CRIMINAL PROCEDURE

CASES AND COMMENTS

SIXTH EDITION

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2005 SUPPLEMENT

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CHAPTER 2

CONFESSIONS AND INTERROGATIONS

A. VOLUNTARINESS OF CONFESSIONS

Page 48 Add new note:

Consider the en banc decision in United States v. LeBrun, 363 F.3d 715 (8th Cir. 2004), *cert. denied* ___ U.S. ___, 125 S.Ct. 1292 (2005).

■ HANSEN, CIRCUIT JUDGE

After thirty-three minutes of questioning, Michael LeBrun confessed to naval investigators that in 1968, while he was enlisted in the United States Navy, he strangled to death his superior officer, Ensign Andrew Muns, on board the U.S.S. Cacapon after Ensign Muns caught LeBrun robbing the safe in the ship's disbursing office. . . .

Muns and LeBrun served as shipmates during the Vietnam War aboard the U.S.S. Cacapon. Ensign Muns served as the disbursing officer, and LeBrun served as the disbursing clerk. On January 16 or 17, 1968, while the U.S.S. Cacapon was moored in the Subic Bay, Muns disappeared. After conducting an investigation into Muns' disappearance, the Navy concluded that Muns had stolen $8600 from the disbursing office and had deserted. Thirty years later, still unconvinced of her brother's wrong-doing, Muns' sister convinced Special Agent Peter Hughes of the Naval Criminal Investigative Service ("NCIS") Cold Case Homicide Unit to reopen the investigation.

In the fall of 1999, NCIS agents conducted four interviews with LeBrun. On each of these four occasions, LeBrun cooperated with the investigators and voluntarily answered questions regarding Muns' disappearance. On three of these occasions, he was given his *Miranda* warnings by the interviewers. During an interview conducted on November 20, 1999, LeBrun told NCIS agents that he realized that he may have been involved in the death and disappearance of Ensign Muns. LeBrun also told the agents that he felt that he had repressed memories, and he asked Agent Hughes if he knew of a therapist who could help LeBrun recover those memories. After completing the first round of interviews, the NCIS agents did not have any further significant contact with LeBrun for approximately ten months as they continued to investigate other leads. By September of 2000, however, the NCIS had focused on LeBrun as the lead suspect in the case. At that time, NCIS agents decided to interview LeBrun again.

On September 21, 2000, NCIS Special Agent Early and Corporal Hunter of the Missouri Highway Patrol arrived unexpectedly at LeBrun's place of employment. Hunter told LeBrun that he and Early were conducting an investigation and requested that LeBrun accompany them to the Missouri Highway Patrol office to participate in an interview. Although the officers did not tell LeBrun the subject of their investigation, LeBrun agreed to accompany the officers because he thought that the officers might be investigating certain criminal allegations concerning LeBrun's employer. At the officers' suggestion, LeBrun rode in the front seat of an unmarked patrol car to the station house. The door was unlocked during the trip, and LeBrun was not restrained in any manner.

After they arrived at the patrol office, but before they went inside, Agent Early told LeBrun that he was not under arrest, that he was free to terminate the impending interview at any time, and that he was free to leave at any time. He was also told that he was subject to audio and visual recording anywhere inside the building. The officers then took LeBrun inside the office to a windowless interview room. The authorities had prepared the room prior to LeBrun's arrival, adorning the interview room walls with enlarged photographs of scenes from LeBrun's life. After LeBrun took a seat, NCIS Agents Early and Grebas identified themselves and initiated the interview. At no point immediately prior to or during the September 21, 2000, interview did the agents recite to LeBrun the *Miranda* warnings. The district court found that the decision not to warn was a conscious one made by the interviewers. Special Agent Early testified that no warning was thought necessary because it was not an under arrest custodial situation.

Despite the agents' failure to recite the *Miranda* warnings, LeBrun testified at the suppression hearing that at the time of the interview he understood what his *Miranda* rights were. LeBrun also testified that at the time the interview commenced he believed that he was not in custody and that he was free to leave at any time. The government concedes that the officers used psychological ploys during the course of the interview to facilitate a confession. For example, the agents told LeBrun that he was the prime suspect in Muns' death and that they had significant evidence establishing that LeBrun was the killer. The agents also told LeBrun that a protracted trial in a distant district would drain his financial resources and would ruin his family's reputation. At no point, however, did the agents shout at LeBrun or use physical force against him. After approximately thirty-three minutes of questioning, LeBrun confessed to the crime. LeBrun explained that while he was robbing the safe, Ensign Muns walked into the disbursing office. He confessed that he rushed Muns and killed him by strangling him and then smashing his head against the deck of the disbursing office. At the agents' urging, LeBrun then physically reenacted the robbery and attack. He also explained how he had dumped Muns' body and the missing money into a tank of caustic fuel oil to dispose of the evidence.

After LeBrun confessed to the killing, Agents Early and Grebas asked whether he wanted to apologize to Muns' sister, Mary Lou Taylor, who had flown in from Milwaukee to assist in the interrogation if it became necessary. He indicated that he did. Dr. Taylor, accompanied by Agent Billington, who was posing as Muns' brother and whom the agents had told LeBrun was stricken with cancer, then entered the interview room. LeBrun acknowledged to Taylor and Billington that he was responsible for Muns' death, and he apologized. After the agents had completed their questioning, LeBrun consented to having his house searched. LeBrun then withdrew a cellular telephone from his pocket and called his spouse. The agents drove LeBrun to his house and searched it. After conducting their search, the officers left LeBrun at home. They did not arrest him that day.

LeBrun was arrested at a later date and charged with felony murder in violation of 18 U.S.C. § 1111. . . .

* * *

The facts surrounding the confession are straightforward. LeBrun confessed to strangling Ensign Muns after only thirty-three minutes of questioning. Neither Agent Grebas nor Agent Early was armed during the interview. The agents never shouted at LeBrun or physically threatened him. The government concedes that it used psychological pressure to facilitate a confession. The district court correctly recognized that the type of psychological pressure Agents Grebas and Early exerted on LeBrun here did not alone render his confession involuntary. *See Astello,* 241 F.3d at 967–68 (holding that tactics such as subjecting a suspect to psychological

pressure, making false promises, playing on a suspect's emotions, and using his family against him did not render a confession involuntary). The district court concluded, however, that these tactics, when coupled with certain statements that Agents Early and Grebas made concerning nonprosecution, rendered LeBrun's confession involuntary. The critical exchange occurred as follows:

> LEBRUN: So, am I hearing that I won't be prosecuted?
>
> GREBAS: That's what you are hearing.
>
> LEBRUN: Is that what I am hearing?
>
> GREBAS: That's what you are hearing.
>
> EARLY: If it's [the killing of Ensign Muns] spontaneous and that's the truth, you will not be prosecuted.
>
> GREBAS: That's absolutely right.
>
> LEBRUN: I am here to tell you there was no premeditation.
>
> EARLY: All right.
>
> LEBRUN: It was spontaneous.
>
> EARLY: Okay.
>
> GREBAS: So it was, let me get this clear. It was spontaneous?
>
> LEBRUN: Correct.
>
> GREBAS: If this is true, then you killed him and it was over, it was over the money; is that right?
>
> LEBRUN: I don't know what it was over.

(R. at 65–66.) The district court noted that the agents qualified their representations by stating to LeBrun that it was only "possible" that LeBrun would not be prosecuted. The district court explicitly did not "make any findings as to what-if any-promise was actually made, or what the legal effect of any promise [was]." (R. at 83–84.) Instead, the district court found only that "LeBrun *believed* he would not be prosecuted if he confessed to a 'spontaneous' murder." (R. at 83.)

Applying the facts as found by the district court to the controlling legal standard, we conclude that LeBrun's confession was not compelled because a defendant's mistaken *belief* that he could not be prosecuted does not render a confession involuntary. *See United States v. Kilgore,* 58 F.3d 350, 353 (8th Cir.1995) (stating that defendant's mistaken belief that he had been promised leniency would not render confession involuntary); *Winfrey v. Wyrick,* 836 F.2d 406, 411–12 (8th Cir.1987) (concluding that defendant's murder confession was voluntary even though defendant was encouraged to talk because of erroneous *belief* that if the shooting was accidental it would negate an element of the offense), *cert. denied,* 488 U.S. 833, 109 S.Ct. 91, 102 L.Ed.2d 67 (1988).

Even assuming that a reasonable person would view the Agents' statements as a promise, a promise made by law enforcement "does not render a confession involuntary per se." *Simmons,* 235 F.3d at 1133; *see also Tippitt v. Lockhart,* 859 F.2d 595, 598 (8th Cir.1988) (concluding that defendant's confession was voluntary despite officers' promise), *cert. denied,* 490 U.S. 1100, 109 S.Ct. 2452, 104 L.Ed.2d 1007 (1989). A promise is merely one factor in the totality of the circumstances. *See Simmons,* 235 F.3d at 1133 (stating that a promise made by law enforcement is only one relevant consideration). Whatever the facts of an individual case, our polestar always must be to determine whether or not the authorities overbore the defendant's will and critically impaired his capacity for self-determination. Thus, it is not enough to show that the authorities' representations were the but-for cause of a confession. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 224, 93 S.Ct. 2041, 36

L.Ed.2d 854 (1973) (concluding that a but-for type analysis is inadequate because "[u]nder such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind"). Therefore, even assuming that the agents' statements could be construed as a promise and that the statements induced LeBrun's confession, our inquiry remains the same: whether the facts surrounding this interview demonstrate that the authorities overbore LeBrun's will and capacity for self-determination. This is a very demanding standard, and we are of the view that the facts of this case do not rise to that level.

We have previously concluded that a promise not to seek execution or a promise not to prosecute failed to render the confessions of similarly situated defendants involuntary. For example, in *Tippitt,* we held that the government's promise to a defendant not to prosecute him for capital murder in exchange for a confession did not render the confession involuntary in light of other facts showing that the interrogation was brief and that the defendant possessed an eleventh grade education. *See* 859 F.2d at 598. We do not think it unreasonable to assume that the psychological pressure exerted on the defendant in *Tippitt* to render a confession and thereby avoid execution would be at least as great as the psychological forces presented in this case. In *United States v. Larry,* 126 F.3d 1077 (8th Cir.1997), we held that the defendant's statement implicating himself as being a felon in possession of ammunition was voluntary even though it was induced by a promise that the defendant would not be prosecuted for a separate offense involving a drive-by shooting. *See* 126 F.3d at 1079. The facts of this case are no more compelling than those in *Tippitt* or *Larry.*

We place substantial weight on the fact that LeBrun confessed after a mere thirty-three minutes. Thus, this is not a situation where the officers wore down a defendant's will with persistent questioning over a considerable length of time. We also place significant weight on the fact that LeBrun testified that he had a subjective understanding of his *Miranda* rights at the time of the interview. *See Simmons,* 235 F.3d at 1133–34 (stating that a particularly compelling fact militating in favor of finding a voluntary confession was that defendant understood his rights). We also place substantial weight on the fact that LeBrun was a sophisticated individual with legal training. LeBrun was fifty years old at the time of the interview. He has served in the military, attended five years of college and one year of law school, and worked as a manager in a real estate office. As we have noted, "one of the key concerns in judging whether confessions were involuntary, or the product of coercion, [is] the intelligence, mental state, or any other factors possessed by the defendant that might make him particularly suggestible, and susceptible to having his will overborne." *Wilson,* 260 F.3d at 952. Generally, we have concluded that where the defendant possessed at least average intelligence, then his inculpatory statements were not compelled. *See, e.g., United States v. Gallardo–Marquez,* 253 F.3d 1121, 1123–24 (8th Cir.) (concluding confession was voluntary where defendant was of average intelligence and had prior contact with law enforcement), *cert. denied,* 534 U.S. 1031, 122 S.Ct. 570, 151 L.Ed.2d 443 (2001); *Astello,* 241 F.3d at 968 (concluding that confession of an eighteen-year-old was voluntary where he had completed eleventh grade and possessed a capacity to understand what was being said during the interview); *Simmons,* 235 F.3d at 1134 (concluding that confession was voluntary where defendant had full scale I.Q. of 88); *cf. Wilson,* 260 F.3d at 949 n. 4 & 952–53 (finding involuntary confession where defendant was mentally retarded, his overall mental abilities were in the bottom two percent of the population, and testimony revealed that he could be "talked into anything").

In addition to possessing average intelligence, LeBrun did not display any unique sensitivity that would indicate that the agents might overbear his will. LeBrun had met with NCIS investigators on four prior occasions. The videotape of

the interview demonstrates that LeBrun was composed and aware of his surroundings and the circumstances confronting him. In fact, as LeBrun and the Agents discussed the potential statute of limitations problems, LeBrun became more animated and much more interested in the interview. After watching the videotape, it is apparent that LeBrun is an intelligent, calculating person who erroneously perceived a potential loophole in the prosecution's case and tried to take advantage of it by confessing to "spontaneous" murder. Whatever his motivation, it is clear to us that LeBrun's capacity for self-determination was not impaired. Thus, the district court erred in concluding that LeBrun's confession was involuntary.

* * *

■ MORRIS SHEPPARD ARNOLD, CIRCUIT JUDGE, with whom MCMILLIAN, BYE, and SMITH, CIRCUIT JUDGES, join, dissenting.

. . . Our panel opinion in this case, *see United States v. LeBrun*, 306 F.3d 545, 548–50, 552–56 (8th Cir.2002), very effectively rehearsed the tactics used to bring Mr. LeBrun to the point of confessing, which included threatening to ruin him financially, preying on fears related to his cancer, and vividly limning the effects that protracted civil and criminal litigation in a faraway place would have on his family, on its reputation, and in particular on his pregnant wife. I will therefore content myself with some observations on the court's opinion. . . .

While, as the court notes, the agents never shouted at Mr. LeBrun or threatened him physically, the district court found on ample evidence that the atmosphere at the interrogation was police-dominated and that the agents frequently raised their voices and changed their tone when doing so. They also interrupted Mr. LeBrun in a bullying manner and demonstrated a threatening kind of impatience with him. . . .

The court . . . adverts to the fact that the district court made no findings as to what promises the interrogators actually made, but instead found only that Mr. LeBrun reasonably believed that he was promised that he would not be prosecuted if he would say that he had killed Mr. Muns "spontaneously." The court then looks for support in cases that hold that a mistaken belief as to what the law is will not render a confession involuntary. But in at least one of those, *Winfrey v. Wyrick*, 836 F.2d 406, 411–12 (8th Cir.1987), it was crucial to the holding that the defendant's mistaken belief that he would not be prosecuted was not induced by anything that his interviewers told him; it was based entirely on his own ideas about what the law was. I agree that that kind of mistake cannot possibly render a confession inadmissible. But the clear purport of what the agents said in this case was that Mr. LeBrun would not be prosecuted if he said what the agents wanted him to say, and they even assured Mr. LeBrun that Mr. Muns's family approved of the deal. Indeed, they said that the family would not pursue civil remedies if he confessed and apologized. What the family wanted, the interrogators said, was simply to clear Mr. Muns's name.

In addition to the part of the interview that the court quotes in its opinion, the record reveals that, both before and after the exchange that the court isolates, the interviewers made reference to an alleged statute of limitations difficulty that would prevent prosecution for a "spontaneous" murder; and the officers intimated, moreover, that if Mr. LeBrun would simply admit to a spontaneous killing, they would call the United States Attorney in charge of the prosecution and tell him that there was no case against Mr. LeBrun. In addition, I respectfully suggest that the district court did not, as the court maintains, note that the agents qualified their representations by telling Mr. LeBrun that it was "only 'possible' "that he would not be prosecuted. In relevant part, the transcript of the interview reveals only that one of the agents said at one point that "it was possible, beyond possible" that no

prosecution would take place if Mr. LeBrun would cooperate, which is significantly different from what the court asserts was said. Taken in their entirety, the agents' assurances, which operated both as representations of what the law was and as promises, were categorical.

The district court shrank from holding that an absolute promise not to prosecute was made, not because of this part of the exchange between Mr. LeBrun and his interrogators, but because the promise not to prosecute was fleetingly qualified at one point, by one agent, by the condition that Mr. LeBrun must be telling the truth that the killing was spontaneous before the government would refrain from prosecution. This transitory allusion to truth-telling does nothing to undermine the district court's factual finding that Mr. LeBrun believed that he would not be prosecuted. My own examination of the transcript and the video tape leaves little room for doubt that the agents were in fact making such a representation about the law and a promise that Mr. LeBrun would not be prosecuted, and indeed it appears that the entire interview was deliberately structured around this stratagem. But nothing in particular really turns on this point: The coercive effect, if any, of a reasonably perceived promise is exactly the same as that of an actual promise.

In addition to the coercive tactics that the court briefly rehearses, among the enlarged pictures displayed prominently on the wall of the small interrogation room was a picture of Mr. Muns's family at his gravesite. The agents, moreover, did not merely invent generic phantom witnesses to the killing; they contrived a bizarre tale of a suicide note implicating Mr. LeBrun, and even claimed that there were other witnesses to the killing who were so haunted that their lives had been ruined by what they had seen. These were all knowing falsehoods. None of this finds a place in the court's opinion. Finally, and perhaps most importantly, the court fails altogether to mention the district court's finding that, despite the agents' assurances, Mr. LeBrun did not feel free to leave as the interview progressed. This is a finding of fact that is supported by Mr. LeBrun's testimony and cannot be reasonably rejected as clearly erroneous. It is also a finding that weighs heavily in favor of the district court's conclusion that Mr. LeBrun's confession was involuntary.

This is probably the right juncture to observe that it is not immediately apparent why statements by interrogators that are untrue, and known to be false, are more "coercive" than statements that are true. Such techniques may be reprehensible, but that fact would not seem to contribute to their propensity to overwhelm the will. Perhaps it is enough simply to note that the Supreme Court has said that "[t]he fact that the police misrepresented the statements that [a witness] had made is ... relevant," *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), in circumstances like the present ones. But we need also to consider the possibility that what lies at the bottom of these kinds of cases is not merely an aversion to something called coercion, but a general uneasiness about the fairness of admitting confessions that were induced by knowing, lurid falsehoods and unfulfilled promises, whether "coercive" or not. In fact, the Supreme Court has specifically said that "the admissibility of a confession turns as much on whether the techniques for extracting the statements ... 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." *Miller v. Fenton,* 474 U.S. 104, 116, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

In sum, a consideration of the evidence in this case, including the kinds of pressure that were brought to bear on Mr. LeBrun, the assurances of leniency that went unfulfilled, and the deceit that the interrogators practiced, leads me to the conclusion that his confession was illegally obtained and should have been sup-

pressed. At the very least, it seems to me relatively plain that the government has not carried its burden, *see Lego v. Twomey*, 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), of showing that the relevant statements were voluntary.

I therefore respectfully dissent and would affirm the judgment of the district court....

B. MIRANDA V. ARIZONA AND THE INTERPRETATION OF ITS REQUIREMENTS

2. INTERPRETATION OF MIRANDA REQUIREMENTS

(a) THE MEANING OF "CUSTODY" AND "DEPRIVATION OF FREEDOM OF ACTION IN ANY SIGNIFICANT WAY"

Page 105. Add to end of note (d) Indicia of Arrest of the textbook.

In the context of a habeas proceeding, the Court addressed the test for what constitutes custody for purposes of *Miranda*:

Yarborough v. Alvarado

United States Supreme Court
541 U.S. 652, 124 S.Ct. 2140 (2004).

■ OPINION: JUSTICE KENNEDY delivered the opinion of the Court.

... The United States Court of Appeals for the Ninth Circuit ruled that a state court unreasonably applied clearly established law when it held that the respondent was not in custody for *Miranda* purposes. *Alvarado* v. *Hickman*, 316 F.3d 841 (2002). We disagree and reverse.

I

Paul Soto and respondent Michael Alvarado attempted to steal a truck in the parking lot of a shopping mall in Santa Fe Springs, California. Soto and Alvarado were part of a larger group of teenagers at the mall that night. Soto decided to steal the truck, and Alvarado agreed to help. Soto pulled out a .357 Magnum and approached the driver, Francisco Castaneda, who was standing near the truck emptying trash into a dumpster. Soto demanded money and the ignition keys from Castaneda. Alvarado, then five months short of his 18th birthday, approached the passenger side door of the truck and crouched down. When Castaneda refused to comply with Soto's demands, Soto shot Castaneda, killing him. Alvarado then helped hide Soto's gun.

Los Angeles County Sheriff's detective Cheryl Comstock led the investigation into the circumstances of Castaneda's death. About a month after the shooting, Comstock left word at Alvarado's house and also contacted Alvarado's mother at work with the message that she wished to speak with Alvarado. Alvarado's parents brought him to the Pico Rivera Sheriff's Station to be interviewed around lunchtime. They waited in the lobby while Alvarado went with Comstock to be interviewed. Alvarado contends that his parents asked to be present during the interview but were rebuffed.

Comstock brought Alvarado to a small interview room and began interviewing him at about 12:30 pm. The interview lasted about two hours, and was recorded by Comstock with Alvarado's knowledge. Only Comstock and Alvarado were present. Alvarado was not given a warning under *Miranda* v. *Arizona*, 384 U.S. 436 (1965). Comstock began the interview by asking Alvarado to recount the events on the night of the shooting. On that night, Alvarado explained, he had been drinking alcohol at a friend's house with some other friends and acquaintances. After a few hours, part of the group went home and the rest walked to a nearby mall to use its public telephones. In Alvarado's initial telling, that was the end of it. The group went back to the friend's home and "just went to bed." App. 101.

Unpersuaded, Comstock pressed on:

"Q. Okay. We did real good up until this point and everything you've said it's pretty accurate till this point, except for you left out the shooting.

"A. The shooting?

"Q. Uh huh, the shooting.

"A. Well I had never seen no shooting.

"Q. Well I'm afraid you did.

"A. I had never seen no shooting.

"Q. Well I beg to differ with you. I've been told quite the opposite and we have witnesses that are saying quite the opposite.

"A. That I had seen the shooting?

"Q. So why don't you take a deep breath, like I told you before, the very best thing is to be honest.... You can't have that many people get involved in a murder and expect that some of them aren't going to tell the truth, okay? Now granted if it was maybe one person, you might be able to keep your fingers crossed and say, god I hope he doesn't tell the truth, but the problem is is that they have to tell the truth, okay? Now all I'm simply doing is giving you the opportunity to tell the truth and when we got that many people telling a story and all of a sudden you tell something way far fetched different." *Id.*, at 101–102 (punctuation added).

At this point, Alvarado slowly began to change his story. First he acknowledged being present when the carjacking occurred but claimed that he did not know what happened or who had a gun. When he hesitated to say more, Comstock tried to encourage Alvarado to discuss what happened by appealing to his sense of honesty and the need to bring the man who shot Castaneda to justice. ("[W]hat I'm looking for is to see if you'll tell the truth"); ("I know it's very difficult when it comes time to 'drop the dime' on somebody[,] ... [but] if that had been your parent, your mother, or your brother, or your sister, you would darn well want [the killer] to go to jail 'cause no one has the right to take someone's life like that ..."). Alvarado then admitted he had helped the other man try to steal the truck by standing near the passenger side door. Next he admitted that the other man was Paul Soto, that he knew Soto was armed, and that he had helped hide the gun after the murder. Alvarado explained that he had expected