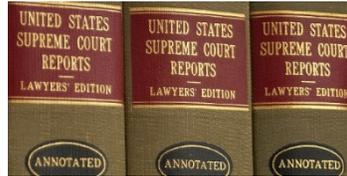




SUFFOLK ACADEMY OF LAW
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**SUFFOLK COUNTY ASSIGNED COUNSEL
DEFENDER PLAN
CRIMINAL LAW SERIES #6
Confessions and or Statements**

FACULTY

Hon. Peter H. Mayer

**Program Coordinators: Hon. John J. Leo, Hon. John Kelly,
Hon. Peter H. Mayer (Retired)**

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Retired Justice Peter Mayer: Mayer is retired from the bench where he served as a Justice of the Supreme Court. Prior to ascending the bench Mr. Mayer specialized in defending criminal cases on the Federal and state level in Suffolk County and throughout the country. He served in the Suffolk County District Attorney's Office for over 10 years as a trial assistant, as Bureau Chief of the Major Crime Bureau as well as serving as an Assistant in the Suffolk County Attorney's Office defending civil rights cases. He is also a member of the Colorado state bar. He is presently in private practice primarily specializing in the defense of criminal and civil cases. He also serves as an advisor to the Assigned Counsel Program of Suffolk County.

Admissibility of statements, confessions of defendant

- I- Where it starts- Huntley Hearing
 - A- One advantage - you get it for the asking - no affidavit from defendant needed.
 - B- Defendant is entitled to have question of the voluntariness of a statement determined at a hearing before trial as opposed to simply submitting this question to the jury alone.
 - C- The defendant is entitled to have all underlying facts plus voluntariness reliably determined by the Court.
 - D- Upon the Court making a determination that the statement is admissible, the Jury gets to pass upon the same issues (voluntariness) in the trial.
 - E- In both instances the DA must prove voluntariness beyond a reasonable doubt.
 - F- In trial, the jury will get a charge to this effect. (People v Huntley 15 NY 2d 72 and Jackson v Denno 378 U.S. 368(1964))
- II- The three most important CPL sections when dealing with alleged statements of the defendant.
CPL 710.30, CPL 710.20 sub. 3, CPL 60.45
 - 1- CPL 710. 20 outlines the procedure for a defendant seeking relief when they have been aggrieved by an unlawful or improper acquisition of evidence. Sub. 3 allows this motion when the evidence “consists of a record or potential testimony reciting or describing a statement of such defendant involuntarily made, within the meaning of CPL 60.45.

Notice that this section would apply even if the statement was made to an individual not employed by nor working as an agent of an official law enforcement agency.
 - 2- CPL 710.30

Evidence of the intention to introduce the statement and the substance of the statement must be introduced within 15 days after arraignment.

Important to note that if they fail this requirement, do not make a motion to suppress as such a motion will be seen as a waiver of the CPL 710.30 notice objection.

The relief you seek is preclusion as opposed to suppression.
 - 3- CPL 60.45

Motion to suppress may be made when the statement is alleged to be involuntarily made as that term is defined in CPL 60.45.

Note that under 60.45 2. (a) the statement is subject to suppression if “any person uses or threatens the use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impairs the defendant’s physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement.

Once again, note that the above states “any person”

Make note of sub. 3- all interrogations including the giving of rights must be video recorded if it involves a class A-1 felony, except one defined in section 220 (drug cases) felony offenses defined in section 130.95 and 130.96, felonies defined in section 125 (homicide offenses) or 130 (sex offenses). that is defined as a class B violent felony offense in section 70.02 of the penal law.

Sub b-failure to record shall not be the subject of a motion to suppress but the Court shall consider the failure to record as a factor, but not the sole factor, in determining whether such confession or admission was involuntarily made.

Sub c gives various reasons constituting good cause for not recording the proceeding.

III- Cross should include:

- a) Exact time of initial detention, how long in a cell, precise description of the cell, how long isolated, his every movement was directed and controlled by the police, number of detectives, how long in custody before being brought to the interrogation room.
- b) All movement was not of his free choice but a choice by the detectives-take them through each movement, how long, exact time questioning started, bathroom breaks, food, length of interrogation time, how many detectives, who else came into the room, begins as an interview to gain trust and changes to an interrogation where the questioning becomes more aggressive-were detectives jackets off displaying gun and badge.
- c) Physical size of defendant- alone in an 8 by 10 room, chained to a wall with 2 burly detectives with guns rattling off rapid fire questions. Show the lopsided nature of this completely police dominated scene. Once again, be

creative and think through what kinds of factors would make a person under these circumstances want to end this and/or satisfy the interrogators because they seem to know a lot about this. Point is to cast doubt that this statement is truly “voluntary”.

IV- Tailoring the cross to fit the facts relevant to your client

A- Has your client suffered from any form of mental illness, intellectual disabilities, a drug or alcohol background, poor verbal skills, vocabulary and comprehension?

B- How far did he go in school, was he in special ed, if so, what particular educational disabilities did he suffer from.

If there is a drug and alcohol history you can lead the cop into an admission that based on his experience, background and training people with these kinds of issues have memory problems, even black out from time to time.

Did the officer know he had these problems - did he even ask?

Did he ask a defendant with a drug history the last time he got high, whether he slept the night before the arrest, whether he was high right now?

Does the Officer have experience in understanding that heavy drug and alcohol users have significant memory problems and knows that witnesses like this are unreliable. If he has experience interviewing witnesses like this who have memory problems because of their history, it's very difficult to say that this similarly situated defendant is any different. Notwithstanding this, the cop wants everyone to rely on the accuracy of a defendant's confession which will contain dates, times and places. Did the defendant supply this information, or did the detective?

Important to establish that every fact in the confession the officer knew in advance, so it cannot be claimed that any particular fact was within the exclusive knowledge of the defendant.

C- The drug and alcohol history cross is for the hearing, not the jury, unless you've incorporated somehow in your defense to the case in chief.

D- Cross the officer - if your client dropped out of school in the 8th grade, ask the officer what level of schooling he had. Simply ask the cop if he ever asked the defendant how far he went in school or whether he had any disabilities in understanding or reading the

English language. The idea is to establish he never asked these questions because he didn't care - his purpose is to get an incriminating statement because he has assumed guilt. Get the officer to admit this. Always keep in mind that intellectually vulnerable clients are capable of falsely confessing. Here also, get an admission that the officer knows from experience that people with mental illness, psychological disabilities, low level intellectual capacity also have a difficult time retrieving facts from memory. The picture you want to paint is that it was the cop who provided everything that he, the cop, wrote into the confession. How many questions were asked where the defendant said "I don't remember"- what were those questions. Any notes or memorandums on that?

E- Example of how a cop can lure a vulnerable client and gain client's trust:

- 1) When an investigator meets with a suspect, it is common to treat the meeting like an interview, not an interrogation.
- 2) An interview format allows you to develop a rapport with the suspect.
- 3) An interview format can make rapport easier to develop because the questions are non-threatening.
- 4) An interview format allows the investigator to suggest the suspect is helping the investigator solve the crime.
- 5) If you move from an interview to an interrogation, the questions become more aggressive.
- 6) The goal of an interrogation is to get a suspect to confess to committing a crime.
- 7) A police interrogation is supposed to be stressful for the suspect
- 8) It is stressful whether the suspect is guilty or innocent.
- 9) A successful interrogation persuades the suspect that confessing is the only option.

V. Cross on failure to record statement

- A- Just because the law may not require recording doesn't mean they can't or shouldn't do it.
- B- Officer, this statement was not recorded either by video or audio right?
- C- You do have access to video and audio equipment, right?
- D- In fact, it's located in the very room in which you interrogated my client, correct?
- E- So, there's no video of any conversation you had with the defendant, correct?
- F- No audio?
- G- Nothing recorded by a stenographer?

- H- No secretary recording the conversation in shorthand?
- I- So, no transcript of the exact give and take between you and the defendant, right?
- J- Can we agree that the decision to not record this statement was a choice you made?
- K- So there's no demonstrative record of the precise Q&A you had with my client for the 2 plus hours you questioned him before the written statement was commenced?
- L- The written statement was written by who – the cop?
- M- Because that's how you do it?
- N- That's how you've been trained to do it?
- O- In your professional career any signed confession you took were all written by you or another Detective with whom you were working?
- P- If we examined all the written confessions you've taken, all of them were written by you?
- Q- You didn't give him a pad and pen and tell him to write down what happened, right?
- R- In fact, you have never allowed a defendant to do that?
- S- Another decision you made, right?
- T- And that's because you know the elements of the crime for which you are seeking an admission?
- U- And you want to make sure that all the elements of the crime are contained in the statement?
- V- That's why you write the statement- And you want to make sure of that because you have personally already concluded his guilt, correct?
- W- Did my client ask to give his version in writing in his own words?
- X- Would you tell us if he did?
- Y- Have any notes to this effect?
- Z- If he did, you wouldn't have allowed it because your trained to never let that happen, right?
- AA- We can agree, you had the control over everything that was to go in the statement?
- BB- You also had control over every aspect of this defendants very existence, correct?
- CC- This included bathroom breaks, when, where?
- DD- Food -what food ,when-did you ask in the very beginning of the questioning the last time he ate? When was the last time he had anything to drink? Notes to that effect?

EE- You determined when he was allowed to use the bathroom?

FF- You determined whether and when to give him something to drink? When?
Where? Notes on this?

GG- YOU determined when he was allowed food? When, where? Notes?

HH- So, we can agree that it was you who made the decision as to what parts of his oral statements would go into the confession?

II- It was you who determined what parts would be left out?

JJ- Cross here on his notes, memos, or reports that outline the oral statements-this is important to make sure you've been given everything. Ask if he took the notes during the oral questioning or his partner, or both. Make sure you have everything.

KK- It was also you who told him where to put his initials on the rights warnings?

LL- It was you who told him where to put the entries to show a waiver of those rights?

VI- A word about the 4th amendment

A- If the defendant is alleged to have made, say orals in a police car, imperative to inquire as to what point in time defendant was not free to leave.

B- When an individual is physically or constructively detained by virtue of a significant interruption of his freedom of movement as a result of police action, such an individual has been seized within the 4th amendment. (People v Cantor 36 NY 2d 106 [1975]).

C- Defendant was deprived of his freedom of movement when he was encircled by 3 police officers as he stood alongside his car, which was being blocked by a police vehicle, was seized within the 4th amendment. (People v. Cantor, supra)

D- Sample inquiry -

1- Where was defendant when you first approached him?

How many police officers approached him?

Size and weight of defendant, size and weight of cops.

Were guns visible. Describe.

Where was each cop standing in relation to defendant? Be creative.

Once you establish the time of seizure, rights have to be given – incriminating statements made from the point where it is clear defendant was seized for 4th

amendment purposes, without the administering of Miranda rights are deemed involuntary. This is basic PFT analysis.

- 2- Definition of seizure - What a reasonable person, innocent of any wrongdoing, would have thought had he been in the defendant's position. (People v. Yukl 25 NY2d 585 [1969])

VII- Notice calls

- A- Client's family member calls in the middle of the night to tell you the police have the client in custody.
- B- Call precinct immediately.
Get through to the detective with immediate instructions to stop all questioning.
Ask him or her to note the date and time of the "notice" in their report.
If the detective is not available, then do the same with whatever officer you're speaking with making sure to get his or her name and badge number.
- C- Make your own notes of this call as complete as possible.

VIII- Planned mistake

- A- Every written confession has a word in it that is crossed out with the defendant's initials right next to it.
- B- This is preplanned by the detective so as to be able to testify that the defendant actually read the document and drew his attention to the mistake.
- C- You must cross on this
 - 1 - Officer, I call your attention to paragraph 3 third sentence, the fourth word is crossed out and defendant's initials appear.
 - 2 - You have been trained in interrogation, yes?
 - 3 - And you have been trained that an extremely effective way to prove the defendant actually read the statement you wrote is to be able to testify that it was the defendant who struck the word out, correct?
 - 4 - How many written confessions have you taken in your career?
 - 5 - We can agree, can we not, that if we examine every one of those confessions we will find at least one crossed out word with the defendant's purported initials, right?

6 - And we can agree that in all those cases in which you have been called upon to testify, you told the judge and jury that the defendant, while reading the statement, objected to a particular word, and you crossed it out to accommodate his wishes?

7 - That's how you're trained?

8 - You're trained this way as it makes you look like a very fair police officer to the Court and Jury?

9 - Take a good look at the crossed-out word- it may be something ridiculous that no one would object to.

IX- A word about the Reid method.

A - Many of Suffolk's cops have been trained in the Reid method of interrogation. Cross should include a segment about interrogation training by way of the Reid or any other method.

B - A major aspect of the Reid technique is the interrogator's insistence on the suspect's guilt, often buttressed by the claim that the police have evidence against the defendant that they do not, in fact, have.

C - Lying to a suspect, by itself, does not justify suppression of a confession but it must be considered as part of the totality of evidence on the question whether the prosecution has proved voluntariness beyond a reasonable doubt. Interestingly, the Reid system instructs that presenting false evidence should be avoided when interrogating a youthful suspect with low social maturity or a suspect with a diminished mental capacity-it admonishes against the display of a position of certainty regarding the suspect's guilt.

1. What evidence did the cop say he had-did he falsely claim he had a witness, a fingerprint, or a lab test linking the defendant to the crime? If you did say such things, would you tell us?

D- Reid instructs that the interrogator should assess the suspects intelligence, verbal communication skills, vocabulary comprehension and/or whether he is under the influence of drugs before commencing the interview. Find out if the cop was trained in this or any other technique that emphasizes the above principles. Did he ask about the educational history, mental health history?

E- Reid, and other training techniques counsels interviewers to make an informed assessment about the subject's "suitability for interrogation."

F- Giving a suspect false objective evidence of his guilt works well with suspects who have memory or blackout problems.

G- The Reid method says at some point the suspect has to be confronted with the certainty of his guilt and the futility of maintaining his innocence. Did the defendant ever use the phrase "I don't remember" in response to any question, what question-which later appears as an established fact in the written confession. Reid says this method should not be used if the suspect says that he can't remember committing the crime as it runs the risk of a false confession. After all, the cop seems to know many things that I may have done, but just don't remember. Courts should be made aware that Reid counsels against doing this when a suspect says he can't remember.

H- Did the suspect ever ask what will happen to me if I talk to you? What was your response? (a promise that there would be some form of leniency would diminish the prosecutor's voluntariness proof)

I- It is not uncommon for the suspect to keep changing his story to match the facts that are being supplied by the police. This is a suspect who believes that his best alternative is to please the police. Be precise on the exact language the suspect used when first confronted and note changes as the hours went by. Did he say things regarding the crime that could never have happened?

J- Reid cautions against confessions that are not properly corroborated. The latest version of Reid says " The truthfulness of a confession should be questioned, however, when a suspect is unable to provide any corroboration...proper corroboration of a confession has been emphasized because it represents the best measure of trustworthiness of a confession... The absence of any specific corroboration within the confession should be viewed suspiciously." The preceding is directly from Reid.

K- Reid further counsels against lengthy interrogations, showing crime scene photos (which provides facts to the suspect that he might not have known thus poisoning the reliability of his statement.) It also counsels against interrogators being openly armed and shackling the defendant.

L- Conclusions from Reid-

1-Strengthen the suppression argument by noting when 1- the police use the false evidence ploy for vulnerable defendants,

- 2-obtain the confession by specific response to a suspect who asks about the consequences of confessing
- 3-fails to record interrogations
- 4-fails to corroborate confessions
- 5-interrogates the suspect for greater than 4 hours and 6-shackles the suspect or confronts him with armed investigators.

X - Make sure to make fact finders aware that every detail in the confession was already known to the cops beforehand.

OVERVIEW OF INTERROGATION STRUCTURE

Q-Interrogations are a two step process?

Q- You try to structure the suspect's perception about the nature of the situation?

Q- You try to structure the suspect's perception about the choices he has?

Q- The first step is to make the suspect believe his situation is hopeless?

Q-You do this by leading the suspect to believe they've been caught?

Q- so you told the suspect his guilt could be proven, right?

Q- You told him there was no way out, right?

Q-You started with the presumption that he did it right?

Q-Your whole purpose is to make the suspect believe they've been caught?

Q-Did you directly accused him of committing the crime?

Q-Did the defendant ever assert his innocence?

Q-You ignored that, right?

Q-Because to you, it's a lie

Q-Did he offer an alibi?

Q- Did you tell him the evidence belies his alibi?

Q- Did you tell him the evidence against him was incontrovertible?

Q-Did you tell him there's physical evidence that proves his guilt?

Q- There was no such evidence, correct?

Q-Did you tell him eyewitnesses link him to the crime?

Q-You told him this even though there were no eyewitnesses?

Q-Did you tell him forensic evidence links him to the crime?

Q-You told him this even though no forensic evidence exists linking him to the crime?

Q-Because you didn't have any of the evidence I just referred to, it was imperative that you get a confession?

Q-Your other purpose is to convince the suspect that guilt can be proven beyond a reasonable doubt?

Q-Did he ask what would happen to him if he confessed?

Q-What benefit did you tell him he would get if he confessed?

Q-Did you tell him he would feel better if he confesses?

Q-Did you tell him that his friends and/or family will think better of him if he confesses?

Q-Did you tell him you could act as an ally to help him if he confesses?

Q-At anytime during this process, did the defendant appear anxious?

Q- Did you tell him that you would tell his friends and/or family that he (defendant) was a good guy because he cooperated?



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