No. 21-

IN THE

Supreme Court of the United States

BENJAMIN J. MCCLELLAN,
Petitioner,
v.

STATE OF OHIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 9, 2021

QUESTION PRESENTED

Whether the denial of petitioner's Motion to Suppress his confession was proper.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Benjamin J. McClellan, Appellant below. Respondent is the State of Ohio, Appellee below. Petitioner is not a corporation.

RULE 14(b)(iii) STATEMENT

This case arises from the following proceedings in the Court of Common Pleas of Highland County, Ohio, Ohio's Fourth District Court of Appeals, the and the Ohio Supreme Court:

State of Ohio v. McClellan, Case No. 17CR0212

State v. McClellan, Case No. 2019-Ohio-4339

State of Ohio v. Benjamin McClellan, Case No. 2020-Ohio-122

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly re-lated to this case.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Benjamin J. McClellan, respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 2020-Ohio-122 and is reproduced in the appendix to this Petition at Pet. App. A. The opinion of Ohio's Fourth District Court of Appeals is below and is reported at 2019-Ohio-4339 and is reproduced at Pet. App. B. The Highland County Court of Common Pleas Decision Overruling the Petitioner's Motion to Suppress is unreported at but is Case No. and is reproduced at Pet. App. C.

JURISDICTION

The judgment of the Ohio Supreme Court denying certiorari to the petitioner was rendered on January 21, 2020, Pet. App. 11a, and Ohio's Fourth District Court of Appeals denied petitioner's appeal on September 4, 2019, Pet. App. 14a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that ""No person shall be held to answer for a capital, or otherwise infamous crime, unless on

a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Section 1 of the Fourteenth Amendment makes the provisions of the Fifth Amendment applicable to the states:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

INTRODUCTION

What level of dishonesty must citizens of the United States tolerate from the law enforcement community as it investigates serious crimes? What menace can citizens of the United States expect from the police during non-custodial questioning? At what point does our court system become corrupted by lies told by police in order to extract a "confession" from a suspect?

A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt. But a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape that no credit ought to be given to it. *Dickerson v. United States, 530 U.S. 428, 433.* Those who have never faced a police interrogation would likely scoff at the idea that they would voluntarily confess to criminal activity when they have done nothing wrong. But the uninitiated are the ones in the most danger. Police use more than the cliché "good cop" "bad cop" technique these days.

The Fifth Amendment, as well as the Due Process Clause of the Fourteenth Amendment, protects us all from coerced confessions, this Court having found such confessions to be inherently untrustworthy. Id.

Yet courts across the United States are in disarray over what constitutes a voluntary or coerced confession and citizens in differing states are being treated differently. This inconsistent application of the Fifth Amendment is intolerable to our constitutional system of justice.

When courts in this country smile upon deceptive tactics in order to elicit confessions from suspects, it isn't only the suspects who are injured. Such decisions also lower the esteem in which the police and the courts are held. And to what benefit? Whose interest is served by incarceration of persons based upon false confessions? Our overcrowded prisons and their budges bulge further at the waist, the real per-

petrators elude justice, and our local communities get the false sense of security that a danger has passed.

Further, convictions for sex crimes follow the convicted for long periods via sex offender registration requirements. Ohio's reporting requirements last from 15 years to 25 years, to lifetime reporting. Any failure on the part of the petitioner and those like him to comply fully with the rules or their regular reporting deadlines is, of itself, a serious criminal offense. Those convicted of sex crimes also face restrictions upon where they may live during their reporting periods.

This Petition offers the Court an excellent opportunity to clarify the application of the Fifth Amendment's prohibition against coerced confessions. The question presented is a recurring one of great importance to citizens of the many states witnessing a dramatic increase in coercive and/or deceptive tactics by law enforcement officers resulting in false confessions. This case is an excellent vehicle for settling this issue in a single opinion.

STATEMENT OF THE CASE

A. Voluntary and Coerced Confessions

The Fifth Amendment of the United States Constitution bars the admission into evidence of involuntary confessions coerced from citizens accused of criminal activity. The Amendment reads, in pertinent part as follows: "No person… shall be compelled in any criminal case to be a witness against himself…." Physical mis-

treatment is the easy case with regard to involuntary false confessions. But how subtle a form can compulsion take? What about police deception and trickery to secure a confession? Are false confessions obtained by trickery preferable to those obtained by brute force?

B. Case Background

On August 31, 2017, AE, a female under the age of 13, reported to Sgt. Aaron Reynolds of the Hillsboro, Ohio Police Department that sometime during the Easter Break in 2017, petitioner, while living at AE's residence, came into her into her bedroom while she was changing her clothes and forced her to have sex with him. AE further alleged that petitioner told her that he would hurt her if she told anyone.

AE further alleged that though she left her home to live with other relatives after the alleged assault, she returned to her previous residence. She further alleged that she woke up on a day in late August of 2017 to find petitioner having sex with her. AE told police that she was unable to stop petitioner.

Sgt. Reynolds obtained certain of AE's clothing that she had been wearing around the time of incident in late August of 2017 and sent them to Ohio's Bureau of Criminal Identification for testing.

On September 1, 2017, petitioner voluntarily came to the Hillsboro, Ohio Police Department where he was advised of his *Miranda* rights and interviewed regarding AE's accusations. Petitioner denied the accusations.

On September 15, 2017, Ohio's BCI returned the results of its testing upon the articles of clothing Sgt. Reynolds has sent. A single sperm cell was found in the inner crotch panel area of one of AE's pairs of shorts.

On September 18, 2017, petitioner voluntarily returned to the police station for another interview with Sgt. Reynolds. After being advised of his *Miranda* rights, petitioner consented to giving a DNA sample to Sgt. Reynolds for the purposes of testing.

On October 27, 2017, a person from BCI told Sgt. Reynolds that the comparison of petitioner's DNA and the single sperm cell found in AE's shorts was a match.

Petitioner again voluntarily returned to the police station for another interview with Sgt. Reynolds that same day. Police employed what has become to be known as the "Reid" method for interrogating witnesses to get confessions. Many of the officers' tactics appear to be drawn from the " Reid Technique," which was for some time the most widely used interrogation protocol in the country. Miriam S. Gohara, A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques, 33 FORDHAM URB. L.J. 791, 808 (2006). The technique heavily relies on false evidence ploys and other forms of deceit. Id. at 809. It follows a nine-step approach:

[A]n interrogator confronts the suspect with assertions of guilt (Step 1), then develops " themes" that psychologically justify or excuse the crime (Step 2), inter-

rupts all efforts at denial (Step 3), overcomes the suspect's factual, moral, and emotional objections (Step 4), ensures that the passive suspect does not withdraw (Step 5), shows sympathy and understanding and urges the suspect to cooperate (Step 6), offers a face-saving alternative construal of the alleged guilty act (Step 7), gets the suspect to recount the details of his or her crime (Step 8), and converts the latter statement into a full written confession (Step 9).

Saul M. Kassin, On the Psychology of Confessions: Does Innocence Put Innocents at Risk?, 60 AM. PSYCHOLOGIST 215, 220 (2005); see Edwin D. Driver, Confessions and the Social Psychology of Coercion, 82 HARV. L. REV. 42, 51-55 (1968) (explaining the social psychological impact of the Reid tactics). Investigators are encouraged to start by accusing the suspect while emphasizing the importance of telling the truth. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 213 (4th ed. 2001). Dassey v. Dittmann, 877 F.3d 297 at 321.

After being advised of his *Miranda* rights, Sgt. Reynolds told petitioner about the results of the DNA comparison test. Sgt. Reynolds also told petitioner that the BCI scientist told Sgt. Reynolds that the sperm cell could only have gotten to where it was found (the inner crotch panel of AE's shorts) by coming from inside of AE. Petitioner was never told that if two or more articles of clothing are washed together in washing machine, sperm cells often transfer from one article of clothing to another. Petitioner was also never told that during sex, hundreds of millions of sperm cells are transferred from one person to another, making the finding of only one

sperm cell unlikely to be there as a result of sexual activity. Petitioner was also not told if his sperm cells were found in other articles of clothing mixed in with the laundry.

Sgt. Reynolds then said, "So with that being said, I think now is the time to be very forthcoming." Petitioner again immediately denied having sexual relations with AE.

Sgt. Reynolds then made several false statements to petitioner in an effort to get him to confess to having sex with AE. Sgt. Reynolds' primarily attempted to convince petitioner that there was a difference between forcible rape in this situation and consensual sex. Sgt. Reynolds further made a threatening statement to petitioner as well, stating that if petitioner told his side of the story (if he admitted to having consensual sex with AE) then he could "rest easy, knowing he was being treated fairly." Sgt. Reynolds then corrected himself to say that no matter what, petitioner would receive fair treatment: "If we have the truth from both sides, we can see what happened clearly, and then we can make a good decision. And you can even rest easy knowing that you're being treated fairly - - which you're being treated fairly any way." Sgt. Reynolds also spoke about different treatment for the petitioner if he admitted to having consensual sex with AE: "That—it can't—it doesn't absolve what happened. However, honesty goes a long way."

Sgt. Reynolds further talked about how petitioner would be treated: "I can't give legal advice. * * * But, I mean, it could be anything from whatever the judge decides from - - you know, it depends on the- - it just depends on the circumstances. * * * You could go to jail. You could just have to go to court. You could go to court. You could get - - you know, the judge has the full discretion. * * * So to be honest with you, I don't know. I don't know. * * * I don't know what we're looking at here. * * * I don't think we're looking at a forcible rape. I don't think that. You know what I mean? So that makes a difference." A complete list of the statements Sgt. Reynolds made can be found at Paragraph 24 of the Decision and Entry of Ohio's Fourth District Court of Appeals in *State v. McClellan*, 2019-Ohio-4339.

After about 20 minutes of this, petitioner told Sgt. Reynolds that he and AE had consensual sex after she followed him into the bathroom while he was intoxicated. *Id*. at Paragraph 10.

C. Proceedings Below

The State of Ohio indicted petitioner Benjamin J. McClellan on November 13, 2017, accusing him of two counts of rape, both first degree felonies, in violation of Ohio Revised Code Section 2907.02(A)(1)(b) and 2907.02(A)(2). On December 20, 2017, petitioner attended his arraignment and pleaded not guilty to the two charges against him.

On February 23, 2018, after receiving the State of Ohio's responses to his Crim. R. 16 Discovery Request, petitioner filed a Motion to Suppress with the trial court, arguing that his confession from October 27, 2017 should not be admitted into evidence since it was involuntary.

The trial court held a hearing on the petitioner's motion to suppress on March 19, 2018 and overruled the motion on March 21, 2018. On May 9, 2018, petitioner changed his plea to "No Contest" in order to preserve his right to appeal. The trial court found the petitioner guilty that same day of the single charge of violating Ohio Revised Code Section 2907.02(A)(2) "forcible rape" and the State of Ohio dismissed the statutory rape charge. On June 7, 2018, after a sentencing hearing, the trial court sentenced petitioner to seven years of confinement, with credit for 55 days of jail time.

Petitioner filed a timely Notice of Appeal with the Trial Court on June 7, 2018 and the case was transferred to Ohio's Fourth District Court of Appeal. Petitioner and respondent submitted written arguments in favor their positions regarding the voluntary or coerced nature of petitioner's confession on October 27, 2017. After considering the written arguments as well as oral arguments, Ohio's Fourth District Court of Appeals overruled the petitioner's appeal on October 11, 2019.

Petitioner then filed a notice of appeal and sought the discretionary review of the Ohio Supreme Court on November 25, 2019. On January 21, 2020, the Ohio Su-

preme Court declined to hear the case. This case is timely filed before this Court given the extensions of time found in this Court's orders regarding the Covid-19 pandemic.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

The Fifth Amendment of the United States Constitution bars the admission into evidence of involuntary confessions coerced from citizens accused of criminal activity. The Amendment reads, in pertinent part as follows: "No person… shall be compelled in any criminal case to be a witness against himself…." U.S. Const. amend. XIV, § 1.

1. Standard on Review

Appellate "review of errors that prejudice substantial rights" requires "de novo standard of review of mixed questions of law and fact" Brecht v. Abrahamson, 507 US 619, 642 (1983)*(Stevens, J., concurring in judgment*); *Kotteakos v. United States*, 328 U. S., 750, 638-639 (1986).

Whether or not a suspect's confession is voluntary is a legal determination which courts are to review *de novo*. *Arizona v. Fulminate* (1991), 499 U.S. 279, 287.

2. Involuntary Confessions Prohibited

Because the Fifth Amendment, as well as the Due Process Clause of the Fourteenth Amendment, protects against the concern that coerced confessions are inherently untrustworthy, *Dickerson*, 530 U.S. at 433 "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt … but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape … that no credit ought to be given to it." (Quotation omitted.) *Id.*

A defendant is entitled to a fair hearing and reliable determination of the voluntariness of a confession prior to its use at trial. *Jackson v. Denno*, 378 U.S. 368, 378, 84 S.Ct. 1774, 1781, 12 L.Ed.2d 908 (1964). It is important to note that once the admissibility of a confession is challenged, the prosecution must prove voluntariness by a preponderance of the evidence. See *Lego v. Twomey* (1972), 404 U.S. 477, 489, 92 S.Ct. 619, 626, 30 L.Ed.2d 618; *United States v. Restrepo*, 994 F.2d 173, 183 (5th Cir.1993) While such a standard entails an assessment of the evidence in terms of greater and lesser weight, the burden nevertheless rests with the prosecution to establish that the confession was voluntary.

Indeed, this Court has held that the use of an inherently coercive tactic by police is a prerequisite to a finding of involuntariness. *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed. 2d 473 (1986).

"[E]ven if *Miranda* warnings were required and given, a defendant's statements may be made involuntarily and, thus, be subject to exclusion." *Dickerson*, 530 U.S. at 434.

3. Factors for Voluntariness

When charged with determining whether a confession was voluntary, an inquiring court must sift through the totality of the circumstances, including both the nature of the police activity and the defendant's situation. *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *United States v. Kimball*, 25 F.3d 1, 8 (1st Cir.1994). In short, an inquiring court must conduct the juridical equivalent of an archeological dig into the whole of the circumstances. In doing so, appellate courts defer to the district court's factual findings, see *Fulminante*, 499 U.S. at 287, 111 S.Ct. 1246, and review its ultimate conclusion on voluntariness *de novo*. *Id.*

The totality of the circumstances includes the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement. *Thomas v. State of Arizona,* 356 U.S. 390, reh. denied 357 U.S. 944; *Fikes v. State of Alabama*, 352 U.S. 191 reh. denied 352 U.S. 1019; *Brown v. Allen*, 344 U.S. 443, 469, reh. denied 345 U.S. 946, 73; *Watts v. State of Indiana*, 338 U.S. 49, 69.

Relevant considerations may also include the length and nature of the questioning, any promises or threats made, and any deprivation of essentials (e.g., food, water, sleep, bathroom facilities) imposed upon the suspect. See *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961). But these considerations mostly apply where challenge to the confession is that it has been extracted through physical coercion or threat of physical violence.

4. Deception and Inducement

The decisions of the lower courts in this matter all analyzed this issue on whether the will of the Petitioner was overborne by serious threats and long term physical and mental deprivations.

But trickery, deception, and the use of subtle psychological methods can also induce false confessions. A false confession induced in such manners is as equally unreliable and poses the same dangers to society and the rights of the Petitioner as one extracted through force or threat of force.

No one factor of the many listed and to be listed is sufficient, taken in isolation to determine the voluntary nature of a confession. Thus, while deception is also a factor bearing on voluntariness, this factor, standing alone, is not dispositive of the issue. *Schmidt v. Hewitt* (C.A. 3, 1978), 573 F. 2d 794, 801. See *Frazier v. Cupp* (1969), 394 U.S. 731, 739.

About inducement, an express or implied promise of leniency is a further factor to be considered among the totality of the circumstances, but is not, standing alone, determinative. "'The police can render a confession involuntary if they extract a confession by the use of a direct or implied promise of leniency." *State v. Copley*, 2006-Ohio-6478, at ¶18.

In *Copley*, an eighteen-year-old female was accused of sexual contact with a child. During her interview, an investigating officer "asked appellee what she thought should happen to a person who performed oral sex on a two-year-old child." *Copley* at ¶14. When the defendant did not answer, the investigating officer reminded her that she had previously stated "that such a person should get counseling, care, or treatment." *Id*. Ohio's Ninth District Court of Appeals concluded that these and similar statements constituted an implied promise of leniency, yet standing alone were insufficient to render the defendant's confession involuntary. *Id*. at ¶19. A promise of leniency must be coupled with other factors to render a confession involuntary under the totality of the circumstances test. *State v. Copley*, 2006-Ohio-6478, at ¶18, quoting *State v. Robinson* (Jan. 11, 1995), 9th Dist. No. 16766; 1995 WL 9424; See also, *People v. Flores* (1983), 144 Cal. App. 3d 459, 192 *cf. People v. Ditson*, supra, 57 Cal.2d 415, 432, fn. 5 (petition for writ of cert. dismissed 371 U.S. 937 [9 L.Ed.2d 273, 83 S.Ct. 311]); *State v. Edwards*, 49 Ohio St.2d 31,41 (1976); *State v. Arrington* (1984), 14 Ohio App.3d 111, 114.

Indeed, in *Arrington* (1984), 14 Ohio App.3d at 112-115, the police, during non-custodial questioning and after giving the suspect his *Miranda* warnings, told the suspect that, if he was found to be merely an accomplice to aggravated murder, the Court had the option to give him probation whereas if he were found to have pulled the trigger, a three-year prison sentence would be mandatory. Ohio's Sixth District Court of Appeals determined this to be a misstatement of the law by the police officers interviewing the suspect. *Id.* at 114.

Similarly, in the instant case, Sgt. Reynolds repeatedly gave petitioner false and misleading information, in large part by drawing a false distinction between forcible rape and consensual sex. Either act would violate 2907.02, Ohio's Rape Statute. Sgt. Reynolds coupled this with implied promises that if petitioner admitted to having consensual sex with AE, the forcible sex charge would not be valid:

"I can't give legal advice. * * * But, I mean, it could be anything from whatever the judge decides from - - you know, it depends on the- - it just depends on the circumstances. * * * You could go to jail. You could just have to go to court. You could go to court. You could get - - you know, the judge has the full discretion. * * * So to be honest with you, I don't know. I don't know. * * * I don't know what we're looking at here. * * * I don't think we're looking at a forcible rape. I don't think that. You know what I mean? So that makes a difference."

In fact there is no difference under Ohio law between admitting to forcible rape and admitting to consensual sex with someone under 13. Both are rape under Ohio Revised Code Section 2907.02. Ohio's Fourth District Court of Appeals, in making its enumeration of the deceptive statements of the police officer to the Petitioner, referred to this as "extremely deceptive."

When the deceptive nature of Sgt. Reynolds' statements is combined with the fact that Petitioner was charged with both forcible and statutory rape anyway, the subtle inducement was clearly a false promise as well.

A confession is involuntary whether coerced by physical intimidation or psychological pressure. Townsend v. Sain, 372 U.S. 293, 307, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963). Law enforcement conduct which renders a confession involuntary does not consist only of express threats so direct as to bludgeon a defendant into failure of the will. Subtle psychological coercion suffices as well, and at times more effectively, to overbear "a rational intellect and a free will." As the Supreme Court noted in Malloy, "(w)e have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed." 378 U.S. at 7, 84 S.Ct. at 1493 (citing Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963)). *United States v. Tingle* (C.A. 9, 1981), 658 F.2d 1332, 1335-1336.

Regarding both deception and inducement, "'[t]o support a determination that a confession was coerced, the evidence must establish that: (1) the police activity was objectively coercive; (2) the coercion in question was sufficient to overbear

defendant's will; and (3) defendant's will was, in fact, overborne as a result of the coercive police activity.'" *United States v. Rigsby* (C.A.6, 1991), 943 F.2d 631, 635.

Ohio's Fourth District Court of Appeals held that it agreed with the trial court that the record of the evidence was devoid of any inducements on the part of police to get petitioner to confess:

Appellant has also directed us to Statement 5, where he was exhorted to tell his story so that he could even "rest easy knowing that you're being treated fairly- - which you're being treated fairly anyway." While Statement 10 is extremely deceptive and Statement 5 is deceptive in its vague reassurance, we agree with the trial court that the record is devoid of any promises of leniency in the event Appellant confessed to consensual sex.

But the problem is that the holding requires an overt almost bright-line offer of leniency, and it ignores the many cases which require courts to consider subtle and vague offers of better treatment for the suspects. The line to be drawn between permissible police conduct and conduct deemed to induce or tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police. *People v. Flores* (1983),144 Cal.App.3d 459, 192 Cal.Rptr. 772.

In the case of *State of Ohio v. Bohanon*, 2008-Ohio-1087 Ohio's Eighth District Court of Appeals relying on *Colorado v. Connelly* (1986), 479 U.S. 157, 164, upheld the trial court's ruling that the suspect's confession was involuntary. The police officers, during non-custodial questioning of the suspect falsely told her that she had been videotaped stealing the victim's purse. *Id.* at Paragraph Six. Further, they made vague statements about the case being resolved. They told her that if she wrote a letter of apology to the victim and made restitution: "We can get rid of this, try to settle the matter right now." *Id*. Nothing more was said about what "getting rid of this" meant, nor what "this" was. Nothing further was said about what trying to "settle the matter right now" entailed. After the suspect wrote the requested letter, the State of Ohio indicted her on theft charges and sought to introduce the letter the suspect wrote the victim as evidence. *Id*.

The trial court granted the suspect's motion to suppress. *Id*. at Paragraph Eight. The Court of Appeals reasoned that "subtle inducement inherent in the detective's suggestion that they 'could get rid of this, settle the matter right now,' and that appellee should write her aunt a letter of apology and sit down and talk to her" could be considered in reaching the decision upon whether the confession was voluntary or coercive. *Id.* at Paragraph Eleven. The Court further reasoned that "Perhaps an Oxford don would have recognized the legal implications that an apology would have, but someone of appellee's limited intelligence and psychological condition would not." *Id*.

While the *Bohanon* Court noted the mental condition of the suspect (IQ of 66 and was taking two anti-psychotic medications, *id*. at Paragraph Seven), there were many things about Petitioner that denoted unsophistication and inexperience as well. He was 19 years old and had a rural high school education only. Further, there was no evidence of prior experience with criminal charges was presented at the suppression hearing.

Ohio's Fourth District Court of Appeals quoted the Trial Court's Entry: "When Defendant asked what would happen if there had been consensual sex the officer responded that it depended upon the circumstances and that he could not say what would happen." Perhaps nothing better illustrates Petitioner's lack of sophistication, experience, and intelligence than asking a police officer engaged in investigating his case for legal advice.

With regard to vague promises being sufficient to establish inducement, all it took in the *Copley* case *supra*, was for the investigating officer to remind the suspect that she had previously stated "that such a person should get counseling, care, or treatment." Yet the lower courts in the instant case ignored or otherwise disregarded the numerous and deceptive statements about how Petitioner would be treated in describing the record as "devoid" of evidence of inducement. Thus we are left with a situation wherein some courts consider subtle evidence of inducement a factor and other courts do not Such *ad hoc* reasoning on such important issues is not proper within our system of justice.

It is certainly true that when the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, there is nothing improper in such police activity. *Flores* at 192.

But on the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. *Id*. The offer or promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear. *Flores* citing *People v. Hill* [1967], 66 Cal.2d 536, 549, 58 Cal.Rptr. 340, 426 P.2d 908.)

In the case at bar, the statements Sgt. Reynolds made to the suspect were primarily lies and other misleading statements. From the outset of the October 27, 2017 meeting, Sgt. Reynolds falsely told petitioner that a "scientist" from the Ohio BCI told him that the only way that petitioner's sperm cell could have gotten into the place where it was found was if it came out of the victim.

While this sounds true from a commonsense point of view, it is completely false in real life:

In a number of child sexual abuse cases, the alleged perpetrator is a member of the nuclear family. In those cases, there is a possibility that the suspect's DNA

was innocently deposited onto the child's clothing without acts of sexual assault ever occurring, for example via secondary transfer within the washing machine. To assess the quantity and quality of DNA that may be transferred among clothing during laundering, we conducted three series of experiments. First, we evaluated the level of spermatozoa that may be transferred by washing pristine pairs of underwear with bed sheets containing a varying number of ejaculates. Secondly, we explored whether current genetic methods may also detect the transfer of DNA from vaginal secretions during a machine wash. Finally, we analyzed the background levels of DNA on children's underwear collected from control families where sexual abuse never occurred. For both spermatozoa and vaginal secretions, we revealed that sufficient amounts of DNA may transfer onto laundered clothing to yield complete genetic profiles. Furthermore, DNA from relatives living within the same household was found in most cuttings taken from control children's underwear. Based on these findings, we present a framework for the handling and interpretation of intrafamilial sexual abuse cases. These suggestions should help determine whether DNA was deposited directly onto a fabric or merely transferred during a wash. Sarah Noël et al., *DNA transfer during laundering may yield complete genetic profiles,* Forensic Science International: Genetics Volume, Jul 23, 2016, at 240-247, https://www.sciencedirect.com/science/article/abs/pii/S1872497316300734

In fact, given the multiple millions of sperm cells one would expect to find if the suspect actually had sex with the alleged victim, finding only one sperm cell in

such an intimate area would be next to impossible unless it came from washing two items of clothing together. Ohio's Fourth District Court of Appeals did find as a matter of fact that petitioner and the alleged victim lived in the same home at the time of the alleged assaults, so it would be strange if their clothing was not washed together. With regard to this issue, we see that: "In short, small amounts of DNA can be easily transferred.... Because of this, finding someone's DNA on an object is less significant to a determination of guilt or innocence of a suspect." Bess Stiffelman, No Longer the Gold Standard: Probabilistic Genotyping Is Changing the Nature of DNA Evidence in Criminal Trials, 24 BERKELEY J. CRIM. L. 110, 115-16 (2019). But it is not hard to understand that most 19 year olds from rural Ohio with a high school education still have the previous understanding of most people as to DNA being "gold standard" evidence.

Many courts have held that subtle (and in this case not so subtle) psychological pressures are proper factors for consideration regarding the voluntary nature of a confession. But the only thing the average person understands about DNA is that it is the gold standard of evidence. As such, it is easy to see how an innocent person could be confused and coerced by such misleading evidence into admitting to something he or she did not do in the face of such "damning" evidence.

When the subtle inducements and even veiled threats (of unfair treatment) are combined with the deceptive statements (at least one of which was noted to be "extremely deceptive" by Ohio's Fourth District Court of appeals) in the context of

Petitioner and his inexperience with the legal system and the manner in which police pursue criminal charges, both the Highland Court of Common Pleas and Ohio's Fourth District Court of Appeals erred when they concluded that the record was devoid of evidence of inducement.

One last factor has been in place in Ohio law for nearly 150 years. Confessions obtained through the influence upon the suspect's "hopes and fears" are inadmissible. As was said in *Rufer v. State* (1874), 25 Ohio St. 464, 470, "Whilst voluntary confessions are always admissible against a prisoner on trial, it is well settled that confessions of guilt made through the influence of hopes or fears, induced by promises or threats of temporal benefit or disadvantage, are wholly inadmissible."

It is difficult to say with a straight face that Sgt. Reynolds was not playing upon the hopes and fears of Petitioner with his false and misleading statements, as well as playing upon the unsophisticated nature of Petitioner with his vague assurances and thinly veiled threat of unfair treatment without a confession from petitioner.

CONCLUSION

Outside of a limited number of marshals and bailiffs, the judicial branch of our government, both at the state and federal levels, does not have an armed force to enforce its decisions. Nor can it use the power of the purse to directly deny funding for governmental or private forces to enforce its decisions. Rather, it depends

largely upon the well-reasoned and logical nature of its decisions and its perception of judicial fairness. But once our courts get the reputation for winking at such deception of our citizenry by the police as occurred in the instant case, the power of our courts is dangerously diminished. For once a reputation is earned, it is difficult to be rid of. For the foregoing reasons, the Court should grant the Petition for a writ of certiorari.

Respectfully submitted,

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