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APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (JULY 12, 2019)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS SANDER,

Plaintiff-Appellant,

v.

CITY OF DICKINSON, NORTH DAKOTA; KYLAN KLAUZER; JEREMY MOSER; TERRY OESTREICH; DOES 1-10,

Defendants-Appellees.

No. 18-1560

Appeal from United States District Court for the District of North Dakota-Bismarck

Submitted: April 15, 2019
Filed: July 12, 2019
[Unpublished]

Before: SMITH, Chief Judge, ARNOLD and KELLY, Circuit Judges.

PER CURIAM

Thomas Sander sued the City of Dickinson, North Dakota ("City"), and several of its current or former

police detectives for a variety of claims stemming from Sander's arrest and prosecution in connection with a suspected arson fire of a local Catholic high school of which he was the principal. Sander's complaint asserted several federal civil rights claims under 42 U.S.C. § 1983 against the detectives related to their alleged unconstitutional conduct in investigating, interrogating, and arresting Sander. The complaint also alleged several causes of action against the City relating to its hiring, training, and supervision of the detectives, as well as several other state law causes of action against all the defendants. The City and the detectives moved for summary judgment on all claims. The district court,[1] in three detailed and well-considered orders, granted the City's and the detectives' motions for summary judgment.

Sander now appeals the district court's grant of summary judgment to the defendants on his (1) claims for violations of his federal constitutional right to be free from coercive interrogation; (2) claims for violations of his federal constitutional right to be free from a reckless police investigation; (3) claim for violation of his federal constitutional right to be free from detainment without due process of law; (4) *Monell*[2] claims for violations of his federal constitutional rights; and (5) false arrest, abuse of process, and deceit claims under North Dakota law.

We review de novo the district court's adverse grant of summary judgment. *Revels v. Vincenz*, 382

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[1] The Honorable Daniel L. Hovland, Chief Judge, United States District Court for the District of North Dakota.

[2] *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691 (1978).

F.3d 870, 874 (8th Cir. 2004). Having carefully reviewed the parties' briefs, the record, and the applicable legal principles, we hold that the district court did not err in granting summary judgment to the defendants for the reasons set forth in its orders. Accordingly, we affirm. *See* 8th Cir. R. 47B.

APPENDIX B
JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (JULY 12, 2019)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS SANDER,

Plaintiff-Appellant,

v.

CITY OF DICKINSON, NORTH DAKOTA; KYLAN KLAUZER; JEREMY MOSER; TERRY OESTREICH; DOES 1-10,

Defendants-Appellees.

No. 18-1560

Appeal from United States District Court
for the District of North Dakota-Bismarck
(1:15-cv-00072-DLH)

Before: SMITH, Chief Judge, ARNOLD and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in

this cause is affirmed in accordance with the opinion of this Court.

July 12, 2019

Order Entered in Accordance with Opinion:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C
ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA GRANTING DEFENDANTS CITY OF DICKINSON'S AND DOES 1-10'S MOTION FOR SUMMARY JUDGMENT (FEBRUARY 5, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

THOMAS SANDER,

Plaintiff,

v.

THE CITY OF DICKINSON, NORTH DAKOTA; KYLAN KLAUZER; JEREMY MOSER; TERRY OESTREICH; AND DOES 1-10,

Defendants.

Case No. 1:15-cv-72

Before: Daniel L. HOVLAND, Chief Judge, United States District Court.

Before the Court is Defendants City of Dickinson and Does 1-10's "Motion for Summary Judgment" filed on October 3, 2016. *See* Docket No. 67. The Plaintiff filed a response in opposition on October 31, 2016. *See* Docket No. 82. Defendants City of Dickinson and Does 1-10 filed a reply brief on November 14, 2016.

See Docket No. 89. For the reasons explained below, Defendants City of Dickinson and Does 1-10's motion for summary judgment is granted.

I. Background

This case stems from a fire which occurred at Trinity High School in Dickinson, North Dakota, on March 3, 2014. The Plaintiff, Thomas Sander, brought this suit against the Defendants because he believes he was wrongfully targeted as a suspect, and subsequently arrested in connection with the fire. The Court has previously outlined the facts in this case in great detail in its Order, dated February 5, 2018, granting summary judgment in favor of Defendants Kylan Klauzer and Jeremy Moser, and will not reiterate them here. *See* Docket No. 124.

On June 8, 2015, Sander commenced this lawsuit against the Defendants[1] asserting nineteen separate causes of action. *See* Docket No. 1. Sander's complaint asserts several federal civil rights claims under 42 U.S.C. § 1983 against the Defendants, relating to alleged unconstitutional conduct in investigating, interrogating, and arresting Sander. The complaint also asserts several causes of action against the City of Dickinson ("the City") relating to its training and supervision of the named Defendants, and alleges several other state law causes of action against all of the Defendants, ranging from intentional infliction of emotional distress to defamation and deceit.

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[1] Defendant Oestreich, a former Dickinson Police Department official, has since been elected Sheriff of Stark County, North Dakota and has left the Dickinson Police Department.

II. Legal Analysis

Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Davison v. City of Minneapolis, Minn.*, 490 F.3d 648, 654 (8th Cir. 2007); Fed. R. Civ. P. 56(a). Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. *Id.*

The Court must inquire whether the evidence presents sufficient disagreement to require the submission of the case to a jury or if it is so one-sided that one party must prevail as a matter of law. *Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 832 (8th Cir. 2005). The moving party bears the burden of demonstrating an absence of a genuine issue of material fact. *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir. 2002). The non-moving party may not rely merely on allegations or denials; rather, it must set out specific facts showing a genuine issue for trial. *Id.*

The City and Does 1-10 argue the City is entitled to summary judgment on Sander's federal claims under 42 U.S.C. § 1983 because Sander cannot produce evidence of an unconstitutional city policy or custom that was the driving force behind any alleged constitutional violation. *See* Docket No. 68. The City and Does 1-10 also argue Does 1-10 are entitled to summary judgment on all of Sander's claims against

Does 1-10 because Sander has failed to specifically identify them, and he cannot prove the personal involvement required for supervisor liability under 42 U.S.C. § 1983.

A. Sander's Claims Against the City Under 42 U.S.C. § 1983

Sander's complaint asserts claims against the City under Section 1983 for supervisor liability; a *Monell* claim for unconstitutional practice and policy; and a *Monell* claim for unconstitutional discipline, training and supervision. *See* Docket No. 1. The City argues it is entitled to summary judgment on Sander's federal claims to the same extent the individually named defendants are. *See* Docket No. 68.

The Eighth Circuit Court of Appeals has consistently recognized a general rule that, in order for municipal liability to attach, individual liability must first be found on an underlying substantive claim. *See Moore v. City of Desloge, Mo.*, 647 F.3d 841, 849 (8th Cir. 2011); *McCoy v. City of Monticello*, 411 F.3d 920, 922 (8th Cir. 2005). Similarly, in order to maintain an action for training or supervisory liability, a plaintiff must show that the failure to train or supervise caused the injury. *Moore*, 647 F.3d at 849. The Court has previously ruled that Sander has failed to establish that Officer Kylan Klauzer, Officer Jeremy Moser, or Terry Oestreich violated Sander's constitutional rights. *See* Docket Nos. 124 and 125. Thus, the Court finds that Sander cannot maintain his claims against the City for supervisor liability, unconstitutional practice and policy, or for unconstitutional discipline, training, and supervision.

The City argues that, even if Sander could establish a failure by the City with regard to issuing full *Miranda* warnings, that failure cannot support liability under Section 1983. *See* Docket No. 68, p. 7; *see also Chavez v. Martinez*, 538 U.S. 760, 772 (2003) ("[F]ailure to read *Miranda* warnings to [a suspect] did not violate [suspect's] constitutional rights and cannot be grounds for a § 1983 action."); *Hannon v. Sanner*, 441 F.3d 635, 636-37 (8th Cir. 2006). The Court agrees. Because there can be no individual capacity claim against any of the named defendants for failing to give Sander the *Miranda* warnings, it follows that there can be no municipal liability against the City for any officer's failure to give Sander the full *Miranda* warnings or for an alleged unconstitutional practice, policy, or custom not to provide the full *Miranda* warnings.

The City also argues it is entitled to summary judgment on Sander's federal claims because there is no evidence to create a dispute of fact as to whether a policy or custom of the City was the driving force behind any alleged violation of Sander's constitutional rights. *See* Docket No. 68. Under 42 U.S.C. § 1983, a municipality may not be held vicariously liable for the unconstitutional acts of its employees. *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999); *Andrews v. Fowler*, 98 F.3d 1069, 1074 (8th Cir. 1996) (local government may not be sued under Section 1983 for injury inflicted solely by its employees or agents under theory of respondent superior). However, a municipality may be held liable for the unconstitutional acts of its officials or employees when those acts implement or execute an unconstitutional municipal policy or custom. *Mettler*, 165 F.3d at 1204. For a

municipality to be liable, a plaintiff must prove that a municipal policy or custom was the "moving force behind the constitutional violation." *Id.*; *see also Board of County Com'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 404 (1997) (only a municipality's "deliberate" conduct can meet the "moving force" requirement).

To prove a municipal custom exists, Sander must satisfy three requirements:

> (1) The existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees;
>
> (2) Deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and
>
> (3) Th[e] plaintiff['s] injur[y] by acts pursuant to the governmental entity's custom, *i.e.*, [proof] that the custom was the moving force behind the constitutional violation.

Mettler, 165 F.3d at 1204. It does not appear from the pleadings that Sander argues the City had any facially unconstitutional official policies that caused any deprivation of his rights. Rather, the only municipal custom Sander identified is the alleged widespread use of "soft *Miranda*" warnings. *See* Docket No. 82. However, as noted above, the City cannot be held liable for officers' failure to give *Miranda* warnings. *See Hannon*, 441 F.3d at 636-37. Sander concedes as much in his response in opposition. *See* Docket No. 82, p. 30. The Court is not persuaded by Sander's argument that the use of "soft *Miranda*" warnings was the moving force behind the other violations he

alleges occurred during the investigation, including unconstitutional interrogation tactics, inadequate investigation, evidence destruction, and an arrest without probable cause. As noted previously, the Court has already held that the officers did not violate Sander's constitutional rights. *See* Docket Nos. 124 and 125. Further, even if there was a widespread practice or custom of using the so-called "soft *Miranda*," the failure to give complete *Miranda* warnings is not closely related to the ultimate injury Sander asserts he sustained. *See Andrews*, 98 F.3d at 1077. Sander simply cannot demonstrate the close relationship necessary to conclude that the City's failure to properly train the officers caused the injuries Sander alleges or that the alleged custom of utilizing the so-called "soft *Miranda*" warnings was the moving force behind the alleged constitutional violations. The Court finds that Sander's claims against the City under Section 1983 fail as a matter of law.

B. Sander's State Law Claims Against The City

Sander's complaint asserts numerous state law claims against the City, including false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress, abuse of process, gross negligence, willful misconduct, deceit, defamation, vicarious liability, and a violation of Article 1, Section 1 of the North Dakota State Constitution. *See* Docket 1. The City argues it is entitled to summary judgment on Sander's state law claims against it to the same extent as the named defendants and adopts their arguments as its own. *See* Docket No. 68, p. 14.

The Court has previously found that: 1) the law enforcement officers were exercising highly dis-

cretionary functions in the investigation, interrogation, and arrest of Sander; 2) probable cause was present when prosecution against Sander was initiated; 3) Sander failed to point to evidence in the record to support a finding of the officers having an ulterior purpose or motive, other than bringing an offender to justice or that they used any legal process to gain a collateral advantage over Sander; 4) the law enforcement officers were entitled to state-law immunity under N.D.C.C. § 32-12.1-03(3) as a matter of law, 5) Sander failed to establish a causal connection between the alleged deception and the harm he alleged he sustained; 6) the law enforcement officers' conduct at issue did not rise to the level of "extreme and outrageous conduct" as required under North Dakota law; 7) Sander failed to point to any case law to support his claim for a private right of action under the North Dakota Constitution, and this Court will not take the extraordinary step of inferring one; and 8) the law enforcement officers were entitled to summary judgment in their favor on Sander's state law claims against them for false arrest, false imprisonment, malicious prosecution, abuse of process, gross negligence, willful misconduct, deceit, defamation, and the State constitutional claim under Article 1, Section 1 against them. *See* Docket Nos. 124 and 125. The Court finds that the City is entitled to summary judgment on Sander's state law claims against it for the same reasons.

The only remaining state law claim Sander asserted against the City which the Court must resolve is a claim for vicarious liability. *See* Docket No. 1, p. 24. The City argues this claim "does not actually plead any cause of action independent from the other

state-law claims Sander alleges in his complaint." *See* Docket No. 68, pp. 14-15. Further, the City argues it is already vicariously liable for the acts of the named Defendants done in the scope of their employment, in light of the applicable statutes on municipal liability and immunity. *See Nelson v. Gillette*, 1997 ND 205, ¶ 12, 571 N.W.2d 332. The City notes it is "unable to discern any distinction between the municipal liability under state law for the allegedly wrongful acts of its employees and the generic 'Vicarious Liability' claim Sander alleges" in his complaint. *See* Docket No. 68, p. 15. The City argues it is entitled to summary judgment on Sander's vicarious liability claim against it to the same degree it is entitled to summary judgment on Sander's other state law claims. The Court agrees. The Court finds that Sander's state law claims against the City fail as a matter of law.

C. Sander's Claims Against Does 1-10

The City and Does 1-10 argue Does 1-10 are entitled to summary judgment on all of Sander's claims against Does 1-10 because Sander has failed to specifically identify the officers, and he cannot prove the personal involvement required for supervisor liability under Section 1983. *See* Docket No. 68.

A plaintiff may assert Section 1983 claims against a public official acting in his individual capacity and in his official capacity. *Baker v. Chisom*, 501 F.3d 920, 923 (8th Cir. 2007). The Eighth Circuit Court of Appeals has held that if a plaintiff's complaint is silent about the capacity in which he is suing the defendant, the complaint is interpreted as including only official-capacity claims. *Id.* Thus, if the complaint

does not specifically name the defendant in his individual capacity, it is presumed he is sued only in his official capacity. *Id.*

Sander's complaint does not assert any claims against Does 1-10 in their individual capacities. *See* Docket No. 1. Thus, the Court will interpret Sander's complaint as including only official-capacity claims. *See Baker*, 501 F.3d at 923. A suit against a government official in his or her official capacity is another way of pleading an action against an entity of which an officer is an agent. *Baker*, 501 F.3d at 925. The City and Does 1-10 argue Does 1-10 are entitled to summary judgment on the official capacity claims against them to the same extent the City is. The Court agrees.

To the extent there are any Section 1983 individual capacity claims against Does 1-10, the City and Does 1-10 argue they are entitled to summary judgment in their favor because, absent the identification of the individual fictitious defendants, they cannot defend the conduct that Sander believes supports liability. *See* Docket No. 68. The Court agrees. *See Whitson v. Stone County Jail*, 602 F.3d 920, 928 (8th Cir. 2010) (in Section 1983 cases, an official is only liable for his own misconduct and is not accountable for other agents' misdeeds under a theory such as respondeat superior or supervisor liability).

The City and Does 1-10 also argue they are also entitled to summary judgment in their favor regarding the state law claims against Does 1-10, to the extent there are any individual capacity claims against Does 1-10, because Sander has failed to amend his pleadings and identify and serve Does 1-10 with this suit. *See* Docket No. 68. Sander filed his complaint in June of 2015, discovery has since been completed, and the

time to amend the pleading has passed. *See* Docket Nos. 1, 29, 45, and 50. Sander has failed to identify the unnamed police officers identified only as "Does 1-10" in his complaint or in an amended pleading, and he failed to address any of his claims against Does 1-10 in his response in opposition to the summary judgment motion.

Because Sander failed to identify the unnamed police officers identified as "Does 1-10" in his complaint; failed to establish the personal involvement required for supervisor liability under Section 1983, and failed to specifically address any of his claims against Does 1-10 in his response, the Court dismisses all of Sander's claims against Does 1-10 without prejudice. *See Thornton v. U.S. Dept. of Justice*, 93 F. Supp. 2d 1057, 1063-64 (D. Minn. 2000).

III. Conclusion

After carefully reviewing the entire record and for the reasons set forth above, the Court GRANTS Defendant City of Dickinson and Does 1-10's "Motion for Summary Judgment" (Docket No. 67). Because the Court has dismissed all of Sander's claims against all of the Defendants, Sander's "Motion to Amend Complaint to Claim Exemplary Damages" (Docket No. 72) is FOUND AS MOOT.

IT IS SO ORDERED.

Dated this 5th day of February, 2018.

/s/ Daniel L. Hovland
Chief Judge
United States District Court

APPENDIX D
ORDER GRANTING DEFENDANT TERRY OESTREICH'S MOTION FOR SUMMARY JUDGMENT (FEBRUARY 5, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

THOMAS SANDER,

Plaintiff,

v.

THE CITY OF DICKINSON, NORTH DAKOTA; KYLAN KLAUZER; JEREMY MOSER; TERRY OESTREICH; AND DOES 1-10,

Defendants.

Case No. 1:15-cv-72

Before: Daniel L. HOVLAND, Chief Judge, United States District Court.

Before the Court is Defendants Terry Oestreich's "Motion for Summary Judgment" filed on October 3, 2016. *See* Docket No. 69. The Plaintiff filed a response in opposition on October 31, 2016. *See* Docket No. 81. Oestreich filed a reply brief on November 21, 2016. *See* Docket No. 90. For the reasons explained below, Oestreich's motion for summary judgment is granted.

I. Background

This case stems from a fire which occurred at Trinity High School in Dickinson, North Dakota, on March 3, 2014. The Plaintiff, Thomas Sander, brought this suit against the Defendants because he believes he was wrongfully targeted as a suspect and subsequently arrested in connection with the fire. The Court has previously outlined the facts in this case in great detail in its Order Granting Summary Judgment in favor of Defendants Kylan Klauzer and Jeremy Moser, and will not reiterate them here. *See* Docket No. 124.

On June 8, 2015, Sander commenced this suit against the Defendants[1] asserting nineteen separate causes of action. *See* Docket No. 1. Sander's complaint asserts several federal civil rights claims under 42 U.S.C. § 1983 against the Defendants, relating to alleged unconstitutional conduct in investigating, interrogating, and arresting Sander. The complaint also asserts several causes of action against the City of Dickinson relating to its training and supervision of the named Defendants, and alleges several other state law causes of action against all of the Defendants, ranging from intentional infliction of emotional distress to defamation and deceit.

II. Legal Analysis

Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-

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[1] Defendant Terry Oestreich, a former Dickinson Police Department official, has since been elected Sheriff of Stark County, North Dakota and is no longer employed by the Dickinson Police Department.

moving party, indicates no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Davison v. City of Minneapolis, Minn.*, 490 F.3d 648, 654 (8th Cir. 2007); Fed. R. Civ. P. 56(a). Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. *Id.*

The Court must inquire whether the evidence presents sufficient disagreement to require the submission of the case to a jury or if it is so one-sided that one party must prevail as a matter of law. *Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 832 (8th Cir. 2005). The moving party bears the burden of demonstrating an absence of a genuine issue of material fact. *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir. 2002). The non-moving party may not rely merely on allegations or denials; rather, it must set out specific facts showing a genuine issue for trial. *Id.*

Oestreich moves for summary judgment on all of Sander's claims against him, arguing he is entitled to qualified immunity and state law immunity. *See* Docket No. 70. Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. *Sheets v. Butera*, 389 F.3d 772, 776 (8th Cir. 2004). "Qualified immunity shields government officials from suit unless their conduct violated a clearly established constitutional or statutory right of which a reasonable person would have known." *Littrell v. Franklin*, 388 F.3d 578, 582 (8th Cir. 2004) (citation omitted). The

Supreme Court has construed qualified immunity protection to shield "all but the plainly incompetent or those who knowingly violate the law." *Id.* For qualified immunity to apply, a two-part inquiry is conducted:

(1) Whether the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and

(2) Whether the right was clearly established at the time of the deprivation.

Howard v. Kansas City Police Dep't, 570 F.3d 984, 988 (8th Cir. 2009).

A. Sander's Federal Law Claims Under 42 U.S.C. § 1983

In a 42 U.S.C. § 1983 case, an official is only liable for his own misconduct and is not accountable for the misdeeds of other agents under a theory such as respondeat superior or supervisor liability. *Whitson v. Stone County Jail*, 602 F.3d 920, 928 (8th Cir. 2010). Further, the doctrine of qualified immunity also requires an individualized analysis as to each officer because a person may be held personally liable for a constitutional violation only if his own conduct violated a clearly established constitutional right. *Manning v. Cotton*, 862 F.3d 663, 668 (8th Cir. 2017). Thus, Oestreich is only responsible or liable for his own behavior, individually.

1. Substantive Due Process Claims: Sander's 1st and 3rd Claims for Relief

Sander's complaint asserts he was not properly advised of the full *Miranda* warnings, he was subjected to a coercive interrogation, and the officers recklessly failed to investigate other leads. Oestreich argues he is entitled to summary judgment on these claims because he did not violate a fundamental right of Sander's and, even if he did, his conduct was not conscience-shocking. *See* Docket No. 70.

Oestreich argues the Eighth Circuit Court of Appeals has made it clear that defendants may not be held liable under Section 1983 for the failure to properly Mirandize a suspect. *See* Docket No. 70, p. 6. The Eighth Circuit has stated "a litigant cannot maintain an action under § 1983 based on a violation of the *Miranda* safeguards." *Hannon v. Sanner*, 441 F.3d 635, 636 (8th Cir. 2006). Because the reading of *Miranda* warnings is a procedural safeguard rather than a right arising out of the Fifth Amendment, the remedy for a *Miranda* violation is the exclusion from evidence of any compelled self-incrimination, not a Section 1983 action. *Id.*; *Warren v. City of Lincoln, Neb.*, 864 F.2d 1436, 1442 (8th Cir. 1989). Even assuming that Sander's statements were obtained in violation of *Miranda*, Section 1983 does not provide a remedy for a violation of *Miranda*. Sander's exclusive remedy would have been the suppression of his statements, and he already received that remedy in the state district court. *See Hannon*, 441 F.3d at 636.

Further, Sander's claim under Section 1983 relating to his Fifth Amendment right not to incriminate himself fails as a matter of law because Sander did not proceed to a criminal trial. Statements

compelled by police interrogations obviously may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs. *Winslow v. Smith*, 696 F.3d 716, 731 n. 4 (8th Cir. 2012); *Chavez v. Martinez*, 538 U.S. 760, 767 (2003). In Winslow, three suspects who pled guilty and one who pled no contest to murder charges could not bring claims under Section 1983 relating to their Fifth Amendment right not to incriminate themselves because those statements were never used at trial. 696 F.3d at 716, n. 4. Like in *Winslow*, none of Sander's statements were used in a criminal trial. In fact, Sander's confession was suppressed by the state district court, and the state criminal charges against him were ultimately dismissed. A failure to give *Miranda* warnings, even if the police obtain an unwarned confession, cannot alone support Section 1983 liability.

In order to establish a violation of substantive due process rights, a plaintiff must show (1) that one or more of their fundamental constitutional rights were violated, and (2) that the conduct was shocking to the conscience. *Flowers v. City of Minneapolis, Minn.*, 478 F.3d 869, 873 (8th Cir. 2007). Whether conduct shocks the conscience is a question of law. *Folkerts v. City of Waverly, Iowa*, 707 F.3d 975, 980 (8th Cir. 2013). The threshold question is whether the behavior of the governmental officer is so egregious and outrageous that it may fairly be said to shock the contemporary conscience. *Atkins v. Epperly*, 588 F.3d 1178, 1183 (8th Cir. 2009). Conduct intended to injure will generally rise to the conscience-shocking level, but negligent conducts falls beneath the threshold of constitutional due process. *Id.* The Eighth Circuit has

held that investigators shock the conscience when they (1) attempt to coerce or threaten the criminal defendant; (2) purposefully ignore evidence of the defendant's innocence; or (3) systematically pressure to implicate the defendant despite contrary evidence. *Folkerts*, 707 F.3d at 981. However, an officer's negligent failure to investigate inconsistencies or other leads is insufficient to establish conscience-shocking misconduct. *Atkins*, 588 F.3d at 1184.

"Fundamental to our system of justice is the principle that a person's rights are violated if police coerce an involuntary confession from him, truthful or otherwise, through physical or psychological methods designed to overbear his will." *Wilson v. Lawrence County*, 260 F.3d 946, 952 (8th Cir. 2001). Whether or not a confession is the involuntary product of coercion is judged by the totality of the circumstances—including an examination of both the conduct of the officers and the characteristics of the accused. *Id.* "[E]ven though the police use overreaching tactics such as the use of threats or violence, or the use of direct or indirect promises, such promises or threats will not render the confession involuntary unless it overcomes the defendant's free will and impairs his capacity for self-determination." *Sheets*, 389 F.3d at 778. Courts are to review the totality of the circumstances, considering "the degree of police coercion, the length of the interrogation, its location, its continuity, and the defendant's maturity, education, physical condition, and mental condition." *Id.* at 779. However, it goes without saying that "the interrogation of a suspect will involve some pressure." *Id.*

Oestreich did not use violence or threats of violence to extract a confession from Sander during the March

4th interview. Although Sander noted in his deposition that the thought crossed his mind that Oestreich and Klauzer might resort to physical violence during the March 4th interview, Oestreich never touched Sander nor did he make threatening statements towards Sander. *See* Docket No. 53-8, p. 79. Sander asserts "[Oestreich] and Defendant Klauzer – two physicaly imposing law enforcement officers, one of whom was armed – pulled their chairs up around Sander, pinning him into the corner of the interrogation room." *See* Docket No. 81, p. 32. The Court acknowledges Oestreich and Klauzer were seated close to Sander, and Sander was essentially seated in the corner of the room during the interrogation. However, the interview took place in a standard Dickinson police interview room, and Oestreich and Klauzer's proximity to Sander was not unduly coercive or threatening.

Sander asserts he was prevented from using the restroom during the March 4th interview. Upon a careful review of the video recording of the interview, the Court notes there was an approximately 42-minute delay after Sander initially requested to use the restroom. While the officers did indeed delay Sander's access to the restroom, the delay was not unreasonably lengthy and does not alone shock the conscience. Other courts have determined that similar delays do not shock the conscience. *See Dowell v. Lincoln County*, 927 F. Supp. 2d 741, 752 (E.D. Mo. 2013) (thirty-four minute delay in access to the restroom did not shock the conscience).

The statement to an accused that telling the truth "would be better for him" does not constitute an implied or express promise of leniency for the purpose of rendering his confession involuntary. *Simmons v.*

Bowersox, 235 F.3d 1124, 1133 (8th Cir. 2001). Further, officers may elicit statements by claiming not to believe the accused's denials. *Id.* Interrogation tactics such as deception and raised voices also do not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne. *Id.*

It goes without saying that an interrogation of a suspect will involve some pressure as the very purpose is to elicit a confession. *Sheets*, 389 F.3d at 779. However, in reviewing the totality of the circumstances, the Court finds that Oestreich's statements and actions during the March 4th interview did not shock the conscience. Courts are to consider the degree of police coercion, the length of the interrogation, its location, its continuity, and the defendant's maturity, education, physical condition, and mental condition. *See id.* The interrogation on March 4th took place in a Dickinson police interview room around 11:00 a.m., and Sander arrived voluntarily at Oestreich's request. The interview lasted approximately three and a half hours, and the first hour did not consist of probing or accusatorial questioning. No violence or physical threats were used. Further, Sander is an extremely well-educated adult; he graduated from college, received his master's in education, and he was in a graduate program for theology at the time of the interview. *See* Docket No. 65-9, pp. 4-5. In reviewing the totality of the circumstances, the Court finds that the tactics employed by Oestreich during the March 4th interview do not rise to the level of malice or sadism resulting in the inhumane abuse of power that literally shocks the conscience. *See Sheets*, 389 F.3d at 779.; *Moran v. Clarke*, 296 F.3d 638, 647 (8th

Cir. 2002). Therefore, the Court finds Oestreich is entitled to summary judgment on Sander's substantive due process claim against him.

Sander's complaint also alleges Oestreich recklessly failed to investigate other leads, namely failing to investigate James Gordon as a viable suspect. Oestreich argues he is entitled to qualified immunity on this claim because there is no evidence that he failed to follow any lead or otherwise violate a clearly established right of Sander's. The Eighth Circuit recognized a substantive due process cause of action for reckless investigation in *Wilson v. Lawrence County, Mo.*, where the Circuit identified the liberty interest at stake as the interest in obtaining fair criminal proceedings. 260 F.3d at 946. The test for whether state officers' actions violate this protected liberty interest is whether those actions shock the conscience. *Amrine v. Brooks*, 522 F.3d 823, 833 (8th Cir. 2008). Mere negligent failure to investigate does not violate substantive due process, nor do allegations of gross negligence give rise to a constitutional violation. *Id.*

The Eighth Circuit has noted that even if police officers credit one individual's statement over another, and they are ultimately incorrect in their conclusions, qualified immunity protects officers from such types of "mistaken judgments." *Brockinton v. City of Sherwood, Ark.*, 503 F.3d 667, 672 (8th Cir. 2007). Oestreich argues that the decision to discredit Gordon's "confession" was not entirely unreasonable and does not prove that officers conducted a reckless investigation. *See* Docket No. 70, p. 10. The Court agrees. Further, Sander has not demonstrated that Oestreich's conduct during the investigation into the Trinity fire "shocked the conscience." Therefore, the Court finds

that Oestreich is entitled to qualified immunity on this claim.

2. Conspiracy to Violate Civil Rights – Sander's 5th Claim for Relief

Sander's complaint asserts a claim against Oestreich for conspiracy to violate his civil rights. *See* Docket No. 1, p. 11. To prove a 42 U.S.C. § 1983 conspiracy claim, Sander must show: (1) that the defendant conspired with others to deprive him of constitutional rights; (2) that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and (3) that the overt act injured the plaintiff. *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008). Oestreich argues Sander cannot show he was deprived of a constitutional right, and Sander was not injured by the officers' failure to provide the full *Miranda* warnings because his confession was suppressed by the state district court. *See* Docket No. 70. The Court agrees. As discussed above, the officers' failure to provide full *Miranda* warnings to Sander during the March 4th interview is not a constitutional violation and is not independently actionable under Section 1983. *See Hannon*, 441 F.3d at 636. Because Sander cannot show he was deprived of a constitutional right or that he was injured, Oestreich is entitled to summary judgment on Sander's conspiracy claim against him.

3. Failure to Preserve Exculpatory Evidence—Sander's 2nd and 12th Claim for Relief

Oestreich argues he is entitled to summary judgment on Sander's allegations that he suppressed or

failed to disclose exculpatory evidence. An investigating officer's failure to preserve evidence potentially useful to the accused or his failure to disclose such evidence does not constitute a denial of due process in the absence of bad faith. *White*, 519 F.3d at 814. Consequently, to be viable, Sander's claim must allege bad faith to implicate a clearly established right under *Brady. Id.* Even assuming that Oestreich failed to disclose exculpatory evidence, the Court finds there was no *Brady* violation because Sander was not convicted. *See Livers v. Schenck*, 700 F.3d 340, 359 (8th Cir. 2012). In *Livers*, the Eighth Circuit determined the investigating officers were entitled to qualified immunity on pretrial detainees' Section 1983 claim alleging the officers failed to disclose exculpatory evidence in violation of their due process rights, since a pretrial right to disclosure of such evidence, if it existed at all, was not clearly established. 700 F.3d at 359-60. Because Sander was not convicted, he did not suffer the effects of an unfair trial, and his claim against Oestreich for failure to preserve exculpatory evidence fails as a matter of law. *See id.*

4. False Arrest and False Imprisonment – Sander's 17th Claim for Relief

Underlying many of Sander's federal and state law claims is his assertion that he was detained on March 4th without probable cause. Oestreich argues he is entitled to summary judgment because the officers had sufficient probable cause to arrest Sander. *See* Docket No. 70.

A false arrest claim under Section 1983 fails as a matter of law where the officer had probable cause to

make the arrest. *Kurtz v. City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001). A warrantless arrest is consistent with the Fourth Amendment if it is supported by probable cause, and an officer is entitled to qualified immunity if there is at least "arguable probable cause." *Borgman v. Kedley*, 646 F.3d 518, 522-23 (8th Cir. 2011). An officer has probable cause to make a warrantless arrest when the totality of the circumstances at the time of the arrest are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense. *Id.* at 523. Arguable probable cause exists even when an officer mistakenly arrests a suspect believing it is based in probable cause if the mistake is "objectively reasonable." *Id.* An arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. *Devenpeck v. Alford*, 543 U.S. 146, 593 (2004). Although the probable cause standard allows room for reasonable mistakes by a reasonable person, the qualified immunity standard protects "all but the plainly incompetent or those who knowingly violate the law." *Greenman v. Jessen*, 787 F.3d 882, 888 (8th Cir. 2015).

Oestreich argues there was sufficient probable cause to arrest Sander and sufficient circumstantial evidence to indicate Sander was likely the individual who started the fire, including: (1) Sander had a motive as he had recently been told his contract was not being renewed at the end of the school year; (2) Sander had access to the school, the main office, the vault, and his office; (3) Sander had an opportunity to start the fire as he was working late at the school in the main office where the vault is located the evening before the fire, and he left the school shortly

before Storey heard the fire alarm; (4) Sander was one of the few people who had the combination to the vault and knew how to open it; and (5) Sander found the blue sticky note on his laptop which indicated the fire was intentionally set. *See* Docket No. 70.

Given all these facts and the absence of viable alternative suspects with comparable means, motive, and opportunity at the time of the interview, Oestreich argues there was arguable probable cause to arrest Sander when he was detained during the March 4th interview. Sander's response argues that critical details in his confession were "inconsistent with the manner in which the fire was actually started." *See* Docket No. 81, p. 11. However, Sander's argument is misplaced. Other facts uncovered later in the investigation which may diminish probable cause, such as a potential new suspect and inconsistencies in witness statements, do not undermine the analysis because the question regarding probable cause involves what the officers knew at the time on March 4th. The Court finds there was arguable probable cause to arrest Sander when he was detained on March 4th. Further, Oestreich is entitled to qualified immunity if there is at least "arguable probable cause." *See Borgman*, 646 F.3d at 522-23. Accordingly, Sander's claim against Oestreich for false arrest and false imprisonment under Section 1983 fails as a matter of law.

Sander's complaint also asserts a claim for "Deliberate Fabrication and Material Omissions in the Arrest Warrant Affidavit." *See* Docket No. 1, pp. 22-23. Sander's complaint does not specify what the deliberate fabrication or material omissions in the arrest warrant affidavit were. Oestreich argues he is entitled to summary judgment in his favor on this

claim because Oestreich did not prepare or sign the arrest warrant affidavit and, even if he did, he is entitled to qualified immunity. *See Bagby v. Brodhaver*, 98 F.3d 1096, 1099 (8th Cir. 1996) (qualified immunity is appropriate if defendant has been accused of submitting a recklessly false affidavit and if a corrected affidavit would still provide probable cause to arrest or search). Because the Court has already previously determined there was probable cause to arrest Sander on March 4th, even without Sander's confession, Oestreich is entitled to qualified immunity. Sander's claim against him fails as a matter of law.

B. Sander's State Law Claims

1. False Arrest and False Imprisonment—Sander's 6th Claim for Relief

Oestreich argues probable cause is a defense to a false arrest claim, the officers had sufficient probable cause to arrest Sander, and he is entitled to summary judgment in his favor on Sander's state law claim for false arrest and false imprisonment. *See* Docket No. 70, pp. 17-18.

A police officer who has probable cause to believe a suspect has committed a crime is not liable for the state law tort of false arrest simply because the suspect is later proven innocent or the charges are dismissed. *See Kurtz*, 245 F.3d at 758. A plaintiff is not entitled to recover if the arrest is supported by proper legal authority. *See Copper v. City of Fargo*, 905 F. Supp. 680, 702 (D.N.D. 1994). Further, probable cause may serve as a defense if it validates the arrest itself. *Id.* The North Dakota Supreme Court has held that when determining whether an officer had

probable cause to arrest a suspect, the Court applies a totality-of-the-circumstances standard and reviews the facts and circumstances known by the officer. *State v. Berger*, 2004 ND 151, ¶ 11, 683 N.W2.d 897. Whether probable cause exists is a question of law. Id. In order to establish probable cause, the officer does not have to possess knowledge of facts sufficient to establish guilt; all that is required is knowledge that would furnish a prudent person with reasonable grounds for believing a violation has occurred. *Id.* Even though conduct may have an innocent explanation, probable cause "is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers." *Id.* As discussed above, the Court has previously determined there was sufficient probable cause to arrest Sander; therefore, Sander's state law claim against Oestreich for false arrest and false imprisonment fails as a matter of law.

Further, Oestreich also argues he is entitled to state law immunity. *See* Docket No. 70, p. 29. Section 32-12.1-03(3)(c) of the North Dakota Century Code sets forth the discretionary function exception to liability of a political subdivision or political subdivision employee. Section 32-12.1-03, N.D.C.C., states, in pertinent part: "A political subdivision or a political subdivision employee may not be held liable under this chapter for . . . [t]he decision to perform or the refusal to exercise or perform a discretionary function or duty, whether or not such discretion is abused . . . " The North Dakota Supreme Court has interpreted this subsection to provide political subdivisions and their employees immunity from liability for allegations of negligence in the exercise of a dis-

cretionary function. *Copper*, 905 F. Supp. at 702; *see Sande v. City of Grand Forks*, 269 N.W.2d 93, 98 (N.D. 1978); *McLain v. Midway Township*, 326 N.W.2d 196, 199 (N.D. 1982). Therefore, Oestreich is immune from liability for Sander's state law claims for false arrest and false imprisonment, regardless of whether he was negligent or whether he exercised due care, provided that he can demonstrate that the decision to detain or arrest Sander was a discretionary function. "There is a substantial amount of independent judgment required to make a decision to arrest or to conclude whether probable cause exists." *Copper*, 905 F. Supp. at 702; *see Richmond v. Haney*, 480 N.W.2d 751, 759 (N.D. 1992). The Court finds Oestreich was exercising highly discretionary functions in the investigation and arrest of Sander, and he is entitled to state law immunity as a matter of law, and therefore summary judgment on these claims.

2. Malicious Prosecution – Sander's 7th Claim for Relief

With respect to Sander's state law malicious prosecution claim against Oestreich, the Court finds that Sander has not established a triable issue of fact on every essential element of the claim. In order to maintain an action for malicious prosecution, one must establish, at a minimum, the following elements:

1. Institution of a criminal proceeding by the defendant against the plaintiff;
2. Termination of the proceeding in favor of the accused;
3. Absence of probable cause for the proceeding; and

4. Malice.

Kummer v. City of Fargo, 516 N.W.2d 294, 298 (N.D. 1994); *Richmond*, 480 N.W.2d at 755.

Even assuming that Sander could establish Oestreich had instituted a criminal proceeding against him and that it terminated in his favor, Sander must still establish the absence of probable cause and malice. As the Court has already previously addressed, probable cause was present when prosecution against Sander was initiated. Further, regarding the element of malice, the North Dakota Supreme Court has stated, "Overzealous police techniques which lead to a successful defense do not, without more, constitute malice or ulterior purpose sufficient to support a tort claim." *Kummer*, 516 N.W.2d at 298. Absent some evidence that Oestreich was driven by some motive other than to bring an offender to justice, there can be no claim of abuse of process or malicious prosecution. *Id.*

Even if Oestreich's actions could fairly be said to constitute overzealous police work, Sander's state law claim for malicious prosecution against him must fail because there is no evidence in the record to support a jury finding of an ulterior motive beyond Sander's conclusory allegations and unsupported theory that Oestreich had a personal bias against Sander based on Oestreich's daughter's prior experiences and interactions with Sander. Oestreich also argues he is entitled to state law immunity, under N.D.C.C. § 32-12.1-03, as the decisions he made during the investigation were highly discretionary. *See Copper*, 905 F. Supp. at 702; *see Sande v. City of Grand Forks*, 269 N.W.2d 93, 98 (N.D. 1978); *McLain v. Midway Township*, 326 N.W.2d 196, 199 (N.D. 1982).

The Court agrees. Sander's state law claim of malicious prosecution against Oestreich fails as a matter of law.

3. Intentional Infliction of Emotional Distress—Sander's 8th Claim for Relief

Oestreich asserts he is entitled to summary judgment on Sander's state law claim for intentional infliction of emotional distress because Oestreich's conduct was not "extreme and outrageous" as a matter of law. The elements of a tort action for the intentional infliction of emotional distress are extreme and outrageous conduct that is intentional or reckless and causes severe emotional distress. *Kautzman v. McDonald*, 2001 ND 20, ¶ 18, 621 N.W.2d 871. Conduct which qualifies as extreme and outrageous is limited to conduct which exceeds "all possible bounds of decency" and which "would arouse resentment against the actor and lead to an exclamation of 'Outrageous' by an average member of the community." *Id.* The court must initially decide whether the alleged conduct may reasonably be regarded as "extreme and outrageous." *Id.*

Sander's complaint argues the Defendants engaged in extreme and outrageous conduct by "bullying, coercing, and intimidating" Sander into making a "false confession" and persisting in prosecuting Sander "when another individual had admitted to starting the fire." *See* Docket No. 1, p. 13. Again, Sander's complaint refers to the "Defendant Police Officers" collectively, and does not state which particular officer engaged in certain conduct. *See* Docket No. 1, p. 13-14. However, many of Sander's allegations of extreme and outrageous conduct appear to relate to the March 4th interview. Oestreich had legitimate law enforcement objectives

in interviewing Sander as he was attempting to determine the identity of a possible arsonist of a local high school. The Court finds that an average member of the community would not exclaim "Outrageous!" upon learning of Oestreich's actions in this case. As discussed above with respect to the constitutionality of the March 4th interview, the interview did not deviate from practices and tactics commonly employed in police interrogations. Further, as discussed above, Oestreich did not violate Sander's constitutional rights by failing to investigate other potential suspects. The Court finds as a matter of law that the conduct at issue cannot be said to exceed "all possible bounds of decency" or rise to the level of "extreme and outrageous conduct" as required under North Dakota law. *Kautzman*, 2001 ND 20, ¶ 18. Therefore, summary judgment on Sander's claim of intentional infliction of emotional distress against Oestreich is appropriate.

4. Abuse of Process-Sander's 9th Claim for Relief

The Court finds Sander's state law abuse of process claim against Oestreich fails as a matter of law. The tort of abuse of process involves an individual who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it was not designed. *Kummer*, 516 N.W.2d at 297. The essential elements of abuse of process include: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *Id.* The North Dakota Supreme Court has noted that the improper purpose usually "takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself." *Id.* As noted above regarding the malicious process claim,

Sander has failed to point to evidence in the record to support a finding that Oestreich had an ulterior purpose or motive, other than bringing an offender to justice or that he used any legal process to gain a collateral advantage over Sander. Sander makes a point to note that Oestreich was familiar with Sander and his behavior, due to the fact that Oestreich's daughter had previously worked with Sander, and Sander concludes that Oestreich's investigation was colored by a bias against Sander. However, Sander has failed to point to anything in the record which demonstrates or even suggests that Oestreich acted out a personal animosity or bias against Sander. Accordingly, Sander's state law claim of abuse of process against Oestreich fails as a matter of law, and Oestreich is entitled to summary judgment in his favor.

5. Gross Negligence and Willful Misconduct—Sander's 10th & 13th Claims for Relief

Sander's complaint alleges claims of "gross negligence" and "willful misconduct" against Oestreich. *See* Docket No. 1, pp. 15-16, 18-19. The Court has already concluded that a reasonable officer could have believed there was sufficient probable cause to arrest Sander on March 4th, and that doing so was a discretionary act. If a reasonable officer could have believed that the arrest was lawful, their actions cannot constitute gross negligence or willful misconduct. *See Wishnatsky v. Bergquist*, 550 N.W.2d 394, 403 (N.D. 1996). The Court finds that Sander's state law claims for gross negligence and willful misconduct against Oestreich fail as a matter of law, and summary judgment is appropriate.

6. North Dakota Constitution Claim—Sander's 11th Claim for Relief

Sander asserts a claim for relief under Article 1, Section 1 of the North Dakota State Constitution. *See* Docket No. 1, p. 16. Article 1, Section 1 of the North Dakota Constitution states:

> All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

Sander has failed to point to any case law to support his claim for a private right of action under the state constitution, and this Court will not take the extraordinary step of inferring one. The Court finds Oestreich is entitled to summary judgment as a matter of law on Sander's claim against him under Article 1, Section 1 of the North Dakota Constitution.

7. Deceit—Sander's 14th Claim for Relief

Sander's complaint alleges a claim of deceit against Oestreich and outlines various alleged false statements the officers made to Sander. *See* Docket No. 1, p. 19. Again, Sander's complaint does not distinguish which specific officer made which alleged false statements; rather he refers to them collectively as "Defendant Police Officers" or "Defendants." *See* Docket No. 1, p.

19. However, the statements Sander refers to in his complaint were presumably made during the March 4th interview.

"One who willfully deceives another with intent to induce that person to alter that person's position to that person's injury or risk is liable for any damage which that person thereby suffers." N.D.C.C. § 9-10-03. Deceit under N.D.C.C. § 9-10-02 applies where there is no contract between the parties. *Erickson v. Brown*, 2008 ND 57, ¶ 24, 747 N.W.2d 34. Deceit is defined as:

1. The suggestion as a fact of that which is not true by one who does not believe it to be true;
2. The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;
3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
4. A promise made without any intention of performing.

N.D.C.C. § 9-10-02.

The Court finds that Sander has failed to establish a causal connection between the alleged deception and the harm he alleged he sustained. *See Grandbois and Grandbois, Inc. v. City of Watford City*, 2004 ND 162, ¶ 24, 685 N.W.2d 129 (holding police officers' deception regarding misrepresentations on employment applications for bartender positions was insufficient to prove a causal connection between the omission

and the bar's subsequent financial losses following undercover officers' multiple drug arrests). The causal connection between the alleged deception, namely the misleading and lying about the evidence in the case, and the ultimate harm which Sander alleges, being prosecuted, is lacking because there was arguable probable cause to arrest Sander, independent from his confession. Further, Sander failed to identify any authority for holding a law enforcement officer liable under that tort for conduct during an official police interrogation.

8. Defamation—Sander's 18th Claim for Relief

Sander brought a claim of defamation against Oestreich, asserting "Defendant Officers and Detectives made false and unprivileged statements indicating that Tom Sander was guilty of starting the Trinity Fire and that he would be convicted and punished for that crime." *See* Docket No. 1, p. 24. It is unclear which alleged statements Sander believes are actionable, or which statements were made by Oestreich. Again, Sander's complaint does not distinguish which specific defendant made such statements, rather he refers to them collectively as "Defendant Police Officers" or "Detectives." *See* Docket No. 1, p. 24.

To be defamatory, a statement must be false and unprivileged. *See* N.D.C.C. § 14-02-03; N.D.C.C. § 14-02-04; *Mr. G's Turtle Mountain Lodge, Inc. v. Roland Tp.*, 2002 ND 140, ¶ 33, 651 N.W.2d 625. Any statement allegedly made regarding Sander being charged in connection with the Trinity fire could not support liability because it was not false, as Sander was, in

fact, charged. The Court finds that Oestreich is entitled to summary judgment as a matter of law on Sander's defamation claim.

III. Conclusion

After carefully reviewing the entire record and for the reasons set forth above, the Court GRANTS Defendant Oestreich's "Motion for Summary Judgment" (Docket No. 69).

IT IS SO ORDERED.

Dated this 5th day of February, 2018.

/s/ Daniel L. Hovland
Chief Judge
United States District Court

APPENDIX E
ORDER GRANTING DEFENDANTS KYLAN KLAUZER AND JEREMY MOSER'S MOTION FOR SUMMARY JUDGMENT (FEBRUARY 5, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

THOMAS SANDER,

Plaintiff,

v.

THE CITY OF DICKINSON, NORTH DAKOTA; KYLAN KLAUZER; JEREMY MOSER; TERRY OESTREICH; AND DOES 1-10,

Defendants.

Case No. 1:15-cv-72

Before: Daniel L. HOVLAND, Chief Judge, United States District Court.

Before the Court is Defendants Kylan Klauzer and Jeremy Moser's "Motion for Summary Judgment" filed on September 9, 2016. *See* Docket No. 51. The Plaintiff filed a response in opposition on September 30, 2016. *See* Docket No. 65. Defendants Klauzer and Moser filed a reply brief on October 14, 2016. *See* Docket No. 76. For the reasons explained below, Defendants Klauzer and Moser's motion for summary judgment is granted.

I. Background

This case stems from a fire which occurred at Trinity High School in Dickinson, North Dakota, on March 3, 2014. The Plaintiff, Thomas Sander, essentially brought this suit against the Defendants because he believes he was wrongfully targeted as a suspect, and subsequently arrested, in connection with the fire.

On the morning of March 3, 2014, Dickinson police officers were dispatched to reports of a fire at Trinity High School ("Trinity"). *See* Docket No. 53-1, p. 5. Dickinson police officers Casey Brosten, Steven Mattson, Hunter Easterling, and Matthew Hanson were the first to arrive on scene. The officers were informed by dispatch that the fire was contained in the vault area of the school's main office. Officer Hanson grabbed a fire extinguisher and ran into the building; he saw smoke filling the hallways and coming from the main office but initially did not see any flames. The officers waited for the Dickinson Fire Department to arrive, and monitored the building for flames. When Officer Hanson saw flames begin to come out of the vault and into the office, he used his fire extinguisher to push back the flames, but was unable to go any further into the office due to the extreme smoke. Eventually, the Dickinson Fire Department arrived and began extinguishing the fire.

At the scene, Officer Hanson spoke with Robert Storey, a teacher at Trinity, who was living in an apartment in the school. *See* Docket No. 53-1, p. 5. Storey said he arrived at the school at 8:30 p.m. and saw the Plaintiff, Thomas Sander, then-principal of Trinity, in his office, noting it was common for Sander

to work late. Storey said he fell asleep and woke to the fire alarm at approximately 12:15-12:20 a.m. Storey did not smell or see anything unusual and went outside to wait for emergency personnel to arrive. After waiting approximately five minutes, no one had arrived in response to the alarm, and he attempted to call Sander. Storey eventually went to Sander's residence which was across the street from the school. Storey and Sander returned to the school, entered the north gym door, and smelled smoke. Storey and Sander went towards the office, Sander opened the vault, and smoke poured out. Storey said he could not see flames, but could hear crackling. Storey said Sander called 911, and they went outside until emergency personnel arrived.

Officer Hanson also spoke with Sander at the scene. Sander told him he was "certain" he left the school at 11:50 p.m. the previous night. *See* Docket No. 53-1, p. 5. Sander said he went home and was sleeping when Storey woke him at 12:30 a.m. to tell him about the fire alarm. Sander said they went back to the school, entered the north gym door, smelled smoke, and went towards the main office. Sander said he went to his office and grabbed his laptop. Sander said he saw smoke coming from the vault, he opened the door, and smoke "poured" out. *See* Docket No. 53-1, p. 6. Sander said he went back to his office and called 911 from his office phone around "1ish." Sander said he had previously gone into the vault at 9:30 p.m. to get extra office supplies, and the vault door seemed to open "easy." When asked to clarify, Sander pulled out a combination to the safe from his pocket and said he did not have to put the entire combination in, the safe had just opened. When Officer Hanson

asked if Sander forgot to lock the safe, Sander said he may have or someone else could have opened it up. When Officer Hanson asked Sander if he knew of any other information which could possibly help solve how the fire started, Sander said Andrew DesRosier, the athletic director at Trinity, had been in the main office at 10:30 p.m. to make copies which Sander said was very odd and unusual. Sander noted DesRosier left at 10:40 p.m., but was unsure if he left the building or just the office. Officer Hanson noted Sander would not maintain eye contact and displayed "signs of deception," appearing "very eager" to give alternative options as to what caused the fire and "very nervous and uneasy with the conversation" when Officer Hanson mentioned the police would be taking the investigation seriously.

After their conversation, Sander got into a pickup with Storey and other Trinity officials who had arrived. *See* Docket No. 53-1, p. 6. After briefing with another officer, Officer Hanson returned to speak with Sander and Storey. Sander exited the vehicle and told Officer Hanson, "I have not opened this since I got it from my office," and proceeded to open his laptop, revealing a blue sticky note that said "I will bring this school to its knees." Officer Hanson turned the laptop and note over to Officer Jeremy Moser, the responding investigator. Officer Hanson asked Officer Casey Brosten to wait with Sander and Storey until they could be transported to the law enforcement center ("LEC") to give their statements. As Officer Brosten drove Sander and Storey to the LEC, Officer Brosten noted Sander appeared "very nervous" and "began to sweat profusely from his face," despite the fact that it was very cold outside. *See* Docket No. 53-1, p. 21.

Sander and Storey were put into separate interview rooms at the LEC and agreed to provide written statements about the incident. *See* Docket No. 53-1, p. 9. Neither Sander nor Storey were read the *Miranda* warnings.

Officer Moser first interviewed Storey. *See* Docket No. 53-1, p. 9. Storey confirmed he had seen Sander working in his office around 8:30 p.m. when he returned to Trinity that evening. Storey then went to his apartment located in the school, read a book, and went to bed around 9:30 p.m. Storey confirmed he woke up to the fire alarm and after waiting briefly for the fire department to respond, he called Sander and got no answer. Storey called Rich Holgard, who Sander lived with, and informed him the fire alarm was going off. Storey then walked to Holgard's home and spoke with him. They woke Sander up, and Storey and Sander walked back to the school to check the alarm and smelled smoke when they arrived. While inside, the two separated, and Storey went to the cafeteria and garage to try and locate the source of the smoke. Storey returned to the office area and saw Sander open the vault door and smoke "billowed out." Storey confirmed Sander went to his office and called the police. When asked if Storey had any suspicions on who would have started the fire, Storey said Sander told him DesRosier was in the officer earlier in the evening, but Storey did not believe DesRosier would have started the fire, and he did not think DesRosier had access to the vault.

Officer Moser next interviewed Sander. *See* Docket No. 53-1, p. 9. Sander recounted he worked until 11:50 p.m., drove home to Holgard's house, and was woke up by Holgard at approximately 12:45 a.m. *See* Docket

No. 53-1, pp. 9-10. Sander said Holgard told him the school's fire alarm was going off. *See* Docket No. 53-1, p. 10. Sander said he and Storey walked back to the school, entered the building, and immediately smelled smoke. Sander explained he went to his office where the alarm panel is located, he checked the main office where there was more smoke, and opened the vault after noticing a lot of smoke coming out of it. Sander noted only a few people, including himself, have access to the vault. Sander said he went to his office, called 911, and took his laptop from his office. Sander thought the fire was potentially caused by faulty wiring because it was an old building and had not been updated. Sander said that while watching the fire from Holgard's vehicle, he opened his laptop and found the blue sticky note that said "I will bring this school to its knees." Sander also noted the fire may not have been started by faulty wiring and that somebody "arsoned it on purpose." Sander speculated the fire may have been set by someone with a grudge against the school, and the person must have been someone that knew Sander. Sander suggested a "suspect" worth investigating would be Trinity's athletic director, Desrosier, but acknowledged Desrosier did not have the combination for the vault. When Moser asked Sander what he thought the note meant, Sander said it was probably written by someone who wanted to damage or burn the school or destroy some transcripts or files. When questioned whether or not the files would have been backed up electronically, Sander said he did not believe the older transcripts or personnel files were electronically stored.

Sander noted that, in February, he had found out his contract was not being renewed at the end of the

school year because he was not part of the long-term plan, but that he had hoped to stay on for a few years. *See* Docket No. 53-1, p. 11. Officer Moser asked Sander if his vehicle contained anything in reference to the fire, Sander said no, and said officers were welcome to search his vehicle and bedroom. Moser and Detective Travis Leintz drove Sander to Holgard's residence and Sander allowed them to search his bedroom and his car, neither of which revealed anything of interest.

Later on March 3, 2014, Terry Oestreich, a Dickinson police investigator at the time, met with several school officials, including Monsignor Patrick Schumacher, Steve Glasser, Father Kregg Hochhalter, Richard Holgard, and Andrew DesRosier about the fire. *See* Docket No. 53-1, p. 27. Holgard generally confirmed the timeline of Storey's and Sander's statements. When Holgard was notified of the fire, he drove to the school, and waited with Sander, Storey, and Glasser. At some point while Sander was sitting in Holgard's vehicle, Sander opened his laptop, and told the others there was a sticky note and read it aloud. Holgard noted Sander became anxious and wanted to show the note to the police officers. DesRosier confirmed he was working at the school the previous night, but had left at approximately 10:30 p.m. *See* Docket No. 53-1, p. 28.

The following day, on March 4, 2014, Oestreich contacted Sander inviting him back to the LEC for a second interview. *See* Docket No. 53-1, p. 31. The interview began around 11:00 a.m. For approximately the first half hour, Sander and Oestreich discussed personal histories and interests. *See* Docket No. 58

(Exhibit L)[1]. Oestreich then informed Sander that he was not under arrest, he could go anytime he wanted, and anything he said could be used for the investigation. *See* Docket No. 58 at 00:27. The next half hour consisted of Sander explaining his whereabouts and actions on the day of the fire; during that time, Sander spoke with relatively minimal interruptions by Oestreich. *See* Docket No. 58 at 00:30. Only into the second hour did Oestreich first indicate that they were considering Sander as a potential suspect. *See* Docket No. 58 at 1:10.

Oestreich noted a handwriting expert had conducted an analysis and determined there was a ten-point match between the sticky note Sander found on his laptop and Sander's handwriting from his previous written statement. *See* Docket No. 58 at 1:13. Oestreich also stated he was aware Sander had come into a difficult situation at the school, he was being let go at the end of the year, and he had been treated unfairly. *See* Docket No. 58 at 1:15.

Approximately an hour and a half into the interview, Sander stated "I need to get an attorney." *See* Docket No. 58 at 1:30. Oestreich confirmed it was Sander's right to do so, but "it never gets any easier." *See* Docket Nos. 58 at 1:30; 65-9, p. 26. Sander continued to speak with Oestreich, however, and did not further express a desire to speak to an attorney. Eventually, Sander got up to leave, stating "I would like to leave—I'm not under arrest–because we're not getting anywhere." *See* Docket Nos. 58 at 1:43; 65-9, p. 29. Oestreich and Sander kept talking for a short

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[1] All future citations to Docket No. 58 refer to Exhibit L unless otherwise indicated.

time, and then Sander attempted to walk out of the interrogation room when Officer Kylan Klauzer entered and asked Sander to go back into the room and informed Sander he might not be free to leave. *See* Docket No. 58 at 1:55. Sander was left alone in the interrogation room for a few minutes before Oestreich and Klauzer returned. *See* Docket No. 58 at 1:58.

Upon returning, Klauzer stated he had been investigating the fire, and they had evidence that no one had entered the school after Sander left. *See* Docket No. 58 at 1:59. Sander again attempted to leave, but Klauzer informed him he was not free to leave. *See* Docket No. 58 at 2:12. Sander again later asked if he was allowed to leave, and was told "no, not right now." *See* Docket No. 58 at 2:27. Eventually, Sander asked about the consequences of talking. *See* Docket No. 58 at 2:41. Klauzer stated that if Sander was honest, Klauzer's intention was to help Sander obtain a plea deal with ideally no jail time. *See* Docket No. 58 at 2:41.

At one point in the interview, Sander asked if he may be allowed to use the restroom while supervised. *See* Docket No. 58 at 2:43. The officers did not directly respond to his question.[2] Although Klauzer stated he could not make any promises, Oestreich repeatedly noted the state's attorneys would "listen" to them.

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[2] Sander reiterated his request to use the bathroom approximately ten minutes later after he initially asked to do so. *See* Docket No. 58 at 2:52. Klauzer responded saying he wanted to talk about "this" first. Approximately half an hour after his initial request, Sander again requested to use the restroom and was allowed to do so. *See* Docket No. 58 at 3:25. In total, there was an approximately 42-minute delay from Sander's first request to use the restroom.

See Docket No. 58 at 2:45. Sander asked the officers whether he will be able to consult an attorney afterwards, and both officers stated "absolutely." Sander then began to confess to starting the fire. A little over the three hour mark, Klauzer left the room, and Oestreich finished questioning Sander alone. *See* Docket No. 58 at 3:10.

Sander was eventually left alone in the interrogation room. *See* Docket No. 58 at 3:29. During that time, Sander placed a call on his cell phone, explaining he confessed to setting the fire because the police told him they had so much evidence against him; they were not going to allow him to leave that day if he denied starting the fire; and he was hoping to get a lesser sentence and no jail time. *See* Docket No. 58 at 3:40. Sander was arrested that day and charged with arson and endangerment by fire or explosion. By 4:40 p.m. on March 4, a press release from the Dickinson Police Department was issued, noting that Sander had been taken into custody and outlining the charges he faced.

After Sander was arrested on March 4, police dispatch received an anonymous call from a male caller who identified himself as "The Holy Ghost" at 1:51 a.m. on March 5, 2014. *See* Docket No. 55-6, p. 2. The caller stated there was a note by the LEC's door that needed to be read. A note was found in the location where the caller indicated. The note stated:

> Thomas Sander is Innocent I broke into Trinity through the back parking lot entrance (broken door). I entered the vault with this combination 4 left to # 80 3 right to # 45 2 left to # 30 Right to stay I Then lit a Titan Sweatshirt on Fire and left it on a stack of

> papers. I stole all money in cash boxes (proof is paper bag I left with this note) As I left building I pulled Fire Alarm near Men's Locker room exit. Release Mr. Sander and I will turn myself in. signed Ghost.

See Docket Nos. 53-11 and 55-6, p. 2.

Police received another anonymous call from the West River Community Center on March 5, 2014; the male caller stated he was the individual who started the fire at Trinity. *See* Docket No. 55-6. Upon investigating the phone calls, police officers identified James Gordon, a Trinity student, as the likely caller. Gordon was brought to the LEC for questioning, and Oestreich interviewed him.

Initially, Gordon stated he did not write the note left at the LEC, but received it from a stranger. *See* Docket No. 53-10. However, when pressed for more details, Gordon finally admitted that he wrote the note, explaining he did so to help Sander because he was grateful to Sander for helping with his sports eligibility and giving him a job. After Gordon acknowledged that he had, in fact, written the note, Oestreich began to express his suspicion that Gordon had started the fire. Eventually, Gordon admitted to starting the fire at Trinity. At no time in the interview did Gordon ever mention the blue sticky note, and he also denied ever going into Sander's office. Gordon continued to vacillate throughout the interview, and ultimately recanted his earlier confession, stating he did not start the fire and was simply trying to help Sander because he did not believe Sander had started the fire. Gordon was subsequently charged with hindering law enforcement.

State criminal charges were eventually brought against Sander for arson in violation of N.D.C.C. § 12.1-21-01 and endangering by fire or explosion in violation of N.D.C.C. § 12.1-21-02. *See State v. Sander*, No. 45-2014-CR-00366 (N.D. Dist. Ct. 2014). During the course of that case, the state district court ruled that portions of Sander's interrogations were inadmissible against Sander at trial. *See* Docket No. 37-1. Subsequently, the district court granted the State's motion to dismiss the charges against Sander without prejudice.

On June 8, 2015, Sander commenced this suit against the Defendants[3] asserting nineteen separate causes of action. *See* Docket No. 1. Sander's complaint asserts several federal civil rights claims under 42 U.S.C. § 1983 against the Defendants, relating to alleged unconstitutional conduct in investigating, interrogating, and arresting Sander. The complaint also asserts several causes of action against the City of Dickinson relating to its hiring, training, and supervision of the named Defendants, and alleges several other state law causes of action against all the Defendants, ranging from intentional infliction of emotional distress to defamation and deceit.

II. Legal Analysis

Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates no genuine issues of material fact exist and the moving party is entitled to judgment

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[3] Defendant Oestreich, a former Dickinson Police Department official, has since been elected Sheriff of Stark County, North Dakota and has left the Dickinson Police Department.

as a matter of law. *Davison v. City of Minneapolis, Minn.*, 490 F.3d 648, 654 (8th Cir. 2007); Fed. R. Civ. P. 56(a). Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. *Id.*

The Court must inquire whether the evidence presents sufficient disagreement to require the submission of the case to a jury or if it is so one-sided that one party must prevail as a matter of law. *Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 832 (8th Cir. 2005). The moving party bears the burden of demonstrating an absence of a genuine issue of material fact. *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir. 2002). The non-moving party may not rely merely on allegations or denials; rather, it must set out specific facts showing a genuine issue for trial. *Id.*

Klauzer and Moser moved for summary judgment on all of Sander's claims against them, arguing they are entitled to qualified immunity and state law immunity. *See* Docket No. 52. Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. *Sheets v. Butera*, 389 F.3d 772, 776 (8th Cir. 2004). "Qualified immunity shields government officials from suit unless their conduct violated a clearly established constitutional or statutory right of which a reasonable person would have known." *Littrell v. Franklin*, 388 F.3d 578, 582 (8th Cir. 2004) (citation omitted). The Supreme Court has construed qualified immunity protection to shield "all but the

plainly incompetent or those who knowingly violate the law." *Id.* For qualified immunity to apply, a two-part inquiry is conducted:

(1) Whether the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and

(2) Whether the right was clearly established at the time of the deprivation.

Howard v. Kansas City Police Dep't, 570 F.3d 984, 988 (8th Cir. 2009).

A. Sander's Federal Law Claims Under 42 U.S.C. § 1983

In a 42 U.S.C. § 1983 case, an official is only liable for his own misconduct and is not accountable for the misdeeds of other agents under a theory such as respondeat superior or supervisor liability. *Whitson v. Stone County Jail*, 602 F.3d 920, 928 (8th Cir. 2010). Further, the doctrine of qualified immunity also requires an individualized analysis as to each officer because a person may be held personally liable for a constitutional violation only if his own conduct violated a clearly established constitutional right. *Manning v. Cotton*, 862 F.3d 663, 668 (8th Cir. 2017). Thus, Klauzer and Moser are only responsible or liable for their own behavior, individually.

1. Probable Cause – Sander's 17th Claim for Relief

Underlying many of Sander's federal and state law claims is his assertion that he was detained on March 4, 2014, without probable cause. Klauzer and Moser

argue they are entitled to summary judgment because Sander relies on the assumption that his confession during the March 4th interview was essential to finding probable cause; however, Klauzer and Moser argue there was sufficient probable cause to arrest Sander prior to his confession. *See* Docket No. 52.

A warrantless arrest is consistent with the Fourth Amendment if it is supported by probable cause, and an officer is entitled to qualified immunity if there is at least "arguable probable cause." *Borgman v. Kedley*, 646 F.3d 518, 522-23 (8th Cir. 2011). An officer has probable cause to make a warrantless arrest when the totality of the circumstances at the time of the arrest are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense. *Id.* at 523. Arguable probable cause exists even when an officer mistakenly arrests a suspect believing it is based on probable cause if the mistake is "objectively reasonable." *Id.* An arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. *Devenpeck v. Alford*, 543 U.S. 146, 593 (2004). Although the probable cause standard allows room for reasonable mistakes by a reasonable person, the qualified immunity standard protects "all but the plainly incompetent or those who knowingly violate the law." *Greenman v. Jessen*, 787 F.3d 882, 888 (8th Cir. 2015).

In North Dakota, a person commits the offense of arson if he starts a fire or causes an explosion with intent to destroy a building. N.D.C.C. § 12.1-21-01. In *State v. Beciraj*, the North Dakota Supreme Court affirmed the conviction of a co-conspirator for conspiracy to commit arson based on circumstantial evidence establishing her motive and conduct linking her to

the crime. 2003 ND 173, ¶¶ 11-12, 671 N.W.2d 250. The Supreme Court determined there was sufficient evidence to support the jury's guilty verdict because the co-conspirator and her husband had recently taken out homeowners' insurance; the home was unlocked when firefighters arrived although no family members were present; and the co-conspirator had been seen carrying bags of clothing and other household items away from the home on the day of the fire. *See id.*

Klauzer and Moser argue that, like in *Beciraj*, there was ample circumstantial evidence that Sander had committed arson when Klauzer detained him on March 4th: (1) Sander was at the school, in the main office where the vault is located, less than half an hour before Storey heard the fire alarm; (2) Sander stated the vault was closed when he returned to the school to investigate the alarm, narrowing the window for anyone else to have started the fire; (3) Sander produced the sticky note, which strongly indicated the fire was intentional, from his laptop after Officer Hanson told him the police would be taking the investigation seriously; (4) the fire originated in the vault which few people, including Sander, had access to and the combination for, and none of those individuals were seen in the school the night of the fire; and (5) Sander's contract was not being renewed at the end of the year, supporting a potential motive for arson. *See* Docket No. 52.

Given all these facts, and the absence of viable alternative suspects with comparable means, motive, and opportunity, Klauzer and Moser argue there was arguable probable cause to arrest Sander when Klauzer detained him during the March 4th interview. *See* Docket No. 52. Sander's response argues that critical

details in his confession were "inconsistent with what was later learned about the fire." *See* Docket No. 65, p. 13. However, Sander's argument is misplaced. As Klauzer and Moser note, other facts that were uncovered later in the investigation which might diminish probable cause, such as a potential new suspect and inconsistencies in witness statements, do not undermine the analysis because the question regarding probable cause involves what the officers knew at the time on March 4th. The Court finds there was arguable probable cause to arrest Sander when Klauzer detained him during the interview on March 4, 2014.

2. Substantive Due Process Claims—Sander's 1st and 3rd Claims for Relief

Klauzer and Moser argue they are entitled to summary judgment on Sander's substantive due process claim because they did not violate a fundamental right of Sander's and, even if they did, their conduct was not conscience shocking.

Klauzer and Moser acknowledge Sander did not receive adequate *Miranda* warnings before being subjected to a custodial interrogation. *See* Docket No. 52, p. 19. However, they argue the Eighth Circuit Court of Appeals has made it clear that defendants may not be held liable under Section 1983 for those alleged failures. The Eighth Circuit has stated "a litigant cannot maintain an action under § 1983 based on a violation of the *Miranda* safeguards." *Hannon v. Sanner*, 441 F.3d 635, 636 (8th Cir. 2006). Because the reading of *Miranda* warnings is a procedural safeguard rather than a right arising out of the Fifth Amendment, the remedy for a *Miranda* violation is the exclusion

from evidence of any compelled self-incrimination, not a Section 1983 action. *Id.*; *Warren v. City of Lincoln, Neb.*, 864 F.2d 1436, 1442 (8th Cir. 1989). Even assuming that Sander's statements were obtained in violation of *Miranda*, Section 1983 does not provide a remedy for a violation of *Miranda*; thus, Sander's exclusive remedy would have been the suppression of his statements, and he already received that remedy in the state district court. *See Hannon*, 441 F.3d at 636.

Further, Klauzer and Moser argue Sander's claims under Section 1983 relating to his Fifth Amendment right not to incriminate himself fails because Sander did not proceed to a criminal trial. *See* Docket No. 52. Statements compelled by police interrogations obviously may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the self-incrimination clause occurs. *Winslow v. Smith*, 696 F.3d 716, 731 n. 4 (8th Cir. 2012); *Chavez v. Martinez*, 538 U.S. 760, 767 (2003). In *Winslow*, three suspects who pled guilty and one who pled no contest to murder charges could not bring claims under Section 1983 relating to their Fifth Amendment right not to incriminate themselves because those statements were never used at trial. 696 F.3d at 716, n. 4. Like in *Winslow*, none of Sander's statements were used in a criminal trial. In fact, Sander's confession was suppressed by the state district court, and the criminal charges against him were ultimately dismissed. A failure to give *Miranda* warnings, even if police obtain an unwarned confession, cannot alone support Section 1983 liability.

In order to establish a violation of substantive due process rights, a plaintiff must show (1) that one

or more of their fundamental constitutional rights were violated, and (2) that the conduct was shocking to the conscience. *See Flowers v. City of Minneapolis, Minn.*, 478 F.3d 869, 873 (8th Cir. 2007). Whether conduct shocks the conscience is a question of law. *Folkerts v. City of Waverly, Iowa*, 707 F.3d 975, 980 (8th Cir. 2013). The threshold question is whether the behavior of the governmental officer is so egregious and outrageous that it may fairly be said to shock the contemporary conscience. *Atkins v. Epperly*, 588 F.3d 1178, 1183 (8th Cir. 2009). Conduct intended to injure will generally rise to the conscience-shocking level, but negligent conducts falls beneath the threshold of constitutional due process. *Id.* The Eighth Circuit has held that investigators shock the conscience when they (1) attempt to coerce or threaten the criminal defendant; (2) purposefully ignore evidence of the defendant's innocence; or (3) systematically pressure to implicate the defendant despite contrary evidence. *Folkerts*, 707 F.3d at 981. However, an officer's negligent failure to investigate inconsistencies or other leads is insufficient to establish conscience-shocking misconduct. *Atkins*, 588 F.3d at 1184.

"Fundamental to our system of justice is the principle that a person's rights are violated if police coerce an involuntary confession from him, truthful or otherwise, through physical or psychological methods designed to overbear his will." *Wilson v. Lawrence County*, 260 F.3d 946, 952 (8th Cir. 2001). Whether or not a confession is the involuntary product of coercion is judged by the totality of the circumstances—including an examination of both the conduct of the officers and the characteristics of the accused. *Id.* "[E]ven though the police use overreaching tactics

such as the use of threats or violence, or the use of direct or indirect promises, such promises or threats will not render the confession involuntary unless it overcomes the defendant's free will and impairs his capacity for self-determination." *Sheets*, 389 F.3d at 778. Courts are to review the totality of the circumstances, considering "the degree of police coercion, the length of the interrogation, its location, its continuity, and the defendant's maturity, education, physical condition, and mental condition." *Id.* at 779. However, it goes without saying that "the interrogation of a suspect will involve some pressure." *Id.*

It is clear Moser is entitled to summary judgment on Sander's substantive due process claims. Moser did not participate in the March 4th interview with Klauzer and Oestreich. Rather, his interaction with Sander occurred on March 3rd, during a non-custodial interview in which Sander was not considered a suspect or detained, even briefly. In Section 1983 cases, officials are only liable for his or her own misconduct and are not accountable for the misdeeds of other agents; thus, Moser is only responsible or liable for his own behavior. *See Whitson*, 602 F.3d at 928. Therefore, Moser is entitled to summary judgment on Sander's substantive due process claims.

Klauzer did not use violence or threats of violence to extract a confession from Sander on March 4th. Although Sander noted in his deposition that the thought crossed his mind that Klauzer and Oestreich might resort to physical violence during the March 4th interview, he acknowledged Klauzer did not touch him nor did Klauzer make threatening statements towards Sander during the interview. *See* Docket No.

53-8, p. 79. Sander asserts the "defendants[4] who are each over 200 pounds" had Sander "pinned in the corner" of the interrogation room. *See* Docket No. 65, p. 31. The Court acknowledges that Klauzer and Oestreich were seated close to Sander, and Sander was essentially seated in the corner of the room during the interrogation. However, the interview took place in a standard Dickinson police interview room, and Klauzer and Oestreich's proximity to Sander was not unduly coercive or threatening.

Sander asserts he was prevented from using the restroom during the March 4th interview. Upon a review of the video recording of the interview, there was an approximately 42-minute delay after Sander initially requested to use the restroom. While the officers did indeed delay Sander's access to the restroom, the delay was not unreasonably lengthy and does not alone shock the conscience. Other courts have determined that similar delays do not shock the conscience. *See Dowell v. Lincoln County*, 927 F. Supp. 2d 741, 752 (E.D. Mo. 2013) (thirty-four minute delay in access to the restroom did not shock the conscience).

The statement to an accused that telling the truth "would be better for him" does not constitute an implied or express promise of leniency for the purpose of rendering his confession involuntary. *Simmons v. Bowersox*, 235 F.3d 1124, 1133 (8th Cir. 2001). Further, officers may elicit statements by claiming not to

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[4] Throughout his response, Sander often references particular individuals collectively as "Defendants." However, as asserted above, officials are only liable for his or her own misconduct and are not accountable for the misdeeds of other agents. *See Whitson*, 602 F.3d at 928.

believe the accused's denials. *Id.* Interrogation tactics such as deception and raised voices also do not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne. *Id.* While Klauzer informed Sander that he would do his best to encourage the State's Attorney to seek a sentence without a lengthy prison term, Klauzer also noted he could not make any promises.

It goes without saying that the interrogation of a suspect will involve some pressure as the very purpose is to elicit a confession. *Sheets*, 389 F.3d at 779. However, in reviewing the totality of the circumstances, the Court finds that Klauzer's statements and actions during the March 4th interview do not shock the conscience. Courts are to consider the degree of police coercion, the length of the interrogation, its location, its continuity, and the defendant's maturity, education, physical condition, and mental condition. *See id.* The interrogation on March 4th took place in a standard Dickinson police interview room around 11:00 a.m., and Sander arrived voluntarily at Oestreich's request. The interview only lasted approximately three and a half hours, and the first hour did not consist of probing or accusatorial questioning. No violence or physical threats were used. Further, Sander is an extremely well-educated adult; he graduated from college and got his master's in education, and he was in the process of a graduate program in theology at the time of the interview. *See* Docket No. 65-9, pp. 4-5. In reviewing the totality of the circumstances, the Court finds that the tactics employed by Klauzer during the March 4th interview do not rise to the level of malice or sadism resulting in the inhumane abuse of power that literally shocks

the conscience. *See id.*; *Moran v. Clarke*, 296 F.3d 638, 647 (8th Cir. 2002). Therefore, the Court finds Klauzer is entitled to summary judgment on Sander's substantive due process claim against him.

Sander's complaint also alleges Klauzer and Moser recklessly failed to investigate other leads, namely failing to investigate James Gordon as a viable suspect. Klauzer and Moser argue they are entitled to qualified immunity on this claim because there is no evidence that they failed to follow any lead or otherwise violate a clearly established right of Sander's. The Eighth Circuit recognized a substantive due process cause of action for reckless investigation in *Wilson v. Lawrence County, Mo.*, 260 F.3d 946 (8th Cir. 2001), where the Circuit identified the liberty interest at stake as the interest in obtaining fair criminal proceedings. The test for whether state officers' actions violate this protected liberty interest is whether those actions shock the conscience. *Amrine v. Brooks*, 522 F.3d 823, 833 (8th Cir. 2008). Mere negligent failure to investigate does not violate substantive due process, nor do allegations of gross negligence give rise to a constitutional violation. *Id.*

Although Gordon confessed to starting the fire at one point during his interview with Oestreich, Klauzer and Moser argue inconsistencies in Gordon's statement excluded him as a suspect. Specifically, Klauzer and Moser argue Gordon failed to tell Oestreich in his interview about the sticky note on Sander's laptop which officers believed was a crucial piece of evidence in the case; Gordon denied going into Sander's office when he asserted he started the fire; and there was not a fire alarm in the location Gordon identified. Further, Gordon's story vacillated throughout the

interview, until he ultimately stated that he wrote the note and confessed to try and protect Sander. The Eighth Circuit has noted that even if police officers credit one individual's statement over another, and they are ultimately incorrect in their conclusions, qualified immunity protects officers from such types of "mistaken judgments." *Brockinton v. City of Sherwood, Ark.*, 503 F.3d 667, 672 (8th Cir. 2007). Further, Sander has not demonstrated that Klauzer or Moser's conduct during the investigation into the Trinity fire "shocked the conscience." Therefore, the Court finds that Klauzer and Moser are entitled to qualified immunity on this claim.

3. Failure to Preserve Exculpatory Evidence—Sander's 2nd and 12th claim for Relief

Klauzer and Moser argue they are entitled to summary judgment on Sander's allegations that they suppressed or failed to disclose exculpatory evidence. *See* Docket No. 52, p. 33.

An investigating officer's failure to preserve evidence potentially useful to the accused or his failure to disclose such evidence does not constitute a denial of due process in the absence of bad faith. *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008). Consequently, to be viable, Sander's claim must allege bad faith to implicate a clearly established right under *Brady*. *Id.* Even assuming that Klauzer and Moser failed to disclose exculpatory evidence, the Court finds there was no *Brady* violation because Sander was not convicted. *See Livers v. Schenck*, 700 F.3d 340, 359 (8th Cir. 2012). In *Livers*, the Eighth Circuit determined the investigating officers were entitled to qualified

immunity on pretrial detainees' Section 1983 claim alleging the officers failed to disclose exculpatory evidence in violation of their due process rights, since a pretrial right to disclosure of such evidence, if it existed at all, was not clearly established. 700 F.3d at 359-60. Moreover, Klauzer and Moser argue that, to the extent Sander seeks to assert a claim for malicious prosecution under Section 1983, such a claim is barred in the Eighth Circuit, and Klauzer and Moser are therefore entitled to summary judgment. *See Kurtz v. City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001). The Court agrees.

4. Conspiracy to Violate Civil Rights – Sander's 5th Claim for Relief

Sander's complaint asserts claims of conspiracy to violate his civil rights against Klauzer and Moser. *See* Docket No. 1, p. 11. To prove a 42 U.S.C. § 1983 conspiracy claim, Sander must show: (1) that the defendant conspired with others to deprive him of constitutional rights; (2) that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and (3) that the overt act injured the plaintiff. *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008). Klauzer and Moser argue that if the Court granted Klauzer and Moser qualified immunity on the claims asserted above, it should also grant summary judgment on Sander's civil rights conspiracy claims against them. The Court agrees. Further, Klauzer and Moser argue there is no evidence in the record to support a meeting of the minds as to any intention to violate Sander's civil rights. Even if Sander argues there was some manner of agreement between Oestreich and Klauzer not to give Sander the complete *Miranda* warnings prior to the March 4th

interview, Klauzer and Moser argue that claim would fail nonetheless because the underlying claim, failure to give *Miranda* warnings, is not independently actionable under Section 1983. *See Hannon*, 441 F.3d at 636. The Court agrees.

B. Sander's State Law Claims

1. False Arrest, False Imprisonment, Malicious Prosecution, and Abuse of Process—Sander's 6th, 7th, and 9th Claims for Relief

Klauzer and Moser argue they are entitled to state-law immunity on Sander's state law claims for false arrest, false imprisonment, malicious prosecution, and abuse of process because the determination of whether probable cause to arrest exists is a discretionary function, subject to immunity under N.D.C.C. ch. 32-12.1. *See* Docket No. 52, pp. 34-35.

Section 32-12.1-03(3)(c) of the North Dakota Century Code sets forth the discretionary function exception to liability of a political subdivision or political subdivision employee. Section 32-12.1-03, N.D.C.C., states, in pertinent part: "A political subdivision or a political subdivision employee may not be held liable under this chapter for . . . [t]he decision to perform or the refusal to exercise or perform a discretionary function or duty, whether or not such discretion is abused . . . " The North Dakota Supreme Court has interpreted this subsection to provide political subdivisions and their employees immunity from liability for allegations of negligence in the exercise of a discretionary function. *Copper v. City of Fargo*, 905 F. Supp. 680, 702 (D.N.D. 1994); *see Sande v. City of*

Grand Forks, 269 N.W.2d 93, 98 (N.D. 1978); *McLain v. Midway Township*, 326 N.W.2d 196, 199 (N.D. 1982). Therefore, Klauzer and Moser are immune from liability for Sander's state law claims for false arrest and false imprisonment, regardless of whether they were negligent or whether they exercised due care, provided that they can demonstrate that the decision to detain arrest Sander was a discretionary function.

"There is a substantial amount of independent judgment required to make a decision to arrest or to conclude whether probable cause exists." *Copper*, 905 F. Supp. at 702; *see Richmond v. Haney*, 480 N.W.2d 751, 759 (N.D. 1992). The Court finds that Klauzer and Moser were exercising highly discretionary functions in the investigation and arrest of Sander,[5] and they are entitled to state-law immunity as a matter of law, and therefore summary judgment on these claims. Further, irrespective of the availability of state-law immunity regarding these claims, the presence of probable cause, as discussed above, establishes legal authority to arrest and prosecute, making summary judgment appropriate.

With respect to Sander's state law malicious prosecution claim, the Court finds that he has not established a triable issue of fact on every essential element of the claim. In order to maintain an action for malicious prosecution, one must establish, at a minimum, the following elements:

1. Institution of a criminal proceeding by the defendant against the plaintiff;

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[5] It is unclear whether Moser actually participated in the arrest of Sander, as he was not present in the interrogation room during the March 4 interview.

2. Termination of the proceeding in favor of the accused;
3. Absence of probable cause for the proceeding; and
4. Malice.

Kummer v. City of Fargo, 516 N.W.2d 294, 298 (N.D. 1994); *Richmond*, 480 N.W.2d at 755. Even assuming that Sander could establish that either Klauzer or Moser had instituted a criminal proceeding against him and that it terminated in his favor, Sander must still establish the absence of probable cause and malice. *Id.* As the Court has already previously addressed, probable cause was present when prosecution against Sander was initiated. Further, regarding the element of malice, the North Dakota Supreme Court has stated:

> Overzealous police techniques which lead to a successful defense do not, without more, constitute malice or ulterior purpose sufficient to support a tort claim. Absent some evidence that the defendants were driven by some motive other than to bring an offender to justice, there can be no claim of abuse of process or malicious prosecution.

Kummer, 516 N.W.2d at 298. It follows that even if Klauzer and Moser's actions could fairly be said to constitute overzealous police work, Sander's state law claim for malicious prosecution against them must fail because there is no evidence in the record to support a jury finding of an ulterior motive beyond Sander's conclusory allegations.

The Court finds Sander's state law abuse of process claims against Klauzer and Moser fail as a matter of law for similar reasons. The tort of abuse of process involves an individual who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it was not designed. *Kummer*, 516 N.W.2d at 297. The essential elements of abuse of process include: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *Id.* The North Dakota Supreme Court has noted that the improper purpose usually "takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself." *Id.* As noted above regarding the malicious process claim, Sander has failed to point to evidence in the record to support a finding of Klauzer and Moser having an ulterior purpose or motive, other than bringing an offender to justice or that they used any legal process to gain a collateral advantage over Sander. Accordingly, these state law claims against Klauzer and Moser fail as a matter of law, and they are entitled to summary judgment in their favor.

2. Gross Negligence and Willful Misconduct—Sander's 10th & 13th Claims for Relief

Sander's complaint alleges claims of "gross negligence" and "willful misconduct" against Klauzer and Moser. *See* Docket No. 1, pp. 15-16, 18-19. Klauzer and Moser argue discretionary immunity also applies to these claims, noting that the plain language of N.D.C.C. § 32-12.1-03(30 does not contain an exception to immunity for discretionary acts, and decisions to interrogate and arrest suspect are discretionary acts.

The Court has already concluded that a reasonable officer could have believed there was probable cause to arrest Sander for arson, and that doing so was a discretionary act. If a reasonable officer could have believed that the arrest was lawful, their actions cannot constitute gross negligence or willful misconduct. The Court finds that Sander's state law claims for gross negligence and willful misconduct against Klauzer and Moser fail as a matter of law, and summary judgment is appropriate.

3. Deceit—Sander's 14th Claim for Relief

Sander's complaint alleges a claim of deceit against Klauzer and Moser and outlines various alleged false statements the officers[6] made to Sander. *See* Docket No. 1, p. 19. The statements Sander refers to in his complaint were presumably made during the March 4 interview, which Moser was not present for.

"One who willfully deceives another with intent to induce that person to alter that person's position to that person's injury or risk is liable for any damage which that person thereby suffers." N.D.C.C. § 9-10-03. Deceit under N.D.C.C. § 9-10-02 applies where there is no contract between the parties. *Erickson v. Brown*, 2008 ND 57, ¶ 24, 747 N.W.2d 34. Deceit is defined as:

1. The suggestion as a fact of that which is not true by one who does not believe it to be true;

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[6] Again, Sander's complaint does not distinguish which officer made which alleged false statement. *See* Docket No. 1, p. 19.

2. The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;

3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or

4. A promise made without any intention of performing.

N.D.C.C. § 9-10-02.

Klauzer and Moser argue there is no evidence in the record to establish that any deception proximately damaged Sander. Klauzer and Moser argue that the causal connection between the alleged deception, namely the misleading and lying about the evidence in the case, and the ultimate harm which Sander alleges, being prosecuted, is lacking because there was probable cause to arrest Sander independent from his confession. The Court agrees with Klauzer and Moser. The Court finds that Sander has failed to establish a causal connection between the alleged deception and the harm he alleged he sustained. *See Grandbois and Grandbois, Inc. v. City of Watford City*, 2004 ND 162, ¶ 24, 685 N.W.2d 129 (holding police officers' deception regarding misrepresentations on employment applications for bartender positions was insufficient to prove a causal connection between the omission and the bar's subsequent financial losses following undercover officers' multiple drug arrests). Further, Sander failed to identify any authority for holding law enforcement officers liable under that tort for conduct during an official police interrogation.

4. Intentional Infliction of Emotional Distress—Sander's 8th Claim for Relief

Klauzer and Moser assert they are entitled to summary judgment on Sander's claim for intentional infliction of emotional distress against them because their conduct was not extreme and outrageous as a matter of law. The elements of a tort action for the intentional infliction of emotional distress are extreme and outrageous conduct that is intentional or reckless and causes severe emotional distress. *Kautzman v. McDonald*, 2001 ND 20, ¶ 18, 621 N.W.2d 871. Conduct which qualifies as extreme and outrageous is limited to conduct which exceeds "all possible bounds of decency" and which "would arouse resentment against the actor and lead to an exclamation of 'Outrageous' by an average member of the community." *Id.* The court must initially decide whether the alleged conduct may reasonably be regarded as "extreme and outrageous." *Id.*

Sander's complaint argues the Defendants engaged in extreme and outrageous conduct by "bullying, coercing, and intimidating" Sander into making a "false confession" and persisting in prosecuting Sander "when another individual had admitted to starting the fire." *See* Docket No. 1, p. 13. Again, Sander's complaint refers to the "Defendant Police Officers" collectively, and does not state which particular officer engaged in certain conduct. *See* Docket No. 1, p. 13-14. However, many of Sander's allegations of extreme and outrageous conduct appear to relate to the March 4th interview. The officers had legitimate law enforcement objectives in interviewing Sander as they were attempting to determine the identity of a possible arsonist of a local high school. The Court finds that an average member

of the community would not exclaim "Outrageous!" upon learning of the officers' actions in this case. As discussed above with respect to the constitutionality of the March 4th interview, the interview did not deviate from practices and tactics commonly employed in police interrogations. Further, as discussed above, the officers did not violate Sander's constitutional rights by failing to investigate another potential suspect. The Court finds as a matter of law that the conduct at issue cannot be said to exceed "all possible bounds of decency" or rise to the level of "extreme and outrageous conduct" as required under North Dakota law. *Kautzman*, 2001 ND 20, ¶ 18. Therefore, summary judgment on Sander's claims of intentional infliction of emotional distress against Klauzer and Moser is appropriate.

5. Defamation—Sander's 18th Claim for Relief

Sander brought a claim of defamation against Klauzer and Moser, asserting "Defendant Officers and Detectives made false and unprivileged statements indicating that Tom Sander was guilty of starting the Trinity Fire and that he would be convicted and punished for that crime." *See* Docket No. 1, p. 24. It is unclear which alleged statements, made by either Klauzer or Moser, Sander believes are actionable. Again, Sander's complaint does not distinguish which specific defendant made such statements, rather he refers to them collectively as "Defendant Police Officers" or "Detectives." *See* Docket No. 1, p. 24.

To be defamatory, a statement must be false and unprivileged. *See* N.D.C.C. § 14-02-03; N.D.C.C. § 14-02-04; *Mr. G's Turtle Mountain Lodge, Inc. v. Roland*

Tp., 2002 ND 140, ¶ 33, 651 N.W.2d 625. Klauzer and Moser argue that any statement allegedly made regarding Sander being charged in connection with the Trinity fire could not support liability because it was not false, as Sander was, in fact, charged. The Court agrees.

In support of his argument, Sander's response points to a media release that was issued informing the public that Sander made voluntary statements during the March 4th interview implicating him in the fire. Sander argues this is "false" because Sander "consistently maintained his innocence" until the Defendants "unlawfully detained," "cornered," "bullied," "lied," and "cut-off his denials." See Docket No. 65, p. 46. However, any alleged misconduct which Sander alleges was committed by the officers during the March 4th interview does not change the media release's statements into false statements. The Court finds that Klauzer and Moser are entitled to summary judgment as a matter of law on Sander's defamation claims against them.

6. North Dakota Constitutional Claim—Sander's 11th Claim for Relief

Sander asserts a claim for relief under Article 1, Section 1 of the North Dakota State Constitution. *See* Docket No. 1, p. 16. Article 1, Section 1 of the North Dakota Constitution states:

> All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety

> and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

Klauzer and Moser assert they are entitled to summary judgment on this claim because the North Dakota Supreme Court has never inferred a private right of action under the state constitution. *See* Docket No. 52, p. 40. Sander has failed to point to any case law to support his claim for a private right of action under the state constitution, and this Court will not take the extraordinary step of inferring one. The Court finds Klauzer and Moser are entitled to summary judgment as a matter of law on Sander's claim against them under Article 1, Section 1 of the North Dakota Constitution.

III. Conclusion

After carefully reviewing the entire record and for the reasons set forth above, the Court GRANTS Defendants' Klauzer and Moser's "Motion for Summary Judgment" (Docket No. 51).

IT IS SO ORDERED.

Dated this 5th day of February, 2018.

/s/ Daniel L. Hovland
Chief Judge
United States District Court

APPENDIX F
ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING
(AUGUST 23, 2019)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS SANDER,

Appellant,

v.

CITY OF DICKINSON, NORTH DAKOTA, ET AL.,

Appellees.

No. 18-1560

Appeal from United States District Court
for the District of North Dakota-Bismarck
(1:15-cv-00072-DLH)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/
Michael E. Gans

August 23, 2019

APPENDIX G
REPORT OF DR. RICHARD A. LEO, PH.D, J.D. (JULY 12, 2016)

Dr. Richard A. Leo, Ph.D., J.D.
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July 12, 2016

Ryan Shaffer Esq.
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3490 Clubhouse Drive, Suite 104
Wilson, WY 83014

Re: Thomas Sander v. The City of Dickinson et al.
Case No. 1:15-CV-72
United States District Court, District of North Dakota, Northwestern Division

Dear Mr. Shaffer,

This report is per your request in the above-referenced case of Thomas Sander v. The City of Dickinson et al.

I. Qualifications

I am the Hamill Family Professor of Law and Psychology at the University of San Francisco, and formerly an Associate Professor of Psychology and an

Associate Professor of Criminology at the University of California, Irvine. My areas of research, training, and specialization include social psychology, criminology, sociology, and law. For more than two decades, I have conducted extensive empirical research on police interrogation practices, the psychology of interrogation and confessions, psychological coercion, police-induced false confessions, and erroneous convictions. In 1992 and 1993, I spent nine months doing field research inside the Oakland Police Department, which included sitting in on and contemporaneously observing one-hundred twenty-two (122) felony interrogations; in 1993, I also observed sixty (60) fully videotaped interrogations in the Vallejo and Hayward Police Departments in northern California. Since then, I have analyzed thousands of cases involving interrogations and confessions; I have researched, written, and published numerous peer-reviewed articles on these subjects in scientific and legal journals; and I have written several books on these subjects, including *Police Interrogation and American Justice* (Harvard University Press, 2008) and *Confessions of Guilt: From Torture to Miranda and Beyond* (Oxford University Press, 2012).

I am regarded as a national and leading expert on these topics, and I have won numerous individual and career achievement awards for my scholarship and publications. My scholarship has often been featured in the news media and cited by appellate courts, including the United States Supreme Court on multiple occasions. To date, I have consulted with criminal and civil attorneys on more than eighteen-hundred (1,800) cases involving disputed interrogations and/or confessions, and I have been qualified and testified as an expert witness three-hundred and

nineteen (319) times in state, federal, and military courts in thirty-three (34) states plus the District of Columbia, including fourteen times in federal courts and seven times in military courts. I have given many lectures to judges, defense attorneys, prosecutors, and other criminal justice professionals, and I have taught interrogation training courses and/or given lectures to police departments in the United States, China, and the Republic of Cyprus.

My qualifications are summarized in greater detail in my curriculum vitae, which is attached to this report. A list of my court and deposition testimony in the last four years is attached to this report. I am being compensated for my time at the rate of $350 per hour. My compensation is not contingent on the outcome of this litigation nor on the opinions I express in this report or in subsequent court testimony.

II. Materials Reviewed

In conjunction with my preparation of this report, I have reviewed the following materials:

- Complaint and Jury Demand (Filed 6/08/15)
- Answer and Jury Demand (July 27, 2015)
- Terry Oestreich's Answer and Jury Demand (August 17, 2015)
- DVD of March 3, 2014 Interrogation of Thomas Sander
- Transcript of March 3. 2014 Interrogation of Thomas Sander
- DVD of March 4, 2014 Interrogation of Thomas Sander
- Transcript of March 4, 2014 Interrogation of Thomas Sander

- DVD of March 5, 2014 Interrogation of Thomas Sander
- Transcript of March 5, 2014 Interrogation of Thomas Sander
- DVD of March 5, 2014 of Monsignor Patrick Schumacher (March 13, 2014)
- Transcript of March 5, 2014 Interview of Monsignor Patrick Schumacher
- DVD of March 5, 2014 Interview of Richard Gordon
- Transcript of March 5, 2014 Interview of Richard Gordon
- DVD of March 6, 2014 Interrogation of James Gordon
- Transcript of March 6, 2014 Interrogation of James Gordon
- Transcript of Deposition of Terry Oestreich (June 6, 2014)
- Transcript of Deposition of James Gordon (June 6, 2014)
- Transcript of Deposition of Monsignor Patrick Schumacher (June 6, 2014)
- Motion to Suppress and Brief in Support of Motion to Suppress (May 8, 2014)
- Plaintiff's Brief In Response to Defendant's Motion to Suppress Evidence (June 6, 2014)
- Transcript of Motion to Suppress Hearing (July 1, 2014)
- Police and Fire Department Records Relating to Trinity High School Fire on March 3, 2014 (PL000001 to PL000134)
- Transcript of James Gordon's First Call to The Dickinson Police Department (March 5, 2014)

- Note Written By James Gordon (PL000109)
- Personnel File of Detective Kylan Klauzer
- Defendant City of Dickinson's 3rd Amended Answers to Plaintiff's First Set of Interrogatories, Requests for Production of Documents, and Request for Admission to Defendant City of Dickinson, North Dakota plus attached documents (Pp. 103-145)
- Transcript of Deposition of Thomas Sander (April 5, 2016)
- Transcript of Deposition of Kylan Klauzer (June 1, 2016)
- Transcript of Deposition of Jeremy Moser (June 2, 2016)
- Transcript of Deposition of Terry Oestreich (June 3, 2016)
- Transcript of Deposition of Richard Holgard (June 5, 2014)
- Report of Dr. Troy W. Ertelt (Dated June 20, 2014)
- ATF Origin and Cause Report and Related Discovery (PL002574-PL0027511)
- Dennis Rohr Handwriting Examination Report (March 3, 2014)
- Dennis Rohr Handwriting Examination Report #2 (March 5, 2014)

III. Overview

In this report, I will first provide an overview of the relevant social science research on the psychology of police interrogation practices and techniques, police-induced false confessions, risk factors for false confession, psychological coercion, police interrogation con-

tamination, and indicia of unreliability. I will then discuss these issues as they relate to the investigation, interrogations and confession statement of Thomas Sander.

More specifically, in my professional opinion:

1) It has been well-documented in the empirical social science research literature that hundreds of innocent suspects have confessed during police interrogation to crimes (often very serious crimes such as murder and rape) that it was later objectively proven they did not commit;

2) It has been well-documented in the empirical social science research literature that the primary, sequential causes of false confession are: 1) incompetent, reckless, overzealous and/or dishonest police investigation leading to a premature and erroneous misclassification of an innocent person as a guilty suspect; 2) subjecting that factually innocent but misclassified person to a guilt-presumptive, accusatory and psychologically deceptive, manipulative and/or coercive interrogation; and 3) feeding (*i.e.*, "contaminating") that suspect (with) non-public case facts that he or she is pressured and/or persuaded to incorporate into a fabricated false confession;

3) The confession statements of Thomas Sander are almost certainly, if not certainly, false: they contain numerous factual and logical errors, inconsistencies, omissions and other indicia of unreliability that are the hallmarks of false and unreliable confessions;

4) The confession statements of James Gordon bear the indicia of reliability that are the hallmarks of a true confession: James Gordon's confession statement provided police with non-public facts, that were

not likely guessed by chance and not known to the police, and led to new and missing evidence that also corroborated the accuracy of his confession statements;

5) The multiple custodial interrogations of Thomas Sander were guilt-presumptive, accusatory and theory-driven. These interrogations were not structured to find the truth but, instead, to intentionally incriminate Thomas Sander by coercively and unlawfully breaking down his denials of guilt and eliciting a statement of guilt from him that was consistent with the investigators' pre-existing assumptions, beliefs and speculations;

6) Before interrogating him, the investigators misclassified Thomas Sander as guilty when, in fact, they had no evidence whatsoever indicating that Thomas Sander either knew about, or set, the fire at Trinity High School on March 3, 2014;

7) The multiple custodial interrogations of Thomas Sander were intentionally psychologically coercive: the investigators intentionally violated Mr. Sander's due constitutional Miranda and due process rights and intentionally used numerous interrogation techniques that are known to cause a suspect to perceive that he or she has no choice but to comply with their demands and/or requests and that are known to increase the risk of eliciting involuntary statements, admissions and/or confessions;

8) The multiple custodial interrogations of Thomas Sander contained numerous interrogation techniques, methods and strategies that have been shown by social science research to increase the risks of eliciting false and unreliable statements, admissions and/or confessions (*i.e.*, *situational* risk factors) when

misapplied to the innocent. These included sleep deprivation, lengthy interrogation, false evidence ploys, minimization, maximization, and implied and explicit promises and threats;

9) The multiple custodial interrogations of Thomas Sander involved numerous and documented instances of police interrogation contamination (*i.e.*, leaking and disclosing non-public case facts) that contravene universally accepted police interrogation training standards and best practices, and which increased the risk that Thomas Sander's coerced confession statement would, misleadingly, appear to be detailed and self-corroborating; and

10) Detective Oestreich's and Detective Klauzer's repeatedly and intentionally violated national police interrogation training, standards and practices in their interrogations of Thomas Sander, thereby substantially increasing the risk that they would elicit both involuntary and unreliable statements, admissions and/confessions from him.

IV. The Scientific Study of Police Interrogation and False Confessions

There is a well-established empirical field of research in the academic disciplines of psychology, criminology, and sociology on the subjects of police interrogation practices, psychological coercion, and false confessions. This research dates back to 1908; has been the subject of extensive publication (hundreds of academic journal articles, stand-alone books, and book chapters in edited volumes); has been subjected to peer review and testing; is based on recognized scientific principles, methods, and findings; and is generally accepted in the social scientific community.

Significantly, numerous courts have held repeatedly that these principles, methods, and findings are generally accepted in the social science community and therefore accepted expert testimony in criminal and civil rights litigation.

This research has analyzed numerous police-induced false confessions and identified the personal and situational factors associated with, and believed to cause, false confessions.[1] The fact that police-induced false confessions can and do occur has been well-documented and is not disputed by anyone in the law enforcement or academic community. Indeed, leading police interrogation training manuals have, at least since 2001, contained entire chapters and sections on the problem of police-induced false confessions and what investigators need to know to better understand and avoid eliciting false confessions from innocent suspects.[2] Social scientists have documented approximately four-hundred and fifty to five-hundred proven false confessions in America

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1 *See* Saul Kassin, Steven Drizin, Thomas Grisso, Gisli Gudjonsson, Richard A. Leo and Allison Redlich (2010). "Police-Induced Confessions: Risk Factors and Recommendations" in Law and Human Behavior, 34, 3-38; Richard A. Leo (2008), POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press); and Gisli Gudjonsson (2003), THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (John Wiley & Sons Inc).

2 See, for example, *See* Fred Inbau, John Reid, Joseph Buckley and Brian Jayne (2001). CRIMINAL INTERROGATION AND CONFESSIONS, 4th Edition (Aspen Publishers, Inc.) at 411-448; and David Zulawski and Douglas Wicklander (2002). PRACTICAL ASPECTS OF INTERVIEWING AND INTERROGATION, 2nd Edition (CRC Press) at 73-104.

since the early 1970s,[3] but this is surely an underestimate and thus the tip of a much larger iceberg for several reasons. First, false confessions are difficult for researchers to discover because neither the state nor any organization keeps records of the interrogations producing them. Second, even when they are discovered, false confessions are notoriously hard to establish because of the factual and logical difficulties of proving the confessor's absolute innocence. As a result, Richard Ofshe and I coined the term "proven false confession" in 1998,[4] showing that there are only four ways in which a disputed confession can be classified as proven beyond any doubt to be false:

1) when it can be objectively established that the suspect confessed to a crime that did not happen;

2) when it can be objectively established that it would have been physically impossible for the confessor to have committed the crime;

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[3] The largest published study of proven false confessions to date is Steven Drizin and Richard A. Leo (2004). "The Problem of False Confessions in the Post-DNA World. North Carolina Law Review, 82, 891-1007. For a review of the literature documenting proven false confessions, *see* Richard A. Leo (2008), POLICE INTERROGATION AND AMERICAN JUSTICE. At that time, there were approximately two-hundred and fifty to three-hundred proven false confessions in the documented literature. Since 2004, Steve Drizin, Gillian Emmerich and I have collected an additional two-hundred proven false confessions that are the subject of an academic article we are currently drafting but have not yet submitted for publication.

[4] Richard A. Leo and Richard Ofshe (1998). "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation." The Journal of Criminal Law and Criminology. Vol. 88, No. 2. Pp. 429-496.

3) when the true perpetrator is identified and his guilt is objectively established; and/or

4) when scientific evidence dispositively establishes the confessor's innocence.

However, only a small number of cases involving a disputed confession will ever come with independent case evidence that allows the suspect to prove his innocence beyond dispute because doing so is akin to proving the negative. The documented number of proven false confessions in the scientific research literature is, therefore, a dramatic undercount of the actual false confessions that police have elicited in the United States in recent decades. There have almost certainly been thousands (if not tens or hundreds of thousands) more police-induced false confessions than researchers have been able to discover and classify as proven false. Indeed, in a survey of police that my colleagues and I published in 2007, police investigators themselves estimated that they elicited false confessions in 4.78% of their interrogations.[5]

The subject of police interrogation and false confessions is beyond common knowledge and highly counterintuitive.[6] Police detectives receive specialized training

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[5] Saul Kassin, Richard Leo, Christian Meissner, Kimberly Richman, Lori Colwell, Amy-May Leach, and Dana La Fon (2007). "Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs," Law and Human Behavior, 31, 381-400.

[6] *See* Danielle Chojnacki, Michael Cicchini and Lawrence White (2008), "An Empirical Basis for the Admission of Expert Testimony on False Confessions," Arizona State Law Journal, 40, 1-45; Richard A. Leo and Brittany Liu (2009). "What Do Potential Jurors Know About Police Interrogation and False Confessions?" Behavioral Sciences and the Law, 27, 381-399; Linda Henkel, Kim-

in psychological interrogation techniques; most people do not know what these techniques are or how the techniques are designed to work (*i.e.*, move a suspect from denial to admission). In addition, most people also do not know what psychological coercion is, why some techniques are regarded as psychologically coercive, and what their likely effects are. Moreover, most people do not know which interrogation techniques create a risk of eliciting false confessions or how and why the psychological process of police interrogation can, and sometimes does, lead suspects to falsely confess. This unfamiliarity causes most people to assume that virtually all confessions are true.

V. The Social Psychology of Police Interrogation[7]

Police interrogation is a cumulative, structured, and time-sequenced process in which detectives draw on an arsenal of psychological techniques in order to overcome a suspect's denials and elicit incriminating statements, admissions, and/or confessions. This is the sole purpose of custodial interrogation. To achieve

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berly Coffman, and Elizabeth Dailey (2008). "A Survey of People's Attitudes and Beliefs About False Confessions," Behavioral Sciences and the Law, 26, 555-584; Iris Blandon-Gitlin, Kathryn Sperry, and Richard A. Leo (2011) "Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?" in Psychology, Crime and Law, 17, 239-260; and Mark Costanzo, Netta Shaked-Schroer and Katherine Vinson (2010), "Juror Beliefs About Police Interrogation, False Confession and Expert Testimony" in *The Journal of Legal Empirical Studies,* 7, 231-247.

7 *See* Richard A. Leo (2009). "False Confessions: Causes, Consequences and Implications." Journal of the American Academy of Psychiatry and Law, 37, 332-343.

this purpose, interrogators use techniques that seek to influence, persuade, manipulate, and deceive suspects into believing that their situation is hopeless and that their best interest lies in confessing.[8] Sometimes, however, interrogators cross the line and employ techniques and methods of interrogation that are coercive and increase the likelihood of eliciting unreliable confessions or statements.

Contemporary American interrogation methods are structured to persuade a rational guilty person who knows he is guilty to rethink his initial decision to deny culpability and choose instead to confess. Police interrogators know that it is not in any suspect's rational self-interest to confess. They expect to encounter resistance and denials to their allegations, and they know that they must apply a certain amount of interpersonal pressure and persuasion to convince a reluctant suspect to confess. As a result, interrogators have, over the years, developed a set of subtle and sophisticated interrogation techniques whose purpose is to alter a guilty suspect's perceptions so that he will see the act of confessing as being in his self-interest.

These interrogation techniques were developed for the purpose of inducing guilty individuals to confess to their crimes, and police are admonished in their training to use them only on suspects believed to be guilty.[9] When these same techniques are used

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[8] Deborah Davis and William O'Donohue (2004). "The road to perdition: Extreme influence tactics in the interrogation room," In William O'Donohue, ED (2004), *Handbook of Forensic Psychology* (San Diego: Academic Press). Pp. 897-996.

[9] *See* Fred Inbau, John Reid, Joseph Buckley and Brian Jayne (2013). CRIMINAL INTERROGATION AND CONFESSIONS, 5th Edition (Burlington, MA: Jones & Bartlett Learning) at 187

on innocent suspects, they carry the risk that they will elicit false statements, admissions and/or confessions.

The goal of an interrogator is to persuade a suspect to view his immediate situation differently by focusing the suspect's attention on a limited set of choices and alternatives, and by convincing him of the likely consequences that attach to each of these choices. The process often unfolds in two steps: first, the interrogator causes the suspect to view his situation as hopeless; and, second, the interrogator persuades the suspect that only by confessing will the suspect be able to improve his otherwise hopeless situation. The interrogator makes it clear what information he is seeking and attempts to convince the suspect that his only rational option is to confirm the information the interrogator purports to already know.

The first step or stage of an interrogation consists of causing a suspect to view his situation as hopeless. If the interrogator is successful at this stage, he will undermine the suspect's self-confidence and cause the suspect to reason that there is no way to escape the interrogation without incriminating himself. To accomplish this, interrogators accuse the suspect of having committed the crime; they attack and try to undermine a suspect's assertion of an alibi, alternate sequence of events, or verbalization of innocence (pointing out or inventing logical and

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("These nine steps are presented in the context of the interrogation of suspects whose guilt seems definite or reasonably certain"). For empirical support for this observation, *see* Richard A. Leo (2008). POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press).

factual inconsistencies, implausibilities, and/or impossibilities); they exude unwavering confidence in their assertions of the suspect's and his accomplices' guilt; they refuse to accept the possibility of the suspect's denials; and, most importantly, they confront the suspect with incontrovertible evidence of his guilt, whether real or non-existent. Because interrogation is a cumulative and time-sequenced process, interrogators often draw on these techniques repeatedly and/or in succession, building on their earlier accusations, challenges and representations at each step in the interrogation process.

Through the use of these techniques, the interrogator communicates to the suspect that he has been caught, that there is no way he will escape the interrogation without incriminating himself and other suspects, and that his future is determined—that regardless of the suspect's denials or protestations of innocence, he is going to be arrested, prosecuted, convicted, and punished. The interrogator seeks to convince the suspect that this is a fact that has been established beyond any doubt, and thus that any objective person must necessarily reason to this conclusion. By persuading the suspect that he has been caught, that the existing evidence or case facts objectively prove his guilt, and that it is only a matter of time before he will be prosecuted and convicted, the interrogator seeks to alter the suspect's perceptions, such that he comes to view his situation as hopeless and to perceive that resisting the interrogator's demands is futile.

Once the interrogator has caused the suspect to understand that he has been caught and that there is no way out of this predicament, the interrogator

seeks to convince the suspect that the only way to improve his otherwise hopeless situation is by confessing to the offense(s) of which he is accused and confirming the information the interrogator is seeking to extract from the suspect. The second step of the interrogation thus consists of offering the suspect inducements to confess—reasons or scenarios that suggest the suspect will receive some personal, moral, communal, procedural, material, legal or other benefit if he confesses to the interrogator's version of the offense. One goal of these scenarios or inducements is to downplay both the seriousness of the alleged crime as well as the consequences of confessing, leading the suspect to perceive that the consequences of continuing to deny the accusations will be worse than the consequences of admitting to participation in the crime. The interrogator's attempt to diminish the suspect's perception of the consequences of confessing is combined with techniques that are designed to increase the suspect's anxiety in order to create the perceived need for release from the stress of prolonged interrogation.[10] Investigators also use scenarios to plant ideas or suggestions about how or why the suspect may have committed the crime which they may later pressure the suspect to accept and repeat.

Researchers have classified the types of inducements investigators use during the second step of

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10 *See* Brian Jayne (1986). "The Psychological Principles of Criminal Interrogation," in Fred Inbau, John Reid and Joseph Buckley (1986). CRIMINAL INTERROGATION AND CONFESSIONS, Third Edition (Baltimore, MD: Williams & Wilkins) at 332. ("The goal of interrogation is therefore to decrease the suspect's perception of the consequences of confessing, while at the same time increasing the suspect's internal anxiety associated with his deception.").

interrogation into three categories: *low-end* inducements, *systemic* inducements, and *high-end* inducements.

Low-end inducements refer to interpersonal or moral appeals the interrogator uses to convince a suspect that he will feel better if he confesses. For example, an interrogator may tell a suspect that the truth will set him free if he confesses, that confessing will relieve his anxiety or guilt, that confessing is the moral or Christian thing to do, or that confessing will improve his standing in the eyes of the victim or the eyes of the community.

Systemic inducements refer to appeals that the interrogator uses to focus the suspect's attention on the processes and outcomes of the criminal justice system in order to get the suspect to come to the conclusion that his case is likely to be processed more favorably by all actors in the criminal justice system if he confesses. For example, an interrogator may tell a suspect that he is the suspect's ally and will try to help him out—both in his discussions with the prosecutor as well as in his role as a professional witness at trial—but can only do so if the suspect first admits his guilt. Or the interrogator may ask the suspect how he expects the prosecutor to look favorably on the suspect's case if the suspect does not cooperate with authorities. Or the interrogator may ask the suspect what a judge and jury are really going to think, and how they are likely to react, if he does not demonstrate remorse and admit his guilt to authorities. Interrogators often couple the use of systemic incentives with the assertion that this is the suspect's one and only chance—now or never—to tell his side of the story; if he passes up this opportunity, all the relevant actors

in the system (police, prosecutor, judge and jury) will no longer be open to the possibility of viewing his actions in their most favorable light. This tactic may incentivize a suspect to either falsely confess or confirm an incorrect story for the interrogator based on the belief that the suspect will not have the same opportunity to help himself again in the future. Interrogators rely on systemic inducements to persuade the suspect to reason to the conclusion that the justice system naturally confers rewards for those who admit guilt, demonstrate remorse, and cooperate with authorities, whereas it inevitably metes out punishment for those who do not.

Finally, *high-end* inducements refer to appeals that directly communicate the message that the suspect will receive less punishment, a lower prison sentence and/or some form of police, prosecutorial, judicial or juror leniency if he complies with the interrogator's demand that he confess, but that the suspect will receive a higher sentence or greater punishment if he does not comply with the interrogator's demand that he confess. High-end inducements may either be implicit or explicit: the important question is whether the interrogation technique communicates the message, or is understood to communicate the message, that the suspect will receive a lower criminal charge and/or lesser punishment if he confesses as opposed to a higher criminal charge and/or greater amount of punishment if he does not.

Explicit *high-end* incentives can include telling a suspect that there are several degrees of the alleged offense, each of which carry different amounts of punishment, and asking the suspect which version he would like to confess to. Or the interrogator may ex-

plicitly tell the suspect that he will receive a long prison sentence—or perhaps even the death penalty—if he does not confess to the interrogator's version of events. The interrogator may also point out what happens to men of the suspect's age, or men accused of crime, in prison if the suspect does not confess to the interrogator's minimized account. Sometimes interrogators who rely on *high-end* inducements will present the suspect with a simple two-choice situation (good vs. bad): if the suspect agrees to the good choice (a minimized version of the offense, such as involuntary manslaughter or self-defense, or the implication of another person), he will receive a lower amount of punishment or no punishment at all; but if he does not confess right then, criminal justice officials will impute to him the bad choice (a maximized version of the offense, such as pre-meditated first degree murder, or that the suspect was acting alone), and he will receive a higher level of punishment, or perhaps the harshest possible punishment.[11] The purpose of *high-end* inducements is to communicate to a suspect that it is in his rational self-interest to confess to the minimized or less-incriminating version of events that the interrogator is suggesting because if the suspect does so, he will receive a lower charge, a lesser amount of punishment and/or no time in prison, but if he fails to do so, he will receive a higher

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[11] This technique is sometimes referred to in the academic literature as the maximization/minimization technique. *See* Saul Kassin, Steven Drizin, Thomas Grisso, Gisli Gudjonsson, Richard A. Leo and Allison Redlich (2010). "Police-Induced Confessions: Risk Factors and Recommendations" in *Law and Human Behavior*, 34, 3-38; Richard A. Leo (2008), POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press).

charge, a greater amount of punishment and more time in prison, perhaps even the death penalty.

To evaluate whether a particular interrogation was psychologically coercive, an expert must evaluate the interrogator's techniques, methods, and strategies in the light of the generally accepted findings of the social science research literature on the subjects of interrogation, coercive influence techniques, and confessions.

Social science research has repeatedly demonstrated that some systemic inducements (depending on the content of the inducement, how explicitly or vaguely it is stated, and the message that it communicates) and all *high-end* inducements are coercive because they rely on implicit and/or explicit promises of leniency and threats of harm to induce compliance. *Systemic* and *high-end* inducements increase the likelihood of eliciting false confessions and false statements from suspects because of the quid pro quo arrangement and the benefit a suspect expects to receive in exchange for the information the interrogator is seeking, regardless of whether the suspect knows that information to be true or not. Such promises of leniency and threats of harm are regarded as coercive in the social science literature because of the messages they convey and their demonstrated impact on the decision-making of individuals. The expert may also evaluate whether the interrogation techniques, either individually or cumulatively, had the effect of causing a suspect to perceive that he had no choice but to comply with the demands of the interrogator, and thus, the interrogation, in effect, overbore the suspect's will.

VI. The Three Types of False Confessions

False confessions and false statements, of course, will occur in response to traditionally-coercive methods of interrogation such as the use of physical violence, threats of immediate physical harm, excessively long or incommunicado interrogation, or deprivation of essential necessities such as food, water, and/or sleep. However, these types of traditionally coercive techniques no longer appear to be common in the United States. The psychological techniques of interrogation that cross the line and sometimes cause false confessions typically involve one of two patterns: (1) the interrogator communicates to the suspect, implicitly or explicitly, that he will receive a higher charge and harsher sentence or punishment if he does not provide a satisfactory statement, but that he will receive a lesser charge or sentence, or perhaps no punishment at all, if he does; or (2) the interrogator wears down and distresses the suspect to the point that the suspect subjectively feels that he has no choice but to comply with the interrogator's demands if he is to put an end to the intolerable stress of continued interrogation and/or escape the oppressive interrogation environment.

Whether a police-induced false confession or statement is caused primarily by coercive interrogation techniques or by a suspect's pre-existing vulnerabilities to interrogation, or some combination of both, there are three fundamental types of false confessions and statements: a *voluntary* false confession or statement (*i.e.*, a false confession knowingly given in response to little or no police pressure); a *coerced*-or *stress-compliant* false confession or statement (*i.e.*, a false confession knowingly given to put an end to the

interrogation or to receive an anticipated benefit or reward in exchange for confession); and a *coerced*-or *non-coerced-persuaded* false confession or statement (*i.e.*, a confession given by a suspect who comes to doubt the reliability of his memory and thus comes to believe that he may have committed the crime, despite no actual memory of having done so).[12] These different types of false confession typically involve different levels of police pressure, a different psychology of influence and decision-making, and different beliefs about the likelihood of one's guilt. Regardless of type, false confessors typically recant their confessions shortly after they are removed from the pressures and reinforcements of the interrogation environment.

VII. The Three Sequential Police Errors That Can Lead to False (But Sometimes Detailed) Confessions

There are three important decision points in the interrogation process that are known to be linked to false confessions or statements. The first decision point is the police decision to classify someone as a suspect. This is important because police only interrogate individuals whom they first classify as suspects; police *interview* witnesses and victims. There is a big difference between interrogation and interviewing: unlike interviewing, an interrogation is accusatory, involves the application of specialized psychological interrogation techniques, and the ultimate purpose of an interrogation is to get an incriminating statement

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12 *See* Richard Ofshe and Richard A. Leo (1997) "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions." *Studies in Law, Politics & Society*, Vol. 16. Pp. 189-251.

from someone whom police believe to be guilty of the crime. False confessions or statements occur when police misclassify an innocent suspect as guilty and then subject him to a custodial interrogation, and are satisfied with elicitation of a version of events that, in fact, is not true. This is one reason why interrogation training manuals implore detectives to investigate their cases before subjecting any potential suspect to an accusatorial interrogation. [13]

The second important decision point in the process occurs when the police interrogate the suspect. Again, the goal of police interrogation is to elicit an incriminating statement from the suspect by moving him from denial to admission. To accomplish this, police use psychologically-persuasive, manipulative, and deceptive interrogation techniques. As described in detail in the previous sections, police interrogators use these techniques to accuse the suspect of committing the crime, to persuade him that he is caught and that the case evidence overwhelmingly establishes his guilt, and then to induce him to confess by suggesting it is the best course of action for him.

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13 Fred Inbau, John Reid and Joseph Buckley (1986). CRIMINAL INTERROGATION AND CONFESSIONS, Third Edition (Baltimore, MD: Williams & Wilkins) at 3 ("Prior to the interrogation, and preferably before any contact with the suspect, become thoroughly familiar with all the known facts and circumstances of the case."). *See also* Fred Inbau, John Reid, Joseph Buckley and Brian Jayne (2013). CRIMINAL INTERROGATION AND CONFESSIONS, 5th Edition (Burlington, MA: Jones & Bartlett Learning) at 18 ("One basic principle to which there must be full adherence is that the interrogation of suspects should follow, and not precede, an investigation conducted to the full extent permissible by the allowable time and circumstances of the particular case. The authors suggest, therefore, that a good guideline to follow is "investigate before you interrogate").

However, properly trained police interrogators do not use physically-or psychologically-coercive techniques because they may result in involuntary and/or unreliable incriminating statements, admissions, and/or confessions.

The third important decision point in the interrogation process occurs after the police have elicited an admission—an "I did it" statement—from the suspect. This is referred to as the post-admission phase of the interrogation. The post-admission phase of the interrogation is important because it is here that the police can acquire information and evidence that will either support or not support the accuracy of the suspect's admission. Properly-trained police interrogators should know that innocent people sometimes falsely confess to crimes they did not commit.[14] Properly-trained police interrogators also know that guilty suspects sometimes implicate others for crimes they themselves committed in order to diminish their role in the crime. Interrogators therefore will seek to elicit information (that is not generally known and cannot likely be guessed by chance) from the suspect that either demonstrates, or fails to demonstrate,

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[14] Although the "Reid" Manual (CRIMINAL INTERROGATION AND CONFESSIONS by Fred Inbau et al.) did not include a full chapter on false confessions until the Fourth Edition in 2001, the need for police interrogators to be diligent to avoid false confessions has been present for decades. From the very first manual in 1942 and in all subsequent editions (1948, 1953, 1962, 1967, 1986, 2001 and 2013), it has repeatedly implored interrogators not to use any methods that are "apt to make an innocent person confess to a crime he did not commit," implicitly, if not explicitly, suggesting that police interrogator do know that suspects can be made to falsely confess to crimes they did not commit.

independent knowledge of the crime scene details and case facts. Properly-trained police interrogators, therefore, will not ask leading or suggestive questions and will not educate the suspect about details of the victim's allegations or of the alleged crime. Instead, they will let the suspect supply the details of the case independently. Properly-trained police interrogators will also seek to test the suspect's post-admission account against the physical and other credible evidence. Truthful confessions and statements are typically corroborated by solid physical evidence and independent knowledge of underlying case facts that have not been suggested to the suspect; false confessions and false statements are not. [15]

VIII. Populations with Particular Vulnerability in the Interrogation Room

While coercive and/or improper interrogation techniques are often the primary cause of false confessions, certain types or groups of individuals are far more vulnerable to the pressures of interrogation, having their will overborne and/or making a false confession. This includes individuals who are mentally ill, and therefore may confess falsely because they are easily confused, disoriented, delusional or experiencing a non-rational emotional or mental state.

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[15] Richard A. Leo and Richard Ofshe (1998). "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" *The Journal of Criminal Law and Criminology*. Vol. 88, No. 2. Pp. 429-496. This observation has been made in the police interrogation training literature as well. *See also* Fred Inbau, John Reid, Joseph Buckley and Brian Jayne (2013). CRIMINAL INTERROGATION AND CONFESSIONS, 5th Edition (Burlington, MA: Jones & Bartlett Learning) at 354-360.

This also includes juveniles and individuals with a low IQ or low-level cognitive functioning, who may be more vulnerable to interrogators because of their inability to understand the nature or gravity of their situation, their inability to foresee the consequences of their actions, their inability to cope with stressful situations and/or their eagerness to please others, especially authority figures. Juveniles may also be more easily intimidated than adults and may lack the maturity, knowledge, or sense of authority needed to resist simple police pressures and manipulations. Finally, this also includes individuals who, by their nature and personality, are naive, excessively trusting of authority, highly suggestible and/or highly compliant and who are therefore predisposed to believe that they have no choice but to comply with the demands of authorities or who simply lack the psychological resources to resist the escalating pressures of accusatorial interrogation.

IX. Evaluating the Reliability of Incriminating Statements, Admissions and Confessions

In addition to studying the psychology of police interrogation and the correlates and causes of false confessions from the innocent, scientific researchers have also analyzed the patterns, characteristics and indicia of reliability in true and false confession cases. To evaluate the likely reliability or unreliability of an incriminating statement, admission or full confession from a suspect, scientific researchers analyze the fit between the suspect's post-admission narrative and the crime facts and/or corroborating evidence derived from the confession (*e.g.,* location of

the missing murder weapon, loot from a robbery, the victim's missing clothing, etc.). [16]

The purpose of evaluating the fit between a suspect's post-admission narrative and the underlying crime facts and derivative crime evidence is to test the suspect's actual knowledge of the crime. If the suspect's post-admission narrative corroborates details only the police know, leads to new or previously undiscovered evidence of guilt, explains apparent crime fact anomalies and is corroborated by independent facts and evidence, then the suspect's post-admission narrative objectively demonstrates that he possesses the actual knowledge that would be known only by the true perpetrator and therefore is strong evidence of guilt. If the suspect cannot provide police with the actual details of the crime, fails to accurately describe the crime scene facts, cannot lead the police to new or derivative crime evidence, and/or provides an account that is full of gross errors and disconfirmed by the independent case evidence, then the suspect's post-admission narrative demonstrates that he fails to possess the actual knowledge that would be known only by the true perpetrator and is therefore strongly consistent with innocence. Indeed, absent contamination, the fit between the suspect's post-admission narrative and both the crime scene facts and the derivative crime evidence therefore provides an

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16 *See* Richard Ofshe and Richard A. Leo (1997) "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions." *Studies in Law, Politics & Society*, Vol. 16. Pp. 189-251; and Richard A. Leo and Richard Ofshe (1998). "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" *The Journal of Criminal Law and Criminology*. Vol. 88, No. 2. Pp. 429-496.

objective basis for evaluating the likely reliability of the suspect's incriminating statements.

The well-established and widely accepted social science research principle of using the fit standard to evaluate the validity of a confession statement is also a bedrock principle of criminal investigation within law enforcement. Properly trained police detectives realize that an "I did it" statement is not necessarily evidence of guilt and may, instead, turn out to be evidence of innocence. For example, in high-profile murder cases, police regularly screen out volunteered confessions by seeing whether or not the person can tell the police details known only to the perpetrator or lead the police to derivative crime evidence that either corroborates, or fails to demonstrate, the person's guilty knowledge. Police often keep particularly heinous or novel aspects of the crime from the press so that they can be used to demonstrate a confessor's guilty knowledge. Police sometimes deliberately include an error in media releases or allow incorrect statements to go uncorrected so that a true perpetrator will be able to demonstrate his personal knowledge of the crime. In other types of cases, police detectives regularly rely upon the fit standard to identify a true admission that might be mixed in with a collection of volunteered statements.

Using the fit standard to evaluate the validity of a suspect's incriminating statements, admissions or confessions is a bedrock principle of law enforcement because police detectives realize that seeking corroboration during the post-admission phase of interroga-

tion is essential to proper investigative work.[17] This is because it is a fundamental principle of police investigation that true explanations can be supported and false explanations cannot be supported (assuming no contamination has occurred), and because false explanations will not fit the facts of the crime, lead to derivative evidence or be corroborated by independent evidence.

Moreover, post-admission narrative analysis and the fit standard are central to proper criminal investigation because properly-trained detectives should realize that the purpose of detective work is not to clear a crime or get a conviction, but to carefully collect evidence in a way that will lead to the arrest, prosecution and conviction of the guilty while at the same time ensuring that no innocent individual is wrongly arrested, prosecuted or convicted.

A suspect's post-admission narrative therefore provides a gold mine of potential evidence to the unbiased, properly-trained detective who is seeking to ferret out the truth. If the suspect is guilty, the collection of a detailed post-admission narrative will allow the detective to establish the suspect's guilt beyond question, both by demonstrating the suspect's actual knowledge and by corroborating the suspect's statements with derivative evidence. Properly-trained detectives realize that the strongest form of corroboration comes through the development of new evidence using a suspect's post-admission narrative. While it is not possible to verify every post-admission narrative

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17 Fred Inbau, John Reid, Joseph Buckley and Brian Jayne (2013). CRIMINAL INTERROGATION AND CONFESSIONS, 5th Edition (Burlington, MA: Jones & Bartlett Learning) at 354-360.

with the crime facts, a skillful interrogator will seek as much verifiable information about the crime as he can elicit. The more verifiable information elicited from a suspect during the post-admission period and the better it fits with the crime facts, the more clearly the suspect demonstrates his responsibility for the crime.

If the suspect is innocent, the detective can use the suspect's post-admission narrative to establish his lack of knowledge and thus demonstrate his likely or certain innocence. Whereas a guilty suspect can corroborate his admission because of his actual knowledge of the crime, the innocent suspect cannot. The more information the interrogator seeks, the more frequently and clearly an innocent suspect will demonstrate his ignorance of the crime. His answers will turn out either to be wrong, to defy evaluation, or to be of no value for discriminating between guilt and innocence. Assuming that neither the investigator nor the media have contaminated the suspect by transferring information about the crime facts, or that the extent of contamination is known, the likelihood that his answers will be correct should be no better than chance. Absent contamination, the only time an innocent person will contribute correct information is when he makes an unlucky guess. The likelihood of an unlucky guess diminishes as the number of possible answers to an investigator's questions grows large. If, however, his answers about missing evidence are proven wrong, he cannot supply verifiable information that should be known to the perpetrator, and he inaccurately describes verifiable crime facts, then the post-admission narrative provides evidence of innocence.

This, of course, assumes that the suspect's knowledge of the crime has not been contaminated by the media, community gossip, the police or some other source with inside knowledge about crime details. If a suspect has learned unique or non-public crime facts from one of these sources, then the fact that his confession contains these details is, of course, not indicative of pre-existing knowledge or probative of guilt. This problem is discussed in detail in the following section.

X. The Problem of Contamination

The post-admission narrative process is about more than merely eliciting information from the suspect. Investigators in practice have been observed to shape the suspect's narrative to make the confession as persuasive as possible and to enhance the chances of conviction.[18] In this way, confessions are scripted or constructed by interrogators. A persuasive crime narrative requires an explanation of why the crime happened— the motives and explanations of the suspect for committing the crime. It also should contain a statement of the suspect's emotions, not only his or her emotions at the time of committing the crime, but also the shame, regret, or remorse the suspect now feels for having committed the crime. Interrogators are also trained to get the suspect to cleanse the interrogation process, usually by providing statements to the effect that the confession was voluntary. Interrogators will ask the suspect, usually after the suspect's resistance has been broken down and he has been made to believe

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[18] Richard A. Leo (2008). POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press) at 165-194.

that it is in his best interests to confess, whether the suspect was treated well, given food and drink, bathroom breaks, and other comforts, and whether any promises or threats were made to the suspect. Finally, and perhaps most importantly, interrogators seek to ensure that the confession contains both general and specific crime knowledge—the details of the crime that only the true perpetrator should know.

The problem of contamination in false confession cases arises when the interrogator pressures a suspect during the post-admission narrative phase to accept a particular account of the crime story—one that usually squares with the interrogator's theory of how the crime occurred—and then suggests crime facts to the suspect, leads or directs the suspect to infer correct answers, and sometimes even suggests plausible motives for committing the crime.[19] Because they are trained to presume the guilt of those whom they interrogate, American police assume that they are interrogating suspects who already know the correct crime facts. But this is not true when they are mistakenly interrogating an innocent person.

Instead, the innocent suspect is pressured to use facts disclosed to him by his interrogators in order to construct a plausible-sounding confession and post-admission narrative. Indeed, the presence of these details in the suspect's confession falsely gives the suspect's narrative credibility and the appearance of corroboration. After police interrogators have contaminated the suspect with non-public crime facts,

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[19] Richard A. Leo (2008), POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press).

they often attribute "guilty knowledge" to the suspect when he repeats back and incorporates into his confession the very facts that they first educated him about. One researcher has called these contaminated details "misleading specialized knowledge."[20] In many false confession cases, police and prosecutors argue that the suspect's confession corroborates his guilt because he "knows facts only the true perpetrator would know," even though the suspect first learned these facts from his interrogators. Of course, if the interrogation process is not electronically recorded, the interrogator is free to assert that these crime facts were volunteered by the suspect and the trial devolves into a swearing contest between the suspect and the interrogators over who was the source of the details in the confession. If the entire process is recorded, however, then it may be possible to trace the contamination.

Researchers have found that contamination by police regularly occurs in interrogation-induced false confession cases. In a study of the first two-hundred and fifty (250) post-conviction DNA exonerations of innocent prisoners in the American criminal justice system, Professor Brandon Garrett of the University of Virginia Law School showed that this pattern was present in 95% of the false confession cases in this data set (38 of 40 cases). In other words, in the overwhelming majority of these proven false confession cases, police interrogators fed the suspect unique non-public facts that "only the true perpetrator would know," but the prosecutor erroneously alleged that the

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[20] Gisli Gudjonsson (2003), THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (John Wiley & Sons Inc).

suspect volunteered these facts and that the suspect thereby corroborated the reliability of his confession. But because the jury in each case mistakenly believed the prosecutor rather than the defense, each of the confessors was convicted, and in each of these cases the defendant's innocence (and the falsity of the confession) was only proven many years later by DNA.[21] In a recent follow-up study more recent false confession DNA exonerations, Garrett found that another 21 of 23 (91%) were contaminated.[22]

In sum, the problem of contamination means that when applying the fit test to assess the reliability of the confession, it is essential to separate out the contaminated facts from the facts that unquestionably were provided by the defendant.

XI. Professional Opinions

During the custodial interrogations of Thomas Sander, detectives Oestreich and Klauzer intentionally utilized numerous techniques that the empirical social science research has shown significantly increase the risk of eliciting unreliable and false confessions when applied to innocent suspects. These include:

1) *Presumption of Guilt, Presumption of Guilty Knowledge, and Investigative Bias*.[23] Substantial social

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[21] Brandon Garrett (2011). CONVICTING THE INNOCENT (Harvard University Press)

[22] Brandon Garrett (2015). "Contaminated Confessions Revisited," Forthcoming in *University of Virginia Law Review*.

[23] *See* Saul Kassin, Christine Goldstein, and Kenneth Savitsky (2003). "Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt." *Law and Human Behavior*, 27,

science research has demonstrated that a behavioral presumption of guilt leads to tunnel vision, confirmation bias, and investigative bias among police investigators, who, as a result, often end up eliciting unreliable case information.[24] When investigators begin with or arrive at a premature presumption of guilt, they seek to build a case against an individual whose guilt they assume a fortiori-rather than seeking to even-handedly collect factual information and objectively investigate a case. Under these circumstances, investigators act as if they are seeking to prove their pre-existing theories or conclusions rather than investigate a hypothesis. This mental framework causes investigators to disregard contradictory information and evidence, selectively [mis]characterize existing information and evidence, misinterpret a suspect's statements and behavior to conform with the investigators' pre-existing assumptions, and to more aggressively interrogate suspects whose guilt they presume.[25] Most significantly, social science research has demonstrated that investigators' pre-existing presumption of guilt puts innocent suspects at an elevated risk of making

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187-203; C. Hill, A. Memon, and P. McGeorge (2008). "The Role of Confirmation Bias in Suspect Interviews: A systematic Evaluation." *Legal & Criminological Psychology*, 13, 357-371; and Fadia Narchet, Christian Meissner, and Melissa Russano (2011), "Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions." *Law and Human Behavior*, 35, 452-465.

[24] *See* Carol Tavris and Elliott Aronson (2007*). Mistakes Were Made* (But Not By Me). (Harcourt Books).

[25] *See* Saul Kassin, Christine Goldstein, and Kenneth Savitsky (2003). "Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt." *Law and Human Behavior*, 27, 187-203.

or agreeing to a false statement, admission, or confession in order to satisfy overzealous investigators and put an end to the accusatory pressures of sustained police interrogation.[26]

This process of investigative bias, tunnel vision, and a premature conclusion of guilt – setting in motion a series of events in which the police try to create a case against an individual by eliciting a confession of guilt rather than seeking to even-handedly or objectively investigate the case against that individual or to develop an investigation based on where the evidence leads them (as opposed to their pre-existing theories) – is exactly what happened here. The detectives' investigative failures and unwavering presumption of guilt led to the tunnel vision, rush to judgment and behavioral confirmation bias that has been documented in so many psychological studies and in cases of police-induced false confession and erroneous conviction of the innocent.[27]

Without even the pretense of investigating any other possibility,[28] the detectives immediately concluded that Thomas Sander started the fire at Trinity High School, and then set out to build a case

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[26] Saul Kassin, Steven Drizin, Thomas Grisso, Gisli Gudjonsson, Richard A. Leo and Allison Redlich (2010). "Police-Induced Confessions: Risk Factors and Recommendations" in *Law and Human Behavior*, 34, 3-38.

[27] Keith Findley and Michael Scott (2006). "The Multiple Dimensions of Tunnel Vision in Criminal Cases," University of Wisconsin Law Review, 291-397.

[28] *See* Detective Klauzer's testimony at the Suppression Hearing, P. 18. *See also* Klauzer Deposition, P. 200 and Detective Moser Deposition at P. 79.

against him, as if that were the only possibility, despite the lack of any objective evidence supporting their suspicions. Their premature conclusion of his guilt appears to be based primarily on SPO Hanson's misinterpretation of Thomas Sander's alleged body language and the secondarily on fact that Thomas Sander was the reporting party, again rather than any real or meaningful evidence. For example, SPO Hanson immediately concluded that Thomas Sander was lying, and thus guilty, of setting the fire, because in his initial interview by SPO Hanson, Thomas Sander failed to "maintain eye contact", appeared "nervous" and "uneasy," appeared "eager to give alternative options," and thus was showing "different signs of deception."[29] Even Thomas Sander's use of the word "story" in response to SPO Hanson's questioning somehow, absurdly, indicated that he was being deceptive and thus lying about whether he started the fire at Trinity High School on March 3rd.[30] Immediately following SPO Hanson's presumption of Thomas Sander's guilt, the detectives "locked in"[31] on Thomas Sander as the only possible suspect, and set out to build a case against him. One even told Patrick Schumacher that their goal was to build such a tight case against Thomas Sander that his own defense attorney would tell him to plead guilty in order to "cut his losses." After James Gordon confessed that he started the fire, and (unlike Thomas Sander) pro-

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[29] Master Incident Report at PL000054. *See also* Email from Ken Klauzer to Nicholas Gates dated March 6, 2014 titled "Great Job By All"

[30] *See* Master Incident Report at PL00056.

[31] *See* Klauzer Deposition, P. 122

vided corroborating evidence of the reliability of his confession, Detective Moser said of James Gordon "let's get him the hell out of the way" because he did not want the fact of James Gordon's corroborated confession to undermine the successful prosecution of Thomas Sander,[32] to which Detective Moser, as well as Detectives Klauzer and Oestreich, were unalterably and blindly committed. So biased was Detective Klauzer, for example, that he asserted in his deposition that Thomas Sander was intentionally inserting errors into his confession in order to build a defense at trial,[33] apparently never considering that a suspect wishing to build a defense against prosecution would never confess at all in the first place or that factual errors in a confession might reveal a lack of inside or personal knowledge about the crime facts that is a hallmark of false and unreliable confessions.

The detectives' rush to judgment and premature conclusion of Thomas Sander's alleged guilt in starting the Trinity High School fire was both incompetent and reckless in its disregard for the truth and disregard of the potentially disastrous consequences of factually misclassifying Thomas Sander and subjecting him to a guilt-presumptive, accusatory and potentially coercive interrogation that could elicit a manifestly and completely false confession from a factually innocent individual and lead to an erroneous prosecution and/or conviction. It was incompetent because police investigators are not "human lie detectors" and should never base the decision to interrogate on their gut hunches about someone's body language or demeanor

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32 *See* Deposition of Detective Moser, Pp. 123 and 179.

33 *See* Deposition of Detective Klauzer at P. 187

or arbitrary use of meaningless words, but should, instead, only base such decisions on objective evidence of likely or potential guilt. There was none here indicating that Thomas Sander set the Trinity fire. The social scientific research clearly indicates that whether someone appears nervous or maintains eye contact or uses words like "story" is not diagnostic of whether someone is actually lying or telling the truth. These are not accurate cues to deception, and police investigators are not accurate "human lie detectors."[34]

The detectives' rush to judgment and premature conclusion of Thomas Sander's alleged guilt in starting the Trinity High School fire was reckless because in their rush to build a case against Thomas Sander and deliver incriminating evidence against him to the prosecution, the detectives abandoned their role as independent and neutral fact investigators and created a substantial risk, of which they should have been aware, that they would elicit a false and unreliable confession from Thomas Sander. Had the detectives made the effort, and taken the time, to properly investigate this case, they would have realized that Thomas Sander has a social anxiety disorder that makes him sometimes appear nervous, uneasy or awkward around others. They would have also realized that subjecting Thomas Sander to a guilt presumptive accusatory interrogation based on no evidence of his guilt at all could elicit a false and unreliable confession from him. And they would have realized that James Gordon, not Thomas Sander, provided a voluntary and corroborated confession to start-

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[34] *See* Richard A. Leo (2008). POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press).

ing the Trinity High fire. In short, the detectives would have realized that they were prematurely rushing to judgment and willfully creating a substantial and unjustifiable risk of eliciting false information, setting in motion a false prosecution, and potentially causing a false conviction by failing to base their interrogation of Thomas Sander on their unsubstantiated gut hunches about his demeanor rather than conducting any meaningful investigation.

2) *Lengthy Interrogation and Sleep Deprivation*. Lengthy interrogation/custody and sleep deprivation are two related *situational* risk factors for making or agreeing to a false confession during police interrogation.[35] Empirical studies indicate that the overwhelming majority of routine custodial interrogations last less than one hour,[36] whereas the combined time period of custody and interrogation in most interrogations leading to a false confession is more than six hours.[37] The Reid and Associates police interrogation training manual specifically recommends that police interrogate for no longer than four (4) hours absent "exceptional situations" and that "most cases require

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35 *See* Saul Kassin, Steven Drizin, Thomas Grisso, Gisli Gudjonsson, Richard A. Leo and Allison Redlich (2010). "Police-Induced Confessions: Risk Factors and Recommendations" in *Law and Human Behavior*, 34, 3-38.

36 Richard A. Leo (1996). "Inside the Interrogation Room," Journal of Criminal Law and Criminology, 86, 266-303. *See also* Barry Feld (2013). Kids, Cops and Confessions: Inside the Interrogation Room (New York, NY: New York University Press).

37 Steven Drizin and Richard A. Leo (2004). "The Problem of False Confessions in the Post-DNA World. *North Carolina Law Review*, 82, 891-1007.

considerably fewer than four hours."[38] Lengthy detention and interrogation is a significant risk factor for false confessions because the longer an interrogation lasts, the more likely the suspect is to become fatigued and depleted of the physical and psychological resources necessary to resist the pressures and stresses of accusatory interrogation,[39] especially where investigators use physically or psychologically coercive methods.[40] It can also lead to sleep deprivation, which, as mentioned earlier, heightens interrogative suggestibility by impairing decision-making abilities, such as the ability to anticipate risks and consequences, inhibit behavioral impulses and resist suggestive questioning.[41] The longer an interrogation lasts, the more pressure investigators bring to bear on the suspect and the more techniques and strategies they may use to move the suspect from denial to admission. Researchers consider the length of an interrogation

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[38] Fred Inbau, John Reid, Joseph Buckley and Brian Jayne (2001). CRIMINAL INTERROGATION AND CONFESSIONS, 4th Edition (Gaithersburg, Maryland: Aspen Publishers, Inc) at 597.

[39] Deborah Davis and Richard A. Leo (2012). "Interrogation Related Regulatory Decline: Ego-Depletion, Failures of Self-Regulation and the Decision to Confess" *Psychology, Public Policy and Law*, Vol 18. Pp. 673-704.

[40] Saul Kassin, Steven Drizin, Thomas Grisso, Gisli Gudjonsson, Richard A. Leo and Allison Redlich (2010). "Police-Induced Confessions: Risk Factors and Recommendations" in *Law and Human Behavior*, 34, 3-38.

[41] Mark Blagrove (1996). "Effects of length of sleep deprivation on interrogative suggestibility. *Journal of Experimental Psychology: Applied*, 2, 48-59. *See also* Stephen Frenda, Shari R. Berkowitz, Elizabeth F. Loftus, and Kimberly M. Fenn (2016). "Sleep Deprivation and False Confessions." Forthcoming in the *Proceedings of the National Academy of Sciences.*

to include both the time that a suspect is being questioned and/or accused as well as any breaks between questioning/accusation sessions because breaks between accusation and questioning add to the stress and fatigue of the interrogation and sometimes is used as an interrogation technique itself.

The detectives interrogated on March 3-5, 2014 for almost 10 hours. When he was first interrogated in the early morning hours on March 3rd, Mr. Sander had slept less than one hour. That interrogation lasted approximately 4 hours, from approximately 5 am to 9 am. On March 4th, Mr. Sander was detained and interrogated for almost 5 and ½ hours, from 11 a.m. to 4:30 p.m. Like most proven false confessions, the length of time during which Mr. Sander was interrogated and/or in custody for purposes of interrogation, was extraordinary,[42] and therefore, along with the sleep deprivation it contributed to and induced, became a potent risk factor for false confession.

3) *False evidence ploys.* Police interrogators routinely tell criminal suspects that the evidence establishes their guilt: if police possess real evidence, this is called a true evidence ploy. If police are making up, lying about, or exaggerating non-existent evidence, this is called a false evidence ploy. The social science research literature has demonstrated that false evidence ploys are virtually always present in, and substantially likely to increase, the risk of eliciting false statements, admissions, and/or confes-

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[42] Steven Drizin and Richard A. Leo (2004). "The Problem of False Confessions in the Post-DNA World. *North Carolina Law Review*, 82, 891-1007.

sions. False evidence ploys are among the most well-documented situational risk factors for eliciting false and unreliable statements, admissions, and/or confessions, as described in the social science research literature.[43] Many people do not know that police detectives can legally lie by pretending to have incriminating evidence that does not exist, is fabricated or is exaggerated; even those who suspect that the police may be bluffing about the evidence are likely to fear that police will manipulate evidence to prosecute them. The use of false evidence ploys can create or contribute to the suspect's perception that he or she is trapped, there is no way out, and/or that his conviction will be inevitable, thus leading to the perception that he or she is in a hopeless situation and has little choice but to agree to or negotiate the best available outcome or mitigation of punishment given the perceived, subjective reality of the suspect's situation.

In Mr. Sander's many hours of interrogation, Detectives Klauzer and Oestreich repeatedly and intentionally lied to him about imaginary evidence that they falsely claimed existed against him and that they falsely claimed incontrovertibly established his guilt in setting the Trinity High fire. The detectives, in general terms, repeatedly and aggressively told Mr. Sander either that a lot of evidence pointed toward Mr. Sander or that all the evidence pointed to Mr. Sander or that a mountain of evidence pointed to Mr. Sander or that the evidence was against him was

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[43] Saul Kassin, Steven Drizin, Thomas Grisso, Gisli Gudjonsson, Richard A. Leo and Allison Redlich (2010). "Police-Induced Confessions: Risk Factors and Recommendations" in *Law and Human Behavior*, 34, 3-38.

overwhelming. None of this was true, quite the opposite: the detectives possessed no actual evidence that Mr. Sander set the first. More specifically, the detectives repeatedly lied to Mr. Sander by telling him that they possessed handwriting evidence (made according to a supposed 10 point match and training in document analysis), video evidence (*i.e.*, alleged neighborhood security cameras), and witness statements either suggesting, showing or establishing that he started the fire. The detectives also claimed as evidence of his guilt that Mr. Sander was present at the setting of the fire, though this assertion is not consistent with any case evidence. The detectives presented themselves as omniscient (they knew all the evidence and all the facts), and repeatedly told Mr. Sander that they knew for a fact that he was guilty, and that there was no possible explanation other than that he started the fire, and that they would not accept anything he stated to the contrary because, ironically, it would be a lie. Like many innocent false confessors, Mr. Sander was profoundly shaken by the repeated police claims of evidence against him because he assumed the investigators were acting in good faith and did not know that they could lie. As he described in his deposition, Mr. Sander had no reason not to believe the police since he had never been interrogated by them before, and he did not know that they could lie to him: "I only learned afterwards from my criminal defense attorney that the police are allowed to lie to suspects." [44]

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[44] Deposition of Thomas Sander (June, 2016) at P. 283.

As a century of basic psychological research on misinformation effects has shown[45] (as well as decades of psychological research on police lying to suspects during interrogation),[46] false evidence ploys are effective at eliciting compliance,[47] confusing some suspects into believing that they have been framed or that such evidence really does exist,[48] causing some suspects to doubt themselves (deferring to interrogators' authoritative assertions of irrefutable evidence despite knowing they did not commit a crime),[49] and even causing some suspects to develop false beliefs and/or memories of committing crimes.[50] Based on

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[45] Elizabeth Loftus (2005). "Planting Misinformation in the Human Mind: A 30 Year Investigation of the Malleability of Memory, *Learning & Memory*, 12, 361-366.

[46] Saul Kassin, Steven Drizin, Thomas Grisso, Gisli Gudjonsson, Richard A. Leo and Allison Redlich (2010). "Police Induced Confessions: Risk Factors and Recommendations" in *Law and Human Behavior*, 34, 3-38.

[47] Saul Kassin, Steven Drizin, Thomas Grisso, Gisli Gudjonsson, Richard A. Leo and Allison Redlich (2010). "Police Induced Confessions: Risk Factors and Recommendations" in *Law and Human Behavior*, 34, 3-38.

[48] Richard Ofshe and Richard A. Leo (1997) "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions." *Studies in Law, Politics & Society*, Vol. 16. Pp. 189-251.

[49] Richard Ofshe and Richard A. Leo (1997) "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions." *Studies in Law, Politics & Society*, Vol. 16. Pp. 189-251.

[50] Richard A. Leo (2008), POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press) *See also* Deborah Wright, Kimberly Wade and Derrick Watson (2013).

well-established basic and applied social scientific research going back decades, the multiple general and specific false evidence ploys that the investigators used in their interrogations of Mr. Sander significantly increased the risk of eliciting a false and unreliable confession from him, especially the longer his interrogation lasted and the more sleep deprived and frightened he became.

4) *Minimization and Maximization.* A common interrogation strategy is for investigators to portray the offense in a way that minimizes its moral, psychological and/or legal seriousness, thus lowering the perceived cost of confessing by communicating that the consequences of confessing will not be that serious. Interrogation techniques and strategies that minimize the legal seriousness of the crime, in particular, are associated with and known to increase the risk of eliciting false confessions. Such minimization strategies can imply leniency, reduced punishment, or even no punishment at all if the suspect perceives that there is no consequence to confessing (*i.e.*, either that the act to which the suspect is confessing is not a crime or that it carries little or no penalty).[51]

Conversely, interrogation techniques and strategies that maximize the legal seriousness of the crime

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"Delay and Déjà Vu: Timing and Repetition Increase the Power of False Evidence," *Psychonomic Bulletin Review*, 20, 812-818; Julia Shaw and Don Read (2014). "Constructing Rich False Memories of Committing Crime," *Psychological Science*, Pp. 1-11. Published online, January 14, 2015.

[51] Saul Kassin, Steven Drizin, Thomas Grisso, Gisli Gudjonsson, Richard A. Leo and Allison Redlich (2010). "Police-Induced Confessions: Risk Factors and Recommendations" in *Law and Human Behavior*, 34, 3-38.

– *i.e.*, suggest that the suspect will face a bad or perhaps the worst possible outcome if he or she does not make or agree to an incriminating statement-are also associated with and known to increase the risk of eliciting false confessions. Such maximization strategies can imply harsher treatment, confinement, punishment, sentencing and/or other negative outcomes if the suspect fails to comply and confess. The detectives repeatedly and intentionally used both minimization and maximization techniques, as detective Oestreich acknowledged in his June 2016 deposition.[52] For example, the detectives at various points suggested that if Mr. Sander confessed, the setting of the fire was not a big deal or just a mistake or that no one got hurt in the fire or that that it was not his fault or that it was not the end of the world, or that they could work with that and that it wasn't so bad that it couldn't be made right or that they were not judging him, but that if he did not confess to starting the fire, the consequences to him would be much worse.

5) *Explicit Promises and Threats.* These minimization and maximization techniques did not merely *imply* leniency and freedom (in exchange for compliance and confession) and threaten substantially harsher punishment (in the absence of compliance and confession), but rather *explicitly communicated* it. The detectives repeatedly promised Mr. Sander that he would be able to put an end to the interrogation, leave the interrogation room and be able to go home if he confessed to setting the fire; that they could only work through this with him, go to bat for

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[52] Deposition of Terry Oestreich at 119-120.

him and help him if he confessed to setting the fire; that the court system and judge would look more favorably on him if he confessed to setting the fire; that they could make the case go away if he confessed to setting the fire; and that the detectives could work with the State's attorneys and Mr. Sander would receive no jail time if he confessed. Conversely, the detectives threatened that they could not help him if he failed to confess to setting the fire; that it would be immensely worse for him if he did not confess to setting the fire; that other suspects in other cases who turned failed confess, in the form of a plea bargain, received much harsher prison sentences; that he would receive the maximum penalty (10-20 years, a felony) if he did not confess; and that he would be throwing away his career and hurting his family if he did not confess to starting the fire. In their depositions, the investigators admitted that they used threats when interrogating Thomas Sander, and in his recorded phone calls following his confession, Mr. Sander repeatedly stated that he falsely confessed to starting the Trinity fire because of the promise of freedom and immunity in exchange for his confession and the threat of immediate arrest, prosecution and harsher punishment if he did not. In other words, the detectives repeatedly made it explicitly clear to Mr. Sander that whether he would go free and escape prosecution, or be arrested, prosecuted and go to prison for many years all depended on what he told the detectives during the interrogation.

The use of explicit promises of leniency, immunity and/or a tangible benefit, as well as the use of explicit threats of harm, significantly increases the risk of eliciting an involuntary false statement, admission, and/or confession when applied to the innocent.

Indeed, as empirical social science research has repeatedly demonstrated, promises of leniency—like threats of harm or harsher punishment and whether explicit or implicit—are widely associated with police-induced false confession in the modern era and are believed to be among the leading causes. Promises and threats (whether implied or express) are inherently coercive because they exert substantial pressure on a suspect to comply and thus can easily overbear the will or ability of a suspect to resist an interrogator's demands or requests. Like other high-end inducements, promises and threats contribute to creating a sense of despair and hopelessness about a suspect's perceptions of his available options during interrogation. Detectives Oestreich and Klauzer intentionally used repeated promises and threats in their interrogation of Tom Sander with a reckless disregard for the consequences of doing so. There may be no psychological interrogation technique more potent than the use of threats and promises.

6) *Psychological Coercion.* As discussed earlier, it is well-established that psychologically coercive interrogation techniques increase the risk of eliciting false and/or involuntary incriminating statements, admissions and/or confessions. In my professional opinion, I believe that the interrogations of Thomas Sander were psychologically coercive for numerous reasons.

First, and perhaps most fundamentally, during the March 4th interrogation, Mr. Sander stated that he would like to leave the interrogation room if he was not under arrest, put his jacket on and began to stand up in order to leave. As he attempted to exit, he was intentionally prevented from doing so, blocked by Detective Klauzer, who escorted Mr. Sander back

into the room and told him he was not free to leave, despite the fact that Mr. Sander had been told he was not under arrest. There were two other times during this interrogation when Mr. Sander asked to leave but was not permitted to do so, again despite not being under arrest. Instead, after to his attempt to voluntarily leave what he had been previously told was a non-custodial interview, Mr. Sander was, is in effect, pinned into one corner of the interrogation room by Detectives Klauzer and Oestreich, who are both much larger than him and who were blocking the door (Klauzer is 6'2" and 240 lbs., and Oestreich is 6'1" and 230 lbs.), as they continued to relentlessly interrogate him. Intentionally preventing Mr. Sander from leaving a supposedly non-custodial interview when he was not under arrest is textbook psychological coercion and communicated that his freedom and movement was completely under the control of the detectives, who also invaded his personal space, which is known by interrogators to cause interpersonal distress and anxiety, and compelled him not only to stay in the interrogation room but to continue participating in a supposedly voluntary interrogation.

Second, and related, the detectives repeatedly and intentionally denied Mr. Sander's requests to be allowed to go to the bathroom – until after he made an incriminating statement agreeing with their accusations. They also failed to provide him with food or water. Again, this is textbook interrogation coercion, as all detectives either know or should know. And again, this communicated that not only was Mr. Sander's bodily movement, but also his bodily functions, were under the complete control of the investi-

gators depending on whether he complied with their demands and ultimately on what he said.

Third, despite the fact that Mr. Sander was in effect in custody and interrogated on March 4, the detectives intentionally never gave Mr. Sander his required Miranda rights and intentionally did not seek to elicit a required Miranda waiver from him. Nevertheless, Mr. Sander attempted to invoke his constitutional right to counsel to terminate Detective Klauzer's and Detective Oestreich's accusatory, guilt-presumptive and increasingly intense and coercive, interrogation of him, but the detectives intentionally refused to let him do so. Detective Oestreich talked Mr. Sander out of invoking his Miranda right to counsel, thus refusing to allow him access to counsel during the lengthy interrogation. Mr. Sander thus did not appear to understand that he could consult with an attorney during the interrogation, and appears to have come to understand that he would only be able to consult with an attorney after the interrogation. Troublingly, the detectives intentional violation of Miranda caused Mr. Sander to believe that he would penalized if he consulted with an attorney during the interrogation. As he stated during the March 4th interrogation after the detectives had left the room and he was describing what they told him to a friend: "if I persist and get an attorney, you know what, how that would go against me, and that could just be bad and, you know, the jury and whatever would vote against me. I mean that'd be terrible and I would get prison time, and that's not good."[53]

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[53] Interrogation of Tom Sander, March 4, 2014 at 204.

Fourth, as discussed above, the March 4th interrogation of Mr. Sander is replete with numerous explicit promises and threats, techniques that are regarded as inherently psychologically coercive because they are so likely to overbear a suspect's will and lead to involuntary statements, especially over the course of a lengthy interrogation.[54] The March 4th interrogation is striking for the number and explicitness of the threats made by both detectives Oestreich and Klauzer. They intentionally threatened that Mr. Sander could not be leave and would be placed in jail, would be successfully prosecuted and convicted because of the alleged overwhelming evidence against him, and would receive a sentence of ten to twenty years if he did not confess; but they promised him that if he did confess he could leave the interrogation room and go home, that they would work with prosecutors to make sure he received no jail time, and the judge would look more favorably on him, thus receiving a sentence involving restitution and community service, but not prison time. It is clear that Mr. Sander both understood and acted on the detective's highly coercive and explicit threats and promises in making his decision to provide his false confession. As he described in a contemporaneous phone call to a friend during a break in the March 4th interrogation:

> " . . . They said there was no way they could let me leave free today if I denied starting the fire, and that things would only get

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[54] The detectives' threats and interrogation pressure had such a profound impact on Mr. Sander that he wondered whether the detectives were also going to physically assault him. *See* deposition of Thomas Sander at P. 303.

> worse. You know, greater sentencing, you know, jail time and all that if I was, you know, to go before a judge and be convicted with their evidence. They said if I admitted to starting the fire that I can go free today, no jail time. You know, I'd have to go before a judge and pay money and community service hours and all that, but I'd have a lesser sentence."[55]

Sixth, the detectives wore firearms during their interrogation, despite the clear admonition against doing so by national interrogation training firms like Reid & Associates, who teach police that wearing guns during is, or can be interpreted as, coercive by the suspect.

Finally, it is also clear from Mr. Sander's contemporaneous statements on the phone to friends immediately following his March 4th confession statements that the detectives Klauzer and Oestreich's interrogation methods caused him to believe that he had no meaningful control over the conditions of his custodial confinement and interrogation, and ultimately that he had no meaningful choice but to comply with the demands of detectives Klauzer and Oestreich if he wished to persuade them to terminate the interrogation, as well as to be able to go home, and avoid a felony conviction carrying a ten to twenty year prison sentence. Again, the March 4-5 interrogations of Mr. Sander were replete with textbook psychological coercion.[56]

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[55] Interrogation of Thomas Sander, March 14, 2014 at P. 202.

[56] In my professional opinion, the interrogation coercion from March 4th carried over to the March 5th interrogation, as indicated,

7) *Personality Traits as Risk Factors for False Confession.* In addition to the many situational risk factors present in his account – the presumption of guilt, lengthy interrogation, sleep deprivation, false evidence ploys, minimization, implicit and explicit threats and promises, and psychological coercion – Thomas Sander was at a heightened risk of making and agreeing to a false and unreliable confession because of his personality traits and characteristics, *i.e.*, *personal risk factors*. Specifically, as Dr. Troy Ertelt indicated in his June 20, 2014 assessment, Thomas Sander is highly suggestible compared to the general population and, more specifically, he has a pronounced tendency to acquiesce to leading questions, scoring in the 97th percentile on this measure of the Gudjonsson Suggestibility Scale (GSS) when compared to the general population. This means, as Dr. Ertelt states, that he has an extreme tendency to succumb to the demands of authority figures, especially when placed under pressure, and to give in to leading questions. As Dr. Ertelt notes, "his overall level of interrogative suggestibility was significant when compared to other adults in the general population."[57] Mr. Sander is more likely to be easily led and manipulated by authority figures, especially under conditions of high interpersonal pressure. In addition, Dr. Ertelt diagnosed Mr. Sander with Social Anxiety Disorder, which causes Mr. Sander difficulties,

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among other things, by Mr. Sander in his deposition. For example, he stated that, ""I still had that in my mind, that there was a slight possibility that by me admitting on March 5th still that perhaps I might get an easy from the judge." Deposition of Thomas Sander at P. 303

[57] Report of Dr. Troy Ertelt (June 20, 2014) at P. 15.

awkwardness and nervousness in social interactions. As a result of the personality traits identified by Dr. Ertelt, Mr. Sander is highly vulnerable to making and/or agreeing to a false and/or unreliable confession in order to please his interrogators, especially the longer and/or more intense the interrogation(s) last. As Dr. Ertelt notes, "Such social difficulties may have increased his likelihood to acquiesce to his interrogators when forceful and coercive tactics were employed against him."[58] In short, Mr. Sander is highly suggestible. Mr. Sander was especially vulnerable to making or agreeing to a false confession during his her guilt-presumptive, accusatory, psychologically manipulative and highly coercive interrogations by detectives Oestreich and Klauzer on March 4-5, 2014.

8) *Police Contamination and Scripting*. As mentioned earlier, police interrogators are universally trained not to contaminate a suspect by leaking or disclosing non-public case facts to him or her but, instead, to hold back unique case information and let the suspect volunteer case details in order to demonstrate inside knowledge of the crime details to corroborate the accuracy of any incriminating statements. The absence of contamination allows police to verify the accuracy of reliable confessions, but the presence of contamination taints and prevents police from corroborating confessions that are true and makes confessions that are false misleadingly appear true (because they contain non-public crime scene details suggested by the interrogators, and repeated by the suspect, but the claim is made that they were volunteered by the suspect). Related to contamination,

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[58] Report of Dr. Troy Ertelt (June 20, 2014) at P. 23.

police investigators sometimes "script" a suspect's confessions when they not only provide the suspect with details of the crime, but coach or lead the suspect to adopt a narrative of how and why he and she committed the crime. Like contamination, scripting can make otherwise completely false confessions appear not only to be true but persuasively so.[59]

Police contamination and scripting is not so much a risk factor for eliciting a confession – since it often occurs after an admission has already been made – as much as of making an otherwise false confession appear true. Police contamination and scripting make false confessions appear true, and persuasively true, because the innocent suspect's confession is said to contain "details that only the true perpetrator would know" (erroneously since the details were supplied by the police), and it contains characteristics that most people associate with a true confession (*e.g.*, a story line, motive, explanation, emotions and an attribution of voluntariness), even though it is completely false.[60] Contamination and scripting therefore increase the risk that once a suspect has falsely confessed to a crime he or she did not commit, third parties – such as prosecutors, judges, juries, the media and outside observers – will mistakenly believe that the confession is true.

Detectives Oestreich and Klauzer not only aggressively interrogated and coercively pressured Mr. Sander to admit to setting the

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[59] Richard A. Leo (2008). *Police Interrogation and American Justice* (Harvard University Press).

[60] Richard A. Leo (2008). *Police Interrogation and American Justice* (Harvard University Press).

Trinity Fire, but they also repeatedly conveyed to him the details of their theory of the crime (for example, where it was started and how it was started), telling Mr. Sander that a note had been written by an individual claiming to have started the fire, and pressuring Mr. Sander to adopt their theory of why he would have started the fire, *i.e.*, scripting the confession with the seemingly plausible motive that Mr. Sander was angry about being non-renewed as a principal at Trinity High and thus sought to exact revenge on the school and his employer. In his deposition, Mr. Sander describes how the detectives fabricated his false confession through contamination and scripting:

"I thought I had no other option at that point, that my only possible way to get out of the interview that day without being arrested was based upon what Detective Klauzer said that, hey, if you confess, you can leave, get no jail time, no prison time,. And asking about the details that I have and my false confession, that actually that those specifics and details were furnished to me by Detectives Klauzer and Oestreich, that they're the one that were indicating that we know how this happened, Tom, and you wanted to get rid of your personnel file and there was, you know, a curtain there and other specifics like that, so I just parroted back to them and told them what they wanted to hear."[61]

9) *Hallmarks of a False Confession.* The confession statements of Thomas Sander contained numerous factual and logical errors, inconsistencies, omissions, and other indicia of unreliability that are

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61 Deposition of Thomas Sander (April 5, 2016) at P. 323

the hallmarks of proven false confessions. Significantly, Mr. Sander did not know non-public details of the crime that, absent contamination, were not likely guessed by chance but which the true perpetrator would have known and almost certainly would have provided once moved to confess. Moreover, Mr. Sander's confession is inconsistent with the physical evidence: namely, the ATF investigation regarding the origins of the fire, where the first started, and how it was lit – again, significant non-public facts that the true perpetrator would have known. Mr. Sander confessed to starting the fire in a cabinet but in fact it was started outside a drawer in the vault, as corroborated by the ATF report. Mr. Sander would have no reason to get this fact wrong if in fact he had started the fire. In addition, if we credit Robert Storey's statements he provided police in his interview and written statement,[62] Mr. Sander was not even present at Trinity High School at the time the fire started. In short, Mr. Sander's post-admission narrative bears strong indicia of unreliability because it (1) reveals his lack of personal knowledge about the non-public details of the fire that were not supplied to him by the police detectives; (2) falsely repeats back the detectives erroneous theory of how the fire started;

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[62] Richard Holgard, Thomas Sander's housemate, stated that he went to bed on March 2nd at approximately 11:30 p.m. and that Thomas Sander came home 5 minutes before he fell asleep; Mr. estimates that he left nearby Trinity High at approximately 11:50 p.m. According to Mr. Holgard he received a phone call from Mr. Storey at approximately 12:30 about the fire alarm. According to the ATF Report, the fire alarm was triggered by a pull station. We know that the pull station was pulled no earlier than 12:15 a.m. If Mr. Holgard and Mr. Storey's accounts are accurate, Thomas Sander had left Trinity High at least 25 minutes before someone started the fire.

and (3) is inconsistent with the physical and case evidence. In addition, Mr. Sander, though moved to confess to starting the fire, cannot lead police to new of missing information or evidence or explain key facts about the crime that the detectives did not already know. These are all classic indicators of a false confession according to well-established and widely accepted social science research, as discussed earlier in this report.

On the contrary, and quite significantly, James Gordon voluntarily and spontaneously confessed multiple times (over the phone, in a written note, during a police interview) to setting the fire at Trinity High. Unlike Mr. Sander's confession, Mr. Gordon's is not the product of lengthy interrogation, sleep deprivation, lies about non-existent police evidence, minimization or maximization techniques, repeated explicit promises of leniency and threats of harm, or psychological coercion. In other words, it does not contain any situational risk factors for eliciting false and unreliable confessions.

Perhaps more significantly, Mr. Gordon reveals in his confessions non-public details known only by the true perpetrator and the police; his confession statement is consistent with and corroborated by the physical, forensic and other case evidence; and his confession statement lead to new and missing case evidence. Unlike Mr. Sander, Gordon knew the origin (not an accelerant) and the location of the fire (in the vault). Mr. Gordon's had in his car clothing matching that worn by person captured on camera putting the note on the law enforcement center. In his confession, Mr. Gordon stated that he used a lighter to start the fire, and there was a lighter found in his

car. Mr. Gordon correctly told the detectives where the fire alarm was pulled and described the pull station that was pulled (*i.e.*, the pull station by the men's locker room), which the ATF investigation determined to be the pull station that was actually pulled. Mr. Gordon indicated that the fire was started by lighting a sweatshirt, and indeed sweatshirts were stored in the vault (not only is this physically corroborative of Mr. Gordon's initial statement, but it also is a non-public detail that is not likely guessed by chance that would only be known by the true perpetrator and police investigators). And Mr. Gordon knew the combination to the vault, as indicated in his written note.

In short, just as Mr. Sander's coerced confession statements bears no indicia of reliability or corroboration, Mr. Gordon's voluntary confession bears numerous indicia of reliability and substantial corroboration. The fact that Mr. Gordon's written and oral confessions bear substantial indicia of reliability provides even further evidence of the substantial unreliability of Mr. Sander's coerced confession.

In their depositions, detectives Oestreich, Klauzer and/or Moser all agreed that the purpose of a criminal investigation is to find the truth; that information obtained in a criminal investigation must be independently verified; that confessions must be corroborated; that giving intimate details that only the true perpetrator would know is an indicia of a confession's reliability; and that for confession evidence to be treated as trustworthy, it needs to be corroborated by actual facts. Yet detectives Oestreich and Klauzer failed ask follow up with any meaningful questions of James Gordon once he confessed, and they failed to seek

out or even acknowledge any evidence that clearly corroborated James Gordon's confession and invalidated Thomas Sander's, even though such corroboration was glaring and all but staring them in the face. Instead, they chose to altogether ignore the strong evidence of Thomas Sander's innocence and altogether ignore the strong evidence James Gordon's guilt in starting the Trinity High fire, and almost immediately had James Gordon charged with the crime of hindering law enforcement (for making what appears to be a manifestly accurate and substantially corroborated true confession) while writing internal congratulatory memos to themselves about what a great job they had done in the investigation, which almost could not have been further from the truth.

XII. Detective Oestreich's and Detective Klauzer's Repeated and Intentional Violations of Generally Accepted National Police Interrogation Training Standards and Practices

In their interrogations of Thomas Sander on March 3-5, detectives Oestreich, Klauzer and Moeser repeatedly and intentionally violated numerous nationally recognized interrogation training standards, protocols and generally accepted police interrogation practices. In so doing, detectives Oestreich, Klauzer and Moeser demonstrated both that they are in many ways very poorly trained about proper and improper interrogation methods, and that they engage in interrogation practices that create a high risk of eliciting false, unreliable and/or involuntary statements, admissions and confessions

First, police interrogators are trained to properly give the easy-to-administer fourfold Miranda warnings

and elicit knowing and voluntary (implicit or explicit) waivers. Instead, the detectives either intentionally failed to administer Miranda warnings (or elicit a Miranda waiver) from Mr. Sander when they were legally required to (*i.e.*, when he was clearly in custody and they were asking questions that sought to elicit incriminating statements) OR they gave a so-called "soft" Miranda, which has no meaning in practice but instead is a euphemism for giving an incomplete and unlawful warning without any accompanying waiver. In other words, what they describe as a "soft" Miranda warning was no warning at all but, rather, a hard and blatant Miranda violation. The detectives intentionally failed to Mirandize Tom Sander when they knew they were legally required to do so. Making matters worse, when Mr. Sander specifically requested counsel, the detectives in effect intentionally denied his request by talking him out of it – again contravening universally accepted American police interrogation standards and practices.

Second, American police interrogators are trained to thoroughly "investigate before you interrogate," as the famous training firm Reid and Associates puts it in their manual, as Detective Oestreich acknowledged in his June, 2016 deposition.[63] The detectives failed to meaningfully or properly investigate Thomas Sander before subjecting him to a guilt-presumptive, accusatory, lengthy and ultimately coercive interrogation. The detectives did not talk to Derrick Hill, the ATF agent investigating the fire, or to the fire marshal before making Thomas Sander their guilt-presumed suspect nor did they evaluate any physical evidence other than a sticky note from Tom Sander's

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[63] Interrogation of Terry Oestreich (June, 2016) at P. 129

computer. Nor did they even seek to determine whether Tom Sander was in the building at the time the fire was set (the evidence indicates he was not). Instead, they concluded, based on SPO Hanson's third-hand gut hunch about the meaning of Mr. Sander's alleged body language, that he must have started the fire and proceed to conduct a theory-driven interrogation designed to incriminate and build a case against Mr. Sander rather than seek to find the truth.

Third, American police interrogators are trained to never prevent a suspect from going to the bathroom and to provide suspects not only with regular restroom breaks, but also with adequate food, water and rest. Remarkably, detective Oestreich testified in his June 2016 deposition that it is permissible for police interrogators to withhold biological functioning and not let someone go to the bathroom during an interrogation.[64] *No it is not.* In fact, this reflects an intent to unlawfully detain Mr. Sander. The detectives not only intentionally and repeatedly denied Mr. Sander's request to go to the bathroom until he provided the confession they were seeking, but they also failed to provide him with food or water.

Fourth, American police interrogators are trained never to use explicit threats and promises because they are not only apt to make an innocent person to confess, but they violate American constitutional law and are therefore likely to lead to the suppression of any confession evidence, as of course occurred here. The detectives repeatedly and blatantly threatened Mr. Sander with harm if he did not confess and

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64 Deposition of Terry Oestreich (June, 2016) and P. 123.

repeatedly and blatantly promised him leniency and freedom if he did. Such threats and promises are regarded both as psychologically and legally coercive. Remarkably, once again, detective Terry Oestreich testified in his June, 2016 deposition that any technique short of physical coercion, and including psychological coercion, is okay.[65] Again, detective Oestreich is wrong, and dangerously so. As he has acknowledged, detective Oestreich knowingly used psychologically coercive interrogation techniques on Mr. Sander.

Fifth, investigators are trained not to engage in excessively long interrogations. Reid and Associates, the leading interrogation trainers in the United States, tell police that they should not interrogate longer than four hours absent extraordinary circumstances. Mr. Sander was interrogated for approximately 4 and ½ hours on March 4, 2014, creating an unnecessary risk of eliciting and involuntary and/or unreliable confession.

Sixth, American investigators are trained to verify and corroborate confession evidence since the purpose of a criminal investigation is to get the truth, not merely to create testimonial evidence against suspected participants. In their deposition testimony, the detectives, of course, acknowledged this. But in practice in their investigation and interrogations of Thomas Sander, the detectives almost could not have failed at this more emphatically. As discussed in the previous section, the detectives were completely blind to the fact that Mr. Sander's confession statement contained

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[65] Deposition of Terry Oestreich (June, 2016) at Pp. 104 and Pp. 119-120.

no indicia of reliability and substantial indicia of unreliability, while Mr. Gordon's confession statement contained substantial indicia of reliability. Instead of doing what any properly trained investigators would have done – eliminate Mr. Sander as a suspect and pursue Mr. Gordon as a suspect – the investigators instead sought to get Mr. Gordon "out of the way" by charging him with the crime of hindering law enforcement and failing to conduct any follow up questioning of his claims or seek to confirm or disconfirm any of them. Instead, they wrote themselves congratulatory memos about what a great job they had done when in fact they could not have doubly failed more miserably at the most basic function of criminal investigation – separating the innocent from the guilty.

In sum, the detectives were poorly trained, if at all, on the problem of eliciting involuntary and/or unreliable confessions, and they intentionally engaged in interrogation techniques, practices and methods that were improper, unlawful and/or created a high risk of eliciting false confession evidence. In so doing the detectives manifested a willful disregard for pursuing truthful, accurate and corroborated testimonial evidence in their investigation of the Trinity High fire, and were reckless with respect to the consequences of their actions.

XIII. Conclusion

In conclusion, based on my detailed analysis above, it is my professional opinion that:

1) It has been well-documented in the empirical social science research literature that hundreds of innocent suspects have confessed during police interrogation to crimes (often very serious crimes such as

murder and rape) that it was later objectively proven they did not commit;

2) It has been well-documented in the empirical social science research literature that the primary, sequential causes of false confession are: 1) incompetent, reckless, overzealous and/or dishonest police investigation leading to a premature and erroneous misclassification of an innocent person as a guilty suspect; 2) subjecting that factually innocent but misclassified person to a guilt-presumptive, accusatory and psychologically deceptive, manipulative and/or coercive interrogation; and 3) feeding (*i.e.*, "contaminating") that suspect (with) non-public case facts that he or she is pressured and/or persuaded to incorporate into a fabricated false confession;

3) The confession statements of Thomas Sander are almost certainly, if not certainly, false: they contain numerous factual and logical errors, inconsistencies, omissions and other indicia of unreliability that are the hallmarks of false and unreliable confessions;

4) The confession statements of James Gordon bear the indicia of reliability that are the hallmarks of a true confession: James Gordon's confession statement provided police with non-public facts, that were not likely guessed by chance and not known to the police, and led to new and missing evidence that also corroborated the accuracy of his confession statements;

5) The multiple custodial interrogations of Thomas Sander were guilt-presumptive, accusatory and theory-driven. These interrogations were not structured to find the truth but, instead, to intentionally incriminate Thomas Sander by coercively and unlawfully

breaking down his denials of guilt and eliciting a statement of guilt from him that was consistent with the investigators' pre-existing assumptions, beliefs and speculations;

6) Before interrogating him, the investigators misclassified Thomas Sander as guilty when, in fact, they had no evidence whatsoever indicating that Thomas Sander either knew about, or set, the fire at Trinity High School on March 3, 2014;

7) The multiple custodial interrogations of Thomas Sander were intentionally psychologically coercive: the investigators intentionally violated Mr. Sander's due constitutional Miranda and due process rights and intentionally used numerous interrogation techniques that are known to cause a suspect to perceive that he or she has no choice but to comply with their demands and/or requests and that are known to increase the risk of eliciting involuntary statements, admissions and/or confessions;

8) The multiple custodial interrogations of Thomas Sander contained numerous interrogation techniques, methods and strategies that have been shown by social science research to increase the risks of eliciting false and unreliable statements, admissions and/or confessions (*i.e.*, *situational* risk factors) when misapplied to the innocent. These included sleep deprivation, lengthy interrogation, false evidence ploys, minimization, maximization, and implied and explicit promises and threats;

9) The multiple custodial interrogations of Thomas Sander involved numerous and documented instances of police interrogation contamination (*i.e.*, leaking and disclosing non-public case facts) that

contravene universally accepted police interrogation training standards and best practices, and which increased the risk that Thomas Sander's coerced confession statement would, misleadingly, appear to be detailed and self-corroborating; and

10) Detective Oestreich's and Detective Klauzer's repeatedly and intentionally violated national police interrogation training, standards and practices in their interrogations of Thomas Sander, thereby substantially increasing the risk that they would elicit both involuntary and unreliable statements, admissions and/confessions from him.

The opinions I express in this report are based on my own knowledge, research, experience and publications; research and publications in the field; and the case-specific information and evidence that has been provided to me. I understand that additional case information, discovery and/or testimony will be forthcoming, and, accordingly, I reserve the right to modify and extend any opinions expressed in this report, or in a supplemental report, at that time.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,

/s/ Richard A. Leo, Ph.D., J.D.
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