Interrogation

"Neither the body nor mind of an accused may be twisted until he breaks."[1]

The critical juncture in many criminal investigations is the moment when officers sit down with the suspect in a police interview room or question him in the field. As the Supreme Court pointed out, confessions elicited in the course of police questioning "often seal a suspect's fate."[2]

Although it doesn't happen often, officers will sometimes encounter a suspect who actually *wants* to provide a complete and truthful statement. This typically occurs when the suspect's crime was atrocious because, as an esteemed commentator noted, "The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction."[3]

The run-of-the-mill criminal, however, is not so accommodating. In fact, most perpetrators tend to deny everything or admit only what is irrefutable. To get the truth from these people, officers must turn up the heat or, in the words of the United States Supreme Court, "unbend their reluctance."[4] But how much unbending is too much?

Such a question would have seemed zany to the folks who lived in the Middle Ages, a time when suspects who would not confess were simply tortured until they did. Even in the modern era, until around the middle of the 20th Century, officers in some parts of the country employed brutal "third degree" tactics which included "beatings and physical abuse and the brainwashing that comes from repeated suggestion and prolonged interrogation."[5] The success rate of these interrogations was remarkably high, although some of the people who confessed were, unfortunately, innocent.[6]

But that's history. Today, because of the professionalism of law enforcement and the distaste with which Americans view these types of tactics, allegations that officers tormented or physically abused suspects are rare, almost unheard of.

Nevertheless, there is concern that suspects may be subjected to subtle forms of psychological coercion which, although not as repellent as the physical variety, are also capable of breaking a person. As the Supreme Court noted in *Blackburn* v. *Alabama*, "The efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion."[7]

The courts do not, however, prohibit interrogation methods just because they are "sophisticated." In fact, they don't even object to psychological pressure.[8] Instead, the only thing they insist upon, apart from *Miranda* compliance, is that the suspect must have given his statement voluntarily. The question, then, is what must officers do to satisfy this requirement? That's the subject of this article.

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[1] *Culombe* v. *Connecticut* (1961) 367 U.S. 568, 584.

[2] *Moran* v. *Burbine* (1986) 475 U.S. 412, 431.

[3] 3 Wigmore, Evidence § 851 (Chadbourne rev. 1970) pp. 524-25. ALSO SEE *Culombe* v. *Connecticut* (1961) 367 U.S. 568, 576 ["The police may be midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation."].

[4] *Culombe* v. *Connecticut* (1961) 367 U.S. 568, 572.

[5] *People* v. *Andersen* (1980) 101 Cal.App.3d 563, 574.

[6] See *People* v. *Andersen* (1980) 101 Cal.App.3d 563, 574 "[W]hen sufficient pressures are applied, most persons will confess, even to events that are untrue."].

[7] (1960) 361 U.S. 199, 206. Edited. ALSO SEE *Colorado* v. *Connelly* (1986) 479 U.S. 157, 164 [investigators "have turned to more subtle forms of psychological pressure"]; *Jackson* v. *Denno* (1964) 378 U.S. 368, 389 [officers have turned "to more refined and subtle methods of overcoming a defendant's will."].

[8] See O*regon* v. *Elstad* (1985) 470 U.S. 298, 305 [officers may apply "moral and psychological pressures to confess"]; *Oregon* v. *Mathiason* (1997) 429 U.S. 492, 495 ["Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."]; *People* v. *Andersen* (1980) 101 Cal.App.3d 563, 575 ["When a person under questioning would prefer not to answer, almost all interrogation involves some degree of pressure."].

What is "Voluntariness?"

To understand the nature of voluntariness, it is unnecessary to dwell on the various legal definitions of the term because they are all pretty useless. For instance, it has been said that a confession is voluntary if it was the product of a "rational intellect and a free will,"[9] or if it resulted from an "essentially free and unconstrained choice,"[10] or if it was "entirely self-motivated."[11] Definitions such as these are not only vague, they are misleading.[12] If criminals could give usable confessions only if they truly *wanted* to confess, and only if their minds were rational and unburdened, an officer would be lucky to obtain one or two admissible confessions in his entire career.[13]

Instead, to understand the nature of voluntariness, it is more helpful to examine its antithesis—*in*voluntariness. Here, the rules are fairly clear: A statement is involuntary if all of the following circumstances existed:

(1) **Coercion**: The suspect was subjected to coercive interrogation tactics.
(2) **Inability to resist**: Because of the suspect's mental or physical condition, he was unable to resist the coercion.
(3) **Causation**: The coercion was the dominant motivating factor in the suspect's decision to make the statement.

Before we examine these circumstances, three things should be noted. First, although involuntary statements are suppressed because they are inherently unreliable, the use of coercion is also objectionable because of its affect on the criminal justice system and the officers themselves. In the words of the Supreme Court, coercion "brutalizes the police, hardens the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public."[14]

Second, statements obtained by means of *physical* coercion will be suppressed even if the suspect was able to resist and the abuse was not the motivating factor. "When [physical violence] is present," said the Court, "there is no need to weigh or measure its effects on the will of the individual."[15]

Third, in determining whether a statement was voluntary, the courts will consider all of the relevant circumstances surrounding the interrogation. This is significant because it means that voluntariness "does not turn on any one fact, no matter how apparently significant."[16]

What is Coercion?

It might be argued that *all* police interrogation is coercive if the suspect was guilty because his mind is in turmoil. Among other things, he must invent a plausible "innocent" story, then constantly revise it as he becomes aware of contrary physical evidence and statements from victims, witnesses, or accomplices. Furthermore, when each question is asked, he must mentally review his previous answers to avoid being inconsistent. And because his story is composed of assorted lies, he must be able to quickly invent new ones when they are exposed. That's *real* pressure. But it's not the kind of pressure that troubles the courts.

Instead, their concern is whether the officers' words or actions generated the kind of stress that *compelled* the suspect to confess or make damaging

[9] *Blackburn* v. *Alabama* (1960) 361 U.S. 199, 208; *Townsend* v. *Sain* (1963) 372 U.S. 293, 307; *Mincey* v. *Arizona* (1978) 437 U.S. 385, 398; *Reck* v. *Pate* (1961) 367 U.S. 433, 440; *People* v. *Haydel* (1974) 12 Cal.3d 190, 198.
[10] *Culombe* v. *Connecticut* (1961) 367 U.S. 568, 602; *Schneckloth* v. *Bustamonte* (1973) 412 U.S. 218, 225.
[11] *People* v. *Boyde* (1988) 46 Cal.3d 212, 238; *People* v. *Spears* (1991) 228 Cal.App.3d 1, 27.
[12] See *Schneckloth* v. *Bustamonte* (1973) 412 U.S. 218, 224 [there is "no talismanic definition of voluntariness"].
[13] See *Colorado* v. *Connelly* (1986) 479 U.S. 157, 166 ["Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present [involuntariness] claim be sustained."].
[14] *Miranda* v. *Arizona* (1966) 384 U.S. 436, 448. ALSO SEE *Brown* v. *Mississippi* (1936) 297 U.S. 278, 286 [coercion is "revolting to the sense of justice"]; *Spano* v. *New York* (1959) 360 U.S. 315, 320-21 ["life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."]; *People* v. *Montano* (1991) 226 Cal.App.3d 914, 940 [coercion "degrades our system of justice"].
[15] *Stein* v. *New York* (1953) 346 U.S. 156, 183.
[16] *People* v. *Jablonski* (2006) 37 Cal.App.4th 774, 814. ALSO SEE *U.S.* v. *Ballard* (5th Cir. 1978) 586 F.2d 1060, 1063 ["One factor, by itself, is seldom determinative."].

admissions. As the United States Supreme Court pointed out, "[C]oercion can be mental as well as physical, and the blood of the accused is not the only hallmark of an unconstitutional inquisition."[17]

It is important to understand that, while psychological *coercion* is prohibited, officers are free to apply "moral and psychological *pressure*."[18] It must be acknowledged, however, that the line between psychological pressure and psychological coercion can be difficult to detect. Taking note of this, the Supreme Court said in *Haley* v. *Ohio,* "Unfortunately, we have neither physical nor intellectual weights and measures by which judicial judgment can determine when pressures in securing a confession reach the coercive intensity that calls for exclusion of a statement so secured."[19]

To compound the problem, an officer's decisions on how to interrogate a suspect must be made under circumstances that seldom allow for calm and deliberate judgment. Instead, they must respond quickly to the suspect's words, his changing moods, and various ploys. Moreover, they may need to deal with their own anger and frustration caused by an "excess of zeal or aggressive impatience or flaring up of temper in the face of obstinate silence."[20]

To make matters worse, officers know they will not get a statement if they do not press; but if they press too much, any statement they get will be suppressed. With this dilemma in mind, the Court of Appeal aptly noted that officers who are interviewing a suspect "must skate a fine line."[21]

Finally, the question arises: Doesn't the officers' compliance with *Miranda's* warning and waiver procedure provide sufficient assurance that confessions and admissions are voluntary? After all, every suspect who is *Mirandized* is fully aware that he does not have to talk to the officers, and that he can stop the interview whenever he wants.

The answer is that *Miranda* compliance *does* reduce the level of psychological compulsion. In fact, the Supreme Court has noted that "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."[22] But the courts continue to enforce the rule against psychological coercion because a suspect who waives his rights at the beginning of an interview may later, as the result of a sudden or gradual buildup of coercion, be unable to resist and assert his rights.[23]

What, then, are the circumstances that indicate an interview was or was not coercive? In addition to threats and promises (which are covered in the next section), the following are especially important.

The officers' attitude

When judges are reading a transcript of an interview or watching a video recording of one, the first thing that jumps out is the prevailing tone of the interview, especially the officers' demeanor. For example, in rejecting claims of coercion, the courts have noted the following:

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[17] *Blackburn* v. *Alabama* (1960) 361 U.S. 199, 206. ALSO SEE *Culombe* v. *Connecticut* (1961) 367 U.S. 568, 576 [coercion acts as a "suction process" that has "drained [the suspect's] capacity for freedom of choice"]; *Watts* v. *Indiana* (1949) 338 U.S. 49, 52 ["There is torture of mind as well as body."].

[18] O*regon* v. *Elstad* (1985) 470 U.S. 298, 305. Emphasis added. **NOTE**: In the past, courts would sometimes rule that a statement was coerced if it resulted from any pressure whatsoever—no matter how slight. But because the courts now appreciate the difference between pressure and coercion, and because they must now consider the totality of circumstances, the "slightest pressure" test has been abolished. See *Arizona* v. *Fulminante* (1991) 499 U.S. 279, 285 ["[I]t is clear that [the 'slightest pressure' language] does not state the standard for determining the voluntariness of a confession"]; *People* v. *Clark* (1993) 5 Cal.4th 950, 986, fn.10 [the "slightest pressure" test is contrary to [*Fulminante*]].

[19] *Haley* v. *Ohio* (1947) 332 U.S. 596, 666.

[20] *Culombe* v. *Connecticut* (1961) 367 U.S. 568, 574.

[21] *People* v. *Andersen* (1980) 101 Cal.App.3d 563, 576. ALSO SEE *Haynes* v. *Washington* (1963) 373 U.S. 503, 515 ["The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw."].

[22] *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 433, fn.20. ALSO SEE *United States* v. *Washington* (1977) 431 U.S. 181, 188 ["[I]t seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled."]; *Missouri* v. *Seibert* (2004) 542 U.S. 600, 608-09 ["[G]iving the [*Miranda*] warnings and getting a waiver has generally produced a virtual ticket of admissibility."].

[23] See *Dickerson* v. *United States* (2000) 530 U.S. 428, 444 [*Miranda* "does not, of course, dispense with the voluntariness inquiry."].

[24] See *Fare* v. *Michael C.* (1979) 442 U.S. 707, 727 ["restrained"]; *People* v. *Farnam* (2002) 28 Cal.4th 107, 182 ["quiet and nonjudgmental"]; *People* v. *Jones* (1998) 17 Cal.4th 279, 297-98 ["low-key," "nonthreatening"].

- "[The officers] posed their questions in a calm, deliberate manner," their voices were "very quiet and subdued."[25]
- "Everything totally aboveboard with the officers. No coercion, no harassment. No heavy-handedness. [They] were patient and even-handed."[26]
- "[The officers'] manner of presentation of evidence compared favorably with the presentation of evidence by well-behaved lawyers in court. Neither in tone nor tempo nor decibel does coercive pressure appear."[27]

This does not mean that officers must be friendly or dispassionate. On the contrary, the courts have consistently rejected arguments that psychological coercion resulted merely because the officers were persistent,[28] or because the suspect was subjected to "intellectual persuasion"[29] or "searching questions,"[30] or because he was confronted with "contradictory facts,"[31] or because the interview included "loud, aggressive accusations of lying,"[32] loud and forceful speech,[33] "harsh questioning,"[34] or "tough talk."[35]

Interrogation tactics

In the course of an interview, officers will often employ basic or improvised interrogation tactics. While this may give them a psychological advantage, it is not deemed coercive because, as the California Supreme Court observed, "Although adversarial balance, or rough equality, may be the norm that dictates trial procedures, it has never been the norm that dictates the rules of investigation and the gathering of proof."[36] To put it another way, "There is no constitutional right to a clumsy or inexperienced questioner."[37] But, as we will discuss later, the courts have suppressed statements resulting from extreme tactics, especially when they were used against vulnerable suspects.

SYMPATHY: An officer's sympathetic attitude toward a suspect will not render a statement involuntary because an understanding manner, even when feigned, is not coercive.[38] Thus, the U.S. Court of Appeal noted in *Miller* v. *Fenton* that the "good guy" approach "is recognized as a permissible interrogation tactic" and that "a sympathetic attitude on the part of the interrogator is not in itself enough to render a confession involuntary."[39] Or, in the words of the Fifth Circuit, "[T]here is nothing inherently wrong with efforts to create a favorable climate for confession."[40]

"GOOD COP—BAD COP": The ever-popular "good cop-bad cop" routine is not considered coercive unless the "bad" cop gets carried away; e.g., threatens to arrest the suspect's grandmother.[41]

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[25] *People* v. *Perdomo* (2007) 147 Cal.App.4th 605, 618.
[26] *People* v. *Benson* (1990) 52 Cal.3d 754, 780 [edited quote from trial judge].
[27] *People* v. *Andersen* (1980) 101 Cal.App.3d 563, 578.
[28] See *Haynes* v. *Washington* (1963) 373 U.S. 503, 515.
[29] See *People* v. *Ditson* (1962) 57 Cal.2d 415, 433.
[30] See *People* v. *Ditson* (1962) 57 Cal.2d 415, 433.
[31] See *People* v. *Andersen* (1980) 101 Cal.App.3d 563, 576.
[32] See *In re Joe R.* (1980) 27 Cal.3d 496, 515; *U.S.* v. *Braxton* (4th Cir. 1997) 112 F.3d 777, 782 [officers accused the suspect of "not coming clean"]; *Jenner* v. *Smith* (8th Cir. 1993) 982 F.2d 329, 334 ["It was likewise permissible to elicit further statements by claiming not to believe her denials."].
[33] See *Jenner* v. *Smith* (8th Cir. 1993) 982 F.2d 329, 334 ["raised voice" not coercive].
[34] *People* v. *Boyde* (1988) 46 Cal.3d 212, 242.
[35] *In re Shawn D.* (1993) 20 Cal.App.4th 200, 213.
[36] *People* v. *Jones* (1998) 17 Cal.4th 279, 297.
[37] *People* v. *Jones* (1998) 17 Cal.4th 279, 297.
[38] See *People* v. *Jablonski* (2006) 37 Cal.4th 774, 815 [court rejects "excessive friendliness" argument]; *People* v. *Bradford* (1997) 14 Cal.4th 1005, 1043 ["Nor would we conclude that [the officer's] efforts to establish a rapport with defendant constitute coercion."]; *Jenner* v. *Smith* (8th Cir. 1993) 982 F.2d 329, 334 ["Numerous cases have held that questioning tactics such as … a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne."]; *Hawkins* v. *Lynaugh* (5th Cir. 1988) 844 F.2d 1132, 1139-40.
[39] (3d Cir. 1986) 796 F.2d 598, 607 [citing *Beckwith* v. *United States* (1976) 425 U.S. 341, 343].
[40] *Hawkins* v. *Lynaugh* (5th Cir. 1988) 844 F.2d 1132, 1140.
[41] See *Martin* v. *Wainwright* (11th Cir. 1995) 770 F.2d 918, 925 ["bad" cop "discussed the death penalty"].

LIES AND DECEPTION: A statement will not be deemed involuntary merely because the officers lied to the suspect about the existence of incriminating evidence, or if they exaggerated the quality or quantity of their evidence. While lies such as these might motivate some suspects to respond by confessing or making an incriminating statement, the courts have consistently rejected arguments that such tactics were inherently coercive.[42] The following are examples of lies that were not problematic:

- We arrested your accomplice and he confessed.[43]
- The victim ID'd you.[44]
- We located a witness who ID'd you.[45]
- We found your fingerprints on the victim's neck,[46] on the victim's wallet,[47] on the victim's cash register,[48] in the victim's home,[49] in the getaway car,[50] at the scene of the crime.[51]
- We tested soil samples under your car and they matched the dirt at the crime scene.[52]
- You flunked your lie detector test,[53] DNA test,[54] gunshot residue test.[55]
- We know a lot more than we're telling you.[56]
- Richmond detectives gave a murder suspect a "Neutron Proton Negligence Intelligence Test" (actually, they just dabbed his hand with a drug-test solution that naturallly changed color), and said it proved he had recently fired a gun.[57]

The courts have also ruled that a suspect's statement was not involuntary merely because the officers did not reveal the real reason they wanted to question him;[58] or because they denied they were conducting a criminal investigation;[59] or because they told a wounded suspect that he'd better give a statement now because, in their medical opinion, he might die before reaching the hospital.[60]

It must be noted, however, that there is some authority for suppressing statements if, (1) the officers employed a type of deception that was reasonably likely to "procure an untrue statement"; and (2) the suspect's mind was so disordered that he was unusually susceptible to the influences of others, in which case his lack of confidence in his mind's ability to apprehend reality might cause him to accept the officers' repeated lies as the truth.[61] Thus, Court of Appeal explained that "[t]he limits on the use of subterfuge in interrogation are defined by the potentiality of the subterfuge to produce an untrue statement."[62]

In the most cited case, *People* v. *Hogan,*[63] the court ruled that the confession of a rape-murder suspect was involuntary mainly because, (1) he was "sobbing uncontrollably" and was so emotionally distraught that he had vomited, (2) the officers repeatedly suggested to him that he was unquestionably

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[42] See *Illinois* v. *Perkins* (1990) 496 U.S. 292, 297 ["mere strategic deception" is not coercive]; *Amaya-Ruiz* v. *Stewart* (9th Cir. 1997) 121 F.3d 486, 495 ["Misrepresentations linking a suspect to a crime or statements which inflate the extent of the evidence against a suspect do not necessarily render a confession involuntary."]; *People* v. *Chutan* (1999) 72 Cal.App.4th 1276, 1280 ["Police officers are at liberty to utilize deceptive stratagems to trick a guilty person into confessing."]; *People* v. *Thompson* (1990) 50 Cal.3d 134, 167 ["Numerous California decisions confirm that deception does not necessarily invalidate a confession."].
[43] See *Frazier* v. *Cupp* (1969) 394 U.S. 731, 739; *People* v. *Felix* (1977) 72 Cal.App.3d 879, 885.
[44] *People* v. *Pendarvis* (1961) 189 Cal.App.2d 180, 186.
[45] *Ledbetter* v. *Edwards* (6th Cir. 1994) 35 F.3d 1062, 1066.
[46] *People* v. *Musselwhite* (1998) 17 Cal.4th 1216, 1241.
[47] *People* v. *Farnam* (2002) 28 Cal.4th 107, 182.
[48] *People* v. *Connelly* (1925) 195 Cal. 584, 597.
[49] *Lucero* v. *Kerby* (10th Cir. 1998) 133 F.3d 1299, 1311.
[50] *People* v. *Watkins* (1970) 6 Cal.App.3d 119, 124-25.
[51] See *Oregon* v. *Mathiason* (1977) 429 U.S. 492, 495.
[52] *People* v. *Thompson* (1990) 50 Cal.3d 134, 167.
[53] *People* v. *Mays* (2009) __ Cal.App.4th __ [2009 WL 1262408]; *U.S.* v. *Haswood* (9th Cir. 2003) 350 F.3d 1025, 1029.
[54] *Pierce* v. *State* (2002, Indiana Supreme Court) 761 N.E.2d 821, 824.
[55] *People* v. *Parrison* (1982) 137 Cal.App.3d 529, 537.
[56] *People* v. *Jones* (1998) 17 Cal.4th 279, 299.
[57] *People* v. *Smith* (2007) 40 Cal.4th 483, 506.
[58] See *Colorado* v. *Spring* (1987) 479 U.S. 564, 576-77; *U.S.* v. *Boskic* (1st Cir. 2008) 545 F.3d 69, 77-80.
[59] *People* v. *Chutan* (1999) 72 Cal.App.4th 1276.
[60] *In re Walker* (1974) 10 Cal.3d 764, 775, 777.
[61] *People* v. *Cahill* (1994) 22 Cal.App.4th 296, 315.
[62] *People* v. *Felix* (1977) 72 Cal.App.3d 879,886. ALSO SEE *People* v. *Farnam* (2002) 28 Cal.4th 107, 182.
[63] (1982) 31 Cal.3d 815.

guilty and mentally ill, and (3) the certainty of his guilt "was suggested by deceptive references to nonexistence eyewitnesses and proof of rape."

EXPLOITING A SUSPECT'S VULNERABILITIES: The courts have often expressed their disapproval of obtaining statements by exploiting a suspect's deep-seated psychological vulnerabilities. For example, capitalizing on a suspect's profound religious beliefs or fears has been criticized because, as one court said, "Religious beliefs are not matters to be used by government authorities to manipulate a suspect to say things he or she otherwise would not say."[64]

CONFRONTING WITH EVIDENCE: Officers may, of course, confront a suspect with all of the evidence that proves or tends to prove he is guilty. "[G]ood faith confrontation," said the Court of Appeal, "is an interrogation technique possessing no apparent constitutional vices."[65]

WITHHOLDING INFORMATION: A statement is not involuntary merely because officers withheld information that might have made the suspect less apt to confess; e.g., witnesses were unable to ID him in a physical or photo lineup.[66]

ACCUSE OF LYING: Officers may urge the suspect to stop lying and tell the truth, and they may employ any of the variations on this theme such as, "get the burden off your conscience," or "you'll feel better if you tell the truth."[67] As the California Supreme Court explained, "[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary."[68] In one such case, *People* v. *Andersen,* the court explained, "Because defendant had been recounting demonstrable falsehoods to the police in her earlier interviews, the admonition to tell the truth was appropriate and timely and not one extraneously dragged in as a club with which to bully the suspect."[69]

POSIT THEORIES: It is not inherently coercive for officers to tell the suspect about their theories as to how the crime occurred, even if some of their theories would result in a longer prison sentence than others.[70]

LEADING QUESTIONS: A question is "leading" if it suggested a certain answer, usually the answer the officers wanted to hear; e.g., "You were the one who planned the holdup, weren't you?" (leading); "Who planned the holdup?" (not leading). Although it is relevant that the suspect made his statement in response to an officer's leading question, it is not a significant circumstance.[71]

GOING "OUTSIDE *MIRANDA*": Going "outside *Miranda*" was a tactic in which officers would ignore a suspect's invocation of his *Miranda* rights so that they might obtain a statement that prosecutors could use to impeach him at trial if he testified. Although some courts have given mixed signals on the use of this tactic, and have even held that such statements were admissible when there were ex-

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[64] *People* v. *Adams* (1983) 143 Cal.App.3d 970, 989. ALSO SEE *People* v. *Kelly* (1990) 51 Cal.3d 931, 953 ["[T]he tactic of exploiting a suspect's religious anxieties has been justly condemned"]; *People* v. *Montano* (1991) 226 Cal.App.3d 914, 935 ["[The officer] aggravated the situation by using their common religion to conjure up in defendant's mind the picture of confessing to avoid going to hell"]; *Brewer* v. *Williams* (1977) 430 U.S. 387, 402-3 [suspect was "deeply religious and an escapee from a mental hospital"]; *U.S.* v. *Tingle* (9th Cir. 1981) 658 F.2d 1332, 1336 [officers "exert improper influence" when they "prey upon maternal instinct and inculcate fear in a mother that she will not see her child"]. COMPARE *People* v. *Maestas* (1987) 194 Cal.App.3d 1499, 1506 ["Such references [to religion and appellant's Catholic beliefs] were brief and suggestive that appellant tell the truth."].

[65] *People* v. *Andersen* (1980) 101 Cal.App.3d 563, 578, 576.

[66] See *Colorado* v. *Spring* (1987) 479 U.S. 564, 577 [withholding information about the nature of the crime under investigation "could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature."]; *People* v. *Boyette* (2002) 29 Cal.4th 381, 411 ["Defendant does not explain how the voluntariness of his confession required police to disclose they were focusing on him as a suspect."]; *U.S.* v. *D'Antoni* (7th Cir. 1988) 856 F.2d 975, 981 ["Merely withholding information regarding the subject of the interrogation does not render a *Miranda* waiver involuntary"].

[67] See *People* v. *Andersen* (1980) 101 Cal.App.3d 563, 578; *People* v. *Amaya-Ruiz* (9th Cir. 1997) 121 F.3d 486, 494 ["Encouraging Amaya-Ruiz to tell the truth also did not amount to coercion."]; *U.S.* v. *Ballard* (5th Cir. 1978) 586 F.2d 1060, 1063.

[68] *People* v. *Jimenez* (1978) 21 Cal.3d 595, 611.

[69] (1980) 101 Cal.App.3d 563, 578.

[70] See *People* v. *Thompson* (1990) 50 Cal.3d 134, 170.

[71] See *People* v. *Cox* (1990) 221 Cal.App.3d 980, 986 ["The fact that the questions were somewhat leading does not equate to a conclusion that they were coercive."]; *Spano* v. *New York* (1959) 360 U.S. 315, 322 ["leading questions of a skillful prosecutor"].

tenuating circumstances,[72] others have suggested that any resulting statements were involuntary on the theory that a suspect who was being questioned by an officer who was ignoring an unambiguous invocation could feel especially helpless, as he might reasonably believe he was in the hands of an officer who was unscrupulous or corrupt.[73]

Also note that the "outside *Miranda*" tactic might be viewed by the courts as an attempt to undermine the *Miranda* protections, which could result in suppression under the United States Supreme Court's decision in *Missouri* v. *Seibert*.[74]

The surrounding circumstances

While voluntariness depends largely on the officers' words and conduct, many of the miscellaneous circumstances surrounding the interview may also be relevant.

LOCATION OF THE INTERVIEW: Many suspects are questioned in police interrogation rooms which are considered inherently coercive because they are usually small, stark, and located within the confines of heavily-secured government buildings.[75] Nevertheless, this is seldom a significant circumstance if the suspect had waived his *Miranda* rights.

NUMBER OF OFFICERS: The courts often note the number of officers who were present, especially the number of officers who participated in the questioning. For example, in one case the Supreme Court noted that the "tiny" interrogation room was "literally filled with police officers."[76]

***MIRANDA* WAIVER**: Although it is relevant that the suspect was informed of his *Miranda* rights and waived them, a waiver will not save a statement in the face of outright coercion. Said the Court of Appeal, "It cannot be seriously argued that such advice immunizes law enforcement officers from the legal effect of later coercive practices."[77]

SUSPECT ACKNOWLEDGES VOLUNTARINESS: When a suspect gives statement, officers will often ask him to acknowledge in writing or on tape that he was not pressured or coerced. This is good practice. For example, in rejecting a murder defendant's argument that officers had threatened him with the death penalty, the California Supreme Court noted among other things, "The transcript of the second tape-recorded statement supports the officers' testimony. Defendant indicates therein that [the officers] had not coerced him into making a second statement; that he had not been threatened or promised anything."[78]

Like *Miranda* waivers, however, such an acknowledgment will have little or no weight with the courts if it appears the acknowledgment itself was coerced, or if there were other circumstances that cast doubt on the voluntariness of the suspect's statement.[79]

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[72] See, for example, *People* v. *Depriest* (2007) 42 Cal.4th 1, 35 [court rejects the argument that "continued interrogation" after suspect invoked "compels a finding of official coercion"]; *People* v. *Coffman* (2004) 34 Cal.4th 1, 58 ["That [the officer] repeatedly ignored Marlow's requests for an attorney does give rise to concern, but—given Marlow's maturity and criminal experience—it was unlikely Marlow's will was thereby overborne."]; *People* v. *Demetrulias* (2006) 39 Cal.4th 1, 30 ["[T]he deliberateness of a [*Miranda*] violation did not alter the balance struck in *Harris* and other cases between deterring police misconduct and exposing defendants who commit perjury at trial."].

[73] See *Cooper* v. *Dupnik* (9th Cir. 1992) 963 F.2d 1220, 1243 ["With his requests to see a lawyer disregarded, Cooper was a prisoner in a totalitarian nightmare, where the police no longer obeyed the Constitution, but instead following their own judgment, treating suspects according to their whims."]; *People* v. *Neal* (2003) 31 Cal.4th 63, 81-82 [that the officer "intentionally continued interrogation in deliberate violation of *Miranda*" "weighs most heavily against the voluntariness"]; *People* v. *Montano* (1991) 226 Cal.App.3d 914, 932-37; *People* v. *Hinds* (1984) 154 Cal.App.3d 222, 238-39; *Gavin* v. *Farmon* (9th Cir. 2001) 258 F.3d 951, 954.

[74] (2004) 542 U.S. 600.

[75] See *Blackburn* v. *Alabama* (1960) 361 U.S. 199, 204 ["[M]ost of the interrogation took place in closely confined quarters—a room about four by six or six by eight feet"]; *Green* v. *Superior Court* (1985) 40 Cal.3d 126, 131 ["The [interview] rooms 7 by 12 feet, have no windows and require a key to enter or exit."].

[76] *Blackburn* v. *Alabama* (1960) 361 U.S. 199, 207. ALSO SEE *Spano* v. *New York* (1959) 360 U.S. 315, 207 [suspect "was subjected to questioning not by a few men but [12 officers and two deputy DAs]."]. COMPARE *U.S.* v. *Ross* (7th Cir. 2007) 510 F.3d 702, 710 ["Although several armed inspectors were moving around his apartment at the time of his confession, only two inspectors interviewed him at any given time."].

[77] *People* v. *Clark* (1968) 263 Cal.App.2d 87, 91.

[78] *People* v. *Belmontes* (1988) 45 Cal.3d 744, 772. Edited. ALSO SEE *People* v. *Bradford* (1997) 14 Cal.4th 1005, 1044.

[79] See *Haley* v. *Ohio* (1947) 332 U.S. 596, 601 ["Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them."]; *People* v. *Rand* (1962) 202 Cal.App.2d 668, 674 [the defendant's acknowledgment that his statement was given voluntarily "does not detract from the conclusion that such statement was involuntarily made."

Threats and Promises

One of the most coercive things an officer can do during an interview is threaten to take some adverse action against the suspect if he refuses to give a statement. It is also considered coercive to promise something in return for a statement—especially something the suspect wants desperately, such as his freedom or a light sentence. As the California Supreme Court observed, "Promises and threats traditionally have been recognized as corrosive of voluntariness."[80]

Before going further, three things should be noted. First, there is no significant difference between threats and promises. For example, a promise that a suspect will receive a lenient sentence if he gives a statement is essentially an implied threat that he will serve more time if he refuses. Second, an implied threat or promise may be just as coercive as an explicit one.[81] Third, although the courts sometimes say that "false" or "broken" promises are prohibited, a statement motivated by a promise will ordinarily be deemed involuntary, regardless of whether the promise was kept.[82]

Threats pertaining to sentencing

When officers are questioning a suspect who thinks he is toast, there is probably only one thing on his mind: reducing the amount of time he will spend in jail or prison. Consequently, the subject of sentencing is likely to arise, whether it is introduced by the suspect (who is looking for a deal) or by officers (who are looking for a confession). The question, then, is what are the do's and don'ts?

For one thing, officers should make it clear that they cannot promise anything—that decisions on charging and sentencing are made by prosecutors and judges.[83] Furthermore, they must not threaten or promise the suspect that he will receive a particular or lesser sentence if he gives a statement. As the California Supreme Court explained:

> [If the suspect] 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.[84]

This does not mean that the subjects of sentencing and charging are off limits. It just means that officers must make sure that their comments about charging and sentencing are factual, which necessarily means noncommital. "The critical question," said the court in *People* v. *Cahill*, "is when does a representation in the course of an interrogation about penal consequences of silence or untruthfulness amount to a threat or promise?"[85]

For example, in ruling that an officer's comments pertaining to charging or sentencing were coercive, the courts have pointed out the following:

- "The clear implication of the officer's remarks was that unless defendant changed her story and confessed her true involvement in the crime, she would be tried for murder."[86]
- "[The officer implied] that defendant would be tried for first degree murder *unless* he admitted that he was inside the house and denied that he had premeditated the killing."[87]

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[80] *People* v. *Neal* (2003) 31 Cal.4th 63, 84. ALSO SEE *Arizona* v. *Fulminante* (1991) 499 U.S. 279, 286-87 [promise of protection from other inmates]; *Haynes* v. *Washington* (1963) 373 U.S. 503, 512 [promise of phone call to wife]; *People* v. *Esqueda* (1993) 17 Cal.App.4th 1450, 1485 [the officers "implied questioning would only stop if Esqueda gave them the story they wanted"].

[81] See *People* v. *Hill* (1967) 66 Cal.2d 536, 549 ["The offer or promise of such benefit need not be expressed, but may be implied from equivocal language"]; *People* v. *Flores* (1983) 144 Cal.App.3d 459, 471 ["Implicit in this remark is the inference, 'the carrot,' that appellant would be treated differently, more leniently as a reward for his admission or confession."].

[82] See *People* v. *Vasila* (1995) 38 Cal.App.4th 865, 875 ["The Attorney General urges us to conclude that officers are permitted to induce a confession by making promises, so long as they keep them. This is not the law." Edited]; *People* v. *Dominick* (1986) 182 Cal.App.3d 1174, 1192 ["Whether or not the detective's statement was false does not in any way change the actuality of the defendant's state of mind with respect to voluntariness."].

[83] See *People* v. *Groody* (1983) 140 Cal.App.3d 355, 359 ["[The detective] expressly informed appellant that he could make no guarantees of leniency."; *People* v. *Boyde* (1988) 46 Cal.3d 212, 239 ["[The detective] repeatedly and clearly stated that he had no authority to make any promise of leniency . . . but could only pass information on to the district attorney."].

[84] *People* v. *Hill* (1967) 66 Cal.2d 536, 549.

[85] (1994) 22 Cal.App.4th 296, 311.

[86] *People* v. *McClary* (1977) 20 Cal.3d 218, 223.

[87] *People* v. *Cahill* (1994) 22 Cal.App.4th 296, 314.

- "[T]he officers implied that appellant was more likely to be sent to San Quentin if he failed to provide the police with a confession."[88]
- "They told him his only way out was to say [the shooting] was an accident. They implied by so saying he would not have to go to prison and would be out with his children."[89]
- "[D]efendant was given bald promises that, if he provided the necessary information, he would not be prosecuted federally and would be released from custody."[90]

DISCUSSING POSSIBLE SENTENCES: Officers may inform suspects of the possible sentences they are facing—the realities of their predicament[91]—if they do so in a nonthreatening and noncoercive manner.[92] Said the Court of Appeal, "[T]ruthful and commonplace statements of possible legal consequences, if unaccompanied by threat or promise, are permissible police practices and will not alone render a subsequent statement involuntary and inadmissible."[93]

For example, in *People* v. *Bradford* the interrogating officer responded as follows when a murder suspect asked about his possible sentence: "Well, it can go anywhere from, and this is just my opinion, I'm not telling you what's going to happen, it can go anywhere from second-degree murder to first-degree murder . . . . If there's a trail of girls laying from here to Colorado, then it doesn't look too good for you." In rejecting the defendant's argument that the officer's comments rendered his subsequent statement involuntary, the court said, "[W]e believe defendant would reasonably understand these statements to mean that no promises or guarantees were being made."[94]

DISCUSSING THE DEATH PENALTY: While officers may inform a murder suspect that the crime under investigation may carry the death penalty,[95] they may not do so in a threatening manner, nor may they imply that the suspect might avoid the death penalty if he confessed.[96] For example, in *People* v. *Flores* an officer told the defendant, "Right now the way it looks, it looks like robbery and murder. You know what robbery and murder is? Robbery and murder is a capital offense in California. An offense that you could go to the gas chamber." In ruling that the defendant's subsequent statement was involuntary, the court said, "Only by confessing his involvement in the decedent's death could the appellant avoid the possible death penalty."[97] Similarly, in *People* v. *Hinds* the court ruled that the defendant's confession was involuntary because the officers repeatedly "suggested that if appellant did not explain to them mitigating factors, he might get the death penalty."[98]

DISCUSSING MITIGATING CIRCUMSTANCES: Officers may point out to the suspect that the punishment for his crime may depend on the role he played in its

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[88] *In re Shawn D.* (1993) 20 Cal.App.4th 200, 213.
[89] *People* v. *Esqueda* (1993) 17 Cal.App.4th 1450, 1486.
[90] *People* v. *Vasila* (1995) 38 Cal.App.4th 865, 875.
[91] See *People* v. *Daniels* (1991) 52 Cal.3d 815, 863 ["There is nothing improper in confronting a suspect with the predicament he or she is in"]; *People* v. *Andersen* (1980) 101 Cal.App.3d 563, 583 [officers merely "commented on the realities of her position"].
[92] See *People* v. *Cahill* (1994) 22 Cal.App.4th 296, 311 ["The critical question is: when does a representation in the course of an interrogation about the penal consequences of silence or untruthfulness amount to a threat or promise?"]; *U.S.* v *Ballard* (5th Cir. 1978) 586 F.2d 1060, 1063 ["A truthful and noncoercive statement of the possible penalties which an accused faces may be given to the accused without overbearing one's free will."]; *U.S.* v. *Haswood* (9th Cir. 2003) 350 F.3d 1024, 1029 ["Reciting potential penalties or sentences does not constitute coercion."].
[93] *People* v. *Flores* (1983) 144 Cal.App.3d 459, 469. ALSO SEE *People* v. *Davis* (2009) __ Cal.4th __ ["Sergeant Meese said nothing beyond the obvious in that defendant's crimes, involving the kidnap and murder of a child, made him eligible for the death penalty. Meese correctly implied that any evidence of a sexual assault (or lack thereof) would not have altered that circumstance."].
[94] (1997) 14 Cal.4th 1005, 1044.
[95] See *People* v. *Ray* (1996) 13 Cal.4th 313, 340 ["[A] confession will not be invalidated simply because the possibility of a death sentence was discussed beforehand."]; *People* v. *Holloway* (2004) 33 Cal.4th 96, 115 ["In telling defendant that 'we're talking about a death penalty case here, Detective Hash said nothing beyond the obvious, for the crime—the murder of two young women, in their home, with signs of sexual assault—was a clear candidate for capital prosecution."].
[96] See *People* v. *Nicholas* (1980) 112 Cal.App.3d 249, 265 [Officer: "Death penalty went back in today. Did you know that?"]; *People* v. *McClary* (1977) 20 Cal.3d 218, 229 [officers "advised her that unless she changed her statement and admitted the true extent of her complicity, she would . . . face the death penalty."]; *People* v. *Williams* (1997) 16 Cal.4th 635, 659 ["[If] you assist us in this investigation, you won't get the death penalty"].
[97] (1983) 144 Cal.App.3d 459, 466.
[98] (1984) 154 Cal.App.3d 222, 238.

commission and his state of mind at the time. Although there is an implication that the suspect might be better off if he confessed and explained any mitigating circumstances, such an appeal is not considered objectionable so long as the officers did not promise anything specific.[99]

For example, in *People* v. *Garcia* the defendant drove the getaway car that his accomplice, Orlando, used in committing a robbery-murder in Oxnard. After arresting Garcia, an officer told him, "If you guys were doing a robbery, he shot the guy, he panicked or whatever, that's the price he's going to have to pay. We're going to focus our thing on him—Orlando. But there's no sense you going down the way he is, that far down with him as a trigger man." In ruling that the officer's words did not constitute a promise, the California Supreme Court explained that the officer was merely pointing out that "an accomplice is generally better off than a triggerman," adding, "That was sound advice."[100]

In *People* v. *Hill* the officers who were questioning another getaway car driver "urged him to consider his own position and, in effect, to desert a sinking ship and grab a lifesaver if he could, as he might expect his codefendants to do." These comments were entirely proper because, as the court explained, the officers merely "pointed out those benefits which would naturally accrue to him if his true role in the crime was made known, but such benefits did not include leniency or favorable treatment by the state."[101]

In another case, *People* v. *Andersen,*[102] a detective explained to a murder suspect that homicide is broken into degrees "ranging from plot-and-scheme to heat-of-passion," and that if the shooting took place in the heat of an argument she would be "better off explaining her intent to a judge or jury" instead of "persisting in a denial contrary to all the evidence, a denial which makes things go hard. A showing of remorse makes things easier."

The court had no problem with the detective's comment that a showing of remorse is a mitigating factor. Said the court, "This statement is no more than a truthful legal commonplace with which all persons familiar with criminal law would agree." But when the officer added that "a denial makes things go hard," the court said he was "venturing on thin ice" because he was implying that a judge or jury would look at her "in an unfavorable light if she persisted in a false story."

Officers may point out to the suspect that his sentence may depend on whether his crime was planned, impulsive, or accidental, as this is also a "truthful legal commonplace." Thus, in such cases the courts have noted the following:

- The officer suggested that "the killings might have been accidental or resulted from an uncontrollable fit of rage during a drunken blackout, and that such circumstances could make a lot of difference." These remarks, said the court, "fall far short of being promises of lenient treatment in exchange for cooperation."[103]
- "The circumstances of the crime here suggested alternative theories of accidental or intentional killing and, absent evidence refuting one theory, both would likely be asserted. The police did not promise to abandon the theory of intentional killing if defendant confessed."[104]

Officers must not, however, threaten the suspect by saying that they, prosecutors, or the judge would presume there were no mitigating circumstances if he refused to make a statement in which he explained his lesser role or less blameworthy state of mind. For example, in *People* v. *McClary*[105] an officer told a murder suspect, "Your involvement can be less than what we think it is right now. It might be more. I don't know. You're the one that's going to have to say. You can either be a direct participant, or you can be an accessory after the fact. . . . Unless your story changes to where you can say something else

[99] See *People* v. *Maestas* (1987) 194 Cal.App.3d 1499, 1507 ["The comments explain the possible consequences, depending upon his motivation and involvement in the shooting, and as such do not constitute threats or false promises of leniency."].
[100] (1984) 36 Cal.3d 539, 546.
[101] (1967) 66 Cal.2d 536, 550.
[102] (1980) 101 Cal.App.3d 563.
[103] *People* v. *Holloway* (2004) 33 Cal.4th 96, 116.
[104] *People* v. *Thompson* (1990) 50 Cal.3d 134.
[105] (1977) 20 Cal.3d 218.

happened and we can prove you true, then you're going to be tried [as a principal]." In ruling that this comment constituted coercion, the court noted among other things that the officer had "advised her that unless she changed her statement and admitted the true extent of her complicity, she would be charged as a principal to murder and would face the death penalty."

DISCUSSING BENEFITS THAT "FLOW NATURALLY": In addition to discussing the kinds of mitigating circumstances that might be considered by prosecutors and judges, officers may point out those benefits that "flow naturally" from being truthful.[106] In the words of the California Supreme Court, "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, we can perceive nothing improper in such police activity."[107] While there might be an implication that the suspect would receive a reduced sentence or some other consideration if he cooperated, it is not viewed as an implied promise of leniency so long as the officers did not promise or suggest a particular benefit.

Admittedly, it can be difficult to distinguish between discussions of naturally-flowing benefits and implied promises that such benefits would accrue. As the California Supreme Court explained, "The line can be a fine one between urging a suspect to tell the truth by factually outlining the benefits that may flow from confessing, which is permissible, and impliedly promising lenient treatment in exchange for a confession, which is not."[108]

"WE'LL TELL THE JUDGE, DA": Officers may promise the suspect that, if he gives a truthful statement, they would inform the judge or prosecutors that he was cooperative. But they must not promise or suggest that the judge or prosecutors would do something specific in return.[109] Thus, in cases in which such assurances were given, the courts have noted the following:

- "Because none of the detectives' statements indicated that the district attorney would act favorably in specific ways if appellant cooperated, they did not constitute impermissible promises of favorable action."[110]
- "[The detective's] promise to talk to the district attorney about 'special consideration' for appellant, and his statement that one such consideration might be for the district attorney to charge only one burglary, was no more than the pointing out of benefits which might result naturally from a truthful and honest course of conduct."[111]
- "[The detective] repeatedly and clearly stated that he had no authority to make any promise of leniency regarding the pending robbery-kidnap charges, but could only pass information on to the district attorney."[112]
- "[The detective] told defendant the district attorney would make no deals unless all of the information defendant claimed to have was first on the table. We conclude no implied promise of a 'deal' or leniency resulted from these conversations."[113]

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[106] See *People* v. *Ray* (1996) 13 Cal.4th 313, 340 ["[I]nvestigating officers are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime."]; *Juan H.* v. *Allen* (9th Cir. 2005) 408 F.3d 1262, 1273 ["It is not enough, even in the case of a juvenile, that the police indicate that a cooperative attitude would be to the benefit of an accused unless such remarks rise to the level of being threatening or coercive."]; *U.S.* v. *Mashburn* (4th Cir. 2005) 406 F.3d 303, 310 ["[T]he agents simply informed Mashburn of the gravity of his suspected offenses and the benefits of cooperation under the federal system."].

[107] *People* v. *Hill* (1967) 66 Cal.2d 536, 549.

[108] *People* v. *Holloway* (2005) 33 Cal.4th 96, 117. ALSO SEE *People* v. *Thompson* (1990) 50 Cal.3d 134, 169 ["The line between a threat (or a promise) and a statement of fact or intention can be a fine one."].

[109] See *People* v. *Jones* (1998) 17 Cal.4th 279, 298 ["[T]he detective's offers of intercession with the district attorney ['telling the district attorney that defendant had been honest'] amounted to truthful implications that his cooperation might be useful in later plea bargain negotiations."]; *People* v. *Higareda* (1994) 24 Cal.App.4th 1399, 1409 [statement not involuntary merely because the officer told the suspect "if he spoke the truth I would talk to the District Attorney"]; *U.S.* v. *Ballard* (5th Cir. 1978) 586 F.2d 1060, 1063 ["Neither is a statement that the accused's cooperation will be made known to the court a sufficient inducement so as to render a subsequent incriminating statement involuntary."].

[110] *People* v. *Hurd* (1998) 62 Cal.App.4th 1084, 1091.

[111] *People* v. *Groody* (1983) 140 Cal.App.3d 355, 359.

[112] *People* v. *Boyde* (1988) 46 Cal.3d 212, 239.

[113] *People* v. *Seaton* (1983) 146 Cal.App.3d 67, 74.

Note, however, that officers must not tell the suspect that they would notify the judge or DA if he *refused* to give a statement or *failed* to demonstrate remorse, as this could be interpreted as a threat.[114]

"HELP YOURSELF": While there might be a slight implication that the suspect would receive something in return, the courts have ruled that appeals such as the following were not objectionable because the officers did not promise anything specific: "Why don't you go and tell us, it will be better off for you and it will help you later on,"[115] "[I]t'll be in your best interests to tell the truth,"[116] "[A] cooperative attitude will be to your benefit,"[117] "Are you gonna help me? That's all I want and I'll help you."[118]

Promise to release from custody

A statement that is motivated by a promise to immediately release the suspect from custody will ordinarily be deemed involuntary. For example, in *In re J. Clyde K.* the court ruled that the confession of a minor who had been detained for auto burglary was involuntary because the officer promised him that if he "told the truth" he would be released "with only a citation."[119]

Threats and promises pertaining to friends

A threat to take some adverse action against the suspect's friends or relatives is considered highly coercive. So is a promise that the friend or relative would receive some benefit if the suspect was cooperative.[120] Thus, in *People* v. *Matlock* the court noted, "A serious question is presented by the threat of an officer to 'bring the rest of the family in' which was expressly made in order to, and did, induce defendant to 'tell us where the jewelry was.'"[121]

On the other hand, officers may inform the suspect that he might be able to reduce or eliminate his friend's legal problems by giving a statement if, (1) the officers reasonably believed that the friend was implicated in the suspect's criminal activities, and (2) the suspect's statement might reduce or eliminate the friend's legal problems.[122]

For example, in *People* v. *Abbott*[123] a man named Nichols was arrested for robbing the cashier of a restaurant in Glendale as she was making a night deposit. When officers learned that Nichols and the cashier were roommates, they arrested her for conspiracy. While questioning Nichols, an officer told him that his friend would be released if he was truthful and there was no reason to hold her. Nichols then confessed. In rejecting the argument that the officer's comment constituted a coercive promise, the court said, "The officers believed that Nichols, and he alone, could implicate [the cashier] or exonerate her. In justice to her it was their duty to learn, if they could, whether her further detention was warranted and this required the interrogation of

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[114] See *U.S.* v. *Tingle* (9th Cir. 1981) 658 F.2d 1332, 1336, fn.5 [court disapproves of "a representation that a defendant's failure to cooperate will be communicated to a prosecutor"].

[115] *People* v. *Robinson* (1969) 274 Cal.App.2d 514, 520. ALSO SEE *People* v. *Ditson* (1962) 57 Cal.2d 415, 432 ["I'm telling you, Carlos, help yourself."]; *People* v. *Spears* (1991) 228 Cal.App.3d 1, 27 [you'll "be better off" if you give us "the scoop"]; *People* v. *Hill* (1967) 66 Cal.2d 536, 549 [Thus, advice or exhortation by a police officer to an accused to 'tell the truth' or that 'it would be better to tell the truth' unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary."].

[116] See *People* v. *Seaton* (1983) 146 Cal.App.3d 67, 74 [officer said it would be "in his best interests" to provide truthful answers].

[117] See *Fare* v. *Michael C.* (1979) 442 U.S. 707, 727; *Juan H.* v. *Allen* (9th Cir. 2005) 408 F.3d 1262, 1273.

[118] See *People* v. *Coffman* (2004) 34 Cal.4th 1, 61, fn.15.

[119] (1987) 192 Cal.App.3d 710, 722. ALSO SEE *People* v. *Vasila* (1995) 38 Cal.App.4th 865, 874 [officer "promised he would release defendant on his own recognizance"]; *People* v. *Flores* (1983) 144 Cal.App.3d 459, 471-72 [implied OR].

[120] See *People* v. *Steger* (1976) 16 Cal.3d 539, 550 ["A threat by police to arrest or punish a close relative, or a promise to free the relative in exchange for a confession, may render an admission invalid."]. COMPARE *People* v. *Chutan* (1999) 72 Cal.App.4th 1276, 1282 ["Nor do we find anything coercive in [the officer's] statement that 'what happens here affects your whole family.'"].

[121] (1959) 51 Cal.2d 682, 697.

[122] See *People* v. *Howard* (1988) 44 Cal.3d 375, 398 ["The interrogating officers did not imply that the fate of defendant's son and of Stevens depended upon defendant stating what they wanted to hear."]; *U.S.* v. *McShane* (9th Cir. 1972) 462 F.2d 5, 7 [court distinguished *Trout* [below] on grounds that, (1) "the police here had grounds to believe that [McShane's girlfriend] may have been implicated," and (2 the officers did not make explicit threats or promises."]; *People* v. *Daniels* (1991) 52 Cal.3d 815, 863 ["Both had apparently helped defendant escape and hide from the police, and could in fact have been charged as accessories"]. COMPARE *People* v. *Trout* (1960) 54 Cal.2d 576, 584 [statement involuntary after the suspect's wife was arrested without probable cause and was used to entice the suspect to make the statement].

[123] (1958) 156 Cal.App.2d 601.

Nichols. If he felt himself under pressure to make a statement it came from the conditions he had created which placed [the cashier] under suspicion."

Similarly, in *People* v. *Jackson*[124] the defendant shot and killed a man during a residential burglary in Los Angeles. The next day, an officer in Burbank spotted Jackson and his wife in a car that matched the description of the getaway car. After arresting Jackson, the officer found a gun under the driver's seat and ammunition inside Ms. Jackson's purse. So he arrested her, too.

When questioned by an LAPD detective, Jackson said he wanted to make a statement "just to get my wife out of this." The detective responded, "[A]fter I get through talking to her and comparing what you told me with what she says, if I have reason to feel she's not involved in it, I'm sure as hell not going to book her." In ruling that the detective's words did not constitute an promise, the Court of Appeal noted, "At most there was a simple statement of fact by the officer that defendant's wife would be released if further investigation convinced him and his superiors that she [was not involved]."

Finally, in *People* v. *Thompson*[125] detectives in Orange County developed probable cause to arrest Thompson for murdering a 12-year old boy. While looking for Thompson, officers saw his girlfriend, Lisa, get into a car and drive off, so they followed her. Lisa apparently spotted the officers because she "drove evasively" and eluded them. Later that day, officers arrested both Thompson and Lisa at a shopping mall. It appears they arrested Lisa because her evasive driving indicated she was involved in the crime, at least as an accessory.

While questioning Thompson, an officer told him that he was "not convinced" of Lisa's innocence, adding, "[I]nformation hasn't come forward at this time which would cause me to release her. See what I'm saying?" The court said these comments "seem clearly proper" because the officer had reason to believe that Lisa was implicated. But Thompson did not immediately start talking, so the officer pressed, saying, "I think if you truly loved her, you wouldn't allow her to sit here in jail if you knew information that would help her." The officer then referred to Lisa's "fragile mental condition" and suggested that further incarceration could "really break her." "Like I told you before," said the officer, "unless something else comes forward that can show that she's totally uninvolved. You know what I'm saying?" Thompson confessed several hours later.

Although the court ruled that Thompson's confession was voluntary (because the coercion was not the motivating cause, see page 17), it pointed out that the officer's comments came dangerously close to an implied threat because they "could have been understood to convey that defendant's refusal to confess was responsible for Lisa's incarceration."

Immunity and Plea Agreements

Although not an "interrogation" issue, an immunity or plea agreement that requires a prosecution witness to admit to certain things or testify to certain facts at the trial of an accomplice is inherently coercive because of the explicit threat that he will not receive the benefits of the agreement if his testimony is inconsistent.[126] Thus, while immunity agreements may require truthful answers,[127] they must not bind the witness to a particular story or require that his testimony be consistent with a previous statement. As the court explained in *People* v. *Allen*,[128] "[A] defendant is denied a fair trial if the

[124] (1971) 19 Cal.App.3d 95.

[125] (1990) 50 Cal.3d 134.

[126] See *People* v. *Badgett* (1995) 10 Cal.4th 330, 358 ["An immunity agreement that requires the witness to testify consistently with a previous statement to the police is deemed coercive, and testimony produced by such an agreement is subject to exclusion from evidence."]; *People* v. *Boyer* (2006) 38 Cal.4th 412, 455 ["But if the immunity agreement places the witness under a strong compulsion to testify in a particular fashion, the testimony is tainted by the witness's self-interest, and is inadmissible."]; *People* v. *Daniels* (1991) 52 Cal.3d 815, 862 ["We have insisted that the arrangement require the witness to tell the truth, not to present a previously agreed-upon story."]; *People* v. *Maury* (2003) 30 Cal.4th 342, 417 ["[T]he district attorney's promise was not conditioned on [the witness] testifying in a particular fashion or on the testimony's achieving a particular result."].

[127] See *People* v. *Boyer* (2006) 38 Cal.4th 412, 445 ["There is nothing improperly coercive about confronting a lesser participant in a crime with his or her predicament, and offering immunity from prosecution for the witness's criminal role in return for the witness's promise to testify fully and fairly."]; *People* v. *Riel* (2000) 22 Cal.4th 1153, 1179 ["He was obligated to tell the truth, not to conform his testimony to any prior statement given to the police or anyone else, or otherwise to testify in a particular fashion."].

[128] (1986) 42 Cal.3d 1222, 1251-52.

prosecution's case depends substantially on accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion."

Suspect's Ability to Resist

Until now, we have been discussing the circumstances that the courts consider in determining whether officers obtained a statement by means of psychological coercion. But, as noted earlier, coercion alone will not render a statement involuntary. Instead, that can happen only if the suspect was vulnerable to the coercion that officers utilized. To put it another way, a statement can be involuntary only if the coercive influences outweighed the suspect's ability to resist them. In the words of the Supreme Court, "The determination [of voluntariness] depends upon a weighing of the circumstances of pressure against the power of resistance of the person confessing."[129]

Reduced ability to resist

If the suspect had a severely reduced ability to resist, a relatively small amount of coercion might render a statement involuntary. It is important to note, however, that a suspect's vulnerability may not render a statement involuntary if officers did not exploit it[130] or, as discussed on pages 16-17, there were offsetting circumstances. And if there was no coercion at all, the suspect's reduced power of resistance would be irrelevant.[131]

What circumstances indicate a reduced ability to resist? The following are frequently cited.

MINORS: The suspect's young age is relevant because interrogation is likely to have a more coercive effect on a minor than an adult.[132] Still, many young people today are perfectly capable of dealing with the pressures of interrogation.[133] As the court observed in *In re Jessie L.*:

> A minor has the capacity to make a voluntary confession. The admissibility of such a statement depends not upon his age alone but a combination of that factor with other circumstances such as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statements.[134]

MENTAL DEFICIENCY, LACK OF EDUCATION: An adult or juvenile suspect's subnormal intelligence, mental disorder, or lack of education are all relevant, but seldom decisive if not exploited.[135]

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[129] *Dickerson* v. *United States* (2000) 530 U.S. 428, 434. ALSO SEE *Yarbrough* v. *Alvarado* (2004) 541 U.S. 652, 667-88 ["[V]oluntariness of a statement is often said to depend on whether the defendant's will was overborne, a question that logically can depend on the characteristics of the accused."]; *People* v. *Smith* (2007) 40 Cal.4th 483, 502 ["[M]ental condition is relevant to an individual's susceptibility to police coercion"].

[130] See *People* v. *Smith* (2007) 40 Cal.4th 483, 502 ["The record does not convince us that the interrogating officers were aware of, or exploited, defendant's claimed psychological vulnerabilities"]; *In re Norman H.* (1976) 64 Cal.App.3d 997, 1003 [there was no showing that his power of resistance "was in any way overcome by reason of the police or anyone else taking unfair or unlawful advantage of his ignorance, mental condition, or vulnerability to persuasion"]. COMPARE *Reck* v. *Pate* (1961) 367 US 433 [officers exploited the mental state of defendant who was described as "mentally retarded and deficient"].

[131] See *People* v. *Leonard* (2007) 40 Cal.4th 1370, 1403 ["In arguing that his statements were involuntary, defendant stresses his limited intelligence and developmental disability ... But a statement is voluntary unless there is coercive police activity."]; *People* v. *Bradford* (1997) 14 Cal.4th 1005, 1045 ["Having concluded no coercive threats or promises were made, we cannot conclude that defendant's statement was involuntary solely because of any alleged physical or mental condition."].

[132] See *In re Aven S.* (1991) 1 Cal.App.4th 69, 75 [interrogation is "likely to have a more coercive effect on a child than an adult"]; *People* v. *Neal* (2003) 31 Cal.4th 63, 84 [18 years old, "failed to graduate even from continuation high school," intelligence was "quite low, "background was one of thoroughgoing neglect"]; *People* v. *Hinds* (1984) 154 Cal.App.3d 222, 238 ["The record shows appellant was 19 year old, immature and relatively unsophisticated"].

[133] See *Gallegos* v. *Colorado* (1962) 370 U.S. 49, 55 ["There is no guide to the decision in cases such as this [defendant was 14 years old], except the totality of circumstances"]; *People* v. *Boyette* (2002) 29 Cal.4th 381, 412 [although 19-years old with a "lack of educational achievement" and "modest level of literacy," "the record does not even hint that these factors came into play"]; *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002 [15-years old, IQ of 47, but he knew "he did not have to speak to police"].

[134] (1982) 131 Cal.App.3d 202, 215.

[135] See *Procunier* v. *Atchley* (1971) 400 U.S. 446, 453-54 ["low intelligence" is relevant "only in establishing a setting in which actual coercion might have been exerted"]; *People* v. *Kelly* (1990) 51 Cal.3d 931, 951-54 ["[D]efendant's low intelligence and psychiatric symptoms, standing alone, do not render his waiver of *Miranda* rights involuntary."]; *People* v. *Williams* (1984) 157 Cal.App.3d 145, 152 ["Although undereducated and virtually illiterate … Williams was neither insane nor incompetent when questioned"] *U.S.* v. *Montgomery* (7th Cir. 2009) 555 F.3d 623, 632 ["[Borderline intelligence] alone does not result in a finding of coercion."].

PHYSICAL AND MENTAL FATIGUE: Just as a suspect's subnormal intelligence or mental disorder might make the surrounding circumstances appear more coercive, so might exhaustion, extreme nervousness, or acute hunger.[136]

ILLNESS, INJURIES: Illness or injuries might make the suspect more vulnerable, especially if he was also under the influence of medication.[137]

DISTRAUGHT: While it is relevant that the suspect was distraught or depressed, it is seldom a significant circumstance unless the condition was severe or if the suspect's answers were disordered.[138]

DRUGS AND ALCOHOL: Although a suspect's consumption of drugs, alcohol, or both will affect his mental alertness, it is not a compelling circumstance unless he was severely impaired. Thus, in *United States* v. *Coleman*, the Ninth Circuit noted that, "[a]lthough Defendant's heroin withdrawal caused lethargy and physical discomfort, such symptoms alone are insufficient to establish voluntariness."[139]

LENGTH OF THE INTERVIEW: The length of the interview may be related to physical and mental fatigue, and is therefore relevant. In fact, one of the infamous "third degree" tactics featured relays of officers who would question the suspect continuously for several days. While such a tactic would not be tolerated today, the courts recognize that interrogation sessions lasting even a few hours may wear down the suspect physically and mentally.

Nevertheless, the length of the interview is seldom a significant factor if officers provided breaks when requested or when reasonably necessary.[140] For example, in *People* v. *Hill* the court rejected the argument that a lengthy interview was coercive because, as the court explained:

> The actual interrogation, which was divided into five sessions, comprised only about eight hours. The breaks between sessions were not of insignificant duration. Nor was the period of interrogation unduly lengthy under the circumstance. . . . Defendant was promptly provided with food, beverages, and restroom breaks whenever he requested them.[141]

LENGTH OF PRE-INTERVIEW DETENTION: For various reasons, it may be necessary or desirable to keep the suspect waiting in an interview room before the interrogation begins. Like the length of the interview itself, this is seldom a significant circumstance

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[136] See *Spano* v. *New York* (1959) 360 U.S. 315, 322 ["[S]lowly mounting fatigue does, and is calculated to, play its part."]; *People* v. *Montano* (1991) 226 Cal.App.3d 914, 936 ["his pleas of fatigue and lack of sleep [were] ignored"].

[137] See *Mincey* v. *Arizona* (1978) 437 U.S. 385, 398 [[the suspect "complained to [the officer] that the pain in his leg was 'unbearable.'"]; *Reck* v. *Pate* (1961) 367 U.S. 433, 441-42 ["He was physically weakened and in intense pain."]; *People* v. *Barker* (1986) 182 Cal.App.3d 921, 934 [although the suspect was in "severe pain" from a bullet wound, it did not appear that he was suffering from pain severe enough to impair his ability to make a voluntary confession]; *People* v. *Adams* (1983) 143 Cal.App.3d 970, 985 [suspect was "feeling very weak and her chest was very tight" but she "remained alert"]; *People* v. *Perdomo* (2007) 147 Cal.App.4th 605, 612 [statement not involuntary merely because defendant was in "obvious pain" and was possibly under the influence of morphine]; *In re Walker* (1974) 10 Cal.3d 764, 777 ["such pain does not appear from the officers' testimony to have reflected on his competency"].

[138] See *Mincey* v. *Arizona* (1978) 437 U.S. 385, 398-99 [suspect was "depressed almost to the point of coma," he was "evidently confused and unable to think clearly" and some of his answers "were on their face not entirely coherent."]; *People* v. *Hogan* (1982) 31 Cal.3d 815, 839 ["Appellant was sobbing uncontrollably throughout his statement and vomited. The police were forced to terminate the interrogation due to appellant's inability to control himself or answer coherently."]; *People* v. *Esqueda* (1993) 17 Cal.App.4th 1450, 1485 ["Esqueda was emotionally distraught and exhausted, yet [the interrogating officers] unremittingly pressured their prey until he finally yielded."]. COMPARE *People* v. *Richardson* (2008) 43 Cal.4th 959, 993 [defendant was not distraught but, instead, "became increasingly agitated as he was caught in one lie after another"].

[139] (9th Cir. 2000) 208 F.3d 786, 791. ALSO SEE *People* v. *Cox* (1990) 221 Cal.App.3d 980 [suspect was apparently under the influence of meth but the questioning was "short and simple."]; *People* v. *Johns* (1983) 145 Cal.App.3d 281, 289-90 [suspect, who had been shot, had been administered Demerol but he waived his rights, his answers were responsive]; *U.S.* v. *Heller* (9th Cir. 2009) 551 F.3d 1108, 1113 ["there is no other evidence to suggest that the type, dosage, or timing of the Tylenol III influenced Heller's will to resist questioning."].

[140] See *Martin* v. *Wainwright* (11th Cir. 1985) 770 F.2d 918, 927 ["Martin was questioned off and on rather than continuously, and fatigue does not appear to have been a factor in Martin's decision to confess."]; *People* v. *Jablonski* (2006) 37 Cal.4th 774, 815 ["[T]he interrogation was spread over a four-hour period from midmorning to midafternoon with a refreshment break and a lunch break."]; *People* v. *Maestas* (1987) 194 Cal.App.3d 1499, 1505 ["Although he was in custody for more than seven and one-half hours before he finally admitted his involvement in the murder, he was not interrogated during a significant period of this time"].

[141] (1992) 3 Cal.4th 959, 981.

unless the wait was excessive, the suspect was especially vulnerable, or if officers neglected to check periodically to see if he needed food, water, or a visit to the restroom.[142]

Increased ability to resist

In contrast to the circumstances that tend to increase a suspect's vulnerability, the following factors are often cited by the courts as indications the suspect had an increased ability to resist the pressures of interrogation.

EXPERIENCE WITH OFFICERS: A suspect may be less susceptible to coercion if, because of several arrests or other contacts with officers, he had become accustomed to interacting with them.[143] As the Supreme Court observed, "What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."[144]

HARDENED, "STREET WISE": While often related to the suspect's prior interactions with officers, his general toughness or callousness are highly relevant circumstances. Thus, in *People* v. *Williams* the California Supreme Court rejected a claim of involuntariness because, among other things, "The [trial] court described defendant as a 'street kid, street man,' in his 'early 20s, big, strong, bright, not intimidated by anybody, in robust good health,' and displaying 'no emotionalism [or signs of] mental weakness.'"[145] And in *Stein* v. *New York* the U.S. Supreme Court noted, "These men were not young, soft, ignorant or timid. They were not inexperienced in the ways of crime and its detection, nor were they dumb as to their rights."[146]

LIES, CRAFTINESS: It is significant that the suspect lied to officers or was crafty in handling their questions, as this tends to prove he was not overwhelmed by their interrogation methods. This is an especially important circumstance because it is a common occurrence. For example, in rejecting arguments that defendants felt coerced, the courts have noted the following:

- "Defendant admittedly lied to the detectives throughout the interview. This is not the behavior of one whose free will [was] overborne."[147]
- "Even when he later admitted his presence at the scene of the murders, he insisted that he had played no role in the killings."[148]
- "[E]ven after the police showed defendant the fake [lie detector] test results, defendant continued to deny involvement in the crime."[149]
- Defendant "was keen enough to change his story" to fit the facts.[150]
- "His resistance, far from reflecting a will overborne by official coercion, suggests instead a still operative ability to calculate his self-interest in choosing whether to disclose or withhold information."[151]
- Defendant "was probing to find out how much the officers knew."[152]
- The defendants' confessions "obviously came when they were convinced that their dance was over and the time had come to pay the fiddler. Even then, [one of them] was so far in control of himself and the situation as to dictate the quid pro quo for which he would confess."[153]

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[142] See *In re Aven. S.* (1991) 1 Cal.App.4th 69, 77 ["[An officer] checked on the minor periodically."].
[143] See *Fare* v. *Michael C.* (1979) 442 U.S. 707, 726 ["considerable experience with the police"]; *People* v. *Farnam* (2002) 28 Cal.4th 107, 182 [several arrests "and there is no indication he felt intimidated"]; *People* v. *Sapp* (2003) 31 Cal.4th 240, 456 ["well-acquainted with the criminal justice system"]; *People* v. *Jablonski* (2006) 37 Cal.4th 774, 815 ["extensive criminal history"].
[144] *Stein* v. *New York* (1953) 346 U.S. 156, 185. ALSO SEE *Martin* v. *Wainwright* (11th Cir. 1985) 770 F.2d 918, 926 ["What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."].
[145] (1997) 16 Cal.4th 635. 659.
[146] (1953) 346 U.S. 156, 185-86.
[147] *People* v. *Johns* (1983) 145 Cal.App.3d 281, 293. Edited. ALSO SEE *People* v. *Perdomo* (2007) 147 Cal.App.4th 605, 618 ["appellant was even alert enough to attempt to deceive the officers"]; *People* v. *Maury* (2003) 30 Cal.4th 342, 388 [suspect "initiated and instigated the negotiations" with officers]; *In re Cameron* (1968) 68 Cal.2d 487, 500 ["Cameron clung resolutely and emphatically" to his lies].
[148] *People* v. *Williams* (1997) 16 Cal.4th 635, 660.
[149] *People* v. *Mays* (2009) __ Cal.App.4th __ [2009 WL 1262408].
[150] *People* v. *Lewis* (2001) 26 Cal.4th 1, 59.
[151] *People* v. *Coffman* (2004) 34 Cal.4th 1, 59.
[152] *U.S.* v. *Bassignani* (9th Cir. 2009) 560 F.3d 989, 995.
[153] *Stein* v. *New York* (1953) 346 U.S. 156, 186-86.

SUSPECT *WANTED* TO TALK: The suspect's eagerness to talk with the officers—whether sincere or feigned—is an indication that he felt confident and able to deal with pressure; and so is his declining the officers' offer to terminate the interview. Thus, in *People* v. *Holloway*, the court noted, "Aware his alibi had collapsed, [defendant] *wanted* to tell the detectives why he had asked Cruz to lie about his whereabouts."[154]

SUSPECT LATER INVOKED: That the suspect subsequently invoked his *Miranda* rights indicates he did not feel unduly pressured. As the California Supreme Court pointed out in *People* v. *Richardson*, the defendant's invocation of his *Miranda* right to counsel is "contrary to his characterization of himself as a helpless, easily confused naïf."[155]

RATIONAL ANSWERS: A suspect's claim that he was vulnerable because of mental deficiency, fatigue, or the consumption of alcohol or drugs may be disproved by evidence that his answers to the officers' questions were responsive and coherent.[156] Thus, in *People* v. *Guerra* the court noted that the defendant "appreciated subtle nuances in the questions and intelligently answered some poorly phrased compound questions."[157]

SUSPECT WAS COMPOSED: The suspect's calmness or composure in the face of interrogation is another indication that he did not feel pressured. For example, in *People* v. *Storm* the California Supreme Court noted that the defendant "appears calm, prepared, and intent on presenting a coherent and sympathetic version of his [defense]."[158]

Similarly, in *People* v. *Bradford*, the court pointed out that the trial judge had noted the following:

> There isn't any excitement in the voice. There isn't any nervousness particularly. There isn't any outward sign of stress. It is just a straight account of what happened, and there is the same tone which prevailed throughout the three tapes. It is unexcited, unforced and voluntary.[159]

The Motivating Cause Requirement

Even if officers utilized coercion to which the suspect was vulnerable, a subsequent statement will not be deemed involuntary unless the coercion was the motivating factor in the suspect's decision to talk.[160] As the California Supreme Court explained, "Although coercive police activity is a necessary predicate to establish an involuntary confession, it does not itself compel a finding that a resulting

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[154] (2004) 33 Cal.4th 96. 114. Emphasis added. ALSO SEE *People* v. *Thompson* (1990) 50 Cal.3d 134, 169-70 [suspect's willingness to continue the interview after officers offered to end it indicates he did not feel coerced]; *People* v. *Bradford* (1997) 14 Cal.4th 1005, 1041 [court notes that the trial judge said, "The tapes clearly indicate an eagerness to talk all right, and just tell everything that probably could be told, so from that standpoint of voluntariness, there isn't any question about that."].

[155] (2008) 43 Cal.4th 959, 993. ALSO SEE *U.S.* v. *Boskic* (1st Cir. 2008) 545 F.3d 69, 81 [suspect's subsequent refusal to give a written statement reflect "an understanding of his right not to cooperate or talk"].

[156] See *Colorado* v. *Connelly* (1986) 479 U.S. 157 160-62 ["his answers were intelligible"]; *People* v. *Richardson* (2008) 43 Cal.4th 959, 993 [his responses did not indicate "mental defect"]; *People* v. *Perdomo* (2007) 147 Cal.App.4th 605, 618 [suspect's answers were "appropriate to the question asked"]; *U.S.* v. *Montgomery* (7th Cir. 2009) 555 F.3d 623, 633 ["Perhaps most significant of all, he asked relevant questions about his rights prior to giving his statement to the officers."]; *U.S.* v. *Dehghani* (8th Cir. 2008) 550 F.3d 716, 721 ["clear, responsive answers"]; *U.S.* v. *Gaddy* (8th Cir. 2008) 532 F.3d 783, 788 [despite sleeplessness, suspect "appeared awake and coherent"]; *U.S.* v. *Howard* (8th Cir. 2008) 532 F.3d 755, 763 ["coherent and spoke in a manner which indicated he understood what was happening"].

[157] (2006) 37 Cal.4th 1067, 1096.

[158] (2002) 28 Cal.4th 1007, 1036. ALSO SEE *In re Jessie L.* (1982) 131 Cal.App.3d 202, 216 [suspect "appeared very calm and showed no emotion regarding the murder"]; *People* v. *Higareda* (1994) 24 Cal.App.4th 1399, 1409 ["Throughout the interview appellant 'appeared calm,' not frightened or scared."]; *In re Aven S.* (1991) 1 Cal.App.4th 69, 77 [the minor "remained calm and in control of himself throughout the interview process."]; *People* v. *Johns* (1983) 145 Cal.App.3d 281, 293 ["Defendant did not become confused, break down of lose his general composure under the detectives' close questioning."]; *Juan H.* v. *Allen* (9th Cir. 2005) 408 F3 1262, 1273 ["Juan H. stood his ground. The minor remained in control of his responses during the interrogation"].

[159] (1997) 14 Cal.4th 1005, 1041.

[160] See *Colorado* v. *Connelly* (1986) 479 U.S. 157, 164 ["Absent police conduct causally related to the confession, there is simply no basis for concluding [that the confession was involuntary]."]; *People* v. *Rundle* (2008) 43 Cal.4th 76, 114 ["Coercive police tactics by themselves do not render a defendant's statements involuntary if the defendant's free will was not in fact overborne by the coercion and his decision to speak instead was based upon some other consideration."]; *People* v. *Neal* (2003) 31 Cal.4th 63, 85 [the court indicated that the test is whether the coercion played the "dominant role" in causing the statement]; *People* v. *Cahill* (1994) 22 Cal.App.4th 296, 316 ["dominant focus"]; *People* v. *Benson* (1990) 52 Cal.3d 754, 778-79 ["The requisite causal connection between promise and confession must be more than 'but for': causation-in-fact is insufficient."].

confession is involuntary. The statement and the inducement must be causally linked."[161] Although the courts will ordinarily presume that such a link existed, the following circumstances may suffice to rebut the presumption.

THE SUSPECT'S WORDS: In some cases, the suspect will say something that proves he was motivated by something other than coercion.[162] For example, in *People* v. *Mickey* the California Supreme Court ruled that, based on the suspect's remarks to officers, it was apparent that he made his statement because he wanted to "justify, excuse, or at least explain his problematic conduct."[163] The same thing happened in *People* v. *Benson* in which the court upheld the trial judge's ruling that the defendant "spoke not because of coercion applied by the police but as a result of compunction arising from his own conscience."[164]

TIME LAPSE: It is also relevant that the suspect did not immediately respond to the coercive tactics; rather, he gave a statement only after the passage of a significant amount of time.[165] A court may, however, reject such an argument if the coercion consisted of promises or threats which had not been withdrawn. For example, in *U.S.* v. *Lopez* the court ruled that a statement made several hours after officers promised 54 fewer years in prison for a confession was involuntary because "there is no indication that [any officer] made any statements to Lopez that might have dissipated the coercive effect of [the officer's] promise of leniency."[166]

SUSPECT'S TACTICAL COOPERATION: The presumption that coercion was the motivating factor may be rebutted if the suspect had assumed the role of a helpful witness or victim. In such cases, a court might find that his decision to talk was a calculated ploy; i.e., not a response to coercion. In one such case, the court pointed out that "defendant put herself in a position which made an interview with the police inevitable by fabricating a story that she had been kidnapped."[167]

INDEPENDENT INTERVENING ACT: Prosecutors can sometimes prove that the suspect's decision to confess or make a statement resulted from something that occurred *after* the officers had utilized coercive interrogation tactics.[168] An example is found in *People* v. *Williams*[169] where the defendant initially denied that he was at the scene of a contract killing in which four people were killed. One of the officers then made an implied threat concerning the death penalty, but Williams did not change his story. Later on, one of the officers asked him if he had received all of the money he was owed for the "hit." In what the California Supreme Court described as an "apparent slipup," Williams responded by saying that he didn't get any of the money because he "ran out" on his accomplices—thus inadvertently admitting that he was at the scene. Because it was the slipup that resulted in the admission, not the officer's earlier threat, the court ruled that Williams' statement was voluntary.

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[161] *People* v. *Maury* (2003) 30 Cal.4th 342, 404-5.

[162] See *Stein* v. *New York* (1953) 346 U.S. 156, 185 [defendants confessed because of the "inward consciousness of having committed a murder and a robbery and of being confronted with evidence of guilt which they could neither deny nor explain"]; *People* v. *Storm* (2002) 28 Cal.4th 1007, 1035-36 [confession resulted from defendant's "troubled conscience, his assumption he would inevitably be caught, and a desire to minimize his culpability"]; *People* v. *Rundle* (2008) 43 Cal.4th 76, 117 [suspect wanted to "unburden himself"].

[163] (1991) 54 Cal.3d 612, 650.

[164] (1990) 52 Cal.3d 754, 782.

[165] See *People* v. *Thompson* (1990) 50 Cal.3d 134, 169 ["defendant did not make his incriminating statements until several hours after the conversation had turned [to other subjects]"]; *People* v. *Cahill* (1994) 22 Cal.App.4th 296, 316 ["several hours"]; *U.S.* v. *Dehghani* (8th Cir. 2008) 550 F.3d 716, 720 [suspect "continued to deny involvement" after an officer "slammed his hand on the table and raised his voice"].

[166] (10th Cir. 2006) 437 F.3d 1059, 1067.

[167] *People* v. *Andersen* (1980) 101 Cal.App.3d 563, 579. ALSO SEE *People* v. *Guerra* (2006) 37 Cal.4th 1067, 1096 ["Defendant then decided to speak with the detectives, in an effort, the record indicates, to clear himself of suspicion."].

[168] See *People* v. *Williams* (1997) 16 Cal.4th 635, 661 [suspect made the incriminating statement inadvertently; i.e., a "slipup"]; *People* v. *Thompson* (1990) 50 Cal.3d 134, 169; *People* v. *Badgett* (1995) 10 Cal.4th 330, 354, fn.6 ["The trial record indicates that Jasik decided to cooperate with the police while she was in jail because of a discussion she had with her mother, and not because of any discussion Jasik had with the authorities about her release"]; *People* v. *Cahill* (1994) 22 Cal.App.4th 296, 316 [defendant "twice declined the interrogators' suggestion that the discussion stop."].

[169] (1997) 16 Cal.4th 635.

Similarly, in *People* v. *Thompson*[170] the court ruled that an officer's somewhat coercive remark did not render the defendant's subsequent statement involuntary because, shortly before making the statement, he twice declined "the interrogators' suggestion that the discussion stop." Said the court, "From this fact the trial court concluded, and reasonably so, that defendant's incriminating statements were not induced by any implied threat or promise made hours earlier."

SUBSEQUENT STATEMENTS: If the defendant made an incriminating statement after making an involuntary statement, the courts will presume that the subsequent statement was motivated by the earlier coercion.[171] In the words of the California Supreme Court, "Where an accused makes one confession and then testifies or upon subsequent questioning again confesses, it is presumed that the testimony or second confession is the product of the first."[172] Consequently, the second statement will be suppressed unless prosecutors can prove that "the influences under which the original confession was made had ceased to operate before the second statement was made."[173]

Rules of Suppression

If a court finds that a defendant's incriminating statement was involuntary, the question arises: What will be suppressed? Before we answer that question, there are some foundational matters that should be addressed.

General principles

CONSTITUTIONAL BASIS FOR SUPPRESSION: Coercive interrogation tactics violate one or both of the following constitutional rights. First, the officers' use of coercion constitutes a violation of the suspect's Fifth Amendment right not to be compelled to provide testimony against himself.[174] Thus, a civil rights lawsuit may result even if the suspect's statement was not used against him. Second, a due process violation under the Fourteenth Amendment will occur if prosecutors used an involuntary statement against the suspect at his trial.[175]

SUPPRESSING ADMISSIONS AND TRUE STATEMENTS: If a statement was involuntary, it will be suppressed regardless of whether it constituted a confession or merely an admission,[176] and regardless of whether it was plainly true.[177]

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[170] (1990) 50 Cal.3d 134.

[171] See *People* v. *Sanchez* (1969) 70 Cal.2d 562, 574 ["there is a presumption that the influences of the prior improper treatment continue to operate on the mind of the defendant"]; *People* v. *Johnson* (1871) 41 Cal. 452, 455 ["The law presumes the subsequent confessions to have been made and influenced by the same hopes and fears as the first, and this presumption continues until it be affirmatively established by the prosecution that the influences under which the original confession was made had ceased to operate before the subsequent confession was made."].

[172] *People* v. *Johnson* (1969) 70 Cal.2d 541, 547.

[173] *People* v. *McElheny* (1982) 137 Cal.App.3d 396, 402. ALSO SEE *People* v. *Sanchez* (1969) 70 Cal.2d 562, 574-75; *People* v. *Adams* (1983) 143 Cal.App.3d 970, 991; *Beecher* v. *Alabama* (1967) 389 U.S. 35, 38 ["no break in the stream of events"]; *People* v. *Badgett* (1995) 10 Cal.4th 330, 348 ["[I]t falls to the People to demonstrate, in the case of successive confessions or statements, that the 'taint' of the first, involuntary statement has been attenuated."]; *People* v. *Montano* (1991) 226 Cal.App.3d 914, 937 [prosecution must prove "the connection between the [tainted] first interrogation and the [subsequent statement] has become so attenuated as to dissipate the taint."]; *People* v. *Berve* (1958) 51 Cal.2d 286, 291 ["The prosecution must show that such coercive conditions as once existed, no longer prevailed at the time the confession was uttered."]; *People* v. *Vasila* (1995) 38 Cal.App.4th 865, 877 ["there is no evidence sufficient to dissipate the taint of the initial illegal conduct"]; *People* v. *McClary* (1977) 20 Cal.3d 218, 229 ["[The coercion] echoed in the continuum between the two conversations to a degree which renders her statement in the second interview involuntary"]; *People* v. *Douglas* (1990) 50 Cal.3d 468, 505 [taint of coercive questioning by Mexican police that produced a confession was dissipated when suspect was turned over to U.S. authorities to whom he gave a second confession].

[174] See *Cooper* v. *Dupnik* (9th Cir. 1992) 963 F.2d 1220, 1244-45 ["The due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself."].

[175] See *Blackburn* v. *Alabama* (1960) 361 U.S. 199, 210 ["Where the involuntariness of a confession is conclusively demonstrated at any stage of a trial, the defendant is deprived of due process by entry of judgment of conviction without exclusion of the confession."]; *People* v. *Rundle* (2008) 43 Cal.4th 76, 114 [the admission of a defendant's involuntary statement "violates the defendant's federal due process rights"].

[176] See *People* v. *Atchley* (1959) 53 Cal.2d 160, 170; *People* v. *Leach* (1985) 41 Cal.3d 92, 103.

[177] See *Lego* v. *Twomey* (1972) 404 U.S. 477, 485 ["The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles."]; *Rochin* v. *California* (1952) 342 U.S. 165, 173.

GOOD FAITH RULE NOT APPLICABLE: An involuntary statement will be suppressed even though the officers believed in good faith that they were not exerting coercive pressure.[178]

BURDEN OF PROOF: The prosecution has the burden of proving that a defendant's statement was given voluntarily. In the past, prosecutors could meet this burden only with proof beyond a reasonable doubt. But now the required level of proof is merely a preponderance of the evidence.[179]

TOTALITY OF CIRCUMSTANCES: As noted earlier, the courts will consider the totality of circumstances in determining whether a statement was involuntary. The practical consequences of this rule in suppression hearings were demonstrated in *People* v. *Andersen* when the court noted:

> Both the defense and the prosecution have extracted sentences and phrases from the interview and presented them in disembodied form separated from the remainder of the interview as evidence of the presence or absence of coercion. We do not think the interview can be properly analyzed in such piecemeal fashion. Rather it must be considered as a whole in the context of the development of the dialogue between interviewers and interviewee and in light of the totality of circumstances surrounding the confession.[180]

What will be suppressed

If a court rules that a defendant's confession or admission was involuntary, the following will be suppressed.

STATEMENT TO PROVE GUILT, IMPEACHMENT: The statement cannot be used by prosecutors to prove the defendant's guilt, nor may it be used to impeach him if he testifies at his trial. As the United States Supreme Court observed, it has "mandated the exclusion of reliable and probative evidence for *all* purposes" when the evidence "is derived from involuntary statements."[181]

THIRD PARTY'S STATEMENT: A defendant may challenge the admissibility of a statement made by a third party on grounds it was involuntary,[182] even if the statement was plainly true.[183]

THIRD PARTY'S TRIAL TESTIMONY: If officers coerced a statement from a person who later became a witness against the defendant, the witness's testimony at the defendant's trial will not be suppressed as a result of the earlier coerced statement "unless the defendant demonstrates that improper coercion has impaired the reliability of the testimony."[184]

PHYSICAL EVIDENCE: If officers discover physical evidence as the result of the defendant's involuntary statement, the evidence will be suppressed if the defendant can prove that it was the "fruit" of the coercion.[185] But physical evidence obtained as a result of an involuntary statement by a third party may be suppressed only if the coercion was such that it rendered the evidence unreliable.[186] POV

Correction: In the printed edition of the Spring 2009 issue, in the section on warrantless misdemeanor arrests, the text should have said that arrests should ordinarily be made between the hours of 6 A.M. and 10 P.M.

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[178] See *Townsend* v. *Sain* (1963) 372 U.S. 293, 309.
[179] See *People* v. *Sapp* (2003) 31 Cal.4th 240, 455.
[180] (1980) 101 Cal.App.3d 563, 578.
[181] *Michigan* v. *Harvey* (1990) 494 U.S. 344, 351. ALSO SEE *Kansas* v. *Ventris* (2009) __U.S.__ [2009 WL 1138842] [the Fifth Amendment "is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise"].
[182] See *People* v. *Jenkins* (2000) 22 Cal.4th 900, 966 ["Defendant does have standing, however, to assert that his own due process right to a fair trial was violated as a consequence of the asserted violation of Moody's Fifth Amendment rights."]; *People* v. *Douglas* (1990) 50 Cal.3d 468, 499; *People* v. *Badgett* (1995) 10 Cal.4th 330, 344.
[183] See *People* v. *Lee* (2002) 95 Cal.App.4th 772, 786-88.
[184] *People* v. *Badgett* (1995) 10 Cal.4th 330, 348. ALSO SEE *People* v. *Boyer* (2006) 38 Cal.4th 412, 444 ["[T]he defendant must demonstrate how such misconduct, if any, has directly impaired the free and voluntary nature of the anticipated testimony in the trial itself."]; *People* v. *Jenkins* (2000) 22 Cal.4th 900, 968; *People* v. *Douglas* (1990) 50 Cal.3d 468, 500 ["defendant can prevail on his suppression claim only if he can show that the trial testimony given by Hernandez was involuntary at the time it was given"]; *People* v. *Lee* (2002) 95 Cal.App.4th 772, 788 ["defendant must show some connection between the coercion and the evidence"].
[185] See *People* v. *Vasila* (1995) 38 Cal.App.4th 865, 877 ["the weapons should have been suppressed as the fruits of an unlawful interrogation"]; *In re J. Clyde K.* (1987) 192 Cal.App.3d 710, 716-18; *People* v. *Whitfield* (1996) 46 Cal.App.4th 947, 955; *People* v. *Nicholas* (1980) 112 Cal.App.3d 249, 264; *People* v. *Ditson* (1962) 57 Cal.2d 415, 439.
[186] See *People* v. *Jenkins* (2000) 22 Cal.4th 900, 968.