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What is Voluntary? On the Reliability of Admissions Arising From Mr. Big Undercover Operations

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Abstract

It is a bedrock principle of common law that if a suspect is subjected to police threats or inducements any incriminating statement arising from these tactics is presumptively inadmissible. Centuries of experience have taught judges that the institutional power that a person in authority wields in a custodial interrogation affects the suspect's ability to freely choose whether or not to answer questions. Threats and/or inducements inevitably compromise the reliability of any subsequent admissions. In this paper we show that some undercover confession-eliciting techniques can be as functionally, if not *more* oppressive than those sometimes employed by interrogating officers. Both the perceived 'authority' of the agent and the custodial status of the suspect are moot with respect to the degree of psychological control that is being exerted. Consequently we recommend that such tactics should receive more judicial oversight than they have heretofore been given.

Keywords: *Confessions, false confessions, undercover policing, coercion.*

Introduction

The "Mr. Big" procedure is an undercover operation designed to obtain a confession and (ideally) corroborative evidence from a suspect in cases (usually murder) where there is insufficient evidence to support the laying of charges. Undercover police officers pose as members of a powerful and sophisticated criminal organization. They work under the direction of "Mr. Big", another undercover operative posing as the commanding and all-powerful boss of the criminal gang. Once investigators have identified their target, they gradually ensnare him in the fictitious criminal network, slowly introducing him into what he perceives to be an organized crime

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gang. The operatives construct “a complex network of false relationships” between themselves and the target. He becomes socialized into a criminal life style as a result of participating in a series of staged illegal activities whose remuneration and seriousness escalate over time (*R v. Hart*, 2012). Over the course of the undercover operation, the target is conditioned to believe that he is an up-and-comer in the organization. Promises of great financial gain and full-time membership are held out to him as incentives. The benefits of membership are conspicuous, as are the negative consequences of falling out of favour. This sophisticated undercover operation “involves a steady escalation in association, influence and pressure, leading up to the creation of an atmosphere in which it is deemed appropriate to encourage the target to confess” (*Hart*, 2012, ¶ 233).

The scheme usually terminates in a meeting with Mr. Big, the kingpin of the criminal organization. Mr. Big may tell the target that his arrest is imminent and will be a threat to the gang’s security. Mr. Big can thwart the police’s efforts, but only if he knows the details of the crime. Alternatively, the target may be told that because he is familiar with the gang’s illegal activities, he himself needs to disclose his own criminal history as a form of “insurance” should he resign his membership. The target is made to believe that disclosing details of a criminal past demonstrates to the boss that he is honest, trustworthy, and can be called upon by Mr. Big to follow orders. Once a confession is obtained, the lavish lifestyle and elaborate criminal world weaved around the target quickly implodes and he is arrested, handcuffed and charged with a criminal offence.

The undercover operatives exercise considerable control over the target. The scheme can last for many months, even years (Keenan & Brockman, 2010). In one instance, the procedure involved 50 operatives and lasted 13 months (*see Dix v. Canada, (Attorney General)*, 2002). The technique began in British Columbia in the early 1990s as a means of sidestepping Supreme Court of Canada decisions that had set clear limits on the use of undercover investigative techniques against persons in custody, as well as the problems associated with using civilian agents to gather evidence. Post-arrest undercover techniques were curtailed. In this judicial climate, Mr. Big investigations flourished because the Supreme Court appeared to have signaled that judicial censure was largely restricted to police custodial chicanery (*see for instance R. v. Grandinetti*, 2005; *R. v. McIntyre*, 1994). In Mr. Big operations, the target has not been arrested, he is not in custody, and he is unaware of the web of deceit enveloping him. By confining their approbation to custodial contexts, the Supreme Court created a legal loophole that has been used extensively by the RCMP and other police forces. In non-custodial settings, the courts “have merely demarcated (in fairly general terms) the outer boundaries of acceptable conduct, and have left the police to work out the best practices” (Sherrin, 2005, p.613). Approximately 180 Mr. Big investigations were conducted in British Columbia between 1997 and 2004. Since its introduction 20 years ago the technique has spread across Canada, and has seen some sporadic use in Australia. It has not been adopted in either the U.S.A. or the U.K.

The legal loophole

The Mr. Big procedure employs various threats, inducements, and manipulations which, if utilized by a traditional ‘person in authority’ (i.e., a known police officer) would likely render any subsequent admission involuntary, and thus inadmissible. Mr. Big evades constitutional protections against police use of deceptive tactics because the target is not in custody or otherwise detained during the time of the sting and because the person to whom the confession is made is not subjectively perceived as a person in authority.

Detention is the central issue. In *R. v. Hebert* (1990), the Supreme Court of Canada held that an undercover state agent may not actively elicit a statement from a detained suspect. The

Court considered it unfair to give a suspect a right to silence, and then trick him out of it. Hebert had been arrested; he informed the police that he did not wish to talk to them. The police nevertheless planted an undercover officer in his cell, who masqueraded as a fellow prisoner. Hebert's statement to his cell mate was ruled inadmissible. The defendant's right to silence had been overborne by a police trick that violated section 7 of the *Charter* because he had been deprived of the ability to make a conscious choice whether to talk to the police. A loop-hole was thus left open for non-detained suspects because the Court held that his right to silence arises only upon arrest or detention. According to the Court, those in detention are vulnerable and unable to contact counsel at the time of their choosing. The Court further assumed that those who are not detained are free to contact counsel, and are not subject to psychological pressure. The police therefore have considerable leeway to use all kinds of subterfuge and ploys to obtain admissions from non-detained suspects, as is the case in Mr. Big operations¹.

Mr. Big also evades common law protections by employing undercover officers. At common law, admissions to a police officer that have been elicited by means of threats and inducements are considered to be involuntary and inadmissible (*R. v. Oickle*, 2000): "voluntariness is the touchstone of the confessions rule" (¶ 69). The espoused theory underlying this principle is that "involuntary confessions are more likely to be unreliable" (¶ 32). When a person in authority (i.e., a person believed by the suspect to be a state agent) elicits a confession, the Crown must show that the means of elicitation did not entail oppressive tactics. This common law confession rule only applies when the accused knows or believes that he is being questioned by a person in authority (e.g., a police officer). Again, it is assumed that the accused will feel vulnerable in the face of the institutional power that the police wield. The voluntariness rule, however, does not apply unless the accused believes he is dealing with someone with legal authority (*R. v. Grandinetti*, 2005; *R. v. Hodgson*, 1998). The target of Mr. Big operations believes that he is interacting with members of a criminal gang. As a result, police who are disguised as crooks can use, with relative impunity, extraordinary inducements and concomitantly coercive tactics. Mr. Big thus skirts both constitutional protections (by operating deceptively but outside of detention) and common law protections (by operating with inducements and coercion, but without the use of known persons in authority)².

Sometimes the Mr. Big technique produces probative evidence of a suspect's guilt. For example, if a confession leads to the discovery of new evidence, its evidentiary value is significantly enhanced (e.g., *R. v. Ethier*, 2004; *R. v. Copeland*, 1999). The tactics, however, are both relentless and highly controlling. The strong inducements to 'confess' produce a significant risk that innocent people may produce self-incriminating statements, giving rise to a risk of wrongful convictions. When there is little or no evidence to support the confession and where its contents do not fit the known circumstances of the crime, the risk of a wrongful conviction is even higher.

Mr. Big tactics of psychological manipulation

Decades of social science research demonstrate that people are heavily influenced by social context and the actions of others (Latané, 1981; Ross & Nisbett, 1991). The psychological mechanisms at play during a Mr. Big operation can be understood by reference to various principles of social cognition (Kassin, 2008). These principles are an essential part of the reliability assessment of a confession arising during a Mr. Big operation. It is important to note that these

¹ See Keenan and Brockman (2010, Chapter 4) for a discussion on the right to silence as protected by the common law and section 7 of the *Canadian Charter of Rights and Freedoms*.

² In *R. v. Copeland* (1995), Mr. Justice De Villiers of the B. C. Provincial Court asked: "If the rationale of the rule is that involuntary confessions are unreliable, and if such rationale is valid, how can it logically be said that confessions improperly extracted by persons not defined as "persons in authority" are any more reliable than those extracted by persons in authority?" (¶21).

principles should not be viewed as mutually exclusive categories, as there is often overlap between them.

Principle # 1: Positive reinforcement. The principle that people will engage in actions for which they are rewarded is well established (Thorndike, 1931; 1932). We are influenced more by expectations of short-term gain than long-term consequences. Immediate rewards are over-valued, thus making people susceptible to manipulation from anticipated payoffs in the near future. People are predisposed to maximize their self-interests in the here-and-now. This tendency is so prevalent that it has been characterized as “temporal discounting”. In general, people find it difficult to delay gratification (Green, Fry, & Myerson, 1994).

These tendencies are systematically exploited by Mr. Big operatives. The good will of the boss carries with it material comforts, companionship, steady work, and psychological security. Cost does not appear to be a factor in carrying out these undercover operations. Financial payouts are a significant grooming tool and are generally introduced to the target at the outset of the operation. Initially the scenarios consist of a series of contrived (but lucrative) criminal activities or tasks that the target is asked to perform for the gang. Over time he is gradually engaged in a progressively escalating series of criminal actions that entail increased responsibility and larger monetary rewards. Targets are also introduced to a life of opulence. No expense is spared to convey to targets the criminal lifestyle that members of the organization lead and enjoy. In addition to cash payments, undercover operatives provide targets with cellular phones and/or pagers. They routinely fly business class, dine at some of the country’s nicest restaurants, and are quartered in the finest luxury hotels. In essence, targets go from rags to riches very quickly (cf. *Dix v. Canada (Attorney General)*, 2002; *R. v. Hart*, 2012; *R. v. Mentuck*, 2000; *R. v. Unger*, 1993).

Principle #2: Friendship and allegiance. Humans have a basic need to establish and maintain meaningful social relationships with others. The research literature on social influence clearly demonstrates the relationship between friendship and subjective well-being (Cialdini & Goldstein, 2004). Mr. Big operatives systematically develop a strong bond between themselves and their target. Compliments and flattery help promote strong feelings of companionship and camaraderie. In this new social network the suspect feels valued and respected. His own self-esteem improves commensurately. This social dynamic is intrinsic to the success of the operation because the target will not want to do (or say) anything that might compromise the connection to his affluent and successful ‘friends’. Communicator likeability is a well-established principle of persuasion (Cialdini & Trost, 1998). Many Mr. Big targets are not only financially destitute, they are also socially isolated and have few social supports. For them the allure of the gang is irresistible. Expulsion from the new fraternity threatens not only the target’s improved lifestyle, but also his enhanced sense of self-worth. When Nelson Hart was arrested after a 6-month Mr. Big operation, the first person he called was his “best friend” - - the operative who had been feigning friendship for the last half year.

Principle # 3: Authority, expertise, and compliance. We defer to experts. Authority figures, especially if they are admired friends, wield significant power (Cialdini, 2007). We cede control to superiors because it is in our interests to do so. The target’s new bosses exude self-confidence. They speak of past exploits and big plans for the future. The gang members are not just felons, they are very successful felons. Their criminal network is extensive and may reach into the upper management levels of policing and government. Over time, the gang’s criminal activities start to seem commonplace and normative. What’s more, the risks appear to be minimal or absent altogether. Not only does the suspect become socialized into a lifestyle of

lawlessness, many of the social influences by which he is manipulated operate outside of conscious awareness.

Principle #4: Fear (and intimidation) as motivator(s). People will engage in behaviours that assist them in avoiding unpleasant outcomes. Actions that reduce anxiety or feelings of helplessness will tend to recur (Rogers, 1975). Mr. Big operatives often go to extraordinary lengths to impress upon the target the dire consequences of falling into disfavor. Staged beatings (and even killings) of fictional offenders are enacted whose purpose is to terrify the target into compliance with the gang's wishes. In *R. v. Hathway* (2007), for example, undercover operators staged an assault upon a woman. The target watched her (covered in what he believed to be blood) being thrown into the trunk of a car. During the simulated beating, the operative threatened to kill the woman, her spouse, and their two-year old child. RCMP operatives have testified on cross examination that such scenarios are deliberately designed to show the suspect that the criminal organization does not take kindly to persons who betray it, and that its members will resort to deadly force to deal with persons who do so (cf. *United States of America v. Burns*, 1997; *R. v. O.N.E.*, 2000).

Specific examples of how the above-mentioned tactics have been implemented during various Mr. Big operations can be found in Keenan & Brockman (2010); Maidment (2009); Moore et al. (2009); and Smith et al. (2009).

What is 'voluntary'?

In our opinion, there is a fundamental disparity between legal and psychological notions of 'voluntariness.' As McLachlin states in *R. v. Hebert* (1990):

"The state has the power to intrude on the individual's physical freedom by detaining him or her. *The individual cannot walk away.* This physical intrusion on the individual's mental liberty in turn may enable the state to infringe the individual's mental liberty by techniques made possible by its superior resources and power (emphasis added)" (¶ 63).

These "resources", however, can be exerted anywhere -- not just in a jail cell. Whether or not the suspect is in custody, he can still be the target of state control if the state chooses to concentrate its energy on him. Moreover, the perceived authority status of his interlocutors is moot with respect to the degree of psychological control that is being applied. It is quite conceivable that the risk of a false confession may be even greater when the suspect is not in custody because he does not recognize that his statements risk potentially disastrous consequences (Smith et al., 2009). Admissions made in this context are not statements against his penal interest but rather are made in anticipation of the criminal organization making his criminal problems disappear. An innocent suspect may take the risk of lying to his new friends because they have created the circumstances that make the risk worthwhile (Gudjonsson, 2003).

In *R. v. Osmar* (2007), Rosenberg J. left open the possibility that a section 7 Charter challenge regarding state control could be mounted in circumstances where the individual, "although not in detention, was nevertheless *under the control of the state* in circumstances functionally equivalent to detention and equally needing protection from the greater power of the state [emphasis added]" (¶ 42). It remains to be seen what degree of control would be required to meet this threshold. Physical confinement is not a *sine qua non* for the exercise of psychological manipulation, which, in a Mr. Big context, is invasive and relentless. The majority of the Appellate Court in *R. v. Hart* (2012) perceived the control threshold to have been reached.

The operatives impersonate criminals who are very competent, well connected and successful. They are also ruthless and violent when the need arises. They make no secret of the fact that they will beat, torture and even kill when necessary. Membership in the gang carries with it a substantial monetary return, but the target also knows that the gang members are violent. He has witnessed it. They want to recruit him. He wants to be recruited. It is in his interests to make the gang believe that he is as brutal and cold blooded as they are. The Mr. Big procedure creates a social situation that encourages the target to portray himself as a hardnosed villain. The police purposely create conditions that foster statements of doubtful reliability. These statements are treated as “confessions”, and form part (sometimes all) of the evidence submitted at trial. The jury hears and sees the “confession”, but not the 14 months of artifice, coercion and manipulation that preceded the admissions.

It might be argued that the police should not be faulted for using ‘everyday’ methods of persuasion to ensnare criminals. For example, parents cultivate healthy eating habits in their children through the judicious management of rewards. “Eat your vegetables or there will be no desert” is a time-honored strategy. Teachers use praise (or frowns) to control young children’s conduct. Car salesmen extol the merits of their merchandise while presenting themselves as charming confidantes with nothing but the purchaser’s best interests at heart. Offering rewards and making a social connection are ubiquitous practices in the boardroom and the classroom. While there is nothing nefarious about the use of these tactics, context is everything. When the target of a Mr. Big operation makes self-incriminating statements, it is easy to overlook the massive amount of deceit and trickery that has preceded the ‘confession.’ The entire enterprise is counterfeit. Almost all statements from an operative are lies. Every conversation is fake. Every social interaction is duplicitous. Under normal circumstances, there is a transparency associated with our social dynamics. The car salesman may exaggerate the car’s merits, but the dealership is not a façade for some ulterior purpose. The prospective buyer is negotiating the purchase of a real car. Similarly, the teacher’s behavior management techniques are not a disguise for some alternative objective. The magnitude and duration of the deception in a Mr. Big operation are more than enough to overwhelm (and dupe) even the most skeptical and obdurate of targets. Staged reprisals against fictitious offenders are brutal, sometimes sadistic, and frighteningly realistic. It is the combination of influential persuasion strategies and the fraudulent nature of the entire exercise that makes the procedure so powerful. The suspect is oblivious to the orchestrated web of social controls that surrounds him. Although the social forces are potent, their effects operate outside of the target’s awareness. The danger is that the practise can deceive the innocent as well as the guilty. For ethical and logistic reasons, the diagnosticity of the procedure (i.e., its capacity to differentiate true from false confessions) has never been demonstrated, nor could it be.

The Post-Confession Narrative

‘Mr. Big’ operations go to great lengths to create a carefully staged situation in which it is clearly in the suspect’s self-interest to confess to a crime that he may (or may not) have committed. The final ‘confession’ is generally videotaped and shown to the jury. At the time of the trial the confession may appear so compelling (Blair, 2007; Oberlander & Goldstein, 2001; Rogers, Jordan & Harrison, 2004) that contradictory evidence is rendered trivially inconsequential once a defendant has confessed (Hasel & Kassin, 2009; Kassin, Meissner & Norwick, 2005; McCormick, 1972). Often there is little by way of corroborating evidence of guilt. The confession may not go beyond the stark admission of responsibility. Without the ‘confession’ the police would have little or no substantive evidence implicating the target in the crime. In a recent analysis of 81 reasons for decision in criminal cases where a confession was tendered as evidence

at trial as a result of a Mr. Big investigation, Keenan and Brockman (2010) found twenty-three cases where the accused's self-incriminating statements to undercover police officers were the lynchpin in the prosecution's case. Without these statements, there would have been no basis for a conviction. Accordingly, in such situations part of the assessment of reliability should contain an appraisal of the post-admission narrative (Ofshe & Leo, 1997). How, where and when was the crime committed? Does the confession provide investigators with forensic details that could lead to independently incriminating evidence? Does the defendant supply accurate corroborating evidence that was not otherwise available from the media or from the investigators themselves? In one undercover operation (e.g., Kakegamic trial, 2005) two different suspects were targeted. Both confessed, and both reported having acted alone. There are numerous other instances in which the admissions contained improbable or incorrect elements or omitted details that the actual killer would have certainly known (e.g., *New York v. Wise et al.*, (2002); *R. v. Fischer*, 2005; *R. v. Mentuck*, 2000; *R. v. Osmar*, 2007; *R. v. Unger*, 2005; see also Maidment, 2009). Even more disconcerting is the notion that targets intentionally falsify stories of prior misdeeds (*R. v. McCreery*, 1998) and even offer to commit crimes (including murder) for the purported criminal organization in order to prove themselves worthy of the group (*R. v. C.K.R.S.*, 2005). Despite a dearth of independent confirmation, confessions alone are often enough to persuade juries to convict, especially in circumstances where suspects show a propensity to lie and falsify stories.

One way to think about corroboration is to ask how strong the evidence is without the confession. Could the evidence support a conviction? If not, why not? Is it weak or unreliable or purely circumstantial? The probative value of corroborative evidence needs to be established independently of the fact that it might be accompanied by a confession. If its relevance cannot be established, then it is not corroborative. The problem is that the confession may make neutral evidence *appear* more incriminating than it really is. Saul Kassin has termed this process "corroboration inflation" (Kassin, 2012). What is perceived to be (and claimed to be) corroboration may not be corroboration at all. Jurors, however, may be told that in light of this putatively supportive evidence, any concerns they might have about the reliability of the confession have been alleviated. It is as if the mere fact of a confession trumps any misgivings there might be regarding the additional evidence. Sangero & Halpert (2011) have proposed that the evidence against a suspect should be the primary basis for the verdict against him, with a confession simply acting as corroboration. When a case is built on a confession in search of corroboration, there is a risk that ambiguous or inconclusive evidence will be interpreted as inculpatory due to natural human biases at play in criminal investigations. This problem was present in the *Hart* case mentioned earlier. Apart from the manner in which the admissions were elicited, there was no extrinsic evidence capable of corroborating the post-admission narrative (including the confession and the re-enactment at the crime scene). Moreover, there were a number of internal inconsistencies within the statements given by Hart to the undercover officers. This raises doubt as to whether Mr. Hart was telling the truth. Given that the Crown's case depended on the admissions obtained during the undercover operation, the lack of independent corroboration, coupled with the internal inconsistencies, call into question the reliability of his confession. As the Appellate Court noted in its final observations, "Did Mr. Hart confess falsely - or truthfully? We will never know with any degree of certainty or even assurance on the basis of the trial that occurred. In fact, without a truthful confession from Mr. Hart, we will not know whether a crime was committed at all" (*R. v. Hart*, 2012, ¶ 259).

The compelling nature of a 'confession' may be somewhat mitigated in a judge-only trial (see Keenan and Brockman, 2010). At the very least, concerns arising over the prejudicial impact of bad character evidence would be reduced. As a general rule, the prosecution is precluded from leading evidence about the character of the accused during a criminal trial because it has been shown to influence jurors' perceptions of culpability. Sopinka, Lederman and Bryant (2009) note

that there is “considerable danger that it will be used illogically or given too much weight” (p.618). Even where a finding of guilt is not supported by the facts, a jury could nonetheless infer guilt based on evidence of a criminal past. Though highly prejudicial, in Mr. Big cases the Courts have often permitted the presentation of details of an accused’s bad character because the confession to undercover police officers is ostensibly “inextricably interwoven” within discussions of other criminal activities (*R. v. Bonisteel*, 2008). Jurors may thus hear of prior misconduct and/or the suspect’s willingness to engage in ongoing or future criminality. In *R. v. Creek*, (1998) Stewart J. noted that the “. . . dynamic set in motion by the undercover officers who presented themselves to the accused as hard core, successful and violent criminals was based on a perverted moral compass. That is to say, the worse the accused said of himself and his deeds, the better his future with the bad guys' criminal organization would be” (¶ 24).

Recent Developments

Notwithstanding serious misgivings about the reliability of confessions obtained through Mr. Big tactics, there were no demonstrably “false” confessions on record until recently. The *Unger*, *Bates*, and *Hart* cases have changed that state of affairs. Unger was convicted of sexual assault and murder in 1992. His “confession” to a Mr. Big operative was part of the evidence against him, along with a strand of hair found at the scene. DNA testing later excluded Unger as the source of the hair. His conviction was quashed in 2009 and he was formally acquitted of first-degree murder by the Manitoba Court of Appeal. As noted by journalist Dean Pritchard (2009), assistant deputy attorney Don Slough claimed that Unger was the author of his own misfortune because “without Unger’s willingness to confess to the horrific murder of a person he described as a friend, there was no case against him ... It has been suggested that the Crown’s case against him is improbable and that his confession was inconsistent with the known facts. Those arguments were made to the jury and rejected.” In a similar vein, Manitoba Justice Minister Dave Chomiak announced that the province would not be offering any compensation for the miscarriage of justice because it was Unger’s confession that resulted in the conviction in the first place.

In the case of *R. v. Bates* (2009), the defendant was the target of a Mr. Big operation because he was (mistakenly) assumed to have been the shooter during the killing of a competing drug dealer. In an agreed statement of facts, it was later acknowledged that Bates’ statements to the undercover operatives were lies, and that the shooting was an accident on the part of a different individual. At his sentencing hearing however, the Crown attempted to penalize Bates for misleading the police into believing that he had been the shooter. Neither Unger nor Bates however, thought that they were deceiving police officers. Rather, they thought they were lying to the criminals that the police were pretending to be. In Bates’ case, when questioned by the *actual* police, he told the truth about his involvement in the crime. When an innocent person succumbs to the ploys of a deceptive and coercive sting, he or she is often denounced and blamed for falling for the ruse. This is twisted logic. False confessions arising from Mr. Big operations are a consequence of the tactic’s unreliability and not the idiosyncratic failings of the innocent targets who were victimized by it.

In September of 2012, the Newfoundland and Labrador Court of Appeal determined that Nelson Hart’s self-incriminating statements to Mr. Big were coerced, of doubtful reliability, and should have been excluded from evidence at the trial (*R. v. Hart*, 2012). A new trial was ordered. The majority judgment echoed and indeed quoted many of the worries that we have expressed above (and in previous publications). We reproduce a portion of the Hart decision here because it captures succinctly, in our opinion, the essential danger of the Mr. Big procedure:

From a psychological perspective, the custodial bright line can be illusory in terms of the exercise of control. The state's "superior resources and power" are not restricted to the interrogation room or jail cell. The engineering of a new social world and the orchestration of the target's actions for months at a time may constitute, in psychological terms, quintessential "control". The state's agents are not rendered impotent simply because they are pretending not to be state agents. On the contrary, it is quite conceivable that the risk of a false confession may be even greater under such circumstances because the suspect does not appreciate the adverse consequences of his admissions... Lying about a murder to a gang of criminals could be a gamble that the suspect is prepared to take, compared to upsetting them, inviting their wrath, and squandering his connection to the criminal organization ...(¶ 157, underlining added in decision).

The confession is not a statement against self-interest in the usual sense. On the contrary, the purpose of the statement is to convince the "boss" of the target's dependability. Typically the boss is resolutely unreceptive to denials or exculpatory explanations. There are thus strong incentives (gang membership, esteem, money) to tell the boss what the boss clearly wants to hear, and a strong disincentive (violence, if not death) to displease him. The target knows or suspects that the boss will think he is lying if he denies culpability. Consequently, in the inverted moral universe that the operatives have created the confession is in the target's self-interest. It is most assuredly in his financial interest, not to mention concern for his own personal safety. He is motivated to lie to the "boss", and to lie convincingly (¶ 158), citing Moore et al. (2009) at pp. 378 and 387-88 respectively.

Conclusion

We do not dispute the fact that the Mr. Big procedure is a useful police investigative tool. The technique sometimes provides a valuable means of securing incriminating evidence. It can be particularly effective in serious criminal investigations that have reached an impasse. There are clear instances of it having led to the discovery of independent, probative, and reliable evidence of a suspect's culpability. Without it, some individuals would otherwise have gotten away with murder. The procedure's ingenuity however, is also its Achilles' heel. While the technique is capable of exposing the guilty, it can induce innocent suspects to falsely confess for the range of reasons that we have explicated. Consequently, the Mr. Big operation poses an inherent risk of contributing to wrongful convictions. As such it should be used more cautiously than it has been to date and, when used, its trial reliance should always be subject to independent confirmatory evidence.

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