

IN THE COURT OF CRIMINAL
APPEALS OF TEXAS

AND

IN THE 23RD DISTRICT COURT
OF HARRIS COUNTY, TEXAS

EX PARTE

MAX ALEXANDER SOFFAR,

Applicant

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Indictment No. 319724

CCA Writ No. 29,980-03

AFFIDAVIT OF DR. RICHARD A. LEO, PH.D., J.D.

I, Richard A. Leo, hereby declare as follows:

I. Qualifications

1. I am presently employed as an Associate Professor of Law at the University of San Francisco, School of Law. From 1997-2006, I was employed as an Associate Professor of Criminology and an Associate Professor of Psychology at the University of California, Irvine. From 1994-1997, I was employed as an Assistant Professor of Sociology and an Adjunct Professor of Law at the University of Colorado, Boulder.
2. My educational background is as follows: I received a Ph.D. in Jurisprudence and Social Policy (specialization in Criminology and Social Psychology) from the University of California, Berkeley in 1994; a J.D. from the University of California, Berkeley in 1994; a M.A. in Sociology from the University of Chicago in 1989; and a B.A. in Sociology from the University of California, Berkeley in 1985.
3. I am an expert in the area of police interrogation practices, the psychology of police interrogation and suspect decision-making, psychological coercion, false confessions, and wrongful convictions. For almost two decades, I have been conducting empirical research and writing numerous articles and books on the

subjects of police interrogation, psychological coercion, false confession, and wrongful conviction. In this time, I have analyzed more than 2,000 real world interrogations. I am the author of several books, including *Police Interrogation and American Justice* (Harvard University Press, 2008), and more than 50 articles and book chapters, many in leading legal and social science journals. I have won several awards for my publications, and my scholarship has often been featured in the news media and cited by appellate courts. To date, I have consulted with criminal and civil attorneys on more than nine-hundred (900) cases involving disputed interrogations and/or confessions, and I have been qualified as an expert witness one-hundred sixty-eight (168) times in state, federal and military courts in twenty-five (25) states, including the State of Texas, at pre-trial suppressions motions, jury and bench trials, and post-conviction proceedings. I have testified for the defense, for the prosecution, and in civil cases. I have given numerous lectures to judges, defense attorneys, prosecutors, and other criminal justice professionals. I have also taught interrogation training courses and/or given lectures to police departments in America, China, and the Republic of Cypress.

4. I have been retained by Kirkland & Ellis on behalf of Max Soffar in this case. I am charging a reduced rate of \$200/hour for my time. A current copy of my Curriculum Vitae is attached to this Affidavit as Exhibit A.
5. A list of the materials I reviewed for this case is attached to this Affidavit as Exhibit B.

II. The Social Scientific Study of Police Interrogation and Confessions

6. There is a well-established field of research in the academic disciplines of psychology, criminology, and sociology on the subject of police interrogation practices, coercive influence techniques, and confessions. This research dates back to 1908; has been the subject of extensive publication (hundreds of articles, books, and book chapters) in peer reviewed journals; is based on generally accepted principles, methods, and findings; is capable of validity testing; and has been generally accepted as valid in the relevant scientific community.
7. The subject of police interrogation and false confessions is beyond common knowledge and something about which the public has misconceptions. Most people do not know that police detectives receive highly specialized training in psychological interrogation techniques, what these techniques are, or how the techniques are designed to work (i.e., move a suspect from denial to admission). In addition, most people also do not know what psychological coercion is, why some techniques are regarded as psychologically coercive, and what their likely effects are. Moreover, most people do not know which interrogation techniques create a risk of eliciting false confessions when applied to innocent suspects or how and why the psychological process of police interrogation can, and sometimes does, lead the innocent to falsely confess. In fact, most people are

skeptical that innocent suspects will give or agree to false confessions to serious crimes in response to purely psychological interrogation techniques in the absence of a suspect's physical torture or mental illness. This is because people view confessing falsely to a crime as an irrational and self-destructive act. Most people have no direct knowledge of, or experience with, psychological police interrogation, and do not believe that they themselves could be made to falsely confess unless tortured. This skepticism and relative ignorance causes most people to assume that virtually all confessions are true and to presume that any defendant who has confessed is therefore likely guilty. Confession evidence (even false confession evidence) is therefore highly prejudicial, and once a confession is introduced into evidence against a suspect at trial, it almost inevitably leads to a suspect's conviction. Underscoring the prejudicial nature of confession evidence is that studies show that individuals who falsely confessed and chose to take their case to trial were convicted by juries 73-81% of the time before having their innocence proven.

III. The Social Psychology of Police Interrogation

8. Once patrol officers receive the rank of detective, they typically receive intensive training in the practice and law of interrogation and thereafter learn to apply, refine, and hone their interrogation skills through extensive case experience, supervision, and/or additional training. Police interrogation is a cumulative, structured, and time-sequenced process in which detectives draw on an arsenal of psychological techniques in order to overcome a suspect's denials to elicit incriminating statements, admissions, and/or confessions. This is the sole purpose of custodial interrogation. To achieve this purpose, interrogators use techniques — all of which are generally legal — that seek to influence, persuade, manipulate, and deceive suspects into believing that their situation is hopeless and that their best interest lies in confessing. Sometimes, however, interrogators cross the line and employ techniques and methods of interrogation that are coercive and thus regarded as legally impermissible.
9. Contemporary American interrogation methods are structured to persuade a rational person who knows he is guilty to rethink his initial decision to deny culpability and instead choose to confess. Police interrogators know that it is not in any suspect's rational self-interest to confess. They expect to encounter resistance and denials to their allegations, and they know that they must apply a certain amount of interpersonal pressure and persuasion to convince a reluctant suspect to confess. As a result, interrogators have, over the years, developed a set of subtle and sophisticated interrogation techniques whose purpose is to alter a suspect's perceptions such that he eventually comes to see the act of confessing as being in his self-interest. Interrogators accomplish this by persuading a suspect to view his immediate situation differently, by focusing his attention on a limited set of choices and alternatives, and by convincing him of the likely consequences that attach to each of these choices. If successful, this process unfolds in two steps: first, the interrogator causes the suspect to view his situation as hopeless; and,

second, the interrogator persuades the suspect that only by confessing will the suspect be able to improve his otherwise hopeless situation.

STEP ONE: *The Hopeless Situation*

10. The first step, or stage, of successful interrogation consists of causing a suspect to view his situation as hopeless. If the interrogator is successful at this stage, he will undermine the suspect's self-confidence and cause the suspect to reason that there is no way for him to escape the interrogation without incriminating himself. To accomplish this, interrogators accuse the suspect of having committed the crime; they attack and try to undermine a suspect's assertion of an alibi or verbalization of innocence (pointing out or inventing logical and factual inconsistencies, implausibilities, and/or impossibilities); they exude unwavering confidence in their assertions of the suspect's guilt; they refuse to accept the possibility of the suspect's denials; and, most importantly, they confront the suspect with incontrovertible evidence of his guilt, whether real or non-existent. Because interrogation is a cumulative and time-sequenced process, interrogators often draw on these techniques repeatedly and/or in succession, building on their earlier accusations and representations at each step in the interrogation process.
11. Through the use of these techniques, the interrogator communicates to the suspect that he has been caught, that there is no way he will escape the interrogation without incriminating himself, and that his future is determined — that regardless the suspect's denials or protestations of innocence, he is going to be arrested, prosecuted, convicted, and eventually incarcerated. The interrogator seeks to convince the suspect that this is a fact that has been established beyond any doubt, and thus that any objective person must necessarily reason to this conclusion. By persuading the suspect that he has been caught, that the existing evidence or case facts objectively prove his guilt, and that it is only a matter of time before he will be prosecuted and convicted, the interrogator seeks to alter the suspect's perceptions such that he comes to view his situation as hopeless and comes to perceive that resisting the interrogator's demands is futile.

STEP TWO: *Inducement Of A Confession*

12. Once the interrogator has caused the suspect to understand that he has been caught and that there is no way out of this predicament, he seeks to convince the suspect that the only way to improve his otherwise hopeless situation is by confessing to the offense(s) of which he is accused. The second step of successful interrogation thus consists of offering the suspect inducements to confess — reasons or scenarios that suggest the suspect will receive some personal, moral, communal, procedural, material, or other benefit if he confesses to some version of the offense. Researchers have classified the types of inducements investigators use during the second step of interrogation into three categories: *low-end* inducements, *systemic* inducements, and *high-end* inducements.

Types of Inducement

13. *Low-end* inducements refer to interpersonal or moral appeals the interrogator uses to convince a suspect that he will feel better if he confesses. For example, an interrogator may tell a suspect that the truth will set him free if he confesses, or that confessing will relieve his anxiety or guilt, or that confessing is the moral or Christian thing to do, or that confessing will improve his standing in the eyes of the victim or the eyes of the community.
14. *Systemic* inducements refer to appeals that the interrogator uses to focus the suspect's attention on the processes and outcomes of the criminal justice system in order to get the suspect to come to the conclusion that his case is likely to be processed more favorably by all actors in the criminal justice system if he confesses. For example, an interrogator may tell a suspect that he is the suspect's ally and will try to help him out — both in his discussions with the prosecutor as well as in his role as a professional witness at trial — but can only do so if the suspect first admits guilt. The interrogator may also ask the suspect how he expects the prosecutor to look favorably on the suspect's case if he does not cooperate with authorities. In a further variation, the interrogator may ask the suspect what a judge and jury are really going to think, and how they are likely to react, if he does not demonstrate remorse and admit his guilt to authorities. Interrogators often couple the use of systemic incentives with the assertion that this is the suspect's one and only chance — now or never — to tell his side of the story; if he passes up this opportunity, all the relevant actors in the system (police, prosecutor, judge, and jury) will no longer be open to the possibility of viewing his actions in their most favorable light. Interrogators rely on *systemic* inducements to persuade the suspect that the justice system naturally confers rewards for those who admit guilt, demonstrate remorse, and cooperate with authorities; whereas it inevitably metes out punishment for those who do not.
15. *High-end* inducements refer to appeals that directly communicate that the suspect will receive less punishment, a lower prison sentence, and/or some form of police, prosecutorial, judicial, or juror leniency if he complies with the interrogator's demand that he confess. If, however, he does not comply with the interrogator's demand that he confess, the suspect will receive a higher sentence or greater punishment. *High-end* inducements may either be implicit or explicit: the important question is whether the interrogation technique communicates the message, or is understood to communicate the message, that the suspect will receive a lower criminal charge and/or lesser punishment if he confesses as opposed to a higher criminal charge and/or greater amount of punishment if he does not. For example, interrogators sometimes try to persuade suspects that their behavior was merely an accident, or a reasonable response to the victim's provocation, or an act of self defense. By portraying the suspect's behavior as an accident or reasonable response to provocation, the interrogator communicates that the suspect did not intend to harm the victim, that the act was therefore not a crime or a significantly lower level of crime, and that the suspect will therefore

receive little or no punishment if he agrees to the interrogator's version of what happened. By portraying the suspect's behavior as self-defense, the interrogator communicates that no crime at all even occurred and that the suspect will receive no punishment at all if he agrees to this version of what happened (since self-defense is not a crime, but a legally excused response to physical aggression).

16. Sometimes interrogators use more explicit *high-end* incentives, such as telling a suspect that there are several degrees of the alleged offense, each of which carry different amounts of punishment, and asking the suspect which version he would like to confess to. Or the interrogator may explicitly tell the suspect that he will receive a long prison sentence, or perhaps even the death penalty, if he does not confess, and/or may point out what happens to men of his age, or men accused of crime, in prison if he does not confess to the interrogator's minimized account. Sometimes interrogators who rely on *high-end* inducements will present the suspect with a simple two choice situation (good vs. bad): if the suspect agrees to the good choice (a minimized version of the offense, such as involuntary manslaughter or self-defense), he will receive a lower amount of punishment or no punishment at all; but if does not confess, criminal justice offices will impute to him the bad choice (a maximized version of the offense, such as pre-meditated first degree murder), and he will receive a higher level of punishment or perhaps the harshest possible punishment. (This technique is sometimes referred to in the academic literature as the maximization/minimization technique). The point of *high-end* inducements is to communicate to a suspect that it is in his rational self-interest to confess to the minimized or non-incriminating version of the offense that the interrogator suggests. It is in the suspect's rational self-interest to do so because he will receive a lower charge, a lesser amount of punishment, and/or no time in prison. If he fails to confess, however, he will receive a higher charge, a greater amount of punishment, and more time in prison, perhaps even the death penalty (although it is rare that interrogators these days ever threaten a suspect with receiving the death penalty if he does not confess).
17. To evaluate whether a particular interrogation is coercive, experts must determine the facts of the case and then analyze these facts in light of the extensive social science research literature on the social psychology of interrogation and confession. The expert must evaluate whether any of the interrogator's techniques, methods, or strategies were coercive by applying the generally accepted findings of the social science research literature on the subject of interrogation, coercive influence techniques, and false confessions to the specific facts of the case. In particular, the expert must determine whether the interrogator used any techniques that communicated, either implicitly or explicitly, that the suspect would receive a lower sentence, a lesser amount or type of punishment, or perhaps no punishment at all if he complied with the interrogator's demands and/or receive a higher amount or type of punishment — or perhaps the harshest punishment possible — if he did not comply with the interrogator's demands. Social science research has repeatedly demonstrated that some *systemic* inducements (depending on the content of the inducement, how explicitly or

vaguely it is stated, and the message that it communicates) and all *high-end* inducements are coercive because they rely on implicit and/or explicit promises of leniency and threats of harm to induce compliance. Such promises of leniency and threats of harm are not only regarded as coercive in the social science literature because of the messages they convey and their demonstrated impact on the decision-making of individuals, but they are also regarded as legally impermissible by courts. The expert may also evaluate whether the interrogation techniques, either individually or cumulatively, had the effect of causing a suspect to perceive he had no choice but to comply with the demands of the interrogator and thus whether the interrogation, in effect, overbore his will.

IV. Police-Induced False Confessions

18. In addition to evaluating whether an interrogation was coercive and overbore the will or decision-making ability of a custodial suspect, interrogation and confession experts are sometimes also asked to evaluate the factors that can lead to false confessions from the innocent, and to assess the likelihood that a false confession was elicited in a particular case. As mentioned above, social science researchers have demonstrated that, contrary to public misperceptions, false confessions from the innocent occur regularly; that psychological methods of interrogation can and do cause the innocent to sometimes confess falsely; that certain methods of interrogation — particularly methods known or demonstrated to exert a coercive effect — are correlated with the likelihood of a false confession; and that there are established principles with which to evaluate the likely reliability of confessions. In addition, social scientists have identified three different types of false confessions: *voluntary* false confessions (made in response to minimal or no police pressure); *compliant* false confessions (given to terminate the stressful, punishing and/or coercive experience of interrogation by a suspect who privately knows that he is innocent); and *persuaded* false confessions (given by a suspect who comes to doubt the reliability of his memory and comes to believe that he or she may have committed the offense. *Compliant* and *persuaded* false confessions may be either coerced or non-coerced.
19. Although psychological coercion is the primary cause of interrogation-induced false confession, some types of individuals — particularly the mentally handicapped and/or cognitively impaired, juveniles and the mentally ill — are more vulnerable to the pressures of interrogation and therefore less likely to possess or be able to muster the psychological resources or perspective necessary to withstand accusatorial questioning. In particular, the mentally handicapped and impaired possess personality characteristics that increase their risk of interrogation-induced false confession. Because of their cognitive deficits and limited social skills the mentally handicapped and cognitively impaired are slow thinking, easily confused, concrete (as opposed to abstract) thinkers, often lack the ability to appreciate the seriousness of a situation, may not understand the long-term consequences of their actions, and tend to have short attention spans, poor memory and poor impulse control. The mentally handicapped and

cognitively impaired also tend to be highly submissive (especially eager to please authority figures), compliant, suggestible, and responsive to stress and pressure. As a result, the mentally handicapped are disproportionately represented in the reported false confessions cases. Notwithstanding this fact, the vast majority of reported false confessions are from cognitively and intellectually normal individuals.

20. Regretfully, most police interrogators receive no training about the problem and consequences of police-induced false confessions in the American criminal justice system. Most police receive no training in the basics of false confessions (i.e., that normal people can be made to falsely confess in response to contemporary psychological police interrogation methods). Most police are not taught which of their techniques are likely to cause false confessions and why, how to recognize false confessions, or how to prevent false confessions from occurring in the first place. As a result, most police interrogators appear to share the public misconception that false confessions only occur in response to torture or if the suspect is mentally ill, and most police interrogators refuse to acknowledge the possibility that they may have elicited a wholly or partially false incriminating statement, admission and/or confession in one of their cases.

***V. Evaluating the Reliability of Incriminating
Statements, Admissions and Confessions:
The Principles of Post-Admission Narrative Analysis and
Incriminating Statements, Admissions and Confessions***

21. Social science researchers apply well-known, well-established and widely accepted principles of analysis to evaluate the likely reliability or unreliability of an incriminating statement, admission or full confession from a suspect. To evaluate the likely reliability of such statements, researchers analyze the *fit* between the subject's *post-admission narrative* (the account or story the suspect tells following the "I did it" admission statement) and the crime facts and/or corroborating evidence derived from the confession (e.g., location of the missing murder weapon, loot from a robbery, the victim's missing clothing, etc.).
22. The purpose of evaluating the fit between a suspect's post-admission narrative and the underlying crime facts and derivative crime evidence is to test the suspect's actual knowledge of the crime. If the suspect's post-admission narrative corroborates details only the police know (i.e., have not been made public), leads to new or previously undiscovered evidence of guilt, explains apparent crime fact anomalies, and/or is corroborated by independent facts and evidence, then the suspect's post-admission narrative objectively demonstrates that he possesses the actual knowledge that would be known only by the true perpetrator. This unique knowledge is strong evidence of guilt. (This, of course, assumes that the suspect's knowledge of the crime has not been contaminated by the media, community gossip or by the police themselves). If the suspect cannot provide police with the actual details of the crime, fails to accurately describe the crime scene facts,

cannot lead the police to new or derivative crime evidence, and/or provides an account that is full of gross errors and disconfirmed by the independent case evidence, then the suspect's post-admission narrative demonstrates that he fails to possess the actual knowledge that would be known only by the true perpetrator. This lack of knowledge is therefore strongly consistent with a judgment of innocence.

23. The fit between the suspect's post-admission narrative and both the crime scene facts and the derivative crime evidence therefore provides an *objective* basis for evaluating the likely reliability of the suspect's incriminating statements.
24. The well-established and widely accepted social science research principle of using the *fit standard* to evaluate the validity of a confession statement is also a bedrock principle of criminal investigation within law enforcement. Properly trained police detectives realize that an "I did it" statement is not necessarily evidence of guilt and may, instead, turn out to be evidence of innocence. For example, in high profile murder cases, police regularly screen out volunteered confessions by seeing whether or not the person can tell the police details known only to the perpetrator or lead the police to derivative crime evidence that either corroborates, or fails to demonstrate, the person's guilty knowledge. If an element of a crime is particularly heinous or novel, police often keep this fact from the press so that it can be used to demonstrate a confessor's guilty knowledge. Police sometimes deliberately include an error in media releases or allow incorrect statements to go uncorrected so that a true perpetrator will be able to demonstrate his personal knowledge of the crime. In other types of cases, police detectives regularly rely upon the fit standard to identify a true admission that might be mixed in with a collection of volunteered statements.
25. Using the fit standard to evaluate the validity of a suspect's incriminating statements, admissions, or confessions is a bedrock principle of law enforcement because police detectives realize that seeking corroboration during the post-admission phase of interrogation is essential to proper investigative work. It is a fundamental principle of police investigation that true explanations can be supported and false explanations cannot be supported (assuming no contamination has occurred). False explanations will not fit the facts of the crime, lead to derivative evidence, or be corroborated by independent evidence.
26. Moreover, post-admission narrative analysis and the fit standard are central to proper criminal investigation because properly trained detectives realize that the purpose of detective work is not to clear a crime or get a conviction, but to carefully collect evidence in a way that will lead to the arrest, prosecution, and conviction of the guilty. Simultaneously, the post-admission narrative analysis and the fit standard insure that no innocent individual is wrongfully arrested, prosecuted, or convicted.

27. A suspect's post-admission narrative therefore provides a gold mine of potential evidence to the unbiased, properly trained detective who is seeking to ferret out the truth. For if the suspect is guilty, the collection of a detailed post-admission narrative will allow the detective to establish the suspect's guilt beyond question, both by demonstrating the suspect's actual knowledge and by corroborating the suspect's statements with derivative evidence. Properly trained detectives realize that the strongest form of corroboration comes through the development of new evidence using a suspect's post-admission narrative. While it is not possible to verify every post-admission narrative with the crime facts, a skillful interrogator will seek as much verifiable information about the crime as he can elicit. The more verifiable information elicited from a suspect during the post-admission period and the better it fits with the crime facts, the more clearly the suspect demonstrates his responsibility for the crime.
28. If the suspect is innocent, the detective can use the suspect's post-admission narrative to establish his lack of knowledge and thus demonstrate his likely or certain innocence. Whereas a guilty suspect can corroborate his admission because of his actual knowledge of the crime, the innocent suspect cannot. The more information the interrogator seeks, the more frequently and clearly an innocent suspect will demonstrate his ignorance of the crime. His answers will turn out either to be wrong, to defy evaluation, or to be of no value for discriminating between guilt and innocence. Assuming that neither the investigator nor the media have contaminated the suspect by transferring information about the crime facts, or that the extent of contamination is known, the likelihood that his answers will be correct should be no better than chance. The only time an innocent person will contribute correct information is when he makes an unlucky guess. The likelihood of an unlucky guess diminishes as the number of possible answers to an investigator's questions grows large. If, however, his answers about missing evidence are proven wrong, he cannot supply verifiable information that should be known to the perpetrator, and he inaccurately describes verifiable crime facts, then the post-admission narrative provides evidence of innocence.

VI. The Interrogations and Statements of Max Soffar

29. Max Soffar was interrogated on August 5th, 6th, and 7th, 1980 for more than 26 hours by Detective Schultz, Sergeant Clawson, District Attorney Wilson, Detective Kenneth Williamson, and Detective James Ladd. Mr. Soffar signed three police-written incriminating statements — one on each of the three days — regarding his alleged role in the triple murder-robbery of the Fairlanes Windfern Bowling Alley near Houston, Texas in July, 1980. On August 5th, Mr. Soffar signed a police-written statement alleging that he and Latt Bloomfield had burglarized the Bowling Alley the night before the triple murders and that on the night of the triple murders he participated as a lookout in the actual robbery of the Bowling Alley but did not go inside or participate in the murders with Latt Bloomfield. On August 6th, Mr. Soffar signed a police-written statement alleging

again that he participated with Latt Bloomfield in the burglary of the Bowling Alley the night before the triple murders, but that that he refused Latt's request to participate in the robbery or murders of the Bowling Alley on the next night, but merely drove Latt to and from the Bowling Alley that night. On August 7th, Mr. Soffar signed a police-written statement alleging that he participated in the robbery and, at Latt's request, shot two of the four victims in the Bowling Alley that night.

30. Only two hours of the more than twenty-six hours of interrogation during these three days were recorded. But for these two hours, no objective evidence exists of what occurred during these interrogations. Because of the detectives' failure to memorialize almost all of these interrogations, we will never know with certainty what occurred during twenty-four of the twenty-six hours of interrogation, what was said or suggested by whom, and ultimately what in the interrogations led Mr. Soffar to make or agree to his various incriminating, police-written statements.
31. Because the detectives failed to memorialize virtually all of Mr. Soffar's three days of interrogation, the only way we can attempt to reconstruct what occurred during the largely unrecorded portions of the interrogations is through the accounts of the various participants and analyze them in light of what we know from the empirical research literature on police interrogation and confessions. Since the accounts of the detectives are in tension with the account of Mr. Soffar, I will discuss them separately.
32. The various detectives who participated in or were present at the August 5-7 interrogation sessions were never asked to provide a contemporaneous written account of everything they remembered occurring during the August 5-7 interrogations. The only record of their recollections of these interrogations is their responses to the questions posed to them by attorneys in one or more of the following legal proceedings: Mr. Soffar's first trial in 1981, his habeas corpus proceeding in 1994, and/or his second trial in 2006. The detectives' accounts are all highly incomplete. They do not describe the use of any interrogation techniques at all (other than urging Mr. Soffar to tell the truth), and they uniformly deny that they made any promises or threats to elicit Mr. Soffar's compliance and incriminating statements. The detectives' accounts do not provide an explanation for what moved Mr. Soffar from denying direct involvement in the triple murders and the robbery to admitting shooting two of the victims, killing at least one of them, and directly participating in the robbery.

VII. Max Soffar's Susceptibility to Improper Interrogation Techniques

Evidence of Psychologically Coercive Interrogation Techniques

33. Unlike the detectives' various accounts, according to Max Soffar's account (as described in his letter to his counsel following the interrogations), the police used several well-known interrogation techniques: Detective Palmier, the detective

who arrested him, had previously threatened that he was going to lock up Mr. Soffar for life the next time he arrested Mr. Soffar, and implicitly threatened him again when he told Mr. Soffar, "I've got you now punk." According to Mr. Soffar, the interrogating detectives, who interrogated Mr. Soffar for the Bowling Alley murders, used accusation, forceful pressure, repetition, confrontation with false evidence (telling Mr. Soffar falsely that he had been positively identified in a lineup given to the sole surviving victim of the Bowling Alley triple murder-robbery), and threats that Mr. Soffar would get a life sentence if he did not confess to the triple murder-robbery — thus implying a more lenient sentence if he did confess.

34. Mr. Soffar's account of what occurred during the part of the unrecorded portion of his August 5-7 interrogations is corroborated, at least in part, by several sources. *First*, during the taped portion of his August 5th interrogation with Detective Schultz, Mr. Soffar tells Detective Schultz that he was verbally threatened by another officer, presumably Officer Palmier, when he was arrested. *Second*, Sergeant Clawson, who participated in and was present for part of the August 5th interrogation, writes in his affidavit that he told Mr. Soffar that the maximum penalty for the Bowling Alley murders was death, in effect communicating a threat of death if Mr. Soffar was convicted of the capital murder. Sergeant Clawson made this point more explicitly in his testimony, stating that Max should not mess around with the Houston detectives because they were "trying to kill him." *Third*, Detective Schultz in effect communicated the same death penalty threat on August 5th, according to his sworn testimony. Detective Schultz testified that he explained to Mr. Soffar that the Bowling Alley case was a capital murder case and that the penalty for capital murder was death. There is no reason for a police interrogator to tell this to a custodial suspect unless he wishes to let the suspect know that if he does not cooperate he may face execution. *Fourth*, Mr. Soffar's August 7th police-written statement suggests he may have been threatened with harsher punishment, including capital murder, if he did not confess and promised prosecutorial leniency if he did. In that police-written statement, Mr. Soffar suggests that he confessed to capital murder on August 7th because he did not want to "take this whole thing by myself" (i.e., he wanted Latt Bloomfield to share in the punishment for this capital crime). On its face, this explanation makes no sense as a reason for confessing to murdering one or two people unless Mr. Soffar believed, or was led to believe, that the only way to mitigate his punishment (and thus avoid the death penalty) was to shift part of the blame onto another person, in this case Latt Bloomfield.
35. Unlike the Detectives' accounts of the unrecorded portions of Mr. Soffar's August 5-7 interrogations, Mr. Soffar's account, corroborated by police testimony, provides a description of widely-known interrogation techniques and an explanation for why he changed his initial account and confessed to capital murder. In addition to his description of the accusation, pressure, confrontation with false evidence, forceful pressure, promises, and threats, Mr. Soffar states in

the letter to his attorney why he ultimately confessed: "I said I shot her to get them off my back . . . I was so tired I just gave in to them."

36. In my professional opinion, the interrogation techniques described by Mr. Soffar, and corroborated by police testimony, are psychologically coercive. They are psychologically coercive for two reasons: *first*, implicit and explicit threats and promises, commonly referred to as *high-end* inducements, are regarded as inherently coercive in both psychology and law; and *second*, any group or sequence of interrogation techniques that cumulatively cause a person to perceive that he has no choice whether to confess, or that his will is overborne to the point where he cannot resist the interrogators' accusations, is psychologically coercive. If Mr. Soffar's partial description of the unrecorded portions of the interrogations on August 5-7 is accurate, he was subjected to psychologically coercive interrogation techniques. As mentioned above, Mr. Soffar's account was corroborated in part by detectives' Schultz's and Clawson's testimony, Detective Clawson's affidavits, and recorded portions of the interrogations.
37. It is well-documented in the empirical social science research literature that the psychologically coercive interrogation techniques described by Mr. Soffar can, and sometimes do, lead to false confessions. Put differently, these techniques create a risk of eliciting false confessions when misapplied to the innocent. These coercive interrogation techniques are usually the primary explanation for why innocent individuals falsely confessed to crimes they did not commit.

Evidence of Mr. Soffar's Situational Risk Factors

38. In Mr. Soffar's case, several other situational risk factors for false confession were present. *First*, Mr. Soffar's interrogations were unusually long (lengthy interrogation wears down a suspect's resistance by inducing fatigue, increases suggestibility, and compromise mental functioning). *Second*, Mr. Soffar was sleep-deprived, as he mentioned on tape during the recorded portion of his August 5th interrogation (he had not slept in the three days prior to this interrogation). *Third*, Mr. Soffar was, by police accounts as well as his own, coming down from drug use at the time of his initial interrogation. For example, Officer Raymond Willoughby testified that Mr. Soffar was intoxicated (under the influence of alcohol and another type of drug), his speech was slurred, his pupils were dilated and his eyes were bloodshot at the time of his arrest and shortly before his initial interrogation. This is corroborated by Officer Michael Clawson's testimony, as well as Mr. Soffar's own account. *Fourth*, The Bowling Alley triple murder robbery was a high profile crime. Many documented false confessions occur in high profile cases because police are under such public pressure to solve the crime that they apply substantial pressure to suspects to confess, especially when they have no other leads or evidence to link a suspect to a crime, as here. Although the record of what occurred during the unrecorded portions of the interrogation is disputed and highly incomplete, it appears that the detectives applied substantial

pressure to Mr. Soffar to elicit his various police-written confession statements during the 26 hours they questioned him from August 5-7.

Evidence of Mr. Soffar's Personal and Dispositional Risk Factors

39. In addition to the situational risk factors present in these interrogations that put Mr. Soffar at risk for falsely confessing, there are also numerous personal or dispositional risk factors that made Mr. Soffar especially vulnerable to crumbling in the face of police interrogation pressure and falsely confessing. As ample documentation and other expert opinions in the case materials demonstrate, Mr. Soffar is brain damaged, easily led, eager to please, impulsive, has a short attention span, feels overwhelmed, is mentally ill, is unable to foresee consequences, has a tendency to make up stories to get attention, and has a poor grasp of reality. All of these personality traits are associated with an increased likelihood or risk of false confession. Perhaps most notably in this regard, Mr. Soffar is highly suggestible and intellectually low functioning, traits that are correlated and especially likely to put an innocent suspect at risk for falsely confessing in response to police interrogation pressure. Dr. Frumkin administered the Gudjonsson Suggestibility Scales (GSS) to Mr. Soffar and reported that Mr. Soffar is more suggestible than 85% of the population and that "he is higher than average to giving in to misleading information and higher than average to shifting from one response to a different response, under pressure." Dr. Frumkin also tested Mr. Soffar's full scale IQ, which he placed in the low to high 80's, consistent with a low functioning individual.

Evidence of Mr. Soffar's False Confession

40. Turning from the issue of what explains why Mr. Soffar would falsely confessed to what evidence there is that Mr. Soffar falsely confessed, post admission narrative analysis reveals numerous inconsistencies and errors that are, in effect, indicia of his statement's potential unreliability. The selectively recorded portions of Mr. Soffar's August 5-7 interrogations and the accompanying police-written statements unequivocally reveal that Mr. Soffar did not possess unique knowledge of non-public crime facts absent contamination and suggestion. Mr. Soffar, for example, could not lead police to new, missing or derivative case information; he could not explain anomalies; and his statements were not corroborated by physical, medical, eyewitness or other credible evidence. I will develop these points more specifically below.

Mr. Soffar's Statements Contradict Eyewitness Evidence

41. Mr. Soffar's police-written statements are contradicted by the eyewitness evidence in this case. Gregory Garner, the sole surviving witness of the Bowling Alley murders, was interviewed by police at least seven times about what occurred and provided police with a detailed description of the murder-robbery as well of the murderer-robber. Mr. Soffar's account contradicts Mr. Garner's

eyewitness account in numerous aspects. For example, Mr. Soffar says he committed the crime with an accomplice, but according to Mr. Garner the murderer-robber acted alone. According to Mr. Soffar, he wore a disguise, but Mr. Garner states that the murderer-robber wore no disguise. Further, Mr. Soffar states that he entered the Bowling Alley through an open door, but according to Mr. Garner the doors were locked. Mr. Soffar also states that he took money from two cash registers, but according to Mr. Garner the murderer-robber ordered the manager to take money from only one cash register. Mr. Garner also could not positively identify Mr. Soffar in a line-up, perhaps not surprisingly since Mr. Soffar does not match the description of the robber given by Mr. Garner at the time of the crime.

42. Mr. Soffar's police-written statements are contradicted not only by the eyewitness evidence, but also by the physical and forensic evidence. For example, in Mr. Soffar's first police-written statement on August 5th, he states that he burglarized the Bowling Alley the night before the triple murder-robbery, but it has been established that the burglary was committed by two youths, not Mr. Soffar. In Mr. Soffar's August 5th police-written statement, Mr. Soffar said that he found money in a cash register, but the cash register drawers were locked up in the Bowling Alley manager's office. Mr. Soffar also states that during the robbery inside the Bowling Alley, Latt Bloomfield moved the victims around after he fired two shots, but we know that the victims did not move between shots. Finally, Mr. Soffar indicated in his August 5th police-written statement that he also did a robbery of a U Totem store in Galveston the same night that he and Latt Bloomfield allegedly committed the triple-murder robbery at the Bowling Alley, yet police established that no U Totem store in Galveston had been robbed that night.

Mr. Soffar's Statements Contradict Physical Evidence

43. Mr. Soffar's police-written statement on August 6th also contains significant discrepancies and errors with the physical evidence. For example, Mr. Soffar indicated in this August 6th statement that before he broke into the Bowling Alley, he looked through windows to see who was inside. The Bowling Alley, however, did not have any windows. Mr. Soffar also indicated in his August 6th police-written statement that Mr. Bloomfield wore a lady's stocking over his head, yet we know that the triple murderer-robber did not wear a disguise. In addition, Mr. Soffar indicated that in his August 6th police-written statement that the door to the Bowling Alley door was open when Mr. Bloomfield allegedly came in, but, in fact, the door of the Bowling Alley was locked at the time, and one of the victims had to unlock the door to let the triple murderer-robber in. Finally, Mr. Soffar indicated in his August 6th police-written statement that Mr. Bloomfield fired a shot while one of the victims was still standing, but we know that all the shots fired by the triple-murderer were done when every victim was laying down on the floor.

44. Mr. Soffar's police-written statement on August 7th also contains numerous errors and discrepancies with the physical evidence. For example, Mr. Soffar indicated in this statement that he and Latt Bloomfield went into the Bowling Alley together, but there was only one robber. Mr. Soffar indicated that Latt Bloomfield announced, "This is a robbery," and fired a warning shot into the floor. The robber neither announced that a robbery was to occur nor fired a warning shot. Mr. Soffar indicated in his August 7th statement that Latt Bloomfield pulled one of the male victims by his hair and forced him to his knees, but the robber did not physically touch any of the victims. Mr. Soffar indicated in his August 7th statement that the victims were lying in a straight line, but in fact they were lying in a semi-circle. Mr. Soffar indicated that he shot two of the victims and Latt Bloomfield shot two of the victims, but the robber shot all four victims. Mr. Soffar indicated that he and Latt Bloomfield shot all the victims from a distance, but one of the victims was shot a point blank range. Mr. Soffar indicated in his August 7th statement that after shooting the victims Latt Bloomfield took money out of their pockets, but the victims had all handed the robber their wallets before they were shot. These are merely some of the errors in Mr. Soffar's August 7th police-written statements and discrepancies between this statement and the physical evidence. There are many more.
45. In addition to the errors and discrepancies in all three of Mr. Soffar's August 5-7 police-written statements, and the lack of any forensic evidence linking him to the triple murder-robbery at the Bowling Alley, Mr. Soffar demonstrably lacked knowledge of any unique non-public details of the crime. In 26 hours of interrogation, Mr. Soffar could not provide Houston detectives with a single true fact that was not already publicly reported by Houston newspapers and/or publicly reported in Houston television news reports. In other words, over the course of these lengthy interrogations, Mr. Soffar did not provide Houston detectives with any crime details that they did not already know. However, much of the information included in Mr. Soffar's police-written statements could have been provided to him by the media or was provided to him by police, who, remarkably, took him to view the crime scene during the course of the three-day interrogation.
46. One of the most stark illustrations of Mr. Soffar's lack of "inside" knowledge is illustrated by his inability to describe the location of the Bowling Alley to Detective Schultz on August 5th. When attempting to draw the location of the Bowling Alley, Mr. Soffar placed the Bowling Alley on the wrong side of the road and along the wrong highway route, and he could not draw or describe the entrance to the Bowling Alley's parking lot or control booth. On August 6th, Detective Williamson actually drew a detailed map of the Bowling Alley for Mr. Soffar, but Mr. Soffar still could not identify the location of the Bowling Alley, the parking lot to it or the entrance, again revealing his complete ignorance of the kind of crime scene details that the true perpetrator would, of course, know.

47. The fact that Mr. Soffar's police-written statements on August 5th, 6th and 7th are highly detailed does not provide indicia of reliability. Many documented proven false confessions are highly detailed. Indeed, Mr. Soffar's confession to the burglary of the Bowling Alley on the night before the triple murder robbery was both highly detailed and, as was subsequently learned, demonstrably false. There is ample evidence in the records I reviewed that Mr. Soffar was capable of recounting in great details crimes that we know he did not commit, such as the non-existent U-Totem store robbery in Galveston and the robbery of a Weingarten's store in LaMarque.

VII. A False Confession Expert Could Have Been Useful During Max Soffar's Trial

48. In my opinion, an expert in the psychology of police interrogation practices and false confessions could have been helpful at trial. Such an expert could have provided both general and case-specific testimony that would have aided and assisted the jury with its difficult task of deciding what weight to put on Mr. Soffar's August 5-7 police-written statements. Generally, such an expert could have testified about police interrogation training and techniques; how interrogation is designed to work as a psychological process; which interrogation techniques are psychologically coercive and why; how and why certain interrogation techniques can, and sometimes do, lead to false confessions from the innocent; situational and personal risk factors for false confession; and how both experts and law enforcement use the post-admission narrative analysis and standard of fit to evaluate whether confessions statements are likely reliable. More specifically, such an expert could have commented on what techniques were present (or absent) in the various accounts of what occurred during the 24 hours of unrecorded interrogation on August 5-7 and the potential significance, in light of the empirical social science research literature, of what both sides described as occurring. Although such an expert would not, of course, have provided an opinion about whether Mr. Soffar's three police-written statements on August 5-7 were ultimately true or false—that is a task solely within the jury's province—the expert could have educated the court as to the different factors and facts that should have been considered. In my professional opinion, the fact that Mr. Soffar's defense counsel did not call an expert witness meant that he was not able to effectively present to the jury a coherent analysis of the psychological dynamics of police interrogation, how they could have led to a false confession, or the significance of the many errors in Mr. Soffar's post-admission narratives and their lack of fit with the physical and eyewitness evidence.
49. In 2006, at the time of Mr. Soffar's second trial, there were numerous police interrogation and false confession experts who could have testified had the defense chosen to offer evidence of a false confession or improper police interrogation. These experts include: myself, Richard Ofshe, Elliott Aronson, Lawrence Wrightsman, Christian Meissner, Gisli Gudjonsson, Saul Kassin, Mark Costanzo, Deborah Davis, Daniel Lassiter, Allison Redlich, and Lawrence White, among others.

50. In conclusion:

- 1) Because detectives failed to record twenty-four of Mr. Soffar's twenty-six hours of interrogations on August 5-7, over ninety percent of the total interrogation time, we will never know with certainty what occurred during all of the interrogation. We will never know exactly what was said or suggested by whom, and ultimately what in the interrogations led Mr. Soffar to make or agree to his various incriminating police-written statements. The only way to reconstruct what occurred during the unrecorded portions of the interrogation is by analyzing the highly incomplete accounts of the various participants in light of what we know from the empirical research literature on police interrogation and confessions.
- 2) The detectives' accounts are highly incomplete. They do not describe the use of any interrogation techniques (other than urging Mr. Soffar to tell the truth), and they fail to provide an explanation for what moved Mr. Soffar from denying direct involvement in the triple murders and the robbery to admitting shooting two of the victims, killing at least one victim, and directly participating in the robbery. By contrast, Mr. Soffar's account describes several well-known interrogation techniques (accusation, forceful pressure, repetition, confrontation with false evidence, and implicit and explicit threats and promises) that are consistent with what we know about how interrogation occurs in America and provide an explanation for how they elicited his compliance and confession.
- 3) The interrogation techniques described by Mr. Soffar, corroborated in part by police testimony, are psychologically coercive. Mr. Soffar describes the use of interrogation techniques that are regarded as inherently coercive in both psychology and law. Further, Mr. Soffar's account illustrates how the cumulative effect of these interrogation techniques caused him to perceive that he had no choice but to comply with the interrogators' demands, thereby overbearing his will.
- 4) The psychologically coercive interrogation techniques created the risk of eliciting a false confession. Several other situational risk factors for false confession were also present during Mr. Soffar's interrogation: Mr. Soffar's interrogations were unusually lengthy, Mr. Soffar was sleep-deprived, Mr. Soffar was coming down from drug use at the time of his initial interrogation, and the Bowling Alley triple murder robbery was a high profile crime, the kind of case police feel enormous institutional and social pressure to solve and in which they sometimes exert substantial pressure on suspects to confess, especially when they have few meaningful suspects or leads.
- 5) In addition to situational risk factors, there are numerous personal or dispositional risk factors that made Mr. Soffar especially susceptible to making or agreeing to a false confession. These include the amply documented observations

that Mr. Soffar is highly suggestible, easily led and manipulated, eager to please, submissive, brain damaged, mentally ill, impulsive, unable to foresee consequences, easily overwhelmed, and intellectually low functioning, traits that are especially likely to put an innocent person at risk for falsely confessing.

6) The selectively recorded portions of Mr. Soffar's August 5-7 interrogations and the accompanying police-written statements reveal unequivocally that Mr. Soffar did not possess unique knowledge of non-public crime facts of the Bowling Alley triple murder robbery absent contamination and suggestion. In the more than twenty-six hours of interrogation, Mr. Soffar could not provide Houston detectives with a single true fact that was not already publicly reported by the Houston media. However, much of the information included in Mr. Soffar's police-written statements could have been provided to him by the media or was provided to him by police. Moreover, Mr. Soffar could not lead police to new, missing or derivative case information; he could not explain anomalies; and his statements were not corroborated by physical, medical, forensic, eyewitness, or other credible evidence.

7) Mr. Soffar's police-written statements on August 5th, 6th, and 7th are each replete with numerous errors and discrepancies that contradict the physical, medical, and eyewitness evidence in the Bowling Alley triple murder robbery case. Many, but not all, of the errors and discrepancies in Mr. Soffar's post-admission narrative have been documented in this report. These errors and discrepancies indicate that Mr. Soffar's post-admission narratives on August 5th-7th do not fit with the existing evidence and therefore contain strong indicia of unreliability. The fact that Mr. Soffar's police-written statements on August 5th, 6th, and 7th are highly detailed does not provide indicia of reliability. Many documented proven false confessions are highly detailed. Indeed, Mr. Soffar's proven false confession to the burglary of the Bowling Alley on the night before the triple murder robbery was both highly detailed and, as was subsequently determined, demonstrably false. There is ample evidence in the records I reviewed that Mr. Soffar recounted in great details crimes he did not commit, such as the non-existent U-Totem store robbery in Galveston and the robbery of a Weingarten's store in LaMarque.

8) In my professional opinion, Mr. Soffar's defense counsel would have benefitted by calling a police interrogation/false confession expert in his 2006 trial. Many experts were available at the time. Such an expert could have provided both general and case-specific testimony on the subjects described above, without invading the province of the jury or rendering any ultimate opinions. Such expert testimony would have aided and assisted the jury with its difficult task of deciding what weight to put on Mr. Soffar's detailed, but contradictory and ultimately unsupported, incriminating statements of August 5th, 6th, and 7th. In my professional opinion, the fact that Mr. Soffar's defense counsel did not call an expert witness ultimately meant that he was not able to effectively present to the jury a coherent or cogent analysis of the psychological

dynamics of police interrogation; how the interrogation could have led to a false confession in Mr. Soffar's case, the situational and dispositional risk factors for false confession present in Mr. Soffar's case, and the significance of the many errors in Mr. Soffar's post-admission narratives on August 5-7, which do not fit with the physical, medical, forensic, and eyewitness evidence.

9) Because confession evidence is almost universally regarded as the most self-evidently powerful and conclusive evidence of guilt the state can bring in a criminal case, most jurors presume a defendant's guilt when they learn that he or she confessed. In other words, once a jury learns that a defendant has "confessed," there is no longer a meaningful presumption of innocence (not surprisingly, studies have shown the overwhelming majority of false confessors who take their case to trial are convicted by juries). In effect, once a confession is introduced into evidence at trial, the burden of proof shifts to the defendant. In my professional opinion, it is therefore extremely difficult to put on an effective false confession defense without the assistance of a police interrogation/false confession expert, especially in a case as factually complicated as Mr. Soffar's case.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 13th day of August, 2008.

Richard A. Leo

Dr. Richard A. Leo, Ph.D., J.D.

State of CALIFORNIA
County of SAN FRANCISCO
Subscribed and sworn to (or affirmed) before me on
this 13 day of Aug, 2008 by Richard A. Leo, personally known to me or
proved to me on the basis of satisfactory evidence to
be the person(s) who appeared before me.
[Signature] (Notary signature)

