

**THE TAPE NEVER LIES:
RECORDING POLICE INTERROGATIONS TO REDUCE FALSE
CONFESSIONS IN WEST VIRGINIA**

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I. INTRODUCTION

[O]fficers of the criminal justice system—from law enforcement, to prosecutors, to defense attorneys, to judges, and even the jury—are called to both protect the public from lawbreakers and to protect the innocent from being wrongfully convicted. Electronic recording is a simple tool that serves both of these goals.

– The Honorable O.C. “Hobby” Spaulding,
Putnam County, West Virginia, Circuit Court Judge¹

Twenty-year-old Amanda Knox, an American student studying abroad in Perugia, Italy, sits alone in an Italian police station interrogation room. Days earlier, on November 2, 2007, her roommate Meredith Kercher, a British exchange student, was found brutally murdered—Knox and her Italian boyfriend, Raffaele Sollecito, are the prime suspects.² Over the next few days, Knox is heavily interrogated by several Italian

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¹ O.C. Spaulding, Op-Ed, *Police Should Use More Technology*, THE CHARLESTON GAZETTE, Oct. 19, 2013, § 4, available at <http://wvinnocenceproject.wvu.edu/r/download/174495>.

² *Timeline: Meredith Kercher Murder Case*, CNN, <http://www.cnn.com/2011/09/28/world/europe/italy-amanda-knox-timeline/> (last visited Apr. 1, 2015).

police officers when suddenly, on November 5th, the case breaks.³ Alone, without an attorney, without food or sleep, and speaking in a language she is not entirely fluent in, Amanda Knox confesses—at 1:45 am and 5:45 am—to murdering her roommate.⁴ Her confession, despite an Italian law mandating it, is not recorded.⁵ As Amanda Knox vehemently maintained her innocence throughout her ordeal,⁶ it begs the question—why confess to a crime you never committed?

Contrary to popular opinion, suspects falsely confessing to a crime is not an anomaly. According to the Innocence Project, false confessions have played a role in nearly 30% of cases overturned through DNA testing.⁷ False confessions are not just a problem unique to the United States' criminal justice system however; incidences have been documented all over the world.⁸ Now reaching global recognition, as evidenced by the Amanda Knox case, something must be done to impede its progress.

A false confession is “an admission of guilt followed by a narrative statement of what, how, and why the confessor committed the crime.”⁹ Today, researchers have distinguished three types of false confessions: (1) voluntary; (2) coerced-compliant; and (3) coerced-internalized.¹⁰ Voluntary false confessions “are those in which people claim responsibility for crimes they did not commit without prompting or pressure” from outside forces.¹¹ Conversely, in compliant confessions, “the suspect capitulates in order to escape a stressful custodial interrogation, avoid physical or legal punishment, or gain a promised or implied reward.”¹² Finally, internalized confessions are “those in which

³ See *The Illegal Interrogation of Amanda Knox*, INJUSTICE IN PERUGIA, <http://www.injusticeinperugia.org/TheInterrogation.html> (last visited Apr. 1, 2015).

⁴ See Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOLOGIST 431, 431 (2012); see also *Confession Leads to Amanda Knox's First Conviction*, ABC NEWS, <http://abcnews.go.com/2020/video/confession-leads-amanda-knox-conviction-22332268> (last visited Apr. 1, 2015). In a tell-all interview with Diane Sawyer, Amanda Knox explains, in detail, being interrogated by the Italian Police Force. *Id.*

⁵ See Kassin, *supra* note 4, at 431.

⁶ See Elisha Fieldstadt, *Amanda Knox Case: Italian Court Overturns Murder Conviction*, NBC NEWS, <http://www.nbcnews.com/news/world/amanda-knox-case-italian-court-overturns-murder-conviction-n331501> (last visited April 15, 2015).

⁷ See *False Confessions or Admissions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Apr. 1, 2015).

⁸ See Saul M. Kassin, *The Psychology of Confessions*, 4 ANN. REV. L. SOC. SCI. 193, 194 (2008), available at [http://web.williams.edu/Psychology/Faculty/Kassin/files/Kassin%20\(2008\)%20-%20ARLSS%20Chapter.pdf](http://web.williams.edu/Psychology/Faculty/Kassin/files/Kassin%20(2008)%20-%20ARLSS%20Chapter.pdf) (noting that false confession case studies have been documented in Canada, Great Britain, Norway, Holland, Sweden, Iceland, Ireland, Australia, New Zealand, China, and Japan).

⁹ *Id.*

¹⁰ *Id.* at 195.

¹¹ *Id.*

¹² *Id.*

innocent but vulnerable suspects confess and come to believe they committed the crime in question”¹³

Law enforcement, however, is not given a free reign during an interrogation; suspects do have some constitutional rights once an interrogation commences. In the famous case, *Miranda v. Arizona*,¹⁴ the United States Supreme Court held that “[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from [a] defendant can truly be the product of his free choice.”¹⁵ Yet, the *Miranda* warnings, alone, are not enough to protect defendants from confessing to a crime they did not commit.¹⁶ More is needed to ensure constitutional due process rights are protected.

In conjunction with the Department of Justice, over 20 states have required all custodial interrogations be electronically recorded—West Virginia needs to join this list.¹⁷ The West Virginia Innocence Project, in conjunction with the late Judge O.C. “Hobby” Spaulding, created a bill addressing this very problem; the bill was introduced to the legislature in 2014, but unfortunately, failed to pass.¹⁸ Thus, this Article argues that the legislature needs to re-consider a bill mandating electronic recording of custodial interrogations again because recording (1) ensures defendants are protected if they waive their *Miranda* rights; (2) mitigates the immense impact false confessions have at trial; and (3) affords *both* the prosecution and the defense a plethora of benefits.

Implementing a change in West Virginia law enforcement training requires an understanding of why innocent people confess to crimes they did not commit in the first place. Part II, therefore, chronicles the psychological and situational traits that lead to false confessions. Finally, Part III discusses the reasons why West Virginia should pass a statute mandating all custodial interrogations be electronically recorded.

II. FALSE CONFESSIONS: WHAT PROMPTS THE INNOCENT TO CONFESS?

Following a brutal rape in New York City’s Central Park, five African and Hispanic American boys, ages ranging from fourteen to sixteen years old, confessed to

¹³ *Id.*

¹⁴ 384 U.S. 436 (1966) (creating the famous *Miranda* warnings: The person in custody must, prior to interrogation, be clearly informed that he/she has the right to remain silent, and that anything the person says will be used against that person in court; the person must be clearly informed that he/she has the right to consult with an attorney and to have that attorney present during questioning, and that, if he/she is indigent, an attorney will be provided at no cost to represent him/her).

¹⁵ *Id.* at 458.

¹⁶ See *infra* Part III.A.

¹⁷ See *False Confessions & Mandatory Recording of Interrogations*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/False-Confessions.php> (last visited Apr. 2, 2015); see also Saul M. Kassir, *The Social Psychology of False Confessions*, 9 SOC. ISSUES POL’Y REV. 25, 42 (2015).

¹⁸ See O. C. Spaulding Electronic Recording Act, S.B. 440, 2014 Leg. Sess. (W. Va. 2014).

the crime.¹⁹ Although all the boys retracted their confessions, claiming police coercion and intimidation, the jury still convicted them *despite* DNA evidence found on the victim excluding them as the perpetrators.²⁰ Thirteen years later, it was discovered that another person committed the crime.²¹ While the five boys' confessions were recorded, the entire interrogation was not.²²

The 1989 "The Central Park Five" rape investigation illustrates the power of false confessions. Research has shown that some characteristics, whether inherent in the suspect or in the interrogation itself, increase the probability for false confessions to occur. First, Part II.A delves into the most notable—and notorious—Milgram experiment examining the lengths people will go to comply with authority figures. Next, Part II.B describes the two different areas, interrogation tactics and suspect risk factors, which can lead to false confessions.

A. *Obedying Authority Figures: The Milgram Experiment*

In 1961, Yale University psychologist, Stanley Milgram, conducted an experiment investigating the lengths ordinary people would go to obey authority figures.²³ Prompted by the atrocities the Nazis committed during World War II, Milgram wanted to study just how far along a person would obey an authority figure even when asked to do something he or she did not want to do.²⁴

Recruiting forty males, each varying in ethnic and socioeconomic background, Milgram then introduced them to another participant, a "Mr. Wallace"; unknown to the test subjects, however, "Mr. Wallace" was a confederate—accomplice—of Milgram.²⁵ Milgram, in the presence of the test subject, then attached electrodes to the confederate's arms.²⁶ What the test subject did not know, however, was that the electrodes were fake.²⁷ Milgram and the test subject then went to another room containing a shock generator with the amount of volts beginning at 15 and ending at 450.²⁸ Milgram proceeded to have the confederate memorize a list of words; the test subject would then test the confederate's

¹⁹ See Kassin, *supra* note 17, at 25. A documentary, THE CENTRAL PARK FIVE (Sundance Selects 2012), was also created about the case.

²⁰ *Id.*

²¹ *Id.* at 25–26.

²² *Id.*

²³ See generally Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL SOC. PSYCHOL. 371 (1963), available at <http://www.columbia.edu/cu/psychology/terrace/w1001/readings/milgram.pdf>.

²⁴ See Saul McLeod, *The Milgram Experiment*, SIMPLY PSYCHOLOGY, <http://www.simplypsychology.org/milgram.html> (last visited Apr. 2, 2015).

²⁵ Milgram, *supra* note 23, at 372–73.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 373.

memory by asking him to repeat the list of words back.²⁹ If the confederate got an answer wrong—which the confederate purposefully did—the test subject would then administer an electrical shock, increasing the voltage each time.³⁰ If the test subject refused to shock the confederate, Milgram would then issue four orders/prods to see if the test subject would continue to resist or continue shocking the confederate again.³¹

Results were staggering. All 40 participants went over the 300-volt threshold.³² In addition, 65% of the participants continued to shock the confederate to the maximum allowed voltage of 450.³³ Although the test subjects displayed feelings of anguish and distress in doing so, they continued to follow Milgram's orders even at the expense of the confederate's health.³⁴ Despite the obvious ethical violations involved in the study, Milgram's experiment revealed the length ordinary people will go to comply with authority figures. Although Milgram's findings have been subject to controversy, their overall impact on the study of human obedience cannot be understated.³⁵

B. *Situational and Internal Characteristics Leading to False Confessions*

Like with Amanda Knox or the “Central Park Five,” numerous variables exist that can make a person confess to a crime he or she did not commit. Whether they are situational factors or dispositional traits inherent in a person, research has shown that either one can increase the risk of a false confession. Part II.B.1 therefore investigates the situational tactics used in police interrogations that can increase the chance of a false confession. Next, Part II.B.2 examines what traits can make people vulnerable to falsely confessing.

1. Interrogation Tactics

Three interrogation elements can induce a confession to a crime: (1) length of time; (2) presenting false evidence; and (3) minimization.³⁶

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 373–74. The four prods were “Prod 1: Please continue or Please go on. Prod 2: The experiment requires that you continue. Prod 3: It is absolutely essential that you continue. Prod 4: You have no choice, you *must* go on.” *Id.* at 374 (emphasis in original).

³² *Id.* at 375–76.

³³ *Id.*

³⁴ *Id.*

³⁵ *See All Things Considered: Taking a Closer Look at Milgram's Shocking Obedience Study*, NPR (Aug. 28, 2013), <http://www.npr.org/2013/08/28/209559002/taking-a-closer-look-at-milgrams-shocking-obedience-study>; *see also* Cari Romm, *Rethinking One of Psychology's Most Infamous Experiments*, THE ATLANTIC, <http://www.theatlantic.com/health/archive/2015/01/rethinking-one-of-psychologys-most-infamous-experiments/384913/> (last visited Mar. 13, 2015).

³⁶ *See* Kassin, *supra* note 8, at 201.

Police interrogations last an average of 1.60 hours.³⁷ Longer interrogations therefore induce sleep deprivation, fatigue, despair, and isolation, all of which have been found to impair decision-making components.³⁸ Therefore, it is not surprising that false confessions consistently occur in interrogations that go over the normal time window.³⁹ In a study examining 125 false confession cases, interrogations in 34% of those cases lasted between 6 and 12 hours and interrogations in 39% of those cases lasted between 12 and 24 hours.⁴⁰ Thus, 84% of those confessions occurred during interrogations that lasted over 6 hours.⁴¹

The second tactic that can cause false confessions in interrogations is the false evidence ploy. The Supreme Court of the United States has held that law enforcement can use non-coercive methods, such as lying and deception, in the interrogation room.⁴² One such method is the presentation of supposedly incontrovertible—but false—evidence of guilt to the suspect hoping he or she will confess to the crime.⁴³ This tactic has led to numerous false confession claims, as human beings are highly malleable creatures. Introducing false evidence to an otherwise innocent suspect nearly doubles the chance that the person will confess.⁴⁴

The third factor is called minimization. Here, interrogators “minimize” the crime by providing the suspect moral justifications—such as peer pressure, provocation, or spontaneity—for his or her actions.⁴⁵ This tactic leads suspects to confess because they infer that they may get a lighter sentence because they cooperated with the police—even though no promise has been made.⁴⁶ Because suspects crave some sort of leniency, minimization techniques have been led to increase the rates of false confessions.⁴⁷

Law enforcement tactics in an interrogation are not the sole reason that false confessions occur. Traits inherent in people also contribute to the problem.

³⁷ *Id.* at 201.

³⁸ *Id.* at 201; *see also* THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW 6, *available at* [http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project\(07\).pdf](http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project(07).pdf).

³⁹ Kassin, *supra* note 8, at 201.

⁴⁰ *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 948 (2007); *see also* Kassin, *supra* note 8, at 201.

⁴¹ *See* Drizin & Leo, *supra* note 40, at 948 (“50% of the false confessors were interrogated for more than twelve hours”).

⁴² *See generally* *Frazier v. Cupp*, 394 U.S. 731 (1969) (holding that law enforcement can lie to suspects about evidence during interrogation).

⁴³ Kassin, *supra* note 8, at 201.

⁴⁴ *See* Saul M. Kassin & Katherin L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 127–28 (1996).

⁴⁵ Kassin, *supra* note 8, at 202.

⁴⁶ *Id.* at 203.

⁴⁷ *Id.*

2. Suspect-Dispositional Risk Factors

Certain groups of people are more vulnerable to making a false confession than others are. Those with an eagerness to please are at an increased risk to falsely confess to a crime.⁴⁸ Furthermore, people who are more anxious, delusional, or depressed have been found to bend to the whim of their interrogators more easily than others as well.⁴⁹

Two groups of people, however, are overrepresented in false confession cases: (1) juveniles and (2) those with intellectual disabilities.⁵⁰ Because juveniles “are cognitively and psychosocially less mature than adults,” they are more malleable and thus more vulnerable to manipulation by law enforcement officers.⁵¹ Regarding those with intellectual disabilities, many cannot comprehend their legal rights in the interrogation room due to their limited cognitive function.⁵² In addition, people with disabilities may confess to the crime just to avoid the discomfort of interrogation.⁵³

Both situational and dispositional risk factors equally contribute to the alarming trend of false confessions. To prevent more people confessing to crimes they did not commit, either because they are more inclined to do so based on their age or because they feel compelled to by the police, recording interrogations is a simple way to ensure that the correct people are being adjudicated for the crimes they in fact committed.

III. CUSTODIAL INTERROGATIONS MUST BE ELECTRONICALLY RECORDED

With the growing trend of recording all custodial interrogations, West Virginia must now, too, join the ranks. This Part answers why it must do so. First, Part III.A describes why relying on the *Miranda* warnings alone to protect the innocent is not enough. Next, Part III.B examines the significant impact confessions have on juries and argues that such evidence should never reach the courtroom. Finally, Part III.C concludes by discussing why both the prosecution and the defense should want all interrogations recorded.

A. *Miranda Warnings Do Not Adequately Protect Suspects During Interrogations*

A suspect’s rights are constitutionally safeguarded before a police interrogation can occur.⁵⁴ Yet, relying on the *Miranda* warnings to protect a person during an interrogation is not enough. First, many people—due to maturity, age, education levels—

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*; see also THE JUSTICE PROJECT, *supra* note 38, at 6.

⁵¹ Kassin, *supra* note 8, at 204.

⁵² *Id.* at 206.

⁵³ *Id.*

⁵⁴ See generally *Miranda v. Arizona*, 384 U.S. 436 (1966).

lack the capacity to understand what the *Miranda* rights actually are and how to apply them in an interrogation setting.⁵⁵ Second, many people routinely waive their *Miranda* rights: four out of five people have been found to do so.⁵⁶

Some possible reasons exist why a person in an accusatorial interrogation would waive their only protection. Today, police are specifically trained to elicit *Miranda* waivers from suspects.⁵⁷ In addition, many people, who are or think they are innocent, implicitly—and perhaps naively—trust that the process will work and that their innocence will be unveiled.⁵⁸ This phenomenon, known as the Innocence-Confession Paradox, has actually backfired on people as this has led some to falsely confess to crimes they did not commit.⁵⁹ Without the constitutional protections the *Miranda* warnings provide people, once they enter the interrogation room and waive their rights they are at the mercy of their interrogators. Recording interrogations, thus providing outsiders a full view of what really happened, would provide suspects another layer of protection the *Miranda* warnings alone do not give.

B. Confessions Have an Immense Impact on the Jury in Trial

A confession introduced at trial “is so potent that ‘the introduction of [it] makes the other aspects of a trial in court superfluous.’”⁶⁰ Attorneys, police, and even judges have a difficult time distinguishing true confessions from false confessions.⁶¹ Jury studies, in particular, have shown that confessions have a greater impact than other pieces of evidence such as eyewitness and character testimony.⁶² In addition, confession evidence is so powerful that even when the confession seems to be logically or legally coerced, juries still cannot fully discount its worth.⁶³ Because many people are visually simulated, recording interrogations gives the jury the chance to view all situational

⁵⁵ See Kassir, *supra* note 8, at 199.

⁵⁶ See Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996); see also Kassir, *supra* note 8, at 200.

⁵⁷ Kassir, *supra* note 8, at 200. See generally Richard A. Leo, *Miranda’s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC’Y REV 259 (1996).

⁵⁸ Kassir, *supra* note 8, at 200. See generally Saul M. Kassir, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOL. 215 (2005).

⁵⁹ Kassir, *supra* note 8, at 206–07.

⁶⁰ *Id.* at 208.

⁶¹ THE JUSTICE PROJECT, *supra* note 38, at 7.

⁶² *Id.*

⁶³ Kassir, *supra* note 8, at 209. See generally Saul M. Kassir & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 L. & HUM. BEHAV. 469 (1997) (investigating how jurors do not discount confession evidence at trial even when the confessions were clearly coerced).

factors present during the interrogation and also an opportunity to see how the confession was elicited from the suspect.⁶⁴

C. Recording Interrogations Benefits Both the Prosecution and the Defense

Contrary to what people may think, it has been argued that “[t]he greatest beneficiaries of a mandatory video recording rule are *not criminal suspects and defense attorneys*, but police and prosecutors.”⁶⁵ Recording interrogations affords many benefits to the police. First, law enforcement can concentrate on the person’s answers and demeanor instead of taking notes.⁶⁶ This allows officers to go back and see if perhaps a suspect’s story changes as the investigation continues.⁶⁷ Second, it provides a tool for new officers to learn effective interrogation techniques that can be applied later in their careers.⁶⁸ Third, it presents an objective record in case the defense accuses the police of abuse or coercion.⁶⁹ Playing a tape of a non-coerced confession can effectively eliminate all motions to suppress.⁷⁰ Finally, taped interrogations often lead to more guilty pleas because they bolster the strength of the prosecution’s case.⁷¹

As expected, recording interrogations protects suspects from falsely confessing to a crime they did not commit. It provides an avenue for the court to decide whether the confession was coerced or whether it was voluntary and reliably given.⁷² Also, as explained above, it can provide the jury visual proof of what happened in the interrogation room.⁷³ Finally, it simply adds another layer of protection for the person.

IV. CONCLUSION

Although many West Virginia jurisdictions already record interrogations, the O.C. Spaulding Electronic Recording Act was created to provide uniform rules and parameters for all West Virginia law enforcement agencies to follow.⁷⁴ Despite its failure in the legislature, West Virginia lawmakers cannot continue to turn a blind eye to all the research and benefits recording interrogations provides. To avoid future incidents like what Amanda Knox and “The Central Park Five” endured, West Virginia must reconsider

⁶⁴ Kassin, *supra* note 8, at 210.

⁶⁵ THE JUSTICE PROJECT, *supra* note 38, at 7 (emphasis added) (quoting another source).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 7–8.

⁷³ *Id.* at 8.

⁷⁴ See O. C. Spaulding Electronic Recording Act, S.B. 440, 2014 Leg. Sess. (W. Va. 2014).

its position and follow the other states out there by passing a bill that will help prevent potentially innocent people from being imprisoned for crimes they did not commit.