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Cops, courts and (false) confessions

The recent exoneration of Frank Sterling by DNA evidence demonstrates two things: On one hand, the power of forensic science, and the abject failure of our criminal justice system in dealing with police-induced confessions, on the other.

Sterling's confession not only was demonstrably false — proven so by DNA evidence — but also exhibited all of the classic warning signs from the beginning that it, in fact, was false. So, how and why did so many courts get it wrong for so many years?

One must wonder in cases when there is no DNA evidence (the vast majority) how many others have falsely confessed and were wrongfully convicted. Social scientists have concluded that most wrongful convictions, such as Sterling's, are a result of incorrect eyewitness identifications; shoddy, or fraudulent, forensic science; informant testimony or false confessions.

I don't intend here to point my finger of blame in any particular direction regarding Sterling's belated exoneration, but rather to re-examine how lawyers in the criminal justice system, prosecutors, defense counsel and judges, perceive and deal with police-induced confessions.

Indeed most people, lawyers included, cannot grasp the pervasiveness of innocent people confessing to a serious crime that they did not commit, such as Frank Sterling. Far from being an anomaly, researchers have documented about 300 cases with confessions that were proven subsequently to be false, such as the notorious Central Park jogger cases. The concept that only the guilty confess absent torture, unfortunately, is quite false. Yet, police, prosecutors and judges perpetuate that myth, and the results are cases such as Sterling's. There is a simple explanation for the false confession phenomenon — ignoring the physical facts and circumstances surrounding the so-called confession.

Michael Vignera

Most lawyers working in the criminal justice system have never heard of Michael Vignera. While everyone involved in law enforcement and criminal trials is aware of the impact Ernesto Miranda had on the enforcement of the constitution, *viz.*, the infamous *Miranda* rights, few have ever read the full 109-page *Miranda* decision.

Vignera was convicted of first-degree robbery. His conviction was affirmed without opinion — 21 AD2d 752 (Second Dept.

1964) — and the New York State Court of Appeals affirmed without opinion — 15 NY2d 970 (1965); further rev. 16 NY2d 614 (1965).

The U.S. Supreme Court granted *certiorari* and reversed his conviction. 384 U.S. 436 (1966). *Vignera v. New York*, should have raised serious red flags in Sterling's pretrial suppression hearings and all of his post-trial attempts to obtain a new trial prior to his DNA exoneration.

The facts showed that, after working for 36 hours straight as a truck driver, the police brought Sterling in for questions about an unsolved murder. (All of the factual renditions about Sterling's case are from the Innocence Project's website, www.innocence-project.org/Content/Frank_Sterling.php.)

Twelve hours later, Sterling "confessed" to a murder he did not commit. Only the last 20 minutes of the interrogation process was videotaped. (See www.democratandchronicle.com/section/videonetwork?bctid=80190136001.) Frank Sterling subsequently recanted his confession to murder — which was rejected by the police, prosecution and courts — even though, 44 years earlier, the Supreme Court had set forth rather specific warnings concerning police-induced confessions. The first indicia of a problem, is that they "share salient features — incommunicado interrogation of individuals in a police-dominated atmosphere."

Sterling's case was a classic example of what the Supreme Court warned against: "Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms."

The psychological coercion, sometimes overt, sometimes subtle in the secrecy of the interrogation room is a well documented fact — recognized by the Supreme Court in this opinion: "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles — that the individual may not be compelled to incriminate himself."

The Court also warned: "Interrogation procedures may even

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give rise to false confessions.”

What went wrong with the system in Sterling's case? The first red flag that should have been obvious to all was that he was interrogated for 12 hours, after he had worked 36 straight hours. Another red flag was the process involved, i.e., the non-recorded 11-plus hours of interrogation, which created a scenario favored by the police — their word (two detectives) versus that of someone accused of murder — the classic “swearing match,” where they know that the judiciary virtually always will give credibility to the cops. That's not what the Supreme Court mandated, however: “[T]he fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.”

So, factors which the Supreme Court had warned about — secret interrogation for more than 11 hours, inside of a police station after the suspect had worked 36 consecutive hours — ultimately resulted in a vague series of admissions prompted by leading questions.

The Supreme Court denied Sterling's attempts at suppressing his false confession, which was almost summarily affirmed by the Appellate Division — 201 AD2d 1006 (Fourth Dept. 1994) — which did not address any of the factors cited by the Supreme Court. The Court of Appeals then denied leave to appeal. 85 NY2d 914 (1995).

Sterling next sought post-conviction relief pursuant to Criminal Procedure Law, Article 440, which the trial court denied, and the Appellate Division summarily affirmed. 267 AD2d 1111 (Fourth Dept. 1999). The Court of Appeals once again denied leave to appeal. 94 NY2d 901 (2000). Federal *habeas* relief also was denied.

Sterling returned to the trial court in 2004 seeking various forms of relief, including DNA testing. In a detailed opinion, that court again dismissed the issues surrounding Sterling's confession, holding that it “fails to provide credible support for [the] defendant's claim that he falsely confessed to police investigators.” 6 Misc.3d 712, 724 (Monroe County Ct. 2004).

The court, however, did permit DNA testing on an unknown hair, which ultimately was determined to have come from the victim, while denying all other requests for DNA testing. Again, the Appellate Division affirmed. 37 AD3d 1158 (Fourth Dept. 2007). The false confession was still the tail wagging the dog.

Social scientists have long known that sleep deprivation and fatigue increase the probability of false confessions. See Leo, “False Confessions: Causes, Consequences and Implications,”

37 J. Am. Acad. Psychiatry Law 332 (2009). So have police.

In an exhaustive report, Leo documents why Sterling's confession was false, and all of the indicators as to why it was false. (A copy of the report can be viewed at www.democratandchronicle.com/assets/pdf/A2156637428.PDF.) Leo discusses, for example, the “façade of a polygraph exam” and, due to his, fatigue, Sterling was not even a proper candidate for a bona fide polygraph examination — even assuming its reliability. Leo also noted that Sterling's police interrogators contaminated his responses by suggesting answers and showing him photographs of the crime scene before he made his false confession.

Leo concluded (in the article cited): “A suspect's confession sets in motion a seemingly irrefutable presumption of guilt among justice officials, the media, the public, and lay jurors. ... As the case against an innocent false confessor moves from one state to the next in the criminal justice system, it gathers more collective force, and the error becomes increasingly difficult to reverse. *Id.*, at 340. ... American judges too tend to presume that a defendant who has confessed is guilty and, accordingly, treat him more punitively. Conditioned to disbelieve defendants' claims of innocence or police misconduct, judges rarely suppress confessions, even highly questionable ones.” *Id.*, at 341.

It is easy to second-guess decisions in the face of a conclusive DNA exoneration such as Sterling's. It is not easy to ignore the U.S. Supreme Court's warning, issued 44 years earlier, concerning lengthy, incommunicado police interrogations: “[T]he fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so.”

In other words, the confession was not voluntary.

That brings us back to Michael Vignera's trip to the U.S. Supreme Court. For three days in early 1966, that Court heard arguments in four cases consolidated for appeal, to include *Vignera v. New York*. On June 13, 1966, the Court issued its ruling. The lead decision was not Vignera's, but another case about police techniques of psychological coercion to get suspects to incriminate themselves, as happened with Sterling. The lead opinion was *Miranda v. Arizona* — the source of the quotations in today's essay.

Everyone remembers the end result of *Miranda* — the prophylactic requirement of advising a person undergoing custodial interrogation of their *Miranda* rights. Too few remember what led the Court to that holding, that is the pervasive issues of psychological coercion and the possibility of false confessions.

Now we know why Sterling spent 18 years in prison — a false confession was the cornerstone of his wrongful conviction. His confession never should have been elicited under the factual circum-

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stances of his interrogation, much less allowed to taint his trial.

Sterling was lucky to have had a team of dedicated and tenacious lawyers, and very lucky that evidence was still available for DNA testing after so many years. But what about the many cases for which no DNA evidence is available? That is the fundamental challenge and obligation of defense counsel. Courts, likewise, have an obligation to guard against false confessions and to consider the significant body of social science evidence about them.

The *Miranda* decision, the entire majority decision, should help us prevent the next wrongful conviction based on an utterly false confession. But, appreciating the parameters of psychologi-

cal coercion — the core evil *Miranda* was intended to combat — requires us to appreciate the reality of false confessions. Mandating the videotaping of the entire custodial interrogation process must be the first step in eliminating the use of false confessions at trial.

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