

Court Rings False Note On False Confessions

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Body

It is time for New York state to make a confession of its own: innocent people don't confess to crimes they didn't commit unless they are coerced, and a confession to a crime one didn't commit ought never be a bar to a wrongly imprisoned person's right to compensation.

Last month the Court of Appeals issued a highly anticipated decision in Warney v. New York, 2011 N.Y. LEXIS 502, where a wrongly convicted man, someone proven to have been not merely "not guilty" but actually innocent, was blocked by two lower courts from seeking compensation for his wrongful imprisonment because he had originally confessed, and in the lower courts' eyes, did "by his own conduct cause or bring about his conviction," a bar to recovery under New York Court of Claims Act 8-b, the Unjust Conviction and Imprisonment Act.

Talk about potentially rubbing salt in an open wound—investigators coerce you into confessing, but you can't recover compensation for being wrongly imprisoned because the confession you were coerced into giving helped send you away!

The Warney Court recognized that Douglas Warney's pleadings sufficiently detailed his allegation of coercion in order to survive the state's motion to dismiss. The Court noted the lower court's "dismissal was based in large part on factual determinations that were inappropriate at this stage of the litigation." But it also allowed the state to disprove Mr. Warney's claim of coercion at later stages in the proceedings. In other words, the Court made Mr. Warney's case one about pleadings, not confessions.

In so doing, the Court clung to the discredited notion that innocent people confess to crimes without being coerced, and missed a perfect opportunity to both educate the justice system about the mistaken mythology of confessions and remove an unreasonable and illogical barrier to compensation for innocent men and women forced to endure the nightmare of being imprisoned for a crime they didn't commit.

Mr. Warney, with an I.Q. of 68 and a seventh-grade education, was charged with a grisly murder: stabbing his neighbor to death for no apparent reason. While in police custody, but before he had an attorney, Mr. Warney signed a lengthy confession, including in it details known only to the police and the actual killer. Mr. Warney's court-appointed attorneys unsuccessfully sought to suppress his confession before trial, and Mr. Warney testified at trial that his confession was coerced. The jury convicted him and he spent nine years in prison before DNA evidence both set him free and identified the real killer (whose fingerprints had been found at the crime scene).

Arguably, someone who freely confesses to a crime he didn't commit, and where that confession is used to convict that person, did "by his own conduct cause or bring about his conviction."

I write "arguably" because the notion that there are any such cases of an innocent person confessing to a crime without coercion is frankly dubious (or at least ridiculously rare), once one accepts coercion to mean not just the

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use or threatened use of physical force, but the application of skilled interrogation practices to manipulate a subject into believing (either consciously or not) that confessing is in their best interest.

The **Warney Court's** door to this understanding was opened in a concurring opinion (written, ironically, to emphasize that coerced confessions of innocent men and women should still remain a bar to recovery), which describes "the sort of calculated manipulation that appears to be present here, even if the police did not actually beat or torture the confessor, or threaten to do so." But for such manipulation, the concurrence asks, "How indeed could he have known all these facts?"

Exactly. The phenomenon of manipulated confessions has been widely studied and documented, and is less a reflection of deliberate investigatory misconduct than it is of the changing nature of interrogations. As one scholarly review of the subject put it, "[W]here once police routinely relied on third degree practices, today interrogation tactics are more psychological. As American investigators have abandoned the use of force, they have articulated, developed, and refined increasingly subtle and sophisticated interrogation methods and strategies."¹

But the **Court** chose not to walk through the open door and declare that an innocent person's confession cannot be used to blame such person for their wrongful conviction. (The oxymoronic phrase "innocent person's confession" alone should shock anyone into a clear repudiation of ever blaming an innocent person for making a confession while in police custody to a crime they didn't commit.)

That's a shame. False confessions are unnervingly common. A 2008 study of the nation's first 200 post-conviction DNA exonerations (from 1989 to 2007) showed that 16 percent confessed to serious crimes, like murder and rape, we now know they didn't commit.² The 16 percent false confession rate was also found in a later, 2010 survey of the nation's first 252 post-conviction DNA exonerations.³

Perhaps more unnerving is how susceptible ordinary people are to giving false confessions under modern interrogation techniques. Trust me, in the right circumstances it could happen to you.

Legislation I have sponsored, A.7004,⁴ the Coerced Confession Remediation Act, would clarify New York law so that a person who has been exonerated will not be blocked from receiving compensation merely because they "confessed" to a crime they didn't commit. Continuing to pretend that innocent people freely offer detailed accounts of their guilt without being coerced or manipulated would be a form of false confession on our part as to the fairness of our justice system.

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¹ Richard J. Ofshe and Richard L. Leo, "Symposium on Coercion: An Interdisciplinary Examination of Coercion, Exploitation and the Law: II Coerced Confessions: The Decision to Confess Falsely: Rational Choice and Irrational Action," 74, Denv. U. L. Rev 979, 1120 (1997)

² Brandon L. Garrett, "Judging Innocence," 108 Colum. L. Rev. 55, 60 (2008).

³ Brandon L. Garrett, "The Substance of False Confessions," 62, Stan. L Rev. 1051, 1052 (2010)

⁴ A.7004, the Coerced Confession Remediation Act, is in the Assembly Codes Committee.

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