

# WHAT EVIDENCE IS THERE FOR A LINK BETWEEN MENTAL IMPAIRMENT AND AN INCREASED RISK OF FALSE CONFESSIONS?

By Geoffrey Pickersgill<sup>1</sup>

## Abstract

*There has been much research in recent years into the causes of the well-known phenomenon that mentally impaired people tend to be over-represented as defendants in the criminal justice process. Less research, however, has been undertaken into why such defendants and suspects appear to be at a higher risk of making false confessions.*

*This may be because it appears that there is a simple answer to this question: such suspects are mentally impaired and vulnerable to the pressures of the criminal justice system, particularly those involved in being interviewed by the police. This is certainly one valid reason but it is by no means the only reason. Research suggests several causal factors are involved. This paper examines some of these causal factors and in doing so reveals the incremental nature of knowledge construction which various researchers have taken in their studies. Dispositional factors and situational factors are both instrumental in causing false confessions. The paper concludes that there is no one major factor that leads mentally impaired suspects to make false confessions more than suspects who are not mentally impaired but rather it is a combination of factors.*

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## Background

It can be said that most people would believe that it would not be possible for an innocent person to make a false confession that they had committed a crime. However, there is much academic research on the topic which shows that it *is* possible for an innocent person to be made to believe that they had, indeed, committed a crime and for them to then make a false confession. (Henkel and Coffman, 2004, p.568) Drizin and Leo (2004) found that the number of reported miscarriages of justice in the USA due to false confessions were only the ‘tip of the iceberg’. (Drizin and Leo, 2004, p.919) Redlich, et.al. (2009) conclude that false confessions ‘... are not unfortunate anomalies in the criminal justice system but rather are unfortunately common.’ (Redlich et.al. 2009, p.89) The result is that the mentally ill, particularly, are ‘...over-represented in the criminal justice system and over-represented among proven false confessors.’ (Ibid., p. 79) For, research by Teplin (2000) found that ‘the probability of arrest was 67 times greater for persons who demonstrate symptoms of mental illness compared with those without such symptoms.’ (in Redlich, 2004, p.19)

The benchmark for recent research into all aspects of false confessions has been a study by Kassin and Wrightsman in 1985. (Kassin and Wrightsman, 1985). Their study proposed three types of false confessions – voluntary, coerced compliant and coerced internalised. (Kassin and Wrightsman, 1985) Drizin and Leo, et.al. (2004) use Kassin and Wrightsman’s framework and argue that a suspect who has a mental impairment, such as a mental illness or a degree of mental retardation, is more likely to make a false confession than a suspect who has no such impairment. (Drizin and Leo, 2004, p.968) Furthermore, they argue that suspects with a mental impairment can be found making false confessions in all three typologies of false confessions identified by Kassin and Wrightsman. (Ibid.,p.968)

Other key researchers on this topic are Cloud et.al.,(2002), who examined the general vulnerabilities of mentally retarded suspects, Fulero and Everington (1995) on how mentally impaired suspects have difficulty in understanding their rights and legal proceedings, Kassin, (2008) on the role of dispositional vulnerabilities, Gudjonsson, et.al., (2004) on psychotic personality, Viljoen,et.al., (2002) on competency to stand trial, Kassin and Gudjonsson, (2004) with a wide-ranging qualitative review paper, Redlich (2004) on the police interrogation process and more research on this theme by Kassin, Drizin, Grisso, Gudjonsson, Leo and Redlich (2009). Additional research by Viljoen, Roesch and Zapf (2002) shows how the incidence of making false confessions increases with the severity of a person’s psychotic symptoms. (Viljoen, et.al., 2002)

It will be shown that there are not just one or two causes which make suspects with a mental impairment much more likely to make false confessions. Rather, there are often several causes which act in combination that create the conditions conducive to eliciting false confessions. Furthermore, it will be shown that what counts as knowledge is always contested. (Open University, D821,Week 1)

## Evaluation

Kassin and Kiechel’s (1996) positivist, empirical study, highlights how important it is to recognise the situatedness of knowledge and research. (Kassin and Kiechel, 1996) This situated relationship between knowledge and research has been described as, ‘inescapably shaped by the constraints, norms, values preconceptions and taken-for-

granted practices of the social worlds from which they emerge...’ (Open University, D821, Week 5) In contrast to Kassin and Kiechel’s positivist approach to knowledge, what counts as knowledge, for Henkel, are not the results of a laboratory experiment, but a qualitative technique where subjective traits, such as a person's imagination, emotions and meanings are seen as the main driving forces in the cognitive processes that create false memories and, ultimately, produce false confessions from innocent suspects. (Henkel and Coffman, 2004, p. 570) Positivists would reject such objects of enquiry as not valid for research. From an Idealist perspective, however, they are legitimate objects of study and are valid sources of knowledge. For, Idealists argue that ‘reality can only be understood as a construct of the human mind.’ (OU, D821, 2011, Week 6)

However, to illustrate the complexity of epistemological issues, Henkel’s work can also be viewed through an Interactionist lens; Interactionism is one type of Idealism where the subject and object of the social research are confused and where the world we are studying is produced through our interactions. For example, there is an emphasis in Henkel’s work on the authority they give to qualitative research studies of people’s meanings of events and the different ways in which people interact and communicate with each other. An example of this may be the manner in which police interrogations of suspects are carried out and how they can lead to the creation of false memories in innocent suspects’ minds and their subsequent making of false confessions through techniques such as the manipulation of items of evidence, words, phrases, and subjective opinions. (Henkel, 2004, p.572)

Unscrupulous police may see this as an opportunity to ‘stitch-up’ a vulnerable suspect with a false confession. For, research by Finlay and Lyons (2002) has shown that stressful environmental factors, such as being interviewed in a Police Station, can have a causal effect on mentally ill or retarded suspects making false confessions as they are willing to say ‘yes’ to any question put to them by the police so that they can escape the barrage of questions and flee the Police Station (or so they believe). (Finlay and Lyons, 2002) Furthermore, it can be argued that, the fact that it is legal for police in most US States to use ‘trickery and deception’ when interviewing suspects effectively encourages false confessions from vulnerable suspects. (Kassin, 2008, p.250) As Kassin, et.al. put it, ‘There is strong consensus...that individuals with cognitive impairments or psychological disorders are particularly susceptible to false confession under pressure.’ (Kassin, 2009, p.46)

It might also be argued that there is an element of Realism in Henkel’s work in that they acknowledge, through their epistemology and their methodology, that they are studying the ‘real world’ out there and an ‘open’ and complex world that cannot easily be reduced (Reductionism) to the ‘simple’ level of a closed, measurable, quantifiable and testable laboratory experiment (Empiricism and Positivism).

The fundamental question of whether mentally impaired suspects are fit or not to be interviewed is one which researchers Fulero and Everington’s examined in their 1995 article using a positivist epistemology and an empirical methodology. (Fulero and Everington, 1995) They discovered that mentally retarded defendants in the USA, were often found to be incapable of understanding their basic civil rights – their Constitutional Rights in the USA to remain silent under police questioning and not to incriminate themselves (Miranda Rights). (Ibid., p.533)

Fulero and Everington’s (1995) methodology used measuring scales originally developed by Grisso (1981) to measure the competency of juveniles to waive their Miranda Rights. This shows how approaches to knowledge can be incremental and how researchers’ epistemologies are incremental, building on previous researchers’

work. (Open University, D821, Week 5) Two samples of mentally retarded adult participants were tested and compared to Grisso's samples of participants of juveniles and adults. Fulero and Everington's research found that both samples 'scored substantially lower on measures of Miranda comprehension than Grisso's.' (Fulero and Everington, 1995, p.533) This suggests that the data 'raise strong concerns about the ability of many such defendants to make intelligent Miranda waivers.' (Ibid., p.533)

Later research by Redlich, et.al in 2009, confirmed another finding of Fulero's research that mentally impaired suspects' previous experience of the criminal justice process was also a major cause of them making false confessions. (Redlich et.al. 2009, p.82) That is, where suspects in the USA plead guilty of a crime they have not committed or make a false confession in order that they can escape the immediate stressful, interrogative environment of police questioning and hasten the police and court procedures to secure a more lenient sentence. (Ibid., p.82) However, Redlich's findings contrast with Kassin and Gudjonsson's earlier review of the literature in 2004 which found that all the research literature agreed that there were many causes of false confessions made by mentally impaired suspects and they concluded that the key to understanding this phenomenon was a combination of interacting causes. (Kassin and Gudjonsson (2004), p.51)

Kassin and Gudjonsson's (2004) qualitative review article begins by reaffirming the findings from Fulero and Everington (2004) that adults who are mentally retarded 'do not comprehend their rights as fully or know how to apply them' as well as non-retarded individuals. (Kassin and Gudjonsson, 2004, p.39) As they put it, '... this phenomenon occurs in different ways and for different reasons... it is also clear that certain dispositional and situational factors increase both interrogated influence in general and the risk of false confessions in particular.' (Kassin and Gudjonsson, 2004, p.51) In other words, there are both internal and external causal factors that increase the likelihood of a suspect with a mental impairment making a false confession. There are many of both kinds of factors and only a few of the major ones will be described in this paper because covering each and every one of them would go beyond the parameters of this work. This selection process, in itself, is another indication of how what counts as 'knowledge' for some people may not count as knowledge for others. (Open University, D821, Week 1)

Kassin and Gudjonsson (2004) describe how mentally impaired suspects are affected by the need to be seen to comply with authority, much more so than suspects without any mental impairment. (Ibid., p.51) Compliance is an important causal factor in false confessions because, as they put it, 'individuals prone to compliance in social situations may be particularly vulnerable in the interrogation room.' (Ibid., p.51) Furthermore, psychologists have noted that people with a mental illness or a mental retardation have much more compliant personalities. (Redlich, 2004, p.20) As Kassin and Gudjonsson (2004) put it, 'Some people are more vulnerable than others to respond with compliance or suggestibility to interrogative pressure.' (Ibid., p.51) They describe the two major psychological scales used in measuring degrees of compliance and suggestibility in laboratory experiments. (Ibid., p.51) These are, the Gudjonsson Compliance Scale (GCS) and the Gudjonsson Suggestibility Scales (GSS1 and GSS2). (Ibid., p.51) By describing these quantitative instruments in detail and the respective research studies, in the middle of a qualitative paper, the researchers illustrate, again, the fluid and contested nature of knowledge and how knowledge can mean different things to different people. (Open University, D821) For, a research paper on false confessions based on the 'gold standard' of objectivity with scientific

experiments, such as that by Kassin and Kiechel (1996), may be more acceptable and valid as 'knowledge' to an academic audience of a certain 'hard science' persuasion than a research paper where a more qualitative and subjective approach has been taken.

Kassin and Gudjonsson (2004) refer to research studies conducted in England by Gudjonsson and Henry (2003) and in the USA by Everington and Fulero (1999) which 'both found that people who are mentally retarded as a group scored significantly higher than average on the GSS measure of interrogative suggestibility.' (Kassin and Gudjonsson, 2004, p.53) This suggests that suspects who have some kind of mental impairment have 'heightened suggestibility in response to misleading information, which can increase the risk of internalised false confessions....to police during interviews and interrogations.' (Ibid., p.53)

Previous research by Viljoen, Roesch and Zapf in 2002 had found that suspects with severe psychotic illnesses such as schizophrenia are also much more likely to make false confessions than others. (Viljoen, et.al., 2002, p.497) Viljoen's (2002) study is a positivist and scientific piece of research using a survey and experiments involving a 'structured diagnostic technique' to assess mental illness rather than using diagnoses of participants made by third parties. (Viljoen, et.al., p.484) Here, Viljoen was improving on the methodology used in previous research and was following the recommendations made by Hoge, et.al., (1997) in their suggestions made in their paper for future research. (in Viljoen, 2002, p.484) This shows, once again, how knowledge and its epistemology are incremental. (Open University, D821, Week1) That is, the way in which one researcher tackles an issue often builds on the research from a previous researcher, adding new dimensions to the topic.

Viljoen's main finding was that defendants on trial in the USA had 'broad types of psychotic disorders (and) demonstrated high levels of impaired legal abilities in comparison to non-psychotic defendants.' (Ibid., p.497) Taking a Spinozan perspective, it can be argued that there is a clear need for flexible boundaries regarding special protections, in law, targeted specifically at suspects with the more serious psychotic disorders because, as the research shows, suspects with psychotic disorders are more likely not to understand their legal rights and to waive their right to remain silent, for example, and make a false confession. (Ibid., p.500)

These ethical and legal codes which Police in England and Wales follow from PACE and PEACE, where suspects with a mental impairment can only be interviewed in the presence of an 'Appropriate Person,' can be viewed from a deontological perspective. This is evidently a rules and regulations bound Kantian perspective but it also highlights the dynamic nature of ethical issues in general and the need to constantly review and rewrite those codes in the light of developments in modern society for what counts as knowledge is constantly changing. That is, ethical codes of conduct are not set in stone. They need constant revision. From this ever-changing perspective then, this is not so much a deontological issue but more a Spinozan, emergent one. For, it can be argued, ethical guidelines cannot be rigidly imposed on researchers from above but instead they need to emerge out of the everyday encounters and interactions between the participants.

Further support for Viljoen's findings that people with severe psychotic disorders have a high incidence of making false confessions comes from the work by Gudjonsson, et.al. (2004). In this study of University students in Iceland, Gudjonsson replicated a previous study about personality factors and their relationship to false confessions. This illustrates the value of research carried out with a scientific and objective 'gold standard' methodology and how it can be reproduced to the same standard by other researchers. This is a fundamental advantage of the scientific

method where the principles of replication and falsifiability apply, as noted in the D821 course literature. (Open University, D821) Gudjonsson's work confirmed the hypothesis that antisocial personality characteristics and 'active involvement in criminal behaviour' were 'the most significant predictors' of false confessions. (Gudjonsson, 2004, p.125) However, her research also discovered that abnormal personality traits together with a history of high psychoticism were also 'highly predictive of who makes false confessions and false denials.' (Gudjonsson, 2004, p.133)

One particular case of note involving a wrongful conviction involving eliciting a false confession from a mentally impaired suspect was that of Stephen Downing. Downing was eventually released after serving 27 years in prison and received substantial compensation payments. (Roberts, 2008; MailOnline, 2006) Taking Kassin's (2009) academic article on police-induced confessions and comparing its epistemological approach to that of two tabloid newspapers illustrates the different ways in which knowledge construction is formed.

Kassin, et.al. article (2009) strengths lie in the facts that it is an up-to-date review of the literature on the topic, in an authoritative peer-reviewed and respected journal by a group of academics of international repute. (Kassin, 2009) It is a detailed review and analysis which is objective, valid and bias-free and meets the high standards of writing, analysis and presentation expected of an authoritative piece of work aimed at an academic audience. However, the tabloid newspapers' approach to knowledge is completely different to that of Kassin (2009).

A major ethical concern with the MailOnline article is the way in which such a vulnerable person as Mr Downing is depicted. The other tabloid paper's reporting of the Downing case, 'The Daily Mirror', ridicules his lifestyle after his release and questions his mental state. (Roberts, 2008) The stories appear to break the 'harm principle' in research where intended and unintended harm can be inflicted on participants. (Open University, D821, Ethics 1) They also show what Potter has termed a 'power imbalance' between the researcher and the researched. (Potter, 2006, p.218) Factors such as 'vulnerability', 'naivety', 'power imbalance' and the 'harm principle' can also be seen to be important in the dealings between a Police Officer and a mentally impaired suspect and may lead to false confessions.

The MailOnline article is skewed heavily towards qualitative, subjective and value-laden concepts. It can be seen that it leans more towards a Consequentialist and Spinozan position where the Journalist and the Editor acting as 'gatekeepers' make a cost-benefit analysis of the proposed story to determine whether Potter's ideal of a balance of 'minimal harm with maximum benefit' can be achieved. (Potter, 2006, p.219)

## Conclusion

In conclusion, it can be seen that all the research literature presented in this paper indicates that there is a clear link between mental impairment and a high risk of false confessions. The key to explaining why suspects with a mental impairment are more prone to making false confessions is to view their predicament from a wide perspective. It is a combination of factors, rather than individual factors themselves, that lead to false confessions being made. These combinations act on 'the unique vulnerability' of the mentally impaired, as Leo and Drizin (2004) refer to it. (Leo and

Drizin, 2004, p.968) Furthermore, this is a 'unique vulnerability' which Kassin and Gudjonsson (2004) describe as a 'heightened state of malleability.' (Kassin and Gudjonsson, 2004, p.50)

However, it is not only personal dispositional factors that are important in this analysis but also situational and environmental ones. For example, Redlich's (2004) research on police interrogations with the mentally ill shows how a stressful and confusing environment can have more of a detrimental effect on those suspects with a mental impairment than on others without such an impairment. (Redlich, 2004, p.20) In a similar way, Kassin's (2008) study shows that police in North America actively create an environment of trickery and deception around the suspect knowing that this will make 'the uniquely vulnerable' mentally impaired suspect more susceptible to making a false confession. (Kassin, 2008, p.251) Kassin and Gudjonsson's (2004) article also shows how some factors, such as compliance, can be viewed from both a dispositional and situational perspective and in so doing it illustrates how approaches to knowledge are always contested. It also gives further support to the argument that it is the interplay and combination of factors that cause mentally impaired suspects to make false confessions rather than just one or two factors. (Kassin and Gudjonsson, 2004, p. 51)

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