8-20-2012

State v. Stone Appellant's Brief Dckt. 39229

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. CHRIS ALLEN STONE, Defendant/Appellant.	)	S.Ct. No. 39299-2011

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Third
Judicial District of the State of Idaho
In and For the County of Canyon

HONORABLE RENAE HOFF
Presiding Judge

Dennis Benjamin
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
db@nbmlaw.com

Attorneys for Appellant

Lawrence Wasden
IDAHO ATTORNEY GENERAL
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

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II. STATEMENT OF THE CASE

A. *Nature of the Case.*

This is an appeal from the denial of a motion to suppress statements after a conditional plea of guilty.

B. *Pre-Trial Proceedings.*

1. The charge.

Chris Stone was charged by indictment with the first-degree premeditated murder of his wife, Florence Stone. The indictment also alleged a sentencing enhancement for the use of a firearm during the commission of the offense. CR 28-29. Mr. Stone entered not guilty pleas. CR 42. The charge was later reduced to second-degree murder by the filing of an amended indictment and a not guilty plea to the reduced charge was entered. CR 84, 94.

2. The motion to suppress.

A motion to suppress statements was filed and a hearing on the motion was set. CR 58-61, 70. Mr. Stone sought to suppress evidence obtained as a result of law enforcement interviews and a subsequent recorded telephone call from the Ada County Jail. Transcripts of the interviews were admitted at the suppression hearing as State's Exhibits 1 and 2. At first, Mr. Stone told the police that he shot his wife in self-defense after she stabbed him in the abdomen with a knife. But after nearly eight hours of interrogations and only after implied promises of leniency by the detective, Mr. Stone changed his statement, at the suggestion of the detective, to say that he shot Florence because she angered him with the comment that she had only married him in order to obtain a green card. Mr. Stone repeated that involuntary statement later that same evening to his mother in a recorded telephone conversation from the Ada County Jail.

Defendant's Exhibit C.

The court held an evidentiary hearing. It did not make written findings of fact or written conclusions of law, but it orally made the following nine findings of fact:

1.[1] On August 29, 2010, Canyon County deputies were dispatched to 22798 Elsie Road in Caldwell, Idaho, regarding a shooting and possible stabbing.

2. When they arrived, they discovered defendant Stone standing in front of the residence talking on his cell phone. Corporal Paul Maund ordered Stone to get on his knees and handcuffed him. Stone volunteered the following statement to Deputy Maund, "It was self-defense, I had to do it."

2.1. After Stone was handcuffed, Deputy Frank Hernandez approached Stone. Deputy Hernandez then Mirandized Stone, and Mr. Stone responded that he understood his rights.

2.2. Stone then inquired as follows: "Is it in my best interest to keep quiet?" and Deputy Hernandez responded, "Completely up to you."

2.3. Stone then informed Officer Hernandez that he was a speech language pathologist, he was 49 years of age, that he had never been arrested, that he had never previously shot anyone or been stabbed.

2.4. Mr. Stone then volunteered that he had a concealed weapon permit and stated to Officer Hernandez, "And if I hadn't have had my gun, she'd be calling you right now telling you I'm dead." Officer Hernandez's response was to inquire about Mr. Stone's injuries. Mr. Stone's response was as follows: "She stuck the F'ing knife deep inside me."

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[1] The court numbered its findings during the oral ruling. Mr. Stone has kept the court's numbering system, i.e., 1, 2, 3, etc, but has noted additional findings as 2.1, 2.2, 2.3 etc, in cases where the court made more than one factual determination within a single "finding."

3. Mr. Stone was then placed in an ambulance and transported. Officer Hernandez assisted by riding in the ambulance to keep medical staff secure. He then remained at the hospital with defendant Stone.

4. Mr. Stone continued to engage Officer Hernandez as well as EMTs in conversation throughout the ride to the hospital in Boise from the Caldwell location stating, "She married me for a green card."

4.1. The conversation between Caldwell and Boise consists of the transcript, Volume I, pages 14 through 63. During the ride to the hospital while being questioned by the EMT, Mr. Stone described himself as follows: "I am cognitive, I am coherent, I am in a little bit of pain, I feel awful about what just happened, but to tell you the truth, the way she was looking at me, one of us was going to die or get really first F'd up and I didn't choose this."

5. Upon arrival at the hospital, the handcuffs were removed from defendant Stone and the assigned detective, Christopher McCormick, took over. While Stone was being treated medically, he was again Mirandized by the detective. Once again, Stone indicated he understood his Miranda rights. Specifically, Detective McCormick advised the defendant that he was not under arrest or in custody.

5.1. But, Mr. Stone was being treated by use of a breathing device and, as a result, was not able to leave the room on his own. Detective McCormick acknowledged in testimony that he did not have enough evidence to arrest the defendant at that point.

5.2. He described Mr. Stone's demeanor as pleasant, lucid, joking, alert, and outgoing. He further stated that the defendant did not appear confused or incoherent throughout the interview and that he was not aware of any medication the defendant was being given at the time.

He further noted that the defendant did not appear to be under the influence and that it was Mr. Stone who did most of the talking.

6. During the course of the next four to six hours, Detective McCormick continued to question Mr. Stone at the hospital as the defendant continued to be treated medically. Mr. Stone related initially that his wife, Florence, had come to the home to retrieve items of personal property. While loading them into the back of her minivan, she attempted to stab him in the abdomen. As a result, Mr. Stone indicated he retrieved the revolver from his pocket and fired two shots into the back of her head.

7. In the course of treatment, the defendant was removed from the room by medical personnel and administered a CAT scan. He was then returned to the room where Detective McCormick had remained. Detective McCormick challenged Mr. Stone's self-defense version of the incident indicating that a three-dimensional view that he had observed with the radiologist suggested that Mr. Stone had stabbed himself. Mr. Stone denied this, but indicated that in retrieving his pistol, his wife said something that he had never heard before: "I only married you for your green card."

8. The defendant suffers from diabetes, Type II. The hospital records indicate his blood sugar level was above 400 on August 29, 2010. Normal blood sugar is between 80 and 100. A blood sugar level that high, "has an impact on a person's ability to think very clearly."

8.1. In addition, the defendant was given at the hospital a pain medication, Dilaudid. Dilaudid "is a relatively fast-acting, very potent, opiate-type medication," which can cause a hypnotic effect and reduced defenses.

9. The defendant introduced expert testimony of Dr. Ofshe that Detective McCormick

used coercive interrogation techniques which caused the defendant to falsely adopt Detective McCormick's factual scenario of the killing being a spur of the moment response to Florence Stone's statement about the green card, not self-defense.[2] Dr. Ofshe also testified that Detective McCormick employed techniques in which Mr. Stone believed he would be granted leniency if he adopted Detective McCormick's factual scenario and treated more harshly if he did not do so, alleging that this resulted in the defendant's statement being involuntary.

T pg. 384, ln. 22 - pg. 390, ln. 7.

As the court noted in its findings, Richard Ofshe, Ph.D., testified at the motion hearing. Dr. Ofshe obtained his doctorate in Social Psychology from Stanford University. T pg. 19, ln. 4-18. He is professor emeritus of Sociology at the University of California at Berkeley and has been a member of the faculty since 1968. T pg. 27, ln. 1-16. (Dr. Ofshe's curriculum vitae was introduced as Defense Exhibit B.) Since obtaining his doctorate, Dr. Ofshe has studied cult or high-control environments and shared the 1979 Pulitzer Prize for Public Service in Journalism for an investigation on the Synanon organization. T pg. 21, ln. 3-7. In addition, he has extensively studied police interrogation, particularly whether police interrogation techniques can have the effect of eliciting false confessions. T pg. 21, ln. 9-20. At the beginning of that research, he reviewed the legal and social science literature in the field. He then began analyzing transcripts of police interrogations. In doing so, he developed a model of how police interrogations work, specifically of the tactics and techniques used during interrogation and the sequence of techniques. T pg. 22, ln. 23 - pg. 23, ln. 24. He is widely published on the topic of

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[2] Actually Dr. Ofshe did not offer an opinion about the truth or falsity of the statements. See T pg. 134, ln. 20 - pg. 135, ln. 2. See T pg. 135, ln. 15 - pg. 136, ln. 10 (where Dr. Ofshe testified that a statement could be both coerced and true).

police interrogation techniques generally and how those techniques can result in false confessions in particular. T pg. 30, ln. 14 - pg. 31, ln. 13.

Doctor Ofshe reviewed the interrogation transcripts in this case and came to several opinions. First, that the interrogation fit within the model of typical police interrogations which he had previously developed. T pg. 36, ln. 1-12. Second, that the interrogator, Detective McCormick, "developed a strategy to motivate Mr. Stone to abandon his initial account of what happened leading up to the shooting of his former wife and to substitute a scenario for the crime, and particularly for how he was – what motivated him to pull the trigger." The detective did so by linking Mr. Stone's initial version of the events "to severe consequences" while at the same time substituting the detective's theory of the case, i.e., that she was shot after insulting Mr. Stone, and linking that version "to receiving leniency." T pg. 36, ln. 14 - pg. 37, ln. 6.

Doctor Ofshe explained that the detective used a "psychological coercive motivational strategy" to communicate and reinforce the linkage between punishment and Mr. Stone's statement, while at the same time establishing a separate link between leniency and the detective's version of the events. T pg. 38, ln. 18-20. "[F]irst [he] communicated a promise of leniency by posing a hypothetical question to Stone. The question is designed to influence Stone to conclude that if he gives up the allegedly discredited self-defense account of the shooting and thereby supposedly stops trying to fool the judge, the judge will treat him leniently." The detective then "inform[ed] Stone that based on his experience, persons who confess get different sentences than those who try to deceive judges."[3] T pg. 37, ln. 7-14.

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[3] See Defendant's Exhibit A, pg. 10 ("Who do you think the judge is going to be more lenient, going to be more – going to want to work with more?") and pg. 14 ("From my experience, someone who wants to bullshit the system versus somebody who takes

Second, Doctor Ofshe testified that:

> He threatens Stone that if he continues in the self-defense story, that McCormick will be obliged to make up his own account of what happened. He reinforces that by setting out two alternatives, one that this is something that was planned or, as McCormick hopes, something that was just a spur of the moment thing. And he also assures, promises Mr. Stone that he will be punished more severely if he . . . continues to maintain his self-defense account.

T pg. 38, ln. 3-12.[4]

This strategy was specifically designed to link the "receipt of leniency to compliance and confessing and particularly adopting a scenario for the crime typically suggested by the interrogator" and to contrast that to the link between continuing to deny guilt and more severe punishment. Dr. Ofshe testified "that's exactly what McCormick did in this interrogation." T pg. 38, ln. 16 - pg. 37, ln.1.

The result of this technique "was that Mr. Stone shifted from his initial account from what happened . . . [and] adopted the motivational explanation that McCormick offered, [i.e.,] that something your former wife did broke you, caused you to snap. . . that basically this was a momentary loss of control[.]" T pg. 39, ln. 3-11. The doctor noted, "[w]hat's crucial here is there's a distinction between responding to her stabbing you versus responding to something she said. It's a shift to it's what she said that caused you to do this" instead of acting in self defense. T pg. 39, ln. 13-18.

Doctor Ofshe explained that this psychologically coercive motivational strategy is

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accountability, there seems to be some disparity between the sentence, okay?") Exhibit A was prepared by Dr. Ofshe. It takes excerpts from the interrogation transcript and uses them to illustrate his observations about the interrogation. T pg. 57, ln. 24 - pg. 58, ln. 25.

[4] Exhibit A, pg. 12 ("There's going to be consequences but I'll tell you what, they're going to be a whole hell of a lot more severe if you keep on playing the lie and deceit game.")

specifically taught by "Reid and Associates, the principal interrogation training organization in America." T pg. 52, ln. 13-14. "The mechanism for accomplishing this is to introduce a scenario for the crime, a story of how the crime happened that is endorsed by the interrogator that seems to justify leniency and the interrogator presses the suspect to adopt." T pg. 52, ln. 16-21.

Shortly after adopting Detective McCormick's scenario, Mr. Stone was placed in custody and taken to the Ada County Jail. From there, he called his mother and told her what he had just told Detective McCormick. Defendant's Exhibit C is a transcript of that telephone call. Doctor Ofshe testified that Mr. Stone would be expected to maintain the story he just recently adopted, especially since he knew the jail call was being recorded.

> If it's a statement that has been obtained by a promise of leniency or a threat of harm, then it would typical to maintain that statement for some period of time afterwards because they've agreed to so something to get a benefit and they're going to protect that.
>
> In this case, it doesn't even come to that because he knows, and his mother reminds him, that this is being tape-recorded and if he – and that takes away from him, in my judgment, any freedom as to what he might say to her. If he doesn't repeat the story, he's abandoning the deal that he's made, and now he's back in the same position that he would be prior to having made that, only worse.

T pg. 96, ln. 24 - pg. 97, ln. 12.

In conclusion, Dr. Ofshe's opinion was that the reason Mr. Stone changed his story was the detective's perceived promise of leniency and that the techniques employed by Detective McCormick were "indeed a psychologically coercive motivation tactic because it linked confession or compliance to the scenario that McCormick laid out to leniency and linked continuing denial of that and holding to the initial story to relatively more severe punishment." T pg. 100, ln. 9-17; pg. 101, ln. 12-20.

Mr. Stone then presented the testimony of Craig Beaver, Ph.D. The state objected to the

testimony in its entirety on relevance grounds. T pg. 147, ln. 15-16. The court allowed the testimony to be presented and deferred ruling on the state's objection. T pg. 151, ln. 21-23. Eventually, the court ruled that it would not consider "Dr. Beaver's testimony on the psychological makeup which may have caused the defendant to change his recollection of events." It did admit his "testimony in relation to the defendant's diabetes and the effects of the pain medication administered to the defendant." T pg. 384, ln. 6-13.

Dr. Beaver is a neuropsychologist. He holds a doctorate in clinical psychology and is a licensed psychologist in Idaho, Oregon and Washington. T pg. 9-25. He reviewed Mr. Stone's medical records from St. Alphonsus which were admitted into evidence as Defense Exhibit E. T pg. 165, ln. 6-7; 166, ln. 24-25. The records show that Mr. Stone has a history of Type II diabetes and "[b]y his own acknowledgment, he doesn't do a good job of controlling it." T pg. 183, ln. 3-6. A blood test taken at the hospital showed that his blood sugar level was over 400, with 80–100 being the normal range. Dr. Beaver stated that "the literature is very clear in neuropsychology that [once] you get substantially out of those ranges, people's thinking becomes clouded. So especially a blood sugar level that is that high has an impact on a person's ability to think very clearly." T pg. 183, ln. 3-19.

In addition, Mr. Stone was given the pain medication Dilaudid at the hospital. T pg. 183, ln. 20-23. He was given a shot of it and was also put on an I.V. drip with the drug. Diauldid is a "relatively fast-acting, very potent opiate type medication, and it has almost a hypnotic effect on individuals." It not only clouds the judgment of the patient but it "generally relaxes them, thus reducing their defenses." T pg. 184, ln. 3-10.

Dr. Beaver also testified that Mr. Stone was "highly suggestible in comparison to the

average person." T pg. 169, ln. 1405. He based his opinion on a clinical interview with Mr. Stone which revealed that while of average intelligence and above average education, Mr. Stone described a history of social anxiety, with very few close friends and a strong – almost dependent – attachment to his parents, especially for someone nearly fifty years old. T pg. 170, ln 2-23. Dr. Beaver noted that "people with social anxiety are more prone to want to please people in authority or power." T pg. 178, ln. 2-3. In addition, Mr. Stone had struggled with depression, was on medications for that and had been psychiatrically hospitalized in the past. T pg. 170, ln. 24 - pg. 171, ln. 8. Further, he had a high score (above the 75th percentile) in comparison to other criminal defendants on a validated and accepted psychological test, which revealed that he was highly suggestible. T pg. 176, ln. 14-15. The score was even higher when the comparison group was broadened from only criminal defendants to more normative groups. T pg. 176, ln. 16-21. In addition, Mr. Stone's very high general level of suggestibility was increased by the situational factors present during the interview, including the stress of having just shot and killed his wife, the stress and pain of being stabbed with a knife, the stress of being arrested at gunpoint and placed in handcuffs, the stress of being question by law enforcement while in the ambulance on the way to the hospital and the long duration of the interrogation. T pg. 179, ln. 8 - pg. 182, ln. 16.

In light of the above, Dr. Beaver stated that "Mr. Stone as a person who is highly suggestible, the context in which the interrogation by law enforcement took place would [have] substantially increase[d] the likelihood of his suggestibility. And so the two combined would be quite a potent combination with regard to his . . . suggestibility and the influenceability of his recollection of events." T pg. 188, ln. 1-8. He concluded that "as the interrogation wound down

in the early morning hours, it is my opinion that he was not able to resist the stories and questions that the law enforcement person was offering him." T pg. 190, ln. 3-7. In other words, Mr. Stone's will was overborne because he could not "resist the requests or actions of the another." T pg. 189, ln. 13-16.

3. The court's ruling.

The court concluded that Mr. Stone was not in custody at his home or at the hospital, that he understood his *Miranda* rights and he waived his rights. T pg. 395, ln. 3 - pg. 396, ln. 18. It also concluded that Mr. Stone's statements were not involuntary after considering the six factors set out in "*Berkemer v. McCarty*, 468 U.S. 420, 1984." [sic]. T pg. 398, ln. 14. Finally, it concluded that the tactics used by the police during the interrogations did not go "beyond what's considered appropriate," T pg. 403, ln. 20-22, and denied the motion to suppress, concluding that the statements were made voluntarily. T pg. 405, ln. 3.

C. *Conditional Guilty Plea.*

After the denial of the motion to suppress, the parties reached a settlement agreement. The state amended the amended indictment by striking the firearm enhancement. CR 84-85. Mr. Stone entered a conditional guilty plea to the second amended indictment reserving in writing "the right to appeal the Court's denial of the Defendant's motion to suppress and [agreeing that] if the Defendant prevails on appeal he will be allowed to withdraw his guilty plea." CR 144.

D. *Sentencing.*

The district court sentenced Chris to a twenty-year sentence with nine years fixed. CR 165. A timely Notice of Appeal was filed. CR 167.

III. ISSUES PRESENTED ON APPEAL

1. Did the court err in declining to consider the entire testimony of Craig Beaver in support of the motion to suppress?

2. Did the court err in concluding that the statements were made voluntarily in light of the evidence before it?

IV. ARGUMENT

A. *The Court Erred by Declining to Consider the Entire Testimony of Dr. Beaver.*

1. Facts pertaining to argument.

As noted above, Mr. Stone offered the testimony of Craig Beaver, Ph.D. as to his opinions regarding Mr. Stone's suggestibility and the factors which led to Mr. Stone changing his original story and adopting the story suggested by the detective. He also testified about the effect of Mr. Stone's medical condition and medicated state on his mental status.

At the hearing, the state objected on the ground that Dr. Beaver was planning to describe Mr. Stone's physical and psychological condition, whereas "this Court is asked to consider the State's conduct. That's what this hearing is about, not Mr. Stone's mental state without any State conduct." T pg. 146, ln. 20-22. The prosecutor went on to argue that "Dr. Ofshe at least could say, you know, these interview techniques are highly dangerous, I looked at the interviews, the police did this, the police did that." Dr. Beaver was only going to say that "Mr. Stone was susceptible to coercion," T pg. 147, ln 3-5, and this was not an appropriate consideration for the Court. *Id.*

Counsel for Mr. Stone responded that a variety of both Idaho Supreme Court and United States Supreme Court cases require the Court to consider the subjective circumstances of the

person being interrogated – not only the objective circumstances of the interrogation. T pg. 147, ln. 19 - pg. 148, ln. 21. In response, the prosecutor cited *Colorado v. Connelly*, 479 U.S. 157 (1986), arguing that it "says, yes, totality of circumstances is to be considered, but absent the police conduct that caused the will to be overborne, there is no basis for suppression." T pg. 150, ln. 3-6. The prosecutor seemed to argue that only subjective factors "that are readily observable to a police officer," such as "age, intelligence, education," were appropriate considerations for the Court, but that "Mr. Stone's depression, his mental state, his – I don't know – his lack of self esteem are not things that any police officer could reasonably be expected to be aware of, particularly where Mr. Stone was – well, to use Dr. Ofshe's phrase, chatty, talkative." *Id.,* T. pg. 150, ln. 7-16.

The court elected to hear Dr. Beaver's testimony as an offer of proof, and directed the parties to address in briefing its admissibility and its impact on the suppression decision. T pg. 151, ln. 21-24. The court later commented that the state had "made some compelling argument's that Dr. Beaver's testimony is irrelevant for this motion, particularly with regard to suggestability to authority figures, so I'm going to decline to consider Dr. Beaver's testimony on the psychological makeup which may have caused the defendant to change his recollection of events." T pg. 384, ln. 2-9. The court did not further elaborate on the basis for its ruling. It did admit his "testimony in relation to the defendant's diabetes and the effects of the pain medication administered to the defendant." T pg. 384, ln. 10-13. It did not note whether it would consider Dr. Beaver's testimony about the situation stress factors which also contributed to Mr. Stone's will being overborne.

The failure to consider all of Dr. Beaver's testimony was reversible error.

2. Why relief should be granted.

A trial court's determination of relevancy under I.R.E. 401 is subject to de novo review. *State v. Moore*, 131 Idaho 814, 819, 965 P.2d 174, 179 (1998); *State v. Rossignol*, 147 Idaho 818, 822, 215 P.3d 538, 542 (Ct. App. 2009). Evidence is relevant if "it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401; *State v. Hocker*, 115 Idaho 544, 768 P.2d 807 (Ct. App.1989). In this case, Dr. Beaver's testimony about Mr. Stone's suggestibility and the situational factors which affected Mr. Stone's ability to withstand the detective's interrogation techniques was plainly relevant.

To begin, *Colorado v. Connelly*, 479 U.S. 157 (1986), the case relied upon by the state (and presumably the court as well), involved a very different set of facts than the present case. There, a Denver police officer was in uniform, working in an off-duty capacity in downtown Denver. Mr. Connelly approached the officer, "and, without any prompting, stated that he had murdered someone and wanted to talk about it." 479 U.S. at 160. The officer advised Connelly of his *Miranda* rights. Connelly stated that he understood, but still wanted to discuss the murder. He stated that he had not been drinking or taking drugs and that, in the past, he had been a patient in several mental hospitals. *Id.* It was later determined that Connelly suffered from chronic schizophrenia, was actively psychotic at the time of his confession, and had been instructed by voices either to commit suicide or confess. *Id.*, 479 U.S. at 161.

The Colorado courts suppressed Connelly's confession because it was the product of a mental illness, but the United States Supreme Court reversed. It referred to several of its earlier voluntariness cases and concluded that "while each confession case has turned on its own set of

factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct." *Id.*, 479 U.S. at 163-4. Connelly's case, by contrast, was one simply of a person spontaneously providing a confession to police, without any element of overreaching, or indeed of any questioning whatsoever. Even Connelly agreed that "the police committed no wrongful acts ... ." *Id.*, at p. 165. Indeed, the only state action found by the lower courts was that the confession had been admitted into evidence in a state court. *Id.*

Presumably the prosecutor's reference during argument to Mr. Stone being "chatty, talkative," T pg. 150, ln. 16, was made to suggest that, like Connelly, Mr. Stone's statements were spontaneously volunteered. But the present case is a nothing like *Connelly*. Mr. Stone did not simply spontaneously confess. He was taken into custody at gunpoint sometime shortly after 6:00 p.m. and remained in the custody of police officers for the ensuing eight hours. He was extensively questioned, resulting in a transcript of some 369 pages. He was subjected to incommunicado detention. He was denied access to his parents despite repeated requests (both by him and his parents) for a meeting. T pg. 203, ln. 9 - pg. 204, ln. 7. He was also denied access to his cell phone, by which he could have contacted them or other supportive persons directly. Exhibit 1, pg. 15, ln. 8-9. Exhibit 2, pg. 157, ln. 5-6. He was denied access to a bathroom. *Id*, pg. 161, ln. 3-12. And he was subjected to psychologically coercive interrogation techniques.

In short, unlike in *Connelly*, there was abundant "police conduct causally related to the confession." 479 U.S. at 164. Nor is this a case where it was suggested that "defendant's mental condition, by itself and apart from its relation to official coercion should ... dispose of the inquiry into constitutional 'voluntariness.'" *Id.* In this case, officers coerced Mr. Stone, and when police officers take unfair advantage of interrogation subjects they take their victims as they find them.

Even the *Connelly* Court recognized that "mental condition is surely relevant to an individual's susceptibility to police coercion" – it simply ruled that absent coercion, "mere examination of the confessant's state of mind can never conclude the due process inquiry." 479 U.S. at 165.[5] Thus courts, both before and after *Connelly*, have considered a wealth of purely subjective factors in assessing the voluntariness of confessions. These include age,[6] sex,[7] race,[8] physical injury,[9] physical illness,[10] physical fatigue,[11] mental illness,[12] mental deficiency,[13]

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[5] Idaho courts have reached similar results in the absence of coercion. *Hollon v. State*, 132 Idaho 573, 579, 976 P.2d 927, 933 (1999), for example, was a case in which the defendant did "not assert that any police coercion occurred and focuses only on his mental state to support his argument that counsel should have moved to suppress his confession ... ."

[6] *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Haley v. Ohio*, 332 U.S. 596 (1948); *Doody v. Schriro*, 596 F. 3d 620 (9th Cir. 2010).

[7] *Lynumn v. Illinois*, 372 U.S. 528 (1963).

[8] *Davis v. North Carolina,* 384 U.S. 737 (1966); *Haley v. Ohio*, 332 U.S. 596 (1948).

[9] *Mincey v. Arizona*, 437 U.S. 385 (1978) (gunshot wound); *State v. Pickar*, 453 N.W.2d 783 (N.D. 1990) (rib injuries).

[10] *Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (high blood pressure); *Leyra v. Denno*, 347 U.S. 556 (1954) (sinus condition).

[11] *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *State v. Briggs*, 756 A. 2d 731 (R.I. 2000).

[12] *Colorado v. Connelly, supra*, 479 U.S. at 164 ("Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus," *citing Spano v. New York,* 360 U.S. 315 (1959)).

[13] *Bailey v. Comm.*, 194 S.W.3d 296 (Ky. 2006) (Defendant had a desire to be compliant, particularly with authority figures, as a result of a "mental deficiency.")

infirmity caused by alcohol or drug ingestion,[14] and prior experiences with police.[15]

In Idaho, as in all states, the test for voluntariness requires the court to consider "the totality of the circumstances," a standard which originated with *Haynes v. Washington*, 373 U.S. 503 (1963). Idaho courts have repeatedly looked to subjective information regarding defendants, whether known to the police or not, in assessing whether the defendant's will was overborne, considering the totality of the circumstances. *See, e.g., Woodward v. State,* 142 Idaho 98, 108, 123 P.3d 1254, 1264 (Ct. App. 2005) (among other factors, court looks to facts that defendant was "of normal intelligence," and had "had prior experience with law enforcement officers... ."); *State v. Cordova*, 137 Idaho 635, 639, 51 P.3d 449, 453 (Ct. App. 2002) (court lists whether defendant had "a history of mental illness" as a consideration bearing on the voluntariness of his statements, but notes that only counsel's representation to this effect, as opposed to actual evidence, was presented at the suppression hearing); *State v. Tapp*, 136 Idaho 354, 364, 33 P.3d 828, 838 (Ct. App. 2001) (unusually low IQ or cognitive defects).

While police overreaching is *necessary* to establish involuntariness, it is also *sufficient* to do so, so long as the defendant's will is in fact overborne. For example, in *State v. Davis*, 115 Idaho 462, 464-65, 767 P.2d 837, 839-40 (Ct. App. 1989), law enforcement authorities arrested the defendant's mother upon suspicion that she had participated in a robbery with him. When he was advised of this during questioning the defendant became very emotionally upset and confessed to the crime. The district court denied the motion to suppress, but the Court of Appeals

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[14] *Townsend v. Sain*, 372 U.S. 293 (1963) (medication with properties of truth serum); *State v. Vincik*, 398 N.W. 2d 788 (Iowa 1987) (valium administered during medical treatment).

[15] *Woodward v. State,* 142 Idaho 98, 108, 123 P.3d 1254, 1264 (Ct. App. 2005); *Stein v. New York*, 346 U.S. 156 (1953); *Haynes v. Washington*, 373 U.S. 503 (1963).

reversed. It wrote:

> [w]e disagree with the district judge's conclusion that, absent an improper motive by the interrogators, the confession should stand. Once coercive police conduct is established in connection with an interrogation, our focus on review is not upon the motive of the police, but upon whether the police conduct in any way deprived the defendant of his free will. We conclude that coercive conduct existed in this case and that, because of it, Davis's confession was not given voluntarily. We therefore hold that the confession should be suppressed as evidence of Davis's guilt.

Id. (citations omitted). *See also Miller v. Fenton*, 474 U.S. 104, 116 (1985) ("the admissibility of a confession turns as much on whether the techniques for extracting the statements, *as applied to this suspect*, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.") (emphasis added).

For all these reasons, Dr. Beaver's testimony regarding Mr. Stone's individual personality characteristics was plainly relevant to the voluntariness question. It should have been admitted and considered by the district court. This error was prejudicial because, had the court considered Dr. Beaver's testimony, it certainly would have granted the motion to suppress. How his testimony fit within the showing that Mr. Stone's statements were involuntary is set forth below. So, at the least, this Court should vacate the trial court's denial of the motion and remand the case for further proceedings. However, as is also explained below, the evidence, even excluding the portion of Dr. Beaver's testimony which was not considered by the trial court, still requires this Court to reverse the trial court's order denying the motion.

B. *The Court Erred in Concluding the Statements Were Voluntarily Made.*

When the decision on a motion to suppress is challenged on appeal, this Court will accept only those trial court findings of fact which are supported by substantial evidence. It will freely

review the application of constitutional principles to the facts so found and supported. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). Mixed questions of fact and law are also subject to de novo review. *The Highlands Inc. v. Hosac*, 130 Idaho 67, 69, 936 P.3d 1309, 1311 (1992).

In *State v. Cordova*, 137 Idaho 635, 51 P.3d 449 (Ct. App. 2002), the Court stated:

> The United States Supreme Court has recognized that a noncustodial interrogation might in some situations, by virtue of some special circumstance, be characterized as one where a defendant's confession was not given voluntarily. *See Beckwith v. United States*, 425 U.S. 341, 347-48 (1976); *see also State v. Troy*, 124 Idaho 211, 214, 858 P.2d 750, 753 (Ct. App. 1993). . . . .
>
> The proper inquiry is to look to the totality of the circumstances and then ask whether the defendant's will was overborne by the police conduct. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *Troy*, 124 Idaho at 214, 858 P.2d at 753. In determining the voluntariness of a confession, a court must look to the characteristics of the accused and the details of the interrogation, including: (1) whether Miranda warnings were given; (2) the youth of the accused; (3) the accused's level of education or low intelligence; (4) the length of the detention; (5) the repeated and prolonged nature of the questioning; and (6) deprivation of food or sleep. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *Troy*, 124 Idaho at 214, 858 P.2d at 753.

Id. at 638, 51 P.3d at 452. Thus, whenever "the defendant's free will is undermined by threats or through direct or implied promises, then the statement is not voluntary and is inadmissible." *State v. Valero*, — Idaho —, — P.3d — (Ct. App. 2012), *citing State v. Wilson*, 126 Idaho 926, 929, 894 P.2d 159, 162 (Ct. App. 1995). The burden is on the state to prove by a preponderance of the evidence that the statements were voluntary. *State v. Whiteley*, 124 Idaho 261, 268, 858 P.2d 800, 807 (Ct. App. 1993).

Each of the above six factors as well as additional considerations which show that the statements were not voluntary are discussed below.

1. Whether Miranda warnings were given.

While the court found that the police gave *Miranda* warnings, they also repeatedly played down the significance of the warnings by implying that they were mere formalities. Exhibit 1, pg. 8, ln. 4-9. ("And what I read you earlier was your Miranda rights and basically that's just for your protection and mine. You know what I mean? If you'd like to tell us your side of the story, hey, that would be awesome."); p. 39, ln. 21-25 (warnings are "... just to protect you and me. But again, we do need – we need to get, you know, obviously your side of the story now.").

Mr. Stone was never made to understand that the officers were confronting him in an adversarial environment, that they are not acting to protect his interests, and that nothing would prevent the full impact upon him of any incriminating statements. To the contrary, the officers implied that they were simply neutral fact finders, and that they could be trusted to act in Mr. Stone's best interest. See, e.g., Exhibit 2, pg. 31, ln. 6 ("Chris, nobody's judging you."); pg. 142, ln. 23-24 ("[W]e have to do a very through investigation just to protect you as much as to protect her, right?"). In addition, they stated that if Mr. Stone described the events of the shooting in a way they found credible, he would be treated leniently. Exhibit A, pg. 12 ("There's going to be consequences but I'll tell you what, they're going to be a whole hell of a lot more severe if you keep on playing the lie and deceit game.")

Thus, while Mr. Stone continued to answer questions posed by the police officers, he also repeatedly inquired of the officers whether doing so was in his best interest and whether he should have the advice of counsel before proceeding. The fact that *Miranda* warnings were administered has very little to do with whether his statements were voluntary given how the police downplayed the warning's importance.

2. The youth of the accused.

Mr. Stone was 49 years old at the time of the interrogation. T pg. 399, ln. 12. However, he had never had any contact with law enforcement. Upon contact with the police here, he immediately advised officers that this had never happened to him before. "I've never been – I'm 49 years old. I've never been arrested in my life." Exhibit 1, pg. 3, ln. 23-4. In *Woodward v. State*, 142 Idaho 98, 108, 123 P.3d 1254, 1264 (Ct. App. 2005), the Court of Appeals considered the fact that the defendant had "had prior experience with law enforcement officers" in finding his confession voluntary.

3. The accused's level of education or low intelligence.

Mr. Stone has a master's degree in speech pathology and did not "appear to be of . . . low intellect" to the court. T pg. 399, ln. 17-21.

4. The length of the detention.

Here, Mr. Stone was detained starting from sometime after 6:00 p.m. He was taken to the hospital and questioned until around 2:15 a.m. Exhibit 2, pg. 307, ln. 4. He was then arrested and taken to the Ada County Jail where he called his mother at 3:55 a.m. Exhibit C, pg. 2, ln. 10. Thus, the length of detention militates against a finding of voluntariness.

5. The repeated and prolonged nature of the questioning.

Here, Mr. Stone was questioned continuously from the time he was confronted at the house until he was arrested some eight hours later. This is obviously a long period of questioning. *Compare Berghuis v. Thompkins*, __ US __, __, 130 S. Ct. 2250, 2263 (2010) (three hour interrogation not inherently coercive); *State v. Radford*, 134 Idaho 187, 191, 998 P.2d 80, 84 (2000) (interview that lasted only for about two hours was not an excessive length of time).

6. Deprivation of food or sleep.

Mr. Stone did not eat nor did he sleep during the entire time from when the police arrived at his home to the end of the interview at 2:15 a.m., or presumably before he made the jail telephone call at 3:55 a.m.

Thus, none of the six factors listed above strongly support a finding of voluntariness. To the contrary, the length of detention and questioning, and the deprivation of food and sleep all militate against such a finding. But, when considering the totality of the circumstance, there are many other facts concerning the interrogation and about Mr. Stone in particular which prove the statements were not voluntary.

7. Mr. Stone's physical, emotional and psychological state during the interrogation.

Idaho cases hold that statements are not "voluntary" if, based upon the totality of the circumstances, the defendant's will was overborne. *State v. Radford*, 134 Idaho 187, 191, 998 P.2d 80, 84 (2000); *State v. Kuzmichev*, 132 Idaho 536, 544, 976 P.2d 462, 470 (1999). The "totality of the circumstances" test considers both subjective and objective factors. *See, e.g., United States v. Swint*, 15 F.3d 286, 289 (3rd Cir. 1994). Thus, so long as police overreaching is present, the totality of the circumstances which may be considered in making the voluntariness determination includes essentially any factors which might bear on the defendant's ability to exercise his free will. In this case, all the following circumstances show a lack of voluntariness.

(a) Mr. Stone was thrust into a highly stressful environment. He had been involved in the shooting of his former wife, and its tragic consequences, an extremely stressful event – indeed, Dr. Beaver testified that officers involved in on-duty shootings are treated according to a special protocol which provides them access to counseling and contact with

supportive persons prior to being questioned. T pg. 179, ln. 11 - pg. 181, ln. 3. Mr. Stone received none of the emotional support which trained law enforcement officers are provided after a shooting.

In addition, Mr. Stone had also been arrested at gunpoint, Mr. Stone had his clothing cut away from his body, was transported by ambulance to a hospital, and was administered emergency medical treatment. T pg. 224, ln. 12 - pg. 227, ln. 15. From the point of his arrest at the scene, and for some eight hours thereafter, he was never allowed to be out of the presence of police officers.

(b) Mr. Stone had also been stabbed and was in pain, which increases levels of stress. T pg. 184, ln. 15-20. While Mr. Stone reported that he was "in a little bit of pain," during the ambulance ride to the hospital, he complained to the detective that he was in a great deal of pain well prior to him adopting the detective's scenario. Exhibit 2, pg. 190, ln. 4 -10 (Mr. Stone: And boy, I got to tell you something, man. This hurts like hell. This hurts ten times worse than it did when it happened. Is that common? Det. McCormick: Yep. All the adrenaline is leaving your body right now. Mr. Stone: Wow, this – this does not feel good.) Numerous courts have recognized physical injury as a factor which diminishes the voluntariness of a statement. *See, e.g., Mincey v. Arizona*, 437 U.S. 385 (1978) (gunshot wound); *State v. Pickar*, 453 N.W.2d 783 (N.D. 1990 (rib injuries).

(c) At the hospital, Mr. Stone's blood was tested and his blood glucose level was over 400, some 4 times normal levels. At these levels "people's thinking skills become clouded. So especially a blood sugar level that is that high has an impact on a person's ability to think very clearly." T pg. 183, ln. 14-19. Courts have routinely suppressed statements obtained from

persons suffering from physical ailments. *See, e.g., Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (high blood pressure); *Leyra v. Denno*, 347 U.S. 556 (1954) (sinus condition).

(d) Mr. Stone had also been administered Dilaudid, which is:

> a relatively fast-acting, very potent opiate type medication, and it has an almost hypnotic effect on individuals. And so it not only clouds their perception and their thinking skills, but generally relaxes them, thus reducing their defenses. He was given a shot of Dilaudid and then had I.V. Dilaudid when they started the drip on him in the hospital.

Id., p. 184, ln. 4-10. Intoxication is also a factor to consider in the totalities of the circumstances and can lead to a finding of involuntariness. "[V]oluntariness is not necessarily established by proving that the confession was spontaneous or by proving the absence of an improper purpose on the part of the questioning officers. If by reason of mental illness, use of drugs, or extreme intoxication, the confession in fact could not be said to be the product of a rational intellect and a free will . . . it is not admissible and its reception in evidence constitutes a deprivation of due process." *Gladden v. Unsworth*, 396 F.2d 373, 380-81 (9th Cir. 1968).

Numerous courts have found statements to be involuntary when they were taken after a person had been administered psychoactive drugs. *See, e.g., Townsend v. Sain*, 372 U.S. 293 (1963) (medication with properties of truth serum); *State v. Vincik*, 398 N.W. 2d 788 (Iowa 1987) (valium administered during medical treatment).

(e) Further, during an extended period, Mr. Stone requested, but was not allowed, to use the bathroom. Exhibit 2, pg. 161, ln. 3-12.

(f) He was refused the opportunity to meet with his parents or other supportive persons. T pg. 203, ln. 9 - pg. 204, ln. 7. He was also refused the opportunity to use his cell phone, with which he might have contacted his parents. Exhibit 1, pg. 15, ln. 8-9. Exhibit 2, pg.

157, ln. 5-6. He also said that he wanted to call his pastor. Exhibit 1, pg. 53, ln. 14-16.

In this condition, it must be remembered, Mr. Stone was questioned for some 8 hours, until about 2:15 a.m. During this questioning, as will be shown immediately below, officers engaged in tactics which would have unfairly overborne the will of the most stalwart subject. In Mr. Stone's fragile condition he simply had no ability to retain the ability to make rational choices.

8. The psychologically coercive interrogation techniques used by the police.

Defendant's Exhibit A at the suppression hearing was a compendium of excerpts from the interrogation transcripts prepared by Dr. Ofshe to illustrate the primary dynamic of the interrogation. The exhibit is in large measure self explanatory. Further, the transcripts of the interrogation show the following:

(a) The officers deceptively posited themselves as friends of Mr. Stone or as neutral fact finders. The officers repeatedly concealed their central purpose in questioning Mr. Stone – namely that their investigation had focused on him as a murder suspect and that they were working diligently to make a case against him. In doing so, they deprived him of critical information necessary to fairly understand the situation and to exercise his free will. He told the officers immediately that he had no experience dealing with police officers. He said, "I've never been – I'm 49 years old. I've never been arrested in my life." Exhibit 1, p. 3, ln. 23-4.

(b) The police stated that "our main concern now is your well being internally, you know?" (id., p. 28, ln. 20-1), and that their intent was to "protect" Mr. Stone:

> This is – we're still – understand – this is – we do – we do have to do a very thorough investigation *just to protect you as much as to protect her*, right? * * * Well, there's nobody to speak for her so we have to look into that but, the same token, *we have to protect you just as much.*

Exhibit 2, pg. 142, ln. 22 - pg. 143, ln. 5 (emphasis added). *See also* Exhibit 2, pg. 31, ln. 6-7 ("Chris, nobody's judging you. Don't get all freaked out or all bent out of shape."); pg. 218, ln. 1-24 ("I'm a fact finder, I don't play sides, I don't play favorites. I don't play bullshit. ... I haven't bullshitted you. I ain't trying to trip you up. I haven't tricked you ... ."); p. 273, ln. 21 - pg. 274, ln. 1 ("I ... want to help people. I don't like seeing help in agony. ... I know what you're going through, bud. I'm sorry.").

Dr. Ofshe characterized these actions of the officers as positioning themselves as "neutral observers, neutral investigators." T pg. 68, ln. 11-15. The result was predictable. Mr. Stone told the officers that he saw them as his "friends" and understood that they were "impartial." *Id.*, pg. 41, ln. 2. The officers never corrected this misimpression, but rather proceeded to exploit it. For example, at Exhibit 1, pg. 40, ln. 24-25, Mr. Stone says, "I'm – I guess I'm in shock. I'm looking to you as my friend, man." Officer Hernandez responds not by accurately clarifying his relationship to Mr. Stone, but rather by simply saying "Okay." Exhibit 1, pg. 41, ln. 1. Similarly, Mr. Stone later tells Sgt. McCormick, "I believe you guys are going to take good care of me, man." Exhibit 2, pg. 9, ln. 21-22. Again, the officer allows this misimpression to stand without comment. *See also* Exhibit 2, p. 47, ln. 17 ("... I'm not worried about you guys.").

Consistent with his view of the officers as his friends, Mr. Stone repeatedly asked them for advice on the primary issue he confronted – whether he should be talking to them at all. For example, at Exhibit 1, pg. 15, ln. 12-14, Mr. Stone says, "I hope I'm not hurting myself by talking." Rather than answer the question truthfully, or even clarify that he is not in a position to advise Mr. Stone on this question, the officer simply responds, "[w]e can talk all you want." *Id.*

These remarks indicate plainly the officers' awareness of, and willingness to exploit, Mr. Stone's conclusion that they had his best interests at heart.[16]

Mr. Stone repeatedly showed his deference to McCormick, stating that "I don't want to disagree with you. You're an expert at what you do," Exhibit 2, pg. 225, ln. 24-5, that "[y]ou're the cop and I'm just a guy that ...," *id.*, pg. 236, ln. 2-3, and that "[y]ou're a lot smarter than I'll ever be." *id.*, pg. 280, ln. 20. He even complements Det. McCormick on his looks: "You're a good looking guy." *id.*, pg. 263, ln. 4.

It is easy to understand the ominous effect that it must have had on Mr. Stone when his "friends" began to call him a liar.[17] He was isolated, having been arrested at gunpoint, and having been kept in the presence of police officers continuously, even when undergoing a CT scan, for some eight hours. Despite repeated requests to see his parents or to use his cell phone, this had been refused or deferred. This surely provoked, as was intended, a feeling of hopelessness and utter dependency on the officers. *See* T pg. 122, ln. 22-24. (testimony of Dr. Ofshe that the purpose of evidence ploys, whether true or false, is "to lead somebody to believe that their

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[16] *See also* Exhibit 2, pg.112, ln. 6-9 ("I hope I'm not getting myself in trouble talking the way I am. DET. McCORMICK: Well, we're just trying to find out what happened."); pg. 73, ln. 22 - pg. 74, ln. 5 ("I hope I'm doing the right thing talking to you guys because I'm working with an attorney closely with this divorce. I hope I'm, – he's not going to tell me I've been a major jackass talking to you tonight but I really don't feel like I have anything to hide from you guys at all. DET. McCORMICK: Chris, like I told you from the get-go, you know, I'm not here to trip you up or trick you or anything like that"); Exhibit 1, p. 34, ln. 11-12 ("I'm not here to manipulate anything or take sides either."); Exhibit 2, p. 95, ln. 9-10 ("DET. McCORMICK: You know, Chris, like I told you when I came in here, I don't judge ... .").

[17] The stabbing, McCormick repeatedly asserted, "[a]bsolutely positively could not have been done by your wife, Chris. What happened?" And "[i]t's like that because it didn't happen the way you told me it did." Exhibit 2, pg. 234, ls. 15-16, 19-20. *See also*, pg. 249, ln. 17-18. As the officer said, "if you lie to me about something small, what else would you have lied to me about?" Exhibit 2, pg. 231, ln. 12-14.

situation is hopeless."). Detective McCormick even openly acknowledged that he had made a promise, but that it no longer need be honored because Mr. Stone has not confessed: "[s]o when we went into this – go into this, I had every intention of doing – honoring exactly what I told you but once you started lying to me about this stuff, you know, all bets are off. I can't." Exhibit 2, pg. 247, ln. 17-20.

Next, the detective also repeatedly uses the technique of minimization. He says, "[t]his is not the crime of the century. There's going to be consequences, but I'll tell you what, *they're going to be a whole hell of a lot more severe* if you keep on playing the lie and deceit game, okay?" *Id.,* pg. 286, ln. 1-4 (emphasis added). *See also*, Exhibit 2, pg. 256, ln. 9-11 ("I'm not saying this is a good thing but it's not the end of the world regardless of what you think in the back of your head"); pg. 257, ln. 10-11 ("[a] bad thing happened, yes. It's terrible but it's not the end of the world"). Finally he directly asserts that "lying," by which the Detective means failing to confess, is actually worse than murder: "MR. STONE: What's worse than murder? DET. McCORMICK: A liar by far." *Id.*, pg. 257, ln. 15-16. Minimization is a well-recognized technique for impliedly promising leniency, since it tells the subject that his situation is not hopeless, particularly if he adopts the questioner's view of the events surrounding the crime. *See,* Kassin and McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & Hum. Behav. 233 (1991).

9. Implied promises of leniency made by the police.

In addition to the police pretending to be neutral parties in the case and minimizing the seriousness of the situation, they also made it plain that if Mr. Stone continued with his account of the events he would be punished more harshly than if he adopted the scenario suggested by Det.

McCormick. The officers, having positioned themselves as trusted friends of Mr. Stone, and having told him that they do not believe his account, tell him, directly and by implication, that if he continues on the present course he will be subjected to much harsher punishment. Det. McCormick says it directly: "*I'm trying to give you an out*, Chris. I truly am." Exhibit 2, pg. 231, ln. 20-1 (emphasis added). And then the detective warns Mr. Stone that failing to take his "way out" will have tragic consequences for Mr. Stone. Det. McCormick says, "I need to know because if I don't know then I've got to put these pieces together and fill the blanks with what I think happened. Okay?" *Id.*, pg. 225, ln. 20-2. He goes on to say, "[i]f you're not willing to work with me here, you're forcing my hand, okay?" *Id.*, pg. 238, ln. 5-6. And, "I'll tell you what, you're digging yourself in deeper by not [inaudible] ... ." *Id.*, pg. 256, ln. 11-12.

Detective McCormick also introduced the concept of a judge who would be offended, and punish Mr. Stone more harshly, for maintaining his innocence:

> But one thing that I find – I don't want to say amusing, but yeah, yeah, I am going to say it is somewhat amusing is sometimes when I go to court and I see the judge and he has that look of, my God, you're trying to play this off on me like I'm a fricking idiot.

Exhibit 2, pg. 250, ln. 18-22. *See also* pg. 251, ln. 1-9 (pointing out that a person will be treated more harshly if they "think that they're smarter than the judge," or that "they can play the system," than if they "realize they screwed up," and are "taking accountability"). Later in the transcript these statements ripen into brazen statements that confession will result in leniency:

> ... you've got two people [inaudible] in whatever crime they do. You've got one that just thumbs his nose to the system, like I can beat you. I'm better than this. You got one that realizes, hey, I – you know, I messed up. I realize. I didn't mean to do it. I didn't mean to get to that level but I did and I want to make amends. Who do you think the judge *is going to be more lenient*, going to be more – *going to want to work with more*, okay?

Id., pg. 276, ln 21 - pg. 277, ln. 4 (emphasis added). "What separates *the good from the bad* is somebody who's able to take accountability for their actions." *Id.*, pg. 292, ln. 12-14 (emphasis added). Thus, when Det. McCormick tells Mr. Stone (at pg. 294, ln. 10-16) that there is "some disparity between the sentence" for a person who takes accountability as opposed to one "who wants to bullshit the system... ," he is plainly saying that confession will result in a lesser sentence.

Further, Det. McCormick explained his own view of what transpired – namely that Mr. Stone simply reacted on the spur of the moment to an insult expressed by his wife. In the process of repeatedly telling Mr. Stone that his denials were not accepted and would result in harsher punishment, Det. McCormick conveyed to him precisely the scenario which would result in more lenient treatment: "I'm thinking this was heat of the moment. I think – I don't think you had a whole lot of time to think this thing through as well as you could have." Exhibit 2, pg. 250, ln. 2-4. Adopting this view, he plainly indicates, would result in reduced punishment:

> You know, some things happen in the heat of passion, some things happen that just put great people – good people like you and me over the edge. Just take a reasonable intelligent man and just take them to the breaking point. It happens day in and day out. I see it. But the difference is what separates a good person from your normal street thug is the ability to say, "Oh my god. I lost it for a second. This is what put me there."

Id., pg. 257, ln. 16-24. The officer continues to press, "what sent it over the edge? I mean all this bad stuff you're telling me she's done to you – ," *Id.*, pg. 258, ln. 1-3. Later he returns to weaving the ideas of reduced punishment and a snap judgement:

> I know what you told me happened. What I'm trying to decide on is how it happened. Is this something that has been planned for some time or is this something that is the heat of the moment? It just fucking happened because she made you snap? *There's a big difference between those two. Okay? There really is.*

Id., pg. 277, ln. 6-12 (emphasis added). And even more blatantly, "*I want to know*, Chris, that you didn't plan this out the last six months. ... *I'm hoping* this was something that just happened even though in the heat of passion just sent you over the fucking edge." *Id.*, pg. 287, ln. 7-8, 12-14 (emphasis added).

Finally, Mr. Stone accepts the Detective's invitation and states that the precipitating event was that his wife told him that the only reason she married him was to obtain a green card. All that remained was for Mr. Stone to accept Detective McCormick's blatant and repeated indications that Mr. Stone would be treated more leniently if he admitted killing his wife in the heat of passion. Under the circumstances, it is hardly surprising that he ultimately tells the Detective that his wife, a Filipino by birth, stated that she had only married him in order to obtain a green card, and that this pushed him over the edge and caused him to take her life. However, what is telling - even chilling – is that earlier in the interrogation Mr. Stone had mentioned the green card issue in passing, and quite without any suggestion that he found it emotionally upsetting, or that he even believed it:

> FRANK HERNANDEZ[18]: How long has she been in the United States?
>
> MR. STONE: Since she was 18 when we got married.
>
> FH: Okay. Got you.
>
> MR. STONE: She married me for a green card. I don't know about that because we had many happy years together.
>
> FH: Uh-huh. Well, it sounds like it, shoot, you know. You guys have two children together, you know.

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[18] The original transcript refers to an "Unidentified Speaker," who has by stipulation of the parties been identified as Deputy Frank Hernandez ("FH").

MR. STONE: How many of your kids are at Washington?

Exhibit 1, pg. 55-6. It would be very strange for Mr. Stone to so off-handedly mention the green-card comment to Officer Hernandez only to later confess to Detective McCormick that it was the reason he lost control and killed her if Detective McCormick had not coerced that admission.

10. Characteristics of Mr. Stone testified to by Dr. Beaver, but not considered.

Mr. Stone submits that the above conclusively demonstrates that his statements were not voluntary. But in addition, the trial court erroneously declined to consider additional relevant testimony from Dr. Beaver. In particular, he testified that Mr. Stone was highly suggestible by comparison to an average person. T pg. 169, ln. 14-17. He is socially anxious with few close friends, very attached to his parents, has difficulty with crowds, and struggles with depression. T pg. 170, ln. 6-25. Persons who are socially anxious "are more prone to want to please people in authority or power," T pg. 178, ln. 1-2, and are less "able to maintain their thinking integrity" when placed under stress, *id.*, at ln. 4-11. Mr. Stone was recently hospitalized for psychiatric problems. *Id.*, at pp. 170, ln 25 - pg. 171, ln. 1. Dr. Beaver administered a specific test to measure Mr. Stone's suggestibility, the Gudjonnson Suggestibility Scales, and found Mr. Stone to be above the 75th percentile among persons who may have given false confessions and even higher among the general population. *Id.*, at pg. 176, ln. 7 - pg. 17, ln. 5.

V. CONCLUSION

The totality of the circumstances here show the confession was involuntary. In light of the constellation of factors set out above, this Court should find that the trial court erred in concluding that the state had proven by a preponderance of the evidence that Mr. Stone's statements to the police were voluntary.

The Court should reverse the order denying the motion to suppress because it was proven by Mr. Stone that the statements were involuntarily made. Alternatively, the Court should vacate the order because the district court declined to consider Dr. Beaver's testimony. In either case, the case should be remanded and Mr. Stone should be permitted to withdraw his conditional guilty plea.

Respectfully submitted this 20th day of August, 2012.

Dennis Benjamin
Attorney for Chris Stone

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of August, 2012, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.

Dennis Benjamin