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CHALLENGING CONFESSIONS AS INVOLUNARITLY GIVEN OR FALSELY MADE

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INTRODUCTION

Prosecutors love and defense lawyers hate cases in which the defendant has confessed to the crime. This is especially so when the confession is corroborated by other evidence (e.g., eyewitness testimony, physical and/or forensic evidence) tending to connect the defendant to the offense(s) charged.

When this happens, defense counsel's first instinct may be to angle for the best possible plea offer (if any), and sentence commitment. Rather than look for the nearest and most convenient exit ramp, counsel should first consider challenging the confession as involuntarily made (both at a suppression hearing and, if warranted, at trial), and, in appropriate cases (e.g., where a vulnerable, intellectually challenged and/or mentally ill client, or one who speaks only limited English, has been coerced or manipulated by police interrogators) by asking the jury to disregard the confession as false and unreliable.

VOLUNTARINESS

The first step is to bring a motion to suppress the defendant's statements (directly inculpatory ones and those that might later be used to contradict the defendant) pursuant to CPL 710.20 on the grounds that they were involuntarily made and/or the offspring of an illegal arrest, search, or seizure without probable cause.

CPL 60.45 (2) defines an involuntary statement as one that is obtained by: a. ANY PERSON by the use (or threatened use) of PHYSICAL FORCE upon the defendant or another person, or by means of OTHER IMPROPER CONDUCT or UNDUE PRESSURE which IMPAIRED THE DEFENDANT'S PHYSICAL or MENTAL CONDITION to the extent of UNDERMINING HIS/HER ABILITY TO DECIDE WHETHER OR NOT TO MAKE A STATEMENT or

b. by a PUBLIC SERVANT ENGAGED IN LAW ENFORCEMENT or a person acting under his/her direction or in cooperation with him/her BY MEANS OF: i: a PROMISE or FALSE STATEMENT which creates a SUBSTANTIAL RISK that the defendant MIGHT FALSELY INCRIMINATE HIM/HERSELF or ii: in VIOLATION OF THE DEFENDANT'S (FEDERAL OR STATE) CONSTITUTIONAL RIGHTS.

Police generally have broad latitude in their use of interrogation methods (e.g., good cop-bad cop, intimidation ("you're looking at the rest of your life in jail") ingratiation ("you're a smart guy, so let me help you help yourself by getting it all off your chest"), theorization ("you were angry and upset because

your spouse was cheating on you which anyone can understand"), and even deception ("your co-defendant just ratted you out," "we've got eyewitnesses, so just give it up now and the DA and the judge will see that you were cooperative").

While police don't have to (and generally do not) treat criminal suspects with kid gloves, they are not supposed to use or threaten the use of physical force, nor can they engage in a pattern of deceptive or coercive conduct or sneaky stratagems that substantially undermine his/her ability to decide whether to make a statement or which create a significant risk of false incrimination.

See, for example, *People v Thomas* (22 NY3d 629 [2014]): Detectives violated the defendant's due process rights by lying to him upon his return from the hospital psychiatric unit ("tell us what you did so the doctors can save your young son [who was already dead," and browbeating him into adopting their version of the alleged assault), and *People v Keene* (148 AD2d 689 [4th Dept 1989]): Police went too far by having the defendant bear witness through a one-way mirror to the interrogation of his pregnant wife about a burglary wherein she was threatened with felony prosecution and loss of her child to CPS, and offering her a misdemeanor if the defendant fessed up to the crime (See also *People v Tarsia*, 50 NY2d 1 [1980]).

CUSTODIAL INTERROGATION

When analyzing the voluntariness of a client's confession, counsel should determine whether the defendant was in custody (i.e., deprived of his/her freedom of movement such that an innocent person in that situation would feel unfree to leave [*People v Yukl*, 25 NY2d 585 [1969]), and also subject to interrogation (e.g., questions about the defendant's suspected criminal involvement or statements intended to elicit an incriminating response). If so, the police must inform the defendant of his/her *Miranda* rights which the defendant must knowingly and voluntarily waive before agreeing to make a statement (*Miranda v Arizona*, 384 US 486 [1966]).

In this context, counsel must examine the TOTALITY OF THE CIRCUMSTANCES, including factors pertaining to the defendant (e.g., age, intelligence, physical and mental state, experience with law enforcement), the setting and circumstances of the interrogation including: the location (defendant's home or at the police station), the degree of confinement (e.g., accessible or locked room), the duration of the interrogation and the treatment of the defendant, (food or beverage offered?), the number of interrogating officers, the tenor and tone of the interrogation (accusatory or investigatory?), and whether the defendant was arrested or free to leave when it was over (See , for example, *People v Weeks*, 15 AD3d 845 [4th Dept 205]), People v Vargas, 109 AD3d 115 [4th Dept 2013]), *People v Bron*, 153 AD3d 1164 [4th Dept 2017]).

CHALLENGING VOLUNTARINESS OF STATEMENTS AT TRIAL

If the court grants a motion to suppress statements, then the statements are out of the People's case-in-chief, thus enhancing the defendant's plea posture or chances of success at trial. If the motion is denied (or wasn't made), the defense can still raise the voluntariness issue at trial and ask the jury to disregard the defendant's statement as involuntarily made (CPL 710.70 [3]; See also *Jackson v Denno*, 378 US 368 [1964], *People v Graham*, 55 NY2d 147 [1982]).

To do so, the defense must raise the issue at trial by proper objection and offer of proof on involuntariness, thus raising a factual issue for the jury (See *People v Cefaro*, 23 NY2d 283 [1968]). As

noted in *Jackson v Denno* supra, "under the New York rule, the trial judge must make a preliminary determination regarding a confession offered by the prosecution and exclude it if in no circumstances could (it) be deemed voluntary. But if the evidence presents a question of fact as to its voluntariness, …the judge must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and…its truthfulness (citing *Stein v New York*, 346 US 156, 172 [1953]).

As a practical matter, a jury may have a hard time disregarding a confession that it has heard but if the police interrogators were overbearing and/or unfairly deceptive (and the defendant appears to be an easy mark for manipulation) they may be offended enough to entertain serious doubts about its validity.

JURY INSTRUCTION

When the defense contests the voluntariness of a confession, counsel must be sure to request the appropriate jury instruction, stressing that the People bear the burden of PROVING VOLUNTARINESS BEYOND A REASONABLE DOUBT (*People v Huntley*, 15 NY2d 72 [1965]).

Where appropriate, the jury will be instructed to consider whether the police used actual or threatened physical force, applied undue pressure or otherwise engaged in improper conduct that impaired the defendant's ability to decide whether to make a statement, considering the defendant's age, intelligence, physical condition and the conduct of police including their manner of questioning, whether any promises were made, as well as the period of detention and duration of the interrogation.

If the statement is taken in a "detention facility" (e.g. jail, holding center, police station) and is VIDEO TAPED (in particular, in cases where the defendant is charged with an A-1 felony, murder and class B violent felonies under PL Articles 125 and 130), the jury will be advised that such failure is A FACTOR that the jury MAY CONSIDER in deciding whether the statement was made and, if so, given voluntarily (See CPL 60.45[3]). It is not, however, deemed to be a factor in determining whether the confession was falsely made. (*People v Bedessie*, 19 NY3d 147 [2012]).

The jury may also be instructed to consider whether any promises were made that created a substantial risk of the defendant making a false statement. They may also take into account whether there was an unreasonable delay in bringing the defendant to court for arraignment.

FALSE CONFESSIONS

If a client DENIES making the confession (or states that he was browbeaten or inveigled into admitting to a crime he did not commit), and there is a credible factual basis for doing so, counsel may consider attacking such evidence as unreliable and not worthy of the jury's consideration. This is no easy lift and counsel must fully explore the circumstances of the interrogation as well as the defendant's history (e.g., intelligence, learning and comprehension ability, any diagnosed mental illness of psychological infirmity) to show that he/she was SUSCEPTBILE to police manipulation and therefore, prone to a giving a false confession.

If this path is taken, serious consideration must also be given to retaining an EXPERT WITNESS (e.g., psychiatrist or psychologist to evaluate the defendant and to EDUCATE THE JURY ON THE SCIENCE OF

FALSE CONFESSIONS including the individual and situational factors that the scientific community deems relevant to the occurrence of false confessions (See *People v Powell*, (37 NY3d 476 [2021]).

EXPERT WITNESSES

Expert testimony is generally admissible (within the trial court's discretion) when it would help clarify an issue that calls for professional or technical knowledge possessed by a properly qualified expert (by education, training and/or experience) and which is beyond the common knowledge and everyday experience of average jurors (*People v Cronin*, 60 NY2d 296 [1983], *People v Inoa*, 25 NY3d 466 [2015]). The key question is whether the expert opinion is needed to ASSIST THE JURY to determine a material issue in the case and reach a verdict (See also *People v Lee*, 96 NY2d 157 [2001]). It may also be admitted to disabuse jurors of common misconceptions about human behavior (See, for example, *People v Taylor*, 75 NY2d 277 [1990]: Rape trauma expert allowed to explain that victims may appear stoic rather than emotional after being raped and may be less likely to name an offender whom they know).

Expert testimony is not necessarily verboten just because the opinion offered encroaches upon the jury's territory and addresses the ultimate issue in the case (See, for example, *People v Rivers*, 18 NY3d 222 [2011]: fire marshal allowed to testify that fire was started by the pouring of flammable liquid on the staircase of an apartment building).

GENERAL ACCEPTANCE IN THE SCIENTIFIC COMMUNITY

If the expert's opinion is not based on his/her own personal observation and/or testing but rather upon scientific principles, theories and/or methodologies that happen to be new or novel, then the proponent must establish, (e.g., by published, peer-reviewed studies, judicial opinions or other expert testimony), that the particular theory or methodology has gained general acceptance as reliable in the pertinent scientific community (*Frye v United States*, 293 F. 1013 (DC Cir 1923], See also *People v Wesley*, 83 NY2d 417 [1994]).

If not, then the expert testimony will likely be precluded. If the *Frye* hurdle has been overcome, then admissibility will ultimately turn on whether the principles and methodology are RELEVANT (i.e., have been properly and reliably applied) to the case at hand as shown by something more than the expert's own say-so, (See *Cornell 360 West v 51st St Realty Co., LLC*, 22 NY3d 762 [2014], *People v Brooks*, 31 NY3d 939 [2018]).

EXPERTS AND FALSE CONFESSIONS

As with expert testimony on the reliability of eyewitness identification testimony, especially those involving cross racial identifications (e.g., see *People v LeGrand*, 18 NY3d 449 [2007], *People v Boone*, 30 NY3d 521 [2017]), New York courts have come around to acknowledging that FALSE CONFESSIONS sometimes do occur and there are certain factors of individual personality and circumstances (surrounding police interrogations) that the psychiatric, psychological and social science communities generally recognize as giving rise to them. (See *People v Bedessie*, supra at 159-161: A court may permit expert testimony on the dispositional and situational factors generally accepted as being associated with false confessions where the factors are suggested by the facts and circumstances of the case; See also *People v Powell*, supra, [Rivera, J. dissenting]).

As noted in *Bedessie*, "false confessions that precipitate a wrongful conviction manifestly harm the defendant, the crime victim, society, and the criminal justice system. (And) there is no doubt that experts (in psychiatry, psychology, and the social sciences) MAY OFFER valuable testimony to EDUCATE THE JURY about those factors…that the relevant scientific community considers to be associated with false confessions." (19 NY3d at 161)(emphasis added).

Scientific research on this topic (by Saul Kassin PhD of John Jay College of Criminal Justice and Lawrence Wrightsman, Phd , Kansas University) in the 1980's identified three categories of false confessions including VOLUNTARY (where the suspect confesses in the absence of demonstrable external pressure, possibly to protect another or to gain notoriety), COERCED COMPLIANT (suspect confesses to avoid an unpleasant consequence or to obtain some benefit) and COERCED INTERNALIZED (suspect is led to believe the he/she actually committed the crime and adopts the interrogator's version).

Subsequent research in the 1990's (by Richard Ofshe, Phd of Stanford University and Richard Leo, PhD, University of San Francisco School of Law) described the different confession categories as including: 1. STRESS COMPLIANT (suspect is overcome by the typical stress factors including unfamiliar environment, loss of control, distress, confusion, exhaustion), 2. COERCED COMPLIANT (resulting from threats, promises or other psychological manipulation), 3. COERCED PERSUADED (similar to COERCED INTERNALIZED CONFESSIONS where the suspect may be "gaslighted" into doubting him/herself and eventually accepts his/her culpability). (See: "The (In)Admissibility of False Confession Expert Testimony," Touro Law Review, Vol 26 Issue 1, 2011, by David A Perez, digitalcommons.tourolaw.edu).

The Perez article also notes that courts have taken different approaches to such testimony by 1. Limiting it to a general description of the phenomenon of false confessions, 2. Allowing a description of the defendant's mental condition at the time of the confession, 3. Permitting a discussion of the relevant factors present in the interrogations of the defendant. No view permits an expert to opine whether the defendant's confession was false.

THE NEW YORK APPROACH

Drawing mainly from *Bedessie*, *Powell*, and *Frye* supra, NEW YORK ADVISORY EVIDENCE RULE 7.15 states that:

1. Expert testimony regarding the RELIABILITY of a confession MAY BE ADMITTED, LIMITED, OR DENIED in the DISCRETION OF THE TRIAL COURT.
2. In it exercise of discretion, the court should consider a. whether the proposed expert testimony is BASED ON PRINCIPLES that are GENERALLY ACCEPTED in the relevant scientific community; b. whether the proposed testimony meets the general requirements for the admissibility of expert testimony (see Advisory Rule 7.01), in particular, whether the testimony is BEYOND THE KEN of the jury and would aid it in reaching a verdict; c. whether the proffered testimony is RELEVANT to the defendant and the interrogation before the court, and d. the extent to which the People's case RELIES on the confession.

The last criterion listed (corroboration) does not mean that expert testimony on false confessions will only be admitted where the corroborating evidence is near nil, but rather, that summary denial of such testimony may more likely be considered an abuse of discretion because in such cases, the confession

takes on greater importance to the People's case than in those where other evidence (e.g., eyewitness testimony and physical evidence) is prevalent (See *People v Evans*, 141 Ad3d 120 [1st Dept 2010]). The relevant inquiry is whether the confession was corroborated by overwhelming evidence undermining the usefulness of the expert testimony on the issue of false confessions. In short, where the other evidence of guilt (apart from the confession) is aplenty, esoteric discussions of false confessions diminish in importance if not relevance.

Bedessie instructs that the determination whether to admit expert testimony on false confessions should turn on 1. The NATURE OF THE INTERROGATION, 2. The APPLICABILITY of the science of FALSE CONFESSIONS to the defendant and 3. the EXTENT to which the People's case RELIES on the defendant's confession (See also *People v Jeremiah*, 147 AD3d 1199 [3d Dept 1997], *People v Roman*, 125 AD3d 515 [1st Dept 2015]).

ADVISORY RULE 7.15 (cont'd)

3. Expert testimony regarding the reliability of a confession generally falls within the following parameters: a. testimony purporting to IDENTIFY THOSE DISPOSITIONAL FACTORS of an INDIVIDUAL that make it more likely that he/she MAY BE COERCED into giving a false confession (e.g., highly complaint or intellectually impaired individuals or those who suffer from a psychiatric disorder or are otherwise psychologically/mentally fragile), or b. testimony that purports to IDENTIFY CONDITIONS OR CHARACTERISTICS OF AN INTERROGATION that MIGHT INDUCE SOMEONE TO CONFESS FALSELY TO A CRIME.
4. An expert who testifies may NOT render an opinion as to the TRUTH or FALSITY of a confession.
5. To the extent the proffered testimony involves NOVEL SCIENTIFIC THEORIES AND TECHNIQUES not yet found by courts to be generally accepted by the relevant scientific community, the trial court should CONDUCT A *FRYE* HEARING.

SOME CASES

In *People v Bedessie*, supra, the Court of Appeals, (like the 2nd Dept) held that the trial court did NOT abuse its discretion in denying the defendant's application for a *Frye* hearing and to present an expert witness on false confessions (Richard Ofshe, PhD) because his proposed testimony was deemed to be NOT RELEVANT to the defendant and the interrogation in question. The jury was able to assess the reliability of the defendant's confession without expert assistance.

The trial court declined to extend the rule in *People v LeGrand*, supra, (allowing expert testimony on identification reliability when there is minimal corroborating evidence and the testimony is relevant, based on accepted scientific principles and proffered by a qualified expert) to false confessions.

The defendant in *Bedessie*, a pre-school teaching assistant at a Queens pre-school was charged with rape and other sexual offenses stemming from separate incidents of sexual contact (child's hand put to her breast, touching the four-year-old's penis in the school bathroom and placing the child's penis in her vagina).

When the boy developed a rash of which he complained to his mother (who had often asked if he'd ever been improperly touched), the mother inquired about inappropriate touching to which he replied

that “Miss Anita touched my pee pee.” He later told a nurse that the defendant had touched his “pishy” after which he reported a similar account to a detective at the Child Advocacy Center (CAC).

The detective met the defendant at the school and had her accompany him to the CAC for an interview. After advising her of her *Miranda* rights, he confronted her with the child’s accusations and stressed the importance of getting at the truth. He also claimed to know what happened (based on the child’s recitation) and said that he needed to hear the defendant’s version.

The defendant nervously stated that the child tried to touch her breasts and admitted touching his privates while touching herself. She said she did not understand her own behavior. She later gave a similar video-taped confession.

The defendant painted a different picture of the interrogation, alleging that the detective told her to admit to the crimes and receive treatment or go to Rikers. So, she gave the detective whatever he wanted to hear so that she could go home. She denied abusing the child and said the video statement was untrue. (The defendant was allowed to call an expert to testify to factors affecting a child’s rendition of alleged sexual abuse to support her claim that the mother planted the idea in her child’s head).

The defense sought to have Dr Ofshe testify about false confessions but was denied because, in the trial court’s view, the defendant did not demonstrate any of the characteristics of the type of person who the research deems particularly vulnerable to manipulation and the interview situation was not particularly oppressive, deceptive, or overbearing as suggested by the science of false confessions. Moreover, the court was satisfied that the child’s story sufficiently corroborated the confession to render the expert unnecessary.

The dissenting judge (Jones, J.) argued that the in a case with minimal corroborating evidence (unsworn testimony from a four-year-old), the refusal to admit expert testimony on false confessions constituted an abuse of discretion amounting to reversible error. In the dissenter’s view, the expert testimony was not only relevant but would have aided the jury in assessing the reliability and truthfulness of the defendant’s confession. Contrary to the trial court (and the Appellate Division), the dissenter concluded the rule in *People v LeGrand*, supra, should be extended to false confessions.

At a minimum, according to the dissenter, the trial court should have granted a *Frye* hearing. The expert proffer included accepted research on false confessions and the tactics employed (e.g., interrogator claiming to know more than he/she does about the crime, giving the defendant a choice of admitting the crime or going to jail, not videotaping the initial interview) to induce a vulnerable person to provide what the police want to hear. As such, it was relevant and should have been allowed.

People v Powell:

In this robbery case, the Court of Appeals again held that the trial court did not abuse its discretion in declining (after a *Frye* hearing) to permit the defense to call an expert on false confessions on the grounds of RELEVANCE. In particular, the expert (Dr. Redlich PhD of University of California at Davis School of Criminal Justice), in the Court’s view, failed to link her research on the possible causes of false confessions to the particulars of the case (i.e., the second prong of the admissibility inquiry).

The Court noted that while the expert relied on the *Huntley* hearing transcript (but did not interview the defendant), she did not satisfactorily explain how the scientifically accepted theories about the dispositional and situational factors associated with so-called coerced compliant, false confessions were relevant to the circumstances of this defendant and the interrogations that resulted in his confessions over the course of two days.

For example, while the defendant testified to being physically abused by the detective (hit in the head) and threatened (with denial of his seizure medication unless he cooperated), he did not indicate that he was subject to the kind of psychological manipulation discussed in the studies upon which the expert relied. Also, since he flat-out denied making the second statement (which the detective typed out and the defendant signed on a blank second page), testimony about factors pertaining to false confessions had no bearing on a statement that he claimed had not been made.

The defendant was indicted for two robberies committed two days apart on the elevator of a Queens apartment complex. The first case was severed from the second which was the subject of this trial. The victim testified that as she left a grocery store, a light-skinned, approximately 30-year-old black male (about 6' tall with an umbrella) asked her for a light and then followed her to her apartment building where he joined her on the elevator. (Video surveillance camera recorded the encounter with a tall male in a hoodie, hat and with a dark umbrella but did not provide a clear view of the assailant's face).

The robber stole the victim's EBT card and was later captured on video at a store trying to use it. This video showed the face clearly and the defendant was identified shortly thereafter from a photograph. He was arrested in the afternoon on March 1st 2010, in a nearby apartment where he was charged with trespass and possession of a controlled substance.

Early that evening, the defendant was handcuffed to the wall of a police interview room and was found to be in an angry, agitated state. A detective testified that he confronted him with questions about the robberies which he denied.

The detective further testified that the defendant had been advised of his *Miranda* rights after which he signed a waiver card before questioning. After the defendant denied involvement in the robberies, the detective told him that he would be viewed in line-ups (for both robberies) the next morning. He spent the night at Central Booking.

Before the line-ups on the morning of March 2nd, the detective asked the defendant if he wanted to make a statement about the robberies, and then left him alone with pen and paper. According to the defendant, the detective said, "if you work with us, we'll get you out of here." The defendant then wrote out a brief, non-detailed admission about robberies which he said he did because he had been denied food and seizure medication which resulted in his seizing up and urinating involuntarily on the floor.

The defendant was subsequently identified at a line-up after which the detective asked him if he wanted to revise his statement. Still without having taken his meds or received any food as he claimed, (and wanting to go home), the defendant made a more detailed statement (which he later denied giving) that the detective typed out in a police report. The defendant signed the blank second page. He denied being given *Miranda* rights until later.

The defendant was clinically examined by Dr Sanford Drob who found that the defendant had a long history of psychological deficits, cognitive disabilities and drug abuse which could make him vulnerable to suggestive manipulation in a custodial setting. He was not called to testify at trial, however, since the defendant testified to his own infirmities (including that he was strung out on cocaine and heroin when he was arrested).

In upholding the trial court's refusal to allow Dr Redlich to testify, the Court noted that many of the factors that reportedly affect susceptibility to false confessions were not present in this case, some of the theories (e.g., alternate key and cheating paradigms) were either disavowed or inapplicable to the facts of this case, some Dr Redlich's studies were reliant on self-reporting by convicts without independent verification and others reflected no rate of error (more of a consideration under FRE).

Moreover, her description of the so-called Reid police interview technique (several steps starting with isolation, confrontation, presentation of false information, theme development, allowing the suspect to minimize his role) was deemed to be of little probative worth since there was no evidence that the detectives had been trained in the technique (though she said it is used to one degree or another in virtually every police interview).

Consequently, since Dr Redlich's testimony was deemed to be vague, speculative, and unmoored from any scientific theory that was relevant to the facts of the case, the trial court did not err in refusing to admit it.

The dissenting judge (Rivera, J.) argued that the majority was wrong in its affirmance because Dr Redlich's proffered testimony met the requirements of both *Frye* and *Bedessie*. The witness' credentials were not in dispute, the science was generally accepted in the relevant scientific community and the testimony would have aided the jury in deciding whether the defendant's confession should have been credited or rejected as false (citing *People v Bedessie*, supra at 159-161).

In the dissenter's view, the majority's interpretation of precedent conflated "beyond the ken" of the jury with *Frye*'s focus on general acceptance of the underlying scientific principles, and the mere fact that some information may be within a jury's own realm of knowledge and experience does not close the door on otherwise relevant expert testimony on the factors that accepted studies show give rise to false confessions.

The dissenter argued that the majority should have begun and ended its inquiry with the only issue at a *Frye* hearing which is general acceptance of the underlying scientific principles, not whether they were properly applied to the case at hand (i.e., relevance) which is more properly addressed in a motion in limine.

In *People v Evans* (141 AD3d 120 [1st Dept 2016]), by contrast, the First Department held that the trial court ERRED in denying the defendant's application to call an expert on false confessions (Dr Sanford Drob or Professor Maria Harting), despite allowing Dr Drob to testify about the defendant's intellectual and mental deficiencies because such testimony in these two shooting cases (murder in 2006 and attempted murder in 2009) would have aided the jury in determining the truthfulness of the defendant's confessions obtained in successive custodial interviews over the course of a day.

In the court's estimation, since the corroborating evidence in the 2006 case only placed the defendant near the shooting scene (where an innocent female bystander was fatally shot in the head) and the only

direct evidence of the defendant's identity as the shooter in the 2009 shootout came from an 11-year-old bystander who was hit in the ankle while running away, expert testimony on false confessions could have led to a more favorable outcome for the defendant.

For his part, Dr Drob testified that the defendant had a borderline IQ (78) and performed poorly on reality and comprehension testing. He came across as passive, suggestible and eager to please authority figures and therefore, was more vulnerable than others to manipulative behavior by police.

On the afternoon of 6/15/09, the defendant entered a Harlem hospital for treatment of a gunshot wound to his leg. A detective (who suspected the defendant in the 2006 shooting) interviewed the defendant who said that he had caught a round when two others were shooting at each other at the East Harlem basketball courts, after which he caught a cab to the hospital.

Police review of neighborhood surveillance camera showed one Marcel Baker (defendant's friend) and a heavyset male wearing a red, lettered jacket (fitting the 11-year-old boy's description of the defendant) walking toward the scene. The victim later identified the defendant as one the two shooters firing at each other at the courts. (He also identified the other, one Peanut), from a photo array and then at a line-up.

Shortly after the defendant was released from the hospital, detectives gathered the defendant at his apartment and escorted him to the police station. After the defendant repeated his original story, the detective told him that he had information that made him one of the shooters. After *Miranda* warnings, the defendant said, "I'm going to be honest with you, I'm going to tell you what happened." He then said he had an argument with his girlfriend and went outside and walked with Marcel to cool off and smoke weed at the basketball courts where he was by Peanut who was looking for some marijuana.

When the defendant said he had none to offer, Peanut left and came back and raised his hand. The defendant then retrieved a gun from a garbage can (where local dealers allegedly stash their pieces started firing at Peanut).

After "calling BS" on the gun-in-the garbage can line, the detective told the defendant that he wanted to take a written statement from him. He left the defendant in the interview room for about an hour (with brownies and water), and returned and said, "we have you shooting first." The defendant agreed but said he wanted to beat Peanut to the draw. He said he fired several times and then ditched the gun in a nearby bush.

The detective wrote down the defendant's statements and said, "there was no gun found in any bushes." The defendant then stated that he'd dumped it in a garbage chute of a building he ran to before hailing a cab (with Re Re) for the hospital after he was shot. The defendant read and signed the statement.

Later that evening the defendant repeated his story on video tape to a prosecutor. He also said that he was wearing a red jacket, white tee shirt and jeans while Peanut wore black clothing.

The detective advised the defendant that he was under arrest for this shooting but had an even bigger problem in connection with a fatal shooting from August 2006. The defendant replied, "I didn't mean to kill her." He said he didn't know that this unintended victim had been shot until a friend had reported reading about it in the newspaper.

The defendant went on to explain that he was attempting to scare one Angel Garcia who had previously put a gun in his mouth and stolen his wallet and cell phone and later shot his friend, Josh Mirabel in the shoulder. He and Mirabel's brother (Fach) took a cab to the scene where they spied Garcia and several others huddled around a laptop perched on the hood of a car. As they approached, Garcia took off running and the defendant commenced firing several rounds (14 casings were recovered at the scene) one of which struck the victim who was there talking to friends.

The statement was reduced to writing and the defendant signed it. He insisted that he only intended to threatened Garcia and never meant to shoot the woman.

According to the court, in view of the defendant's mental and psychological limitations as described by Dr Drob and considering the several hours of on-again/off-again interrogations lasting until midnight, it was an abuse of discretion (considering what the majority deemed to be only circumstantial or arguable corroborating evidence) to deny the defendant's application to call an expert on false confessions.

In the majority's view, since the confessions were central components of the People's cases, the usefulness of the expert's testimony was not undermined nor was it rendered less necessary by the presence of other compelling evidence (citing *People v Days*, 131 AD3d 972, 981 [2nd Dept 2015]). As the court saw it, even though Dr Drob was allowed to testify about the defendant's susceptibility to manipulation, it did not necessarily follow that the proffered expert testimony on false confessions would not have created the possibility of a more favorable verdict.

The dissenting justice (Tom, P.J.), noted that there was more than ample corroboration (including several shell casings on both ends of the basketball court, eyewitness identification of the defendant as the shooter in the 2009 incident including other witnesses who saw someone matching the defendant's description coming and going from the scene). Regarding the 2006 shooting, there was testimony from the cabbie who drove the defendant to and from the scene and other witnesses who described the scene and the shooting consistently with the defendant's rendition to render expert testimony on false confessions unnecessary.

This was especially so since the trial court did allow the defense to have an expert testify to the defendant's mental, intellectual and emotional condition that rendered him especially persuadable by interrogation from law enforcement authority figures.

In the dissenter's view, allowing false confession testimony in cases like this would open the floodgates to such evidence every time a defendant denies the veracity of an alleged confession. Under the circumstances, neither case properly lent itself to expert testimony and, according to the dissent, was properly excluded.

FINAL THOUGHT

While challenges to voluntariness of confessions are more common (and stand a greater chance of success), in appropriate cases with the right client and circumstances, an attack on the truthfulness of the client's confession may be well worth the effort. A clinical evaluation of the defendant's mental history and intellectual capacity by a qualified professional combined with an expert to educate the jury on the phenomenon of false confessions (which hopefully parallels the particulars of the case at hand) can go a long way to creating reasonable doubt as to the confession's veracity.

This is especially so where the corroborating evidence in the case is meager. In some cases, it might be the defendant's only hope of not being doomed by his own words.