vary so widely (84). He said an issue like time should be left to law enforcement training, not court rules (85).

Drizin suggested there should be an absolute bar to the use of deception with juveniles (87). He said that juveniles, unlike adults, are unaware that the police are allowed to lie. Hegerty said that some of Milwaukee's juveniles are hardened, streetwise criminals (88).

Hammond cautioned that he believes electronic recording is going to change interrogation tactics, and that therefore the commission might want to move slowly and see how change develops, rather than encouraging any further sweeping changes (88). He said that he thinks the reliability test is a good idea (89).

Fleishauer then attempted to clarify what proposed reliability test has sufficient consensus to merit discussing a draft at the next meeting (89-90). He summarized that the test will create a presumption of admissibility if deception is used but that the presumption can be rebutted by evidence of reliability.

Smith then said that he agrees with Wray's earlier comment that another, perhaps more effective, approach is to provide law enforcement managers with information that could help them change their procedures to increase the reliability of confession evidence (91). Smith said he and Wray would work on a document to that effect, and Mowris volunteered for that task as well (92).

Drizin then offered additional risk factors—present in many false confession cases—that the Commission may want to discuss in the future (92). He said that, sometimes when a suspect says he can't remember whether he committed the crime, police officers provide the suspect with a reason why he can't remember, such as because he might have had a blackout or because he was drunk. Drizin said this tactic is dangerous with some suspects because it can lead to "coerced-compliant" confessions in which the suspect comes to believe he committed a crime when in fact he didn't. Drizin also said that he thinks the use of polygraphs in interrogation—and particularly lying about polygraph results—is a dangerous technique. Many suspects ask for lie detector tests, then are told they failed, and this can be crushing (93). The members discussed whether they should review the mechanics and accuracy of lie detector devices, and there seemed to be a consensus that the members should review some written materials about polygraph and voice stress analysis (95).

The members discussed the documentary filmmakers who filmed the meeting (96-98).