REDUCING ONE ASPECT OF THE PERNICIOUS IMPACT OF RECORDINGS OF INTERROGATIONS: POLICE STATEMENTS OF OPINIONS AND LIES

Easton Thompson Kasperek Shiffrin criminal defense team

Brian Shiffrin, Esq.
Easton Thompson Kasperek Shiffrin LLP

I. Recordings of Interrogations Provide the Best Objective Evidence as to What the Defendant Said During the Interrogation and Whether the Defendant's Statements Were Voluntary

A series of exonerations of wrongfully convicted and other cases in which there have been contemporaneous recordings of police encounters have established that police lie. Stories of police falsification are so pervasive that the moniker "testilying" has developed to describe the practice of police giving false testimony. (See I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 Ind. L.J. 835, 836 [2008] [noting that, in New York, a commission founded to investigate police corruption found that perjury was "so common in certain precincts that it has spawned its own word: 'testilying"']; Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U Colo L Rev 1037, 1044 [1996]; Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J Crim L & Criminology 693, 698 [1996]). Sadly, but not unexpectedly, the relationship between police perjury and wrongful convictions has been well documented (see generally, Russell D. Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 Wash U L Rev [2013]).

Not only has it been established that police commit perjury in testifying about police interrogations and that such perjury has led to wrongful conviction of innocent persons, it has been proven that police in Monroe County, New York, lie about their interrogations. Further, it had been proven that innocent men were convicted and imprisoned as a result of these lies being wrongly credited. Specifically, the Monroe County murder convictions of Frank Sterling and Douglas Warney, and the rape conviction of Freddie Peacock, were all predicated on false police testimony as to statements purportedly obtained from the suspect. All three men spent years in prison before they were proved innocent and received financial settlements as a consequence of the police misconduct that resulted in their wrongful prosecutions, convictions, and imprisonment.

The problem with courts accepting false police testimony about statements which are neither true nor voluntary has been increasing well documented. The 2009 New York State

Bar Association Report of 53 recent wrongful convictions in New York found false confessions to be a leading cause of wrongful conviction in New York. (http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf; see generally, Steven Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891-1007 [2004]).

Police lie with impunity with respect to what they believe to be unrecorded encounters with civilians because they are confident that their false version of what transpired will be credited over the accurate version of the suspect. That is what happened in the cases of Sterling, Warney, and Peacock.

With the increase ease of making recordings, more and more proof surfaces as to the frequency of police lying regarding what they believe to be unrecorded encounters. A quick internet search of videos of police unwittingly caught lying by citizens recording their encounters reveals dozens of such cases (see, e.g., http://www.nbcchicago.com/investigations/Video-Shows-Cops-May-Have-Lied-On-the-Stand-255416251.html [video showing five officer lied on the stand]; http://www.wfaa.com/news/local/dallas/surveillance-footage-disputes-dallas-police-affidavit-officer-involved-shooting--mentally-ill-228252551.html; http://baystateexaminer.com/traffic-court-upholds-ticket-even-cop-caught-committing-perjury/; http://articles.latimes.com/2009/oct/07/local/me-lapd-perjury7).

The phenomena of police providing false testimony when they believe that their interrogation was not recorded was also revealed in *People v Perino* (19 NY3d 85 [2012]). In *Perino*, the surreptitious recording of an interrogation made by an arrestee resulted in the prosecution and conviction of a police officer for perjury regarding his false testimony as to what transpired during the interrogation.

Police perjury in cases of unrecorded interrogations occurs because police are confident that if an interrogation is not recorded, a fact-finder will credit the false testimony of the police officer over the truthful testimony of the suspect.

For example, in explaining its decision affirming Mr. Warney's conviction in 2002, the Appellate Division, Fourth Department wrote that:

> Defendant confessed to the crime and gave accurate descriptions of many details of the crime scene. Defendant testified at trial that the police threatened him and forced him to confess to the crime. Two police detectives, however, testified that they did not threaten defendant, and that defendant was cooperative with them.

(*People v Warney*, 299 AD 2d 956 [4th Dept 2002].) Not just the jury, but the Appellate Division credited the police version of the interrogation. After Mr. Warney was incarcerated

for ten years, we learned that Mr. Warney's testimony was accurate and correct, that the police lied, and that the actual perpetrator had killed someone else while the innocent Mr. Warney was incarcerated (https://www.innocenceproject.org/cases/douglas-warney/).

In affirming Mr. Peacock's conviction, where Mr. Peacock denied making the alleged oral statement, this Court found that there had been an evidentiary error, but "in light of the strong evidence of guilt, *including defendant's confession*, we find the error to be harmless" (*People v Peacock*, 70 AD2d 781, 781 [4th Dept 1979]). We now know that, in fact, as he had long urged, Mr. Peacock never confessed (https://www.democratandchronicle.com/story/news/2016/05/05/rape-confession-possibly-fabricated-federal-judge-says/83969432/).

If Mr. Warney's interrogation had been recorded, the Appellate Division, the trial court, and the jurors would have seen what coercive, improper or suggestive tactics led to Mr. Warney's false confession which contained facts that the police told Mr. Warney (since Mr. Warney, innocent of the crime, could not have otherwise known them). If Mr. Peacock's interrogation had been recorded, this Court, the trial court, and the jurors would have seen that, as Mr. Peacock testified, there was no confession.

Instead, Mr. Warney and Mr. Peacock each spent years in prison, not because they were guilty, and not solely because the police used improper tactics. Rather, they spent years in prison because the other players in the criminal justice system were unwilling to accept that the police had lied under oath regarding these purported confessions. Thus, the need for recorded interrogations.

II. One Problem With Introducing Recordings of Interrogations: During Interrogations Police Are Permitted to Lie, Deceive, and State Their Opinion as to the Suspect's Guilt and Credibility

So, after years of efforts, as a result of the terms of negotiated settlements and legislation, New York now requires the recording of most interrogations in major felony cases. But, in many cases, the admission of these recordings has been shown to be as big a problem as testimony about unrecorded interrogations.

First, of all the nature of pressures that lead to involuntary and false confession are not obvious. Instead of using threats to obtain confessions, most police in the United States use a variant of the Reid method of interrogation which is a powerful tool for extracting confessions of guilt from the targets of police interrogation. But a growing number of cases, many of them exposed by the availability of DNA testing, support the proposition that the Reid Method may be "too powerful, i.e. can break down the innocent as well as the guilty. The problem with this is that the very same forces that cause guilty suspects to confess—stress, isolation, maximization, minimization, promises of leniency—can also cause innocent people to confess. (See, The Reid Interrogation Technique and False

Confessions: A Time for Change, Seattle Journal for Social Justice, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3002338 [An easy to understand soon to be published but already available, explanation of how the Reid method works and how it can induce false confessions]).

Perhaps the most famous example perhaps of innocent suspects falsely confessing to serious crimes they did not commit is the so-called Central Park 5, five innocent young men who were coerced into confessing in detail to committing a vicious rape and assault. Even though these confessions were inconsistent with the physical evidence and even though the DNA at the scene did not match any of the five, they were convicted and served many years in prison until they were exonerated by the confession of an unrelated individual whose DNA did match that of the DNA at the scene (http://thepsychreport.com/conversations/coerced-to-confess-the-psychology-of-false-confessions/).

Additionally, an analysis of cases in which defendants were convicted based on their detailed false confessions found that in all but two of the cases "police claimed that the defendant had offered a litany of details that we now know these innocent people could not plausibly have known independently." (Brendan Garrett, The Substance of False Confessions, 62 Stan. L. Rev. 1051, 1064 [2010]). Thus, as in Doug Warney's case, these details had to have been fed to the suspect by the police during the interrogation.

Thus, counsel needs to alert the court and jury to these problems. Although how to do so is beyond the scope of this presentation, there is an excellent outline for doing so available online: Deja Vishny, A Guide To Defending False Confession Cases: Understanding Police Interrogations and Cross-Examinations in Motions and Trials, http://opd.ohio.gov/Portals/0/PDF/PO/Juv%20Summit%202016/Guide%20to%20Defending%20a%20False%20Confession%20Case%20-%20Deja%20Vishny.pdf.

This presentation is focused on another danger with playing a recorded interrogation to a jury. Police are permitted to say thing to a suspect in an effort to obtain statements that they could not testify to in court. They can lie and deceive. The Court of Appeals has held that the police are permitted to lie or use some deceptive methods in their questioning as long as "the deception was [not] so fundamentally unfair as to deny due process" (*People v Tarsia*, 50 NY2d 1, 11 [1980]). Also, during interrogations, police can state their opinion that the defendant is guilty and that his denials are lies.

During interrogations, police can falsely claim that they have evidence of the suspect's guilt, such a a co-defendant's statement, a video, or forensic evidence such as fingerprints They can state baseless opinions as to the impossibility of the suspect's account. They can state opinions, lacking any scientific basis, as to how the wound would appear if accidental versus how it would look if it were an intentional stabbing. They can tell the suspect that they know she is guilty (*People v Berumen*, 46 AD3d 1019, 1020 [3d Dept 2007]).

The fact that these might be proper interrogation techniques does not mean that it is proper for a finder of fact at grand jury or trial to hear what the police say during interrogations.

As described above, we know that police lie and state their opinions while testifying, which is prohibited. Imagine how often they do that during interrogation when they are permitted to do so.

III. Witnesses Are Not Permitted to Testify, Either at Grand Jury or In Court Proceedings, as to Their Opinion as to Whether the Defendant's Version of Events Was Believable

The Court of Appeals has explained what a witness may and may not testify to with respect to an opinion as to whether the defendant's version of events is credible. (*People v Kozlowski*, 11 NY3d 223 [2008]). Witnesses are permitted to testify about facts, but not as to their opinion as to whether the defendant's version of events was believable:

> The line is crossed not when a witness relates facts that may be prejudicial, but when he or she conveys-either directly or indirectly-a personal opinion regarding the defendant's criminal guilt (citations omitted).... What was impermissible about the testimony was that its sole purpose was to bolster the testimony of another witness by explaining that his version of the events was more "believable" (citation omitted). It was thus the equivalent of an opinion that the defendant was guilty, which is impermissible.

(*People v Kozlowski*, 11 NY3d 223, 240 [2008].)

This is not a recent or novel rule. Previously, the Court held that where a prosecutor seeks testimony that the defendant's version of events was not believable, the witness's ". . . testimony is equivalent to an opinion that the defendant is guilty, and the receipt of such testimony may not be condoned (*People v Williams*, 6 NY2d 18, 23 [1959]; *People v Higgins*, 5 NY2d 607, 627-628 [1959]; *People v Gradon*, 43 AD2d 842 [2d Dept 1984])." (*People v Ciaccio*, 47 NY2d 431, 439 [1979].)

Thus, in *People v Amari Brown* (Mon Co Ct, Randall, J., 11/2017 [unreported, copy attached hereto]), a murder indictment was dismissed because a police officer improperly testified at the grand jury as to his opinion that the defendant was not telling the truth as to the alleged actions of the victim.

IV. Testimony as to What the Police Said During Interrogation May be Admitted for the Limited Purpose of Showing the Circumstances in Which the Statement Was Obtained

In *People v Walden* (148 AD2d 971, 971 [4th Dept1989]), the Court held that testimony as to what the police said to the suspect during an interrogation was not improper opinion testimony "where the witness merely explained the circumstances of defendant's second statement to police. In any event, the testimony, if erroneously admitted, was harmless."

Subsequently, in *People v Glover*, 195 AD2d 999 [4th Dept 1993], the Court explained the rationale for and scope of this holding:

> At trial, defendant challenged the voluntariness of his confession. The burden is upon the People to establish voluntariness and, in the absence of circumstances involving physical force, voluntariness "may best be determined through an examination of the totality of the circumstances surrounding the confession" *(People v Kennedy*, 70 AD2d 181, 186). Thus, the trial court properly allowed testimony by the interrogating officer that he told defendant he disbelieved defendant's initial denial of participation in the burglaries because the officer possessed information from someone that two black males and a car "very similar" to defendant's car had been seen leaving the scene of the burglary. *It was not hearsay because the testimony was not offered for its truth, but to establish the circumstances in which the statement was obtained, and to rebut defendant's argument that the officer coerced or fabricated defendant's statement.*

People v Glover, 195 AD2d 999, 999 [4th Dept1993] [emphasis supplied])

IV. Testimony That the Police Officer Believed a Suspect Lied To the Police Is Inadmissible

In contrast to the testimony held to be admissible in *Walden* and *Glover*, the Appellate Division, Fourth Department, and the Court of Appeals have held that the general rule prohibiting witnesses for testifying as to their opinion as the defendant's credibility applies to a police officer's testimony that he believed that the defendant lied to him during the interrogation. The Fourth Department held that "[w]e agree with defendant that the court erred in permitting a detective to testify that defendant lied to the detective during his interview (see *People v Kozlowski*, 11 NY3d 223, 240, rearg denied 11 NY3d 904, cert denied 556 US 1282; *People v Jennings*, 33 AD3d 378, 379, lv denied 7 NY3d 926)." (*People v Pabon*, 126 AD3d 1447, 1448 [4th Dept 2015].)

On appeal, the Court of Appeals held that "the judge should not have admitted the investigator's opinion testimony that defendant lied to him during the interview" citing and quoting *People v Ciaccio* (47 NY2d 431, 439) that " '(i)t is always within the sole province of the jury to decide whether the testimony of any witness is truthful or not.' " *People v Pabon* (28 NY3d 147, 157 [2016].)

Thus, while an officer may testify that he told the suspect that he thought his denials were lies, the officer may not testify that, in fact, he believed that the defendant had lied during the interrogation.

V. The Rule Against Witnesses Giving Opinion Testimony as to the Defendant's Credibility or Guilt Applies to Playing Recorded Interrogations in Which the Officers State Such Opinions

A. Generally

There are apparently no reported New York decisions discussing the application of this rule against witnesses giving opinion testimony as to the defendant's credibility or guilt to the relatively new phenomena of the playing before a factfinder the recorded interrogations in which the officers state opinions as to whether the suspect/defendant is lying when denying guilt. Courts in numerous states that have considered this question have consistently applied the rule against the admission of opinion testimony as to the defendant's guilt to police statements during interrogations.

Some courts have found that the police statements of opinion during interrogation to be inadmissible opinion testimony that should not be admitted indirectly in the form of a recording, and they have held that such statements must be redacted from the recording before it is played for the jury. In other words, those jurisdictions have reasoned that if the police statements would not be admissible from the witness stand, they should not come in through the backdoor via the recording (See *State v Elnicki*, 279 Kan 47, 105 P3d 1222, 1224–25 [2005]; *Commonwealth v Kitchen*, 730 A2d 513, 521 [Pa Super Ct 1999] [holding that statements made in an interrogation accusing a defendant of lying were inadmissible '"because they were 'akin to a prosecutor offering his or her opinion of the truth or falsity of the evidence presented by a criminal defendant ... [or] a prosecutor's personal opinion, either in argument or via witnesses from the stand, as to the guilt or innocence of a criminal defendant....' "]; *Sweet v State*, 234 P3d 1193, 1198, 1199 [Wyo 2010][interrogating officer's accusations amounted to opinion evidence regarding the defendant's veracity should not have been admitted]).

In *State v Elnicki* (279 Kan 47, 105 P3d 1222, 1224–25 [2005]) the court explained that

> it was error for Detective Hazim's comments disputing Elnicki's credibility to be presented to the jury. The jury heard a law enforcement figure repeatedly tell Elnicki that he was a liar; that Elnicki was 'bullshitting' him and 'weaving a web of lies.' * * * A jury is clearly prohibited from hearing such statements from the witness stand in Kansas and likewise should be prohibited from hearing them in a videotape, even if the statements are recommended and effective police interrogation tactics. As far as context for Elnicki's answers are concerned, the State could have safely accomplished its goal simply by having Detective Hazim testify and point out the progression of Elnicki's various stories as the tape was played—minus Hazim's numerous negative comments on Elnicki's credibility. The absence of a limiting instruction merely compounded the already serious problem, misleading the jury into believing that Hazim's negative comments carried the weight of testimony.

(*Id.*)

Court in other states have held that where the interrogation does not result in an admission or confession it is error to introduce the police statements. But these courts hold that where the interrogation does result in an admission or confession, the recordings, including the police statements *may* be admissible to show the context of the defendant's statements *if* on balance the probative value of such evidence outweighs the prejudicial impact, with particular focus of the fact that police may lie or offer baseless opinions during interrogations, *and* the jury is instructed as to the limited purpose for which the police statements are admitted and may be considered (see e.g., *State v Gaudreau*, 139 A3d 433, 448–50 [RI 2016]; *Jackson v State*, 107 So3d 328, 339–42 [Fla 2012]; *State v Demery*, 144 Wash 2d 753 (Wash 2001); *Robinson v State*, 574 So2d 910, 915–16 [Ala Cr App 1990]).

Typical of these decisions is that of the Florida Supreme Court in *Jackson v State* (107 So3d 328, 339–42 [Fla 2012]). In *Jackson,* the court first held that "a police officer's statements during an interrogation are admissible if they provoke a relevant response or provide context to the interview such that a rational jury could recognize the questions are interrogation techniques used to secure confessions." (Id. at 340.). However, the *Jackson* court held that the trial court abused its discretion in admitting the defendant's videotaped interrogation in which the officers repeatedly expressed their opinions about the defendant's guilt (*Id.* at 330, 341–42). The court explained that while the detectives may have intended to secure a confession by consistently expressing their conviction as to the defendant's guilt, as they did not secure a confession. The court held that the admission of the police officers' statements essentially permitted the State to improperly elicit police opinion testimony and invade the province of the jury (Id. at 341). Further, the court held that even to the extent the detectives's statements did yield somewhat relevant responses, this evidence should not have been admitted, as the statements had minimal probative value when compared with the inappropriate statements by the detectives (*Id.* at 341–42; see also *Roundtree v State*,145 So3d 963, 965–67 [Fla App 4th Dist 2014]) (applying *Jackson*) and *Gaines v State*, 155

So.3d 1264, 1271–72 [Fla App 4th Dist 2015] [applying and discussing *Jackson* in a case in which the defendant did not ultimately confess]).

In *Robinson v State* (574 So2d 910, 915–16 [Ala Cr App 1990]), the interrogating officer repeatedly expressed the opinion that the defendant's claim that she accidentally caused the victims injuries and death was not scientifically possible and that the the phsyical evidence did not match her account. The court held that " [t]he fact that the assertions were made in the taped statement rather than on the witness stand does not render them any less inadmissible" and that the admission of the officer's statements during interrogation "effectively permitted the State to bring in through the back door what it could not bring through the front." (*Id.*)

B. If Recordings of Interrogations are Admitted, Limiting Instructions are Required

Courts throughout the country have consistently held that if statement of the opinions of interrogating officers made during interrogation are to be admitted, courts must give limiting instructions charging that the jury cannot consider this statements for the truth, but only for the limited purpose of providing context to the defendant's statements (see e.g. *State v Gaudreau*, 139 A3d 433, 450 [RI 2016]; *State v Demery*, 144 Wash.2d 753, 761–62 [Wash 2001] ["when the trial court admits third party statements to provide context to a defendant's responses, the trial court should give a limiting instruction to the jury, explaining that only the defendant's responses, and not the third party's statements, should be considered as evidence"]; *Lanham v Com.*, 171 SW3d 14, 28 [KY 2005]; *Jackson v State*, 107 So3d 328, 341, n 15 [Fla 2012]).

Unless so instructed, jurors do not know that police may lie and express opinions during interrogation in a effort to get a suspect to confess, but that such statements may not be considered for the truth. The absence of a limiting instruction regarding admitted evidence indicates to the jury that the evidence can be considered for all purposes (*People v Butts*, 177 AD2d 782, 783 [3d Dept 1991]; *People v Bolling*, 120 AD2d 601, 602 [2d Dept 1986]). Thus, without an instruction which actually limits the jury's use and consideration of the police officer's statements and opinions to a limited and proper purpose, the police statements in the interrogation are hearsay which a jury improperly free to consider for their truth.

VI. How To Minimize the Impact of Police Statements in Recorded Interrogations

Referencing the above cited cases, it in incumbent on on counsel to object to the admission of the recording on the ground that it contains inadmissible and prejudicial opinions and statements, including lies. Also, citing *Brown*, *supra*, move to dismiss the indictment on the ground that the grand jury proceedings were defective in that improper and inadmissible opinion evidence from the police was presented to the grand jury.

In cases in which there is no dispute as to the context or voluntariness of the defendant's statements, only the defendant's statements should be admitted, not the recording.

If there is no basis to challenge the voluntariness of the defendant's statements at trial, expressly offer to withdraw the challenge to voluntariness, so that can't be used as a justification for the admission of the police officers' statements.

Remember, to argue that "[e]ven relevant evidence is not admissible if 'its probative value is substantially outweighed by the potential for prejudice' " (*People v Harris*, 26 NY3d 1, 5 [2015], quoting *People v Mateo*, 2 NY3d 383, 424–425 [2004]). The prejudicial impact of a fact finder hearing a police officer repeatedly tell the defendant that we know you are guilty and that your version as to what happened is impossible is obviously great. How probative is it to know that the police said that to the defendant repeatedly?

Most importantly, if the recording is going to be admitted, demand that the jury be instructed *both* at the time of the recording is played *and* in the final charge that police are permitted to lie and deceive during interrogations and that their statements of opinion are only admissible for the limited purpose of showing that circumstances in which the defendant statements were made and are not to be considered as evidence or for the truth of the statements.

If the interrogating officers testify, be prepared to object to any statements which imply that they believed the defendant was guilty and lied when (s)he denied guilt.

When cross-examining the interrogating officers, establish that they were trained that it is permissible to lie, deceive, and state unfounded opinions when questioning suspects.

Be prepared to show the officer specific examples of such conduct during the interrogation of your client (that means you need to have first prepared a transcript of the recording and, using that, you need the ability to quickly show the precise moments during an interrogation when these techniques were used).

Also, be prepared to object to any statements made by the prosecutor in summation which reinforces or echoes the officers's statements during the interrogation.

Remember, a typical interrogation consists of multiple denials of guilt, and then an eventual admission to some of the charged conduct. Your job is to help the jury understand why the fact that your client ultimately made some admissions does not mean that your client is guilty.