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Common-Law Voluntariness in Maryland: Ghosts, Barnacles, and Elusive Bright-Line Rules

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COMMON-LAW VOLUNTARINESS IN MARYLAND: GHOSTS, BARNACLES, AND ELUSIVE BRIGHT-LINE RULES

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I. *Introduction:*

The admissibility of a confession poses complex questions that are often overlooked by many prosecutors and defense attorneys. According to Judge Charles Moylan, "[t]here is today among many members of the bar an intellectually undisciplined tendency to treat the Fifth Amendment privilege as little more than loose shorthand for confession law generally."[2] This impression that confession law is relatively uncomplicated stems, in part, from the promulgation of certain bright-line exclusionary rules which were originally designed to create clear guidelines for police interrogation. This article attempts to demonstrate, however, that Maryland's bright-line exclusionary rule regarding non-constitutional, common-law voluntariness is indeed more complicated than expected.

The United States Supreme Court in *Miranda v. Arizona,*[3] by requiring the now-familiar set of warnings prior to any custodial interrogation, attempted to establish bright-line constitutional guidelines for custodial interrogation. According to Justice Sandra Day O'Connor, however, the unintended result has been that *Miranda* "creates as many close questions as it resolves.... And the supposedly 'bright' lines... have turned out to be rather dim and ill defined."[4]

In 2001 the Court of Appeals of Maryland in *Winder v. State*[5] reaffirmed its own bright-line, *per se* exclusionary rule for analyzing non-constitutional, common-law voluntariness with respect to improper police promises. The Court rearticulated a "two-part test" that: 1) any implied or express police promise of "special consideration from a prosecuting authority or some other form of assistance;"[6] and 2) which *causes* a suspect to make a statement, will render that statement involuntary. As a result, Maryland has one of the most expansive exclusionary rules on improper promises in the country.[7] Yet, like the bright-line rules of *Miranda*, Maryland's *per se* bright-line exclusionary rule for common-law voluntariness creates *almost* as many close questions as it resolves.

Among the issues that the Court of Appeals has not squarely addressed is whether the *per se* common-law rule applies with equal force to non-custodial interrogations. Also unclear is whether implied, improper threats are analyzed under the *per se* rule. Moreover, the Court has not quantified the precise measure of causation needed for an improper promise to render a statement involuntary – that is, whether the promise must only have a *slight* effect on the decision to confess or whether the promise must be the proximate cause of the confession. Furthermore, the Court of Appeals has not definitively addressed how the common-law standard should apply to the jury instruction on voluntariness.

The Court of Appeals has also not resolved whether certain promises are improper. Among these unresolved issues are: 1) the precise definition of an implied, improper promise; 2) promises that are qualified by a police admonition that there are "no guarantees;" 3) promises to tell the prosecutor or judge of a suspect's cooperation, without promising leniency; 4) promises of material items, unrelated to the court system; 5) promises regarding bail; 6) promises of counseling, without promising counseling *in lieu of* punishment; 7) promises to help a non-relative; 8) promises to help a relative with non-legal matters; 9) playing the "false friend" scenario; and 10) false promises, which are otherwise not improper.

With so many unresolved issues in Maryland, one of the principal benefits of the *per se*, bright-line rule – clear guidelines for courts and law enforcement – has been rendered, at least at present, somewhat elusive. This should not, however, be unexpected. The dilemma of analyzing common-law voluntariness is that "despite over two centuries of judicial and legislative concern regarding promises, there is no consensus as to when if ever – *even in theory* – a suspect's decision to confess in return for such promises reflects the minimally sufficient autonomous choice that confession law should seek to assure."[8] Similarly, the Supreme Court, which has "carefully sidestepped promise issues,"[9] has stated that there is "no talismanic definition of 'voluntariness,' mechanically

applicable to the host of situations where the question has arisen .... N]either linguistics nor epistemology will provide a ready definition of the meaning of 'voluntariness.'"[10]

The purpose of this article is to outline the unresolved issues with respect to the common-law voluntariness test and to provide arguments on both sides of each issue for both prosecutors and defense attorneys to utilize in court.

II. Voluntariness –

A. Common Law Versus Due Process

In a nutshell, the State must prove, upon proper objection, the voluntariness of a confession in several different contexts:

A) In a motions hearing, the State has the burden to prove voluntariness, by a preponderance of the evidence, under Maryland, non-constitutional, common law – that is, that the statement was not caused by any improper promises or threats;

B) If the State prevails on the common law,[11] the State then has the burden to prove voluntariness, by a preponderance of the evidence, under the Federal Due Process Clause[12]– that is, that the defendant's will was not overborne, under the totality of the circumstances, by coercive police conduct;

C) Then, at trial, the State has the burden to prove to the trier of fact, beyond a reasonable doubt, that the confession was voluntary.

With respect to the common-law analysis of improper promises, the Court of Appeals in *Winder v. State*[13] explicitly reaffirmed the expansive *per se* exclusionary rule for improper promises in *Hillard v. State,*[14] which itself was a reaffirmation of the common-law exclusionary rule stretching back to 1873 in *Nicholson v. State.*[15] The *Hillard* Court "required [that] no confession or other significantly incriminating remark allegedly made by an accused be used as evidence against him, unless it first be shown to be free of any *coercive barnacles* that may have attached by improper means to prevent the expression from being voluntary."[16]

In defining "coercive barnacles," the *Winder* Court summarized the non-constitutional, common-law test as follows:

> Based on *Hillard,* we glean a two-part test to determine the voluntariness of a custodial confession in circumstances where a defendant alleges that the police induced his or her confession by making improper promises. We will deem a confession to be involuntary, and therefore inadmissible, if 1) a police officer or an agent of the police force promises or implies to a suspect that he or she will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's confession, and 2) the suspect makes a confession in apparent reliance on the police officer's statement.[17]

In applying this test, the Court of Appeals unanimously reversed three murder convictions and death penalty sentences based on several "egregious,"[18] improper promises made by the police in Wicomico County.

With respect to the constitutional analysis, in *Dickerson v. United States*, the Supreme Court stated that the federal due process analysis of voluntariness:

> refined the test into an inquiry that examines "whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession .... The due process test takes into consideration the "totality of all of the surrounding circumstances – both the characteristics of the accused and the details of the interrogation" .... The determination "depend[s] on a weighing of the circumstances of pressure against the power of resistance of the person confessing ...."[19]

In other words, an improper promise is just *one of many factors* in the due process analysis of whether the defendant's will was overborne. However, when a confession results from physical brutality or other tactics which "shock the

sensibilities of civilized society,"[20] "there is no need to weigh or measure its effects on the will of the individual victim."[21]

Although the "primary purpose" of both analyses "is to protect against government overreaching,"[22] the voluntariness analysis under Maryland common law is generally more favorable to the defendant than the analysis under federal due process.[23] The Maryland common-law approach generally applies a "per se exclusionary rule"[24] in which confessions *caused* by a limited set of police tactics – improper promises and threats – are *presumed* to be involuntary, irrespective of actual coercion. In contrast, the federal constitutional approach focuses on whether any number of coercive police practices – including promises and threats, as well as deception and lengthy interrogations – cause the defendant, under the "totality of the circumstances,"[25] to be *actually* coerced into confessing.[26] In short, under the common-law approach, Maryland courts will *not* examine whether an improper promise caused the incarcerated defendant's will to be actually overborne.

The due process test, however, is arguably more favorable to the defendant in one narrow area. If the police use certain coercive techniques to take advantage of a suspect whom they know has a substantial cognitive or psychological impairment, the Maryland common-law approach provides little protection.[27]

Although Maryland courts have often stated that another underlying purpose of the common-law test is "reliability," or "the belief that an involuntary or coerced confession is quite likely to be contrary to the truth,"[28] Maryland courts, at least in the past fifty years,[29] have not actually *analyzed* the truthfulness of a particular confession or the likelihood that a particular interrogation technique would cause a false confession. While the common law in Maryland does not explicitly prohibit an analysis of whether a particular confession is false, the constitutional test does explicitly forbid any evidentiary inquiry into the reliability, or truthfulness, of the confession itself.[30] Nonetheless, the reliability of a confession is an important rationale underlying the requirement that the State prove voluntariness, beyond a reasonable doubt, to the trier of fact.[31]

B. Is the Common-Law *per se* Rule Necessary For *All* Improper Promises?

The *per se* common-law rule is not without its critics. Judge Moylan recently referred to the *Hillard* decision as a "misbegotten ghost."[32] The *per se* rule is based on old Maryland cases, dating back to 1873,[33] which themselves were based upon the expansive common-law *per se* exclusionary rule from eighteenth and early nineteenth century England.[34] The primary focus of those old English cases was preventing unreliable confessions flowing from certain improper promises, which were believed, in those days, to have an overpowering effect on certain suspects.[35] The English courts "relied on intuition rather than empirical data to identify interrogation practices likely to produce such confessions."[36] In 1884 in *Hopt v. Utah*, the Supreme Court's first decision adopting a version of the common-law rule, the Court criticized the expansive common-law exclusionary rule as having "been carried too far."[37]

This eighteenth/nineteenth century *per se* exclusionary rule which was "carried too far" is nearly identical to the holdings in *Hillard*[38] and, for the most part, in *Winder*. As such, there are several concerns with this antiquated pedigree that should be carefully reviewed in order to examine whether the full force of Maryland's common-law exclusionary rule is still necessary.

First, several sociological studies dispute the notion that certain improper promises, short of promises of *significant* leniency, engender false confessions.[39] Second, it can be argued that the *per se* common-law rule is unnecessary in recent times when the defendant now enjoys several layers of added protections – due process voluntariness, *Miranda*, the Sixth Amendment,[40] and the State's burden to prove voluntariness, beyond a reasonable doubt, to the trier of fact.

Third, the *per se* standard was resurrected in 1979 in *Hillard* by a Court of Appeals which may have been reacting to a justifiable fear during the seventies – that a conservative Supreme majority might overturn *Miranda*.[41] For example, in 1977 the Attorney General of Maryland, Francis Burch, joined twenty other State Attorneys General in an Amicus Curiae brief for the eventual decision in *Brewer v. Williams*,[42] urging that the Supreme Court abandon *Miranda*.[43] By 1980, however, with the Supreme Court's decision in *Rhode Island v. Innis*,[44] this fear appeared to be subsiding and, as a result of the recent decision in *Dickerson v. United States*,[45] did not actually come to pass.

Fourth, a Supreme Court decision from 1991 has influenced several other states in repudiating the common-law rule.[46] In *Arizona v. Fulminante,*[47] the Court announced that the *per se* exclusionary rule for improper promises, as encapsulated in the 1897 Supreme Court decision, *Bram v. United States,*[48] "does not state the [constitutional] standard for determining the voluntariness of a confession." The Court in *Bram* held that the *per se* common-law test for voluntariness is subsumed within the Fifth Amendment privilege against compelled self-incrimination.[49] The *per se* constitutional test enunciated in *Bram* is nearly identical to the holding in *Hillard.*[50] Although the constitutional dicta[51] in *Fulminante* is by no means binding on the Court of Appeals in interpreting its own non-constitutional, common-law standard, [52] the Supreme Court's repudiation of such a venerated decision reinforces the need to *evaluate* the contemporary utility of the *per se* standard.

Fifth, in a fifty-state survey, only a handful of states apply an exclusionary rule as expansive as that enunciated in *Hillard* and reaffirmed in *Winder* (Florida,[53] Maine,[54] Michigan,[55] Mississippi,[56] and South Carolina[57]). While many states have a variation of the *per se Hillard/Winder* rule, most of these states have watered down the exclusionary force of the rule with selective holdings. Missouri, for example, applies a *per se* exclusionary rule only for promises of *leniency*, rather than for *any* promise of benefit.[58] Several states have recognized exceptions for promises: 1) initiated by the defendant;[59] 2) regarding bail;[60] 3) to bring the suspect's cooperation to the attention of the prosecutor or judge;[61] 4) which are implied;[62] and 5) which are unrelated to the crime charged.[63] Some states have adopted, by judicial fiat or statute, a modification of the common-law rule whereby only those promises likely to cause a false confession should be forbidden.[64] Many states simply apply the federal due process test that examines whether the suspect's will was actually overborne.[65]

Lastly, psychological literature indicates a greater possibility of an unreliable confession with certain *implied* threats than with improper promises.[66] Yet, from 1997 to 2001, Maryland appellate courts seemed to have developed a more "police friendly," "totality of the circumstances" standard for certain *implied* threats.[67] Similarly, the literature seems to indicate that certain types of deception – lying about physical evidence such as DNA – might be so overwhelming to some suspects such that an unreliable confession could result.[68] Yet, with respect to police deception, the Court of Appeals has consistently utilized the due process, "totality of the circumstances" approach.[69]

Nonetheless, even though the Court of Appeals in *Reynolds v. State* noted "a pronounced trend [in other jurisdictions] away from *per se* exclusion and toward a totality of the circumstances approach,"[70] the Court concluded that "Maryland has followed the old common-law rule, which has seemed to adopt a *per se* exclusion Rule . . . ."[71] The *Winder* Court, without mentioning this majority trend in the country, simply reaffirmed the expansive common-law exclusionary rule. Thus, the *per se* test, absent legislative action,[72] is firmly established in Maryland. Nonetheless, there are many permutations of the test which remain unresolved by the Court.

C. *The Present State of the Maryland Law of Voluntariness*

1. With Respect to Improper Promises, the Court of Appeals will not Examine Whether the Defendant's Will was in fact Overborne.

The common-law approach presumes coercion, upon the showing that an improper promise is causally related to a subsequent confession. The common-law approach "relieves the defendant of the burden of showing that his will was, in fact, overborne by such an influence."[73]

Accordingly, the Court of Appeals in *Winder v. State* did not analyze whether the defendant's will was "overborne," or actually coerced, as is done in the due process approach. The *Winder* Court did utilize, once, the term "coerced" to describe the effect of improper promises on the accused. The Court stated, "[w]e look to all of the elements of the interrogation to determine whether a suspect's confession . . . was coerced through the use of improper means." [74] This limited use of the concept of coercion was consistent with the one-time reference to "coercion" in *Hillard.*[75]

In so holding, the *Winder* Court scaled back a trend in the Court of Appeals from 1986 to 1997 to assimilate the common-law analysis with the "totality of the circumstances" analysis. This trend, which applied the "totality of the circumstances" test to both the common-law and the due process analysis, began in *Lodowski v. State*[76] in 1986, was favorably mentioned in *Reynolds v. State*[77] in 1992, and then appeared nearly completed in *Hof v. State*[78] in 1995.

The trend toward assimilation of the "totality of the circumstances" analysis and the common-law test seemed actually accomplished in *Burch v. State* in 1997.[79] Judge Wilner,[80] writing for the Court, summarized the two tests as follows:

> Under State common law, a confession or other significantly incriminating remark may not be used as evidence against a defendant unless, in the metaphoric words of *Hillard v. State*, it is "shown to be free of any coercive barnacles that may have attached by improper means to prevent the expression from being voluntary." *In plain English, that means that, "under the totality of all of the attendant circumstances*, the statement was given freely and voluntarily." The "totality of the circumstances" test also governs the analysis of voluntariness under the State and Federal Constitutional provisions.[81]

Consistent with this trend, the *Winder* Court conceded that, "we *generally* look at the totality of the circumstances affecting the interrogation and confession .... [T]o determine whether a suspect relied upon an offer of help from an interrogating authority in making a confession, we examine the particular facts and circumstances surrounding the confession."[82] However, the Court did not actually apply an *unqualified* "totality of the circumstances" test and did not examine whether the defendant's will was overborne. Rather, the Court applied the "particular facts and circumstances" (not necessarily the "totality of the circumstances") to the *causation* prong of the common-law analysis.

As such, the Court only examined a narrow set of factors among those catalogued by the Court of Appeals in *Hof v. State*, as part of the "totality of the circumstances" test.[83] The *Winder* Court did not analyze the defendant's age, intelligence, maturity, education, or experience with custodial interrogation. Moreover, the Court did not examine the degree to which the defendant was restrained (e.g., handcuffs), the number of interrogating officers, the size of the room, the distance of the interrogation from familiar surroundings, the tone and volume of the interrogators' voices, whether the defendant was physically mistreated, or whether the defendant was deprived of food and water.[84] Thus, as described in *Martin v. State*, the *Winder* Court simply engaged in a general "cause-and-effect" analysis.[85]

2. Does the Common-Law Exclusionary Rule Apply Only to a "Custodial Confession?"

The *Winder* Court stated that the common-law exclusionary rule applies to a "custodial confession."[86] The Court, therefore, implied that there is no *per se* rule of exclusion with respect to improper promises made in a non-custodial setting. The Court crafted this arguable requirement of custody from dicta in *Reynolds v. State*, which had restated the Maryland common-law *per se* rule in the context of a "defendant in custody."[87] Quoting from several text writers, the Court of Appeals in *Reynolds* stated:

> [I]t is the defendant's sensitivity to inducement while *in custody* and the potential impact of the promise of leniency that render the confession inadmissible. Courts abhor, or at least find distasteful, promises of leniency or immunity made by state agents to defendants subject to the vulnerability of *custodial* interrogation.[88]

Whether consistent with this dictum in *Reynolds* or by historical accident, not one case from the Court of Appeals has *actually applied* a *per se* common-law analysis to a statement taken in a non-custodial setting. In 1997 in *In re Eric F.*, the Court of Special Appeals applied a "totality of the circumstances" test, rather than a *per se* analysis, to an allegedly improper inducement made to a seventeen-year-old suspect who was *not* in custody.[89] It remains to be seen if custody is not present, whether the Court of Appeals will apply an unqualified "totality of the circumstances" test to an improper promise, as was done in *In re Eric F.*, or will retain the *per se* exclusionary rule.

On the other side of the issue, there does not appear to be any case from the Court of Appeals prior to *Reynolds* in 1992 which stated that custody was a prerequisite for the application of the common-law exclusionary rule. Furthermore, it could be argued that if the Court of Appeals viewed custody as a prerequisite to the operation of the *per*

se common-law rule, the Court in two cases involving non-custodial statements, *Reynolds* and *Pappaconstantinou*,[90] would not have mentioned the common-law analysis. Instead, the Court devoted several pages of analysis to different aspects of the common-law rule in both cases. The Court of Special Appeals in *Minehan v. State* recently analyzed the common-law test with respect to allegedly improper promises and threats in a non-custodial setting; however, the court did not have to apply the common-law analysis because it first ruled that the alleged inducements were not improper.[91]

Furthermore, in *Stokes v. State*, a case in which the defendant was at least *detained* during a search warrant, the Court of Appeals did not imply that custody or detention was a prerequisite for the operation of the *per se* rule.[92] The Court held as involuntary the defendant's statements which were made in response to police threats to arrest his wife.[93] One commentator has argued that promises or threats regarding third persons would be no less coercive if the defendant were not incarcerated.[94]

3. Does The Common-Law *per se* Rule Apply to Implied Threats?

Maryland courts have sometimes analyzed *implied* threats under the due process, "totality of the circumstances" test, rather than under the common-law test. The *Winder* Court appeared to leave open the possibility that there may indeed be, as Judge Moylan noted in *Martin v. State*,[95] an "aberrational little pocket dealing with the impact of promises (*though not necessarily of threats*) under Maryland common law."[96] The *Winder* Court explicitly held that the common-law *per se* test applied to improper *promises*[97] and characterized the improper police statements at issue as improper promises, rather than threats: "Of course, as Appellant argues, most of the statements we have recounted can be construed as threats as well as promises. We have not considered the police statements as threats for purposes of our analysis because, as promises alone, they rise to the level of actionable impropriety."[98] In the due process context, the Supreme Court in 1991 in *Arizona v. Fulminante* rejected the *per se* test, as embodied in *Bram*, with respect to a "credible threat of physical violence."[99]

Some other recent cases do appear to draw, albeit implicitly, a distinction between the analysis applied to implied threats and promises. In 1997 in *Burch v. State*, where promises were *not* at issue, the Court of Appeals applied an unqualified "totality of the circumstances" approach to a continuing threat from prior physical violence inflicted upon the defendant.[100] After *Winder*, the Court of Special Appeals in *Raras v. State* relied on *Burch* in applying the "totality of the circumstances" test to an allegedly improper threat.[101] In 2001 in *Jackson v. State*,[102] a case involving a continuing threat of physical abuse of the suspect, the Court of Special Appeals quoted from *Burch* in asserting that the common-law test is governed by the "totality of the circumstances" test.

By comparison, while Maryland appellate courts sometimes apply the "totality of the circumstances" test to implied threats, this test has almost never been *actually applied* to examine the causation from an improper promise. From 1986 and 2001, in most instances in which the Court of Appeals mentions an unqualified "totality of the circumstances" test, promises were either not at issue or the Court did not have to actually analyze the effect of an improper promise.[103]

On the other side of the argument, the vast majority of Maryland cases have not mentioned any difference in the analysis between threats and promises. In *Nicholson v. State*,[104] and a long line of subsequent cases from the Court of Appeals, the Court recited the same test for promises and threats.[105] For example, the Court in 1980 in *Stokes v. State* applied the common-law rule and held that "a promise not to arrest a near relative of the defendant, or a threat to do so, constitutes the form of inducement which will render a resulting statement involuntary."[106] In *Winder* itself, the Court stated in dicta that the first part of the *Hillard* test is to "determine whether the police or a State agent made a *threat*, promise, or inducement."[107] In *Hof v. State*, Judge Moylan stated that a "*conditional* promise is, by definition, a threat in the eventuality the condition is not satisfied."[108] He went on to quote MCCORMICK ON EVIDENCE:[109] "Whether an interrogator's language will be construed as promising a benefit or as threatening a detriment in such situations is a matter of very subjective choice." Other commentators agree that, "the relative morality of purchasing a confession with [a promise] as opposed to obtaining one by use of threats lies very much in the eye of the beholder."[110]

A recent 4-3 decision from the Court of Appeals in *Pringle v. State*,[111] placed in some doubt the existence of

any significant distinction between improper threats and promises. In *Pringle*, the police detained three passengers in a car that contained cocaine in a closed compartment in the back seat. The defendant, who was not the registered owner, was in the front passenger seat. The officer told the detained passengers after finding the drugs, "if no one admitted to ownership of the drugs he was going to arrest them all."[112] No one responded, and the officer placed all three passengers under arrest. Two hours later, the defendant confessed after waiving his *Miranda* rights. After concluding that there was no probable cause for the arrest, the Court performed a Fourth Amendment attenuation analysis of the taint of the illegal arrest on the confession.[113] As part of this taint analysis, the Court conducted an "exploration of voluntariness" of the confession and concluded that there was no attenuation of the "coercive effect" of the "inducement" (threat) that had occurred two hours earlier.

The *Pringle* Court indicated in several ways that it was, in effect, conducting a *per se* common-law analysis of the voluntariness of the threat. The Court recited the common-law test, but did not quote any due process cases, nor make mention of whether the defendant's will was overborne.[114] Most recently, the Court of Special Appeals in *Minehan v. State*[115] analyzed alleged threats in the common law context without mentioning the "totality of the circumstances."

It can also be argued that courts should give the defendant *more* protection from police threats than from improper promises. For instance, the threat to arrest a loved one, by its very nature, is more coercive than a promise *not* to arrest a loved one.[116] In fact, studies indicate that people perceive threats to be more coercive upon the subject's decision to confess than direct or implied promises.[117] For example, the Supreme Court of Nevada held that, while it may be permissible to promise the suspect to tell the prosecutor of his cooperation, it is impermissible to tell the suspect that his failure to cooperate will be communicated to the prosecutor.[118]

The Court of Appeals has expressed no ambiguity, however, in holding that threats pertaining to constitutional rights will render the subsequent statement involuntary. In *Thiess v. State*,[119] the threat to keep the suspect held incommunicado until he confessed rendered a confession involuntary. In *Lewis v. State*,[120] the Court of Appeals indicated that it was improper for a detective to make a threat that the defendant would be labeled a murderer if he requested a lawyer.

4. What Measure of Causation is Required from the Improper Influence?

What if the defendant was only slightly influenced by an improper promise? What if the defendant was *primarily* influenced by genuine remorse, but also by an improper promise? Maryland appellate courts have seldom addressed the precise measure of causation required by the common-law rule.

Notably, in the first voluntariness case in Maryland, *Nicholson v. State*, the defendant argued that "[t]he law does not measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration, *if any degree of influence* was exerted."[121] The Court of Appeals, however, did not reach this issue because the Court accepted the trial court's factual finding that the officers' denials of any improper promise or threat were credible. In 1887 in *Biscoe v. State*, the second case in Maryland involving improper promises, the Court conceded that, "[i]t is not, of course, an easy matter to measure in all cases the force of the influence used, or to decide as to its precise effect upon the mind of the prisoner. . . ."[122] However, the Court again did not reach the issue of how to measure the influence of the inducement.[123]

Despite having identified the issue in these early cases, the Court of Appeals has not squarely decided the precise measure of causation needed for an improper influence to render a statement involuntary. The *Winder* Court only stated:

> The second prong of the *Hillard* test triggers a causation analysis to determine whether there was a nexus between the promise or inducement and the accused's confession. In *Reynolds,* we made clear that "[i]f a suspect did not rely on an interrogator's comments, obviously, the statement is admissible regardless of whether the interrogator had articulated an improper inducement . . . . As to the second factor, the reliance, or nexus, between the inducement and the statement, to determine whether a suspect relied upon an offer of

> help from an interrogating authority in making a confession we examine the particular facts and circumstances surrounding the confession.[124]

In *Winder*, the Court engaged in a *general* "cause-and-effect" analysis that considered a few "attenuat[ing]" factors, such as the timing of the inducement in relation to the confession, the level of intimidation felt by the defendant, any "intervening" factors (new interrogation locations), and the flagrancy of the police conduct.[125] The Court also emphasized that the timing of the confession in relation to the inducement was "critical."[126] The Court stated as well that "a singular [police] statement communicated to the suspect may be sufficient to qualify as an inappropriate offer of help."[127]

The *Winder* Court considered two cases which also seemed to apply a general "cause-and–effect" analysis that considered some attenuating factors.[128] One of the cases cited was *Johnson v. State,*[129] in which the Court of Appeals held as voluntary a confession that was given three days after a statement that had been involuntarily induced by an improper promise. The voluntary confession three days later was given to another officer at another place, and neither the officer nor the defendant mentioned the improper promise.[130]

Neither *Winder* nor *Johnson* discussed prior Maryland cases that had adopted a more stringent ("defendant-friendly") rule of causation. For example, in 1950 in *Edwards v. State*, the Court examined the effect of an improper inducement on two subsequent statements made two hours and thirteen hours, respectively, after the first confession was improperly induced by a promise.[131] The Court stated that the "improper influence which produced the first confession is presumed to still be in effect until a cessation of that influence *is definitely shown, and the evidence to overcome and rebut such a presumption must be clear, strong, and satisfactory, and any doubt on this point is resolved in favor of the accused."*[132] The Court suppressed the second and third confessions. Also, in *Kier v. State*, the Court, citing *Edwards*, suppressed a second confession made *fourteen days* after the first improperly induced confession.[133] *Edwards* and *Kier*, however, might be distinguished because they involved the effect of an improper inducement *and a prior confession* upon a subsequent confession.

In 1996 in *Martin v. State*, the Court of Special Appeals offered a more precise description of the necessary measure of causation: "If the inducement is shown to have *some,* even if only slight, influence on a subsequent confession, the *per se* exclusion approach creates a conclusive presumption that the influence was dispositively catalytic and relieves the defendant of the burden of showing that his will was in fact overborne by such influence."[134]

The Supreme Court of Michigan in *People v. Conte*, an opinion with a nearly identical *per se* test as *Hillard*, held that a promise "must have more than an attenuated causal connection with the confession, but need not be the only or even principal motivating factor."[135] The Supreme Court of Mississippi, which also has an exclusionary rule as expansive as *Hillard*, uses the term "proximate cause"[136] to measure the influence of the improper promise upon the subsequent statement.

5. Did *Winder* Narrow The Definition of An Improper Promise?

The *Winder* Court may have narrowed the definition of an improper promise by defining it as "special consideration from a *prosecuting authority* or some other form of assistance in exchange for the suspect's confession . . .."[137] The *Hillard* Court had stated a broader definition – "help or some special consideration" – without mentioning "prosecuting authority."[138]

This arguably narrowed definition in *Winder* is consistent with an older, and subsequently abandoned, line of Maryland cases from 1961 to 1965. In 1961 in *Presley v. State*, the Court of Appeals stated that the State must prove that a confession was not caused by a "promise, threat or inducement whereby the accused might be led to believe that there would be a *partial or total abandonment of prosecution.*"[139] In several subsequent cases[140] the Court restated this narrowed definition until it appeared for the last time in 1965 in *Smith v. State.*[141]

This narrower definition of an improper promise is consistent with *Hopt v. Utah*, the Supreme Court's first case on common-law voluntariness.[142] In *Hopt,* the Supreme Court held that a confession is involuntary if made "in consequence of inducements . . . *touching the charge preferred.*"[143] Even in 1897 in *Bram v. United States*, *Hillard*'s ancestral role model, the Supreme Court reiterated this qualification that

the improper influence must relate to the "crime charged."[144] Furthermore, this narrowed definition is arguably consistent with the Court's statement in *Reynolds v. State* that, "[g]enerally the type of inducements that rendered confessions inadmissible at common law were inducements extreme enough to make confessions unreliable and which *directly impacted on the accused or the crime charged.*"[145]

This narrowed definition is also consistent with recent sociological studies indicating that minor promises, which do not offer substantial help with the suspect's sentence or likelihood of acquittal, are unlikely to produce a false confession. Professor Welsh White, who has written several articles criticizing police promises, threats, and deception, concluded that:

> *As Wigmore observed, the premise that confessions produced by any promises are untrustworthy was probably never correct.* If the inducement to confess is relatively slight – a promise that the officer will testify that the suspect cooperated, for example – there is little reason to believe that a suspect will respond with a false confession . . . [However, regarding] a promise of *significant* leniency, empirical data as well as intuition suggest that even an innocent suspect will be quite likely to confess rather than risk the consequences of maintaining his innocence.[146]

Some language in *Winder*, however, suggests the contrary. The Court's use of the phrase "or some other form of assistance" could be interpreted as a reaffirmation of an *expansive* definition of an improper promise. The Court did not expressly couple this phrase with the qualifier, "from a prosecuting authority."[147] With the exception of the cases discussed above from 1961 to 1965, and the dicta in *Reynolds*, the Court of Appeals has consistently applied a broad definition of an improper promise. For example, in *Nicholson v. State,*[148] the Court defined an improper promise as "any promise of worldly advantage." The Court repeated the *Nicholson* definition in *Reynolds,*[149] *Hof,*[150] and *Winder.*[151] In 1980 the Court in *Stokes v. State* broadly stated that the "rule in *Hillard* announces that a statement is rendered involuntary if it is induced by any official promise which redounds to the benefit or desire of the defendant."[152]

One court in recent years has broadly interpreted an improper promise to include a material benefit unassociated with the pending case. The Court of Special Appeals in *In re Joshua David C.* quoted the *Nicholson* definition in holding that an officer's promise of a tee shirt to a ten-year-old child rendered the subsequent statement involuntary.[153]

a. What is an *Implied* Promise?

The *Winder* Court established an "objective" test for determining whether the police actually communicated a direct or implied promise. First, a statement will not be suppressed just because the defendant sincerely believed that he would receive some benefit for his confession, without any evidence that his belief was reasonably "premised on a statement or action made by an interrogating officer."[154] Second, the *Winder* Court held that, "[a]lthough a defendant need not point to an express *quid pro quo,* . . . a promise or offer within the substance of the officer's eliciting statement" is required.[155] Third, the Court may have narrowed the definition of an improper promise by not adopting language from previous cases that any "promise, however slight" would constitute an inducement.[156]

The Court of Appeals has most often analyzed an implied promise in the context of the police statement, "it would be better for the defendant to talk." In *Ball v. State*, the Court held as voluntary the defendant's written version of a prior oral confession, despite the detective's statement that it would be "much better if you told the story . . . to the jury . . . so that it is your words not mine . . .."[157] In *Ralph v. State,* the Court of Appeals suggested that when there is no improper police statement or action, other than the admonition, "it is better to tell the truth," an improper promise will not be found.[158] In *Deems v. State,* the police statement, "the truth would hurt no one," was not an improper inducement.[159] Similarly, the Court of Special Appeals in *In re Owen F.* found no implied promise when the officer told a fourteen-year-old with an IQ of 70, "I think it is better if you tell me."[160]

However, in *Biscoe v. State* the statement, "it would be better to tell the truth . . . and have no more trouble about it," was held to be an improper promise – one "of the strongest kind."[161] In *Dobbs v. State,* the *prosecutor's* statement, "Tell the truth. You have nothing to fear, if you weren't in it," was

held to be an implied promise.[162] In *Lubinski v. State*, the Court of Appeals stated that the police statement, "It will help you a lot [if you give a statement]" would be an improper inducement.[163] In *In re Lucas F.*, the Court of Special Appeals held that the exhortation to tell the truth, "so there would be no problem later," was improper.[164] Chief Judge Gilbert wrote that the exhortation sowed the "seeds of a subauditur in the [ten-year-old defendant's] mind that if he related the events that transpired . . . he would avoid subsequent problems."[165]

Studies do indeed show that implied promises of leniency may be interpreted in almost the same way as direct promises. Suspects process information "between the lines."[166] Thus, the "difference between expressions of compassionate understanding on the one hand, and implied promises of leniency on the other, is at the margins sometimes a matter of emphasis and nuance."[167]

b. Qualified Promises – Implied, Improper Promises Accompanied by the Warning that Nothing Can Be Promised.

Another difficult issue arises when the police warn the suspect that the police *cannot* make any promises, and then proceed to make an implied promise. In 1887 in *Biscoe v. State*, the interrogator told the defendant he could make no promises to the defendant, but then told the defendant, "It would be better for him to tell the truth, and have no more trouble about it."[168] The Court of Appeals observed, "But what does this amount to when, in the next breath, we find him [making a promise]?"[169] The Court held the subsequent confession to be involuntary. However, in 1958 in *Merchant v. State*, the Court of Appeals held that because the defendant was told that anything he said can be used against him, there could be no improper promise implied in the police statement, "The truth hurts no one."[170]

In 1990 the Court of Special Appeals in *Watters v. State* held that certain implied promises were not improper because the officer repeatedly reminded the defendant that he could not promise him anything.[171] The officer told the defendant, "I can't promise that you are going to walk out of jail, okay? ... I am giving you the opportunity to tell us what you know. I can't say whether that is going to help you, I can't say that it is not going to help you, because I am not in that position."[172] Most recently, the Court of Special Appeals in *Minehan v. State* held that a suspect "could not reasonably believe the officers would ensure his case was handled with leniency" because the police warned the suspect several times that the police could "not promise [him] anything."[173]

c. Short of a Promise to Advocate for Leniency, a Promise to Tell the Prosecutor or Judge of the Defendant's Cooperation

In *Hillard v. State*, the Court found a statement involuntary which was made in reliance upon the officer's promise "to go to bat" for the defendant with the prosecutor.[174] However, the Court has never directly ruled on a promise simply to *inform* the prosecutor or judge of the defendant's cooperation, without promising *to advocate for* leniency. In *Winder*, the Court of Appeals characterized the various improper offers of help made to the defendant by three different officers as follows: "to contact the prosecuting authorities in order to provide him leniency during his subsequent prosecution. The officers purportedly would carry out their offers by advocating on Appellant's behalf to the state's attorney and the judge presiding over his anticipated trial."[175]

In *Grammer v. State* in 1953, the Court of Appeals implied that a promise to tell the judge of the defendant's cooperation might be problematic. The officer told the suspect that "at the time of court . . . it would be testified to that he had cooperated with us in making a statement."[176] However, because the questionable promise was made after the confession, the court did not have to rule on whether there was an improper promise.[177] In *Hall v. State*, the Court of Appeals expressly declined to rule on a similar question.[178]

In contrast, in *Boyer v. State*, the Court of Special Appeals held that it was not improper for the officer to tell the defendant that the officer would tell the prosecutor of the defendant's cooperation.[179] Similarly, Professor White, who has written extensively on the problem of false confessions, conceded that this type of promise is unlikely to lead to a false confession.[180] The overwhelming majority of states has held that promises of this nature are not improper.[181]

d. Promises of a Material Item, Unrelated to the Case

The Court in *Reynolds v. State* noted that "[p]romises of purely collateral benefits do not generally reach a level that undermines the voluntariness of a confession."[182]

In *In re Joshua David C.,* the Court of Special Appeals applied the common-law exclusionary rule to an involuntary confession made by a ten-year-old who was promised a tee shirt.[183] The court cited *Nicholson v. State*, which prohibited a "promise of worldly advantage."[184] In 1968 in *Lyter v. State,* an implied promise to help the defendant get a job when he got out of jail was held to be improper.[185] In *Mitchell v. State*, the defendant alleged that the police promised to return the defendant's car to his wife.[186] The Court of Special Appeals did not have to analyze the promise about the car because the trial court believed the officers' testimony that they had offered no inducements.

e. Promises Regarding Bail

Although no Maryland appellate court has squarely held that promises related to bail are improper, there are ample dicta to indicate that such promises would be improper. The *Hillard* Court did not specifically hold that the improper promise "to go to bat" with the prosecutor related to bail. However, the trial judge appeared to find that the promise related to the question of bond.[187] Similarly, the Court of Special Appeals in *Whack v. State* stated that "promises to reduce bail . . . may act to vitiate the voluntariness of a confession."[188] In *Ponds v. State*, the Court of Special Appeals stated the confession would have been involuntary if the trial court had believed the defendant's allegations that the police would recommend "personal bond" in exchange for cooperation.[189]

However, in *Pharr v. State*, although the court did not have to decide the propriety of a police promise to get the defendant out on bond, the court did not explicitly state that such a promise was improper.[190] Furthermore, regarding a detective's effort to convince the defendant that he was not in custody, the Court of Special Appeals in *In re Eric F.* held that it was *not* an improper promise for the detective to tell a suspect that whatever the suspect said, the suspect would "go home . . . that night."[191]

f. Promises Regarding Counseling (not in lieu of punishment)

What if the police promise psychological assistance *during* the suspect's eventual jail sentence rather than *in lieu of* it? The Court of Appeals has not addressed this issue.

The *Winder* Court, however, did indicate that the following police statement was an improper inducement: "We think the person who committed these [acts] needs help. I think you need help. The only way we can get you that help is for you to let us know what happened. We can let the State's Attorney's Office know . . .."[192] The Court characterized the officer's statement as a promise to help "with obtaining psychological assistance and leniency from the prosecuting authority."[193] In *Johnson v. State*, the Court found that a statement was "properly suppressed" because it had been induced by a promise of psychological treatment.[194] There, the trooper stated that if the defendant confessed to the murder "he might be able to receive some sort of 'medical treatment at Perkins' instead of being 'locked up for the rest of [his] life....'"[195]

g. Promises Regarding Privacy

In 1937 in *Markley v. State*, the Court of Appeals did not find improper a police promise to keep the defendant's name out of the "published statements on the case."[196] The Court held that an assurance of secrecy, short of a promise not to prosecute, does not render a confession inadmissible.[197] In 1943 in *Ford v. State*, the Court of Appeals did not find improper a promise to tear up the detective's notes at the end of the interrogation.[198] However, a promise to keep a defendant's statement confidential, beyond the narrow holdings of *Markley* and *Ford*, will surely result in an involuntary statement.

h. Promises to Help (Not to Harm) a *Non-Relative* Friend in *Legal* Matters

In 1980 the Court of Appeals in *Stokes v. State* held as improper a "promise not to harm (physically or emotionally) a near relative with whom the defendant naturally has a close bond of affection."[199] The Court specifically left open the issue of what "degree of closeness" the defendant must have with a non-relative friend who is the subject of the police promise or threat.[200] However, in 2002 the Court of Appeals in *Pringle v. State* held, in the context of a Fourth Amendment "attenuation" analysis, that a threat not to arrest a *non-relative, co-defendant* would constitute a "coercive"

"inducement"[201] and, thus, *implied* that the subsequent confession was involuntary.

The Court of Special Appeals in *Bellamy v. State* extended the exclusionary rule of *Stokes* regarding near relatives to a promise to help the defendant's fiancé.[202] In *Fowler v. State,*[203] the Court of Special Appeals held that a detective's exhortation to disclose the co-defendant's name, so that "the weight could be shared," was an improper inducement. However, the court found that the confession was admissible because the defendant had not relied on the inducement. In *Jarrell v. State*, the Court of Special Appeals held, in the context of consent to search under the Fourth Amendment, that the police promise to release a sick friend from jail caused the consent to be involuntary.[204]

The Supreme Court in *Spano v. New York*, although in the due process context, held as involuntary a confession induced by the police officer's statement that the police officer would probably lose his job if the defendant did not confess.[205] The Court held that the defendant's sympathy was "falsely aroused" because the interrogating officer was a childhood friend of the defendant.[206]

i. Promises to Help a *"Near Relative"* in *Non-Legal* Matters

In *Stokes v. State,* the Court of Appeals left open the possibility that it may be improper to promise to help a "near" relative with matters not pertaining to the pending case or to any other case.[207] The Court held as improper a "promise *not to harm (physically or emotionally)* a near relative with whom the defendant naturally has a close bond of affection."[208] A unanimous Supreme Court in *Lynumn v. Illinois*, although a due process case, held a confession to be involuntary after the police told an arrested defendant that if she did not confess, her two children would be taken from her by the State, and her welfare payments would be cut off.[209]

In *Reynolds v. State*, the Court of Appeals found no impropriety with the police exhortation to the defendant to tell the truth in order to help the defendant's daughter, the victim, with her self-doubt over the prospect of no one believing her allegations of sexual abuse against the defendant.[210] The Court labeled this promise as "collateral" because the statement had not "directly impacted" the defendant. The Court emphasized that the benefit of the promise was not something that the "*police* would or would not do if the defendant made a statement."[211]

The Court of Special Appeals in *Finke v. State* also found no impropriety with a similar police exhortation that the defendant should admit the crime to spare his three-year-old grandson the necessity of having to testify against the defendant.[212] In *Boyd v. State*, the defendant asked to see her children before executing a written statement.[213] The officer responded that she would be allowed to see her children after she completed and signed a written statement.[214] In holding that this was not an improper inducement, the Court of Special Appeals stated, "[w]e know of no right on the part of a suspect in a murder case to interrupt the interview process in order that the suspect may visit with his or her children before continuing with the interrogation."[215] The Texas Court of Criminal Appeals in *Muniz v. State,* found no impropriety with an officer's promises to get help from charities for defendant's pregnant wife and sick mother.[216]

j. False Friend Scenario and Promises to Investigate Any Leads That The Defendant Provides in an Exculpatory Statement

In a case decided several months before *Hillard*, the Court of Special Appeals in *Rowe v. State* examined a police statement that the victim was a "no-good-son-of-a-bitch . . . and that the only thing that [the detective] wanted to do really was to shake the hand of the man that murdered him...."[217] The court held that this was not improper because the defendant could not have reasonably interpreted the statement as a "preliminary pardon."[218] Even a noted critic of many modern police interrogation techniques, Professor Albert Alschuler, has acknowledged that the police "should be allowed to express false sympathy for the suspect, [and] blame the victim."[219]

In *Finke v. State*, the Court of Special Appeals examined the police promise to investigate any leads the defendant provided. The court held that this promise was not improper because, if it has any effect at all, it would induce an exculpatory statement.[220] The Court of Special Appeals came to the same conclusion on a similar set of facts in *Clark v. State*.[221]

k. False Statements or Unfulfilled Promises Which Are Otherwise Proper

Generally, the Court of Appeals has held that deception, except "an overbearing inducement, is a 'valid weapon of the police arsenal.'"[222] With respect to police deception, Maryland appellate courts apply the *constitutional* due process test of whether the defendant's will was overborne under the totality of the circumstances.[223] However, if the police lie about the law,[224] the resulting confession will likely be deemed involuntary, especially if the lie pertains to the suspect's constitutional rights.[225]

In *Ford v. State*, the Court of Appeals held that a "breach of faith" regarding a promise to tear up the detective's notes after the defendant confessed was not sufficient to render the confession involuntary.[226] In *Mitchell v. State*, the Court of Special Appeals stated in dicta that it was not a significant factor in the voluntariness inquiry that the police did not follow through on their promise to get the defendant a reduction in bail.[227]

However, Professor White has argued that false or unfulfilled promises, which would otherwise not be improper, should not be permissible and should render a subsequent confession involuntary. He analogized this situation with a defendant's right to withdraw a guilty plea when the State has breached its end of the plea bargain.[228]

l. Encouraging a Suspect to Adopt an "Accidental" Theory of the Case or to Admit to a Lesser Crime

The ploy to encourage a suspect to admit to an accidental theory of the case was unanimously upheld in 1997 by the Court of Appeals in a death penalty case. In *Ball v. State*, the Court upheld the technique of presenting the defendant with two opposing versions the facts.[229] The first version presented the defendant as a diabolical criminal. The second version presented the defendant as a loving father, who had a "tough life," and who shot the victim accidentally.[230] The Court classified this technique as a permissible form of deception, rather than an implied promise of leniency and, thus, applied a "totality of the circumstances" test.

In *Smith v. State*, the Court of Special Appeals held that the police statement, "the Court might take into consideration a version by the accused of the fire being accidental," was not an improper inducement.[231] Nonetheless, Professors Richard Ofshe and Richard Leo claim that this technique has played a part in eliciting some false confessions because the technique "relies on communicating a promise of leniency for its efficacy."[232]

m. Promises Initiated by the Defendant

In *Hillard,* the defendant's attorney appeared to have initiated the idea of the detective "going to bat" for the defendant. However, the Court did not mention this as a factor in finding involuntary a confession which resulted from the *same promise* made later by the detective.[233] The Court ignored this factor and held that the detective's promise rendered the resulting confession involuntary. The Court of Special Appeals in *Jones v. State* held a confession to be involuntary even though the defendant initiated the subject of the police getting him "help."[234] Similarly, in *Bellamy v. State,* even though the defendant initiated the subject, the Court of Special Appeals held as involuntary a confession induced by a promise of help to secure the release of the defendant's fiancé.[235]

However, the Court of Special Appeals in *Mitchell v. State* stated that an important factor in holding that there were no improper inducements was that the "defendant volunteered to give information about [another case] in return for certain things that *he requested* the police do for him."[236] Several states have relaxed the *per se* rule on this basis.[237]

n. Confession Induced By Valid Plea Agreement Between an Unrepresented Defendant and the Prosecutor.

In 1986 the Court of Appeals in *Wright v. State* held as voluntary a statement of an unrepresented defendant which was induced by a plea bargain negotiated with a prosecutor shortly after the defendant was arrested.[238] Because the defendant specifically agreed that any of his statements made as part of the plea bargain, pursuant to Maryland Rule 4-243, would be admissible in the event that he withdrew from the plea, the Court held that these statements were admissible, as long as the State honored its end of the bargain.[239] The Court conceded the next year that its decision in *Wright* was in the minority when compared to other jurisdictions around the country.[240]

6. Should Courts Consider the Likelihood of Certain Police Practices Causing an Unreliable or even False Confession?

The likelihood of producing a false confession was the controlling test for the admissibility of confessions at common law in England after the Restoration in 1660.[241] The Court in *Reynolds* observed that "[t]he common law approach was to identify inducements that might make a confession unreliable or even false."[242] For a limited number of years in Maryland, between 1925 and 1943, the truthfulness of a confession was an important factor in the determination of voluntariness. In 1928 in *Carey v. State*, the Court of Appeals held that the "ultimate test to be applied in determining the admissibility of the statement" is: "Was the situation produced by that evidence such that there was a reasonable probability that the accused would make a false statement or confession . . .?"[243]

Although the Court of Appeals has often explained that one underlying rationale of the common-law rule is that a "promise of some benefit is, of course, inherently untrustworthy,"[244] the Court, since these early cases, has not actually examined the reliability of a particular confession, or the likelihood that a particular police tactic would produce an unreliable confession. However, the Court of Appeals has not explicitly forbidden, under the common law, an analysis of the truthfulness of the confession, as the Supreme Court has done with respect to the due process analysis.[245]

In the past six years, there has been a wave of scholarly articles concerning the phenomenon of false confessions.[246] In one such study, Professors Ofshe and Leo analyzed sixty proven false, or probably false, confessions.[247] Out of the thirty-three *proven* false confessions, only eighteen (55%) were discovered before trial, five (15%) plead guilty, nine (27%) were convicted at trial, and only one (3 %) was acquitted.[248] Sixteen out of the sixty involved cognitively disabled defendants.[249] In the Washington D.C. area, the public awareness of the possibility of a false confession has increased as a result of a series of articles in the *Washington Post* on the lengthy, incommunicado interrogations sometimes employed in Prince George's County.[250]

Despite this heightened concern, the scholarly literature has only produced a relatively small number of documented false confessions which "can be explained . . . primarily on the ground that the interrogator's promise provoked the suspect's confession."[251] Furthermore, there is "no sound empirical proof that such instances are widespread."[252] Even Ofshe and Leo concede that there has been no research "to quantify the number and frequency of false confessions or the rate at which they lead to miscarriages of justice."[253]

Professor White has advocated that trial judges should evaluate the likelihood that a particular police tactic, in general, would produce a false confession.[254] The Ofshe/Leo article, which examined sixty purportedly false confessions, advocated that judges actually examine the reliability of each confession, provided that a videotape regime is in place.[255] The latter proposal has been widely criticized as being unworkable and invading the traditional role of the fact finder.[256]

Judge Andrew Sonner recently suggested, in a dissenting opinion, the unreliability of a confession as a factor in examining an alleged threat to arrest the defendant's companions.[257] Professor Magid, a critic of anecdotal studies purporting to show widespread instances of false confessions, nonetheless concedes that, at least with respect to deceptive police practices, "[t]here is a growing view that reliability is the appropriate focus of the debate."[258]

D. The Jury Instruction on Voluntariness – Should the Jury Apply a Common-Law or Due Process Test?

A jury in Maryland must decide two issues in considering a confession: its voluntariness and its reliability.[259] In 1976 in *Dempsey v. State,* the Court of Appeals, speaking through Judge Eldridge, restated these two roles: "'[The jury] has the final determination, irrespective of the court's preliminary decision, whether or not the confession is *voluntary, and whether it should be believed.*'"[260]

The State's burden to prove voluntariness to the jury is not *constitutionally* required.[261] Since at least 1947,[262] the Court of Appeals has required this "greater safeguard," known as the "Massachusetts Rule,"[263] in order to further Maryland's "strong public policy" against the use of involuntary confessions.[264] As such, the jury must decide voluntariness beyond a reasonable doubt before it even considers the reliability, or "weight," of a confession.[265]

The instruction for the "Statement of Defendant" in the *Maryland Criminal Pattern Jury Instructions,* 3:18, MICPEL, states:

> The State must prove beyond a reasonable doubt that the statement was freely and voluntarily made. A voluntary statement is one that, under all circumstances, was given freely.... To be voluntary it must have not been compelled or obtained as a result of any force, promises, threats, inducements or offers of reward.... In deciding whether the statement was voluntary, consider all of the circumstances surrounding the statement .... If you find beyond a reasonable doubt that the statement was voluntary, give it such weight as you believe it deserves.

In considering voluntariness, should the jury apply the common-law or due process test, or both? The instruction leaves this and other questions unresolved.

First, the instruction does not clarify how the jury can reconcile the inherent tension between the third sentence, which generally encapsulates the common-law *per se* rule, and the second and fourth sentences, which generally refer to a modified due process, "totality of the circumstances" test.[266] Second, the two most recent cases from the Court of Appeals seem to provide conflicting dicta in relation to this question. In 1995 in *Hof v. State,*[267] the Court seemed to favor a modified due process, "totality of the circumstances" approach for the jury. However, in 1986 in *Brittingham v. State,* the Court seemed to endorse the *per se* approach by favorably quoting, among other cases, a 1948 case, *Smith v. State,* that had explicitly applied the *per se* common-law test to the jury's role in determining voluntariness.[268]

Third, the instruction does not provide a definition for a "voluntary" statement beyond the assertion that it is a statement that is "freely" given. Fourth, the instruction omits important clarifying language from both the common-law and due process tests. With respect to the due process test, the instruction does not contain commonly quoted language, such as "coerced," "overborne will," or "capacity for self-determination [being] critically impaired."[269] With respect to the common-law test, the instruction does not define improper promises or threats, nor does it mention "implied" promises or threats.

Fifth, the instruction does not mention whether the voluntariness determination needs to be unanimous. For example, the instruction does not provide guidance on what might happen if the jury disagreed on which test to apply or if the jury was hung on the voluntariness issue.[270]

As presently written, defense attorneys can argue to jurors that they should focus on the "mandatory" nature of the third sentence – that the jury "must" find a confession involuntary if it was obtained as a result of *any* police promise (not necessarily one that the Court of Appeals would define as "improper"). Defense attorneys can argue that, irrespective of the lack of a "compel[ing]" or coercive influence of the promise, the jury should disregard the confession "obtained as a result of" the promise. Of course, the prosecutor would respond that the jury "must" consider the "totality of the circumstances," pursuant to the fourth sentence of the instruction, not just the cause-and-effect of a promise. Without further clarification from the trial judge, jurors could easily consider both arguments to be reasonable interpretations of the instruction, thus creating a greater likelihood of a divided jury on the question of voluntariness.

This defense attorneys' argument is supported by the majority of the case law in Maryland. As mentioned above, the Court in *Brittingham* seemed to endorse the jury's use of the *per se* test.[271] Also, in three cases from 1948 to 1960, the Court seemed to sanction the *per se* test for the jury's consideration of voluntariness.[272]

Furthermore, because the Court has expressly sanctioned *"jury reconsideration* of the trial court's determination,"[273] it can be argued that the jury should reconsider the two voluntariness tests in the same order that the trial court *must* consider them – with the *per se* test conducted *prior to and separate from* the due process test.[274] Thus, pursuant to this formulation, if the jury found the confession involuntary under the *per se* test, it would not need to consider the due process test.

Lastly, there is some empirical support for the role of the *per se* test in protecting the defendant against jurors who are skeptical that improper promises can cause an involuntary or unreliable statement.[275] In *Confessions in the Courtroom,*[276] the authors conducted five empirical studies of jurors' reactions to promises and threats leading to a confession. The results consistently indicated that jurors

perceive that a confession induced by a promise of leniency is less suspect than a confession induced by a threat of severe consequences. These results were consistent with previous studies in which "people attribute more responsibility and freedom to a person for actions taken to gain a positive outcome than for similar actions aimed at avoiding punishment."[277] The authors concluded that this "positive coercion bias" can, and should, be corrected with an instruction to the jury about the coercive effect of certain promises.[278]

Because it appears that the jury must *reconsider* the trial judge's ruling on the *per se* test (either by itself or in conjunction with the due process test), the trial court should give a more detailed instruction on the elements of the common-law test. For instance, the trial court should instruct on which types of promises are deemed improper, and then proceed to explain the *per se* nature of the causation prong.[279]

However, even if the *per se* test were explained in more detail to the jury, this would not alleviate the inherent tension in the instruction: How does the jury reconcile the *per se* test with the "totality" test? Should the jury be instructed that the common-law *per se* test should be applied prior to the "totality" test, as is mandated for a judge at the threshold stage of admissibility? Or should the jury merely be instructed that a promise can be coercive, but the jury should still consider a promise as only one *critical* factor in the totality of the circumstances? If Maryland were to adopt this latter approach, the jury would essentially apply a modified due process analysis.

Such a modified due process, "totality of the circumstances" test is supported by the Court's most recent case on the jury's evaluation of voluntariness. The *Hof* Court seemed to endorse the due process, "totality of the circumstances" test where it traditionally had not applied – in conjunction with the common-law rule of *Hillard*:

> In determining whether a confession is plagued with any "*coercive barnacles,*" "the standard is whether, under the totality of the circumstances, the statement was given freely and voluntarily" .... Otherwise stated, the test of admissibility of [a] confession is whether [the *will* of the accused] *was overborne* at the time he confessed ... or whether his statement was *"freely self-determined* .. .. Thus, a statement is voluntary if it is induced by force, undue influence, *improper promises, including any official promise which redounds to the benefit or desire of the defendant.*"[280]

The Court also emphasized another aspect of the voluntariness test which is not typically as important in the *per se* test: "The critical focus in an involuntariness inquiry is the defendant's state of mind."[281] Thus, as a result of the above quoted language, the Court appeared to eschew a jury instruction for voluntariness that is dominated by the *per se* test.

Furthermore, it can be argued that the deterrence rationale, which is one of the underlying rationales of the *per se* test, at the threshold level of admissibility, does not seem appropriate at the jury level. As Judge Moylan observed, "[i]t is not the job of a jury 'to police the police.'"[282] The Court of Appeals in both *Brittingham*[283] and *Hof*[284] observed that the purpose behind the jury's consideration of voluntariness appears to be the "reliability" of the statement, rather than "to protect against government overreaching"[285] – the deterrence rationale underlying the exclusionary rule at the threshold level of admissibility. Certain studies have shown that *some* improper promises that are forbidden by the common-law rule (short of promises of significant leniency) are not likely to cause *unreliable* confessions.[286] Thus, applying the common-law test, jurors will more often face the difficult task to "disregard a trustworthy, albeit involuntary, confession (the thing that *Jackson v. Denno* said a jury was incapable of doing)."[287] The "totality of the circumstances test" makes it less likely that jurors will face this problem identified in *Jackson.*

Lastly, the defendant may not need the extra protections of the *per se* test. The defendant already enjoys several protections against unreliable statements at the threshold level of admissibility: the *per se* common-law voluntariness test itself, the due process voluntariness test, *Miranda*, and the Sixth Amendment right to counsel.[288] The latter two protections did not exist from 1948 through 1960 when the Court of Appeals seemed to endorse the *per se* approach for the jury.[289]

In conclusion, a middle ground between the two approaches can be found in *Reynolds v. State,* in which the Court quoted the Second Circuit's holding that the voluntariness "inquiry in each case is whether such a promise overbears the suspect's will ... *either alone or in conjunction with* other

factors."[290] Thus, a "compromise" instruction should inform the jury that they *could* find the defendant's will to be overborne as a result of merely one improper promise because certain promises of leniency, especially with incarcerated defendants, can be highly coercive. Next, the jury should be instructed that if they do not believe that the promise alone caused an overborne will, they should consider other factors in the totality of the circumstances in determining voluntariness.[291]

III. Conclusion

The Court of Appeals made clear in *Winder* and *Williams* that it will apply a more restrictive application of the "totality of the circumstances" approach to certain improper promises. The Court of Appeals will presume coercion by essentially engaging in a cause-and-effect analysis, which has little, if anything, to do with whether the defendant's will was actually overborne. However, many issues still remain unclear.

While the case law slowly develops so as to fill in some of the ambiguities in the common-law standard in Maryland, defense attorneys and prosecutors can be assured that there are many arguments to be made on both sides with respect to most confessions. Practitioners can be assured that there are even more creative arguments to be made under *Miranda*, the Sixth Amendment, and the due process right to an attorney and to silence. Confession law is indeed far more complicated than expected.

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[2] Ross v. State, 78 Md. App. 275, 278, 552 A.2d 1345, 1347 (1989) (citations omitted). See Hof v. State, 97 Md. App. 242, 629 A.2d 1251 (1993) (Moylan, J.), affirmed on different grounds at 337 Md. 581, 655 A.2d 370 (1995), for a comprehensive history of federal and common-law voluntariness.

[3] 384 U.S. 436 (1966).

[4] Withrow v. Williams, 507 U.S. 680, 711 (1993) (O'Connor, J. concurring, in part, and dissenting in part).

[5] 362 Md. 275, 765 A.2d 97 (2001).

[6] *Id.* at 309, 765 A.2d at 115.

[7] *See infra* notes 53-65 and accompanying text.

[8] George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis,* 1993 U. ILL. L. REV. 207, 252.

[9] *Id.* at 215.

[10] Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973) (citations omitted).

[11] *See* Hillard v. State, 286 Md. 145, 150 n.1, 406 A.2d 415, 418 n.1 (1979) (citing State v. Raithel, 285 Md. 478, 484, 404 A.2d 264, 267 (1979)) ("[C]ourts should not decide constitutional issues unnecessarily.").

[12] The State must prove voluntariness irrespective of the existence of *custody* regarding both the common law, In re Joshua David C., 116 Md. App. 580, 597 (1997), and due process. Beckwith v. United States, 425 U.S. 341, 347-48 (1976) (A non-custodial interrogation "might possibly in some situations, by virtue of some special circumstances" result in an involuntary statement.).

[13] 362 Md. at 307-308, 765 A.2d at 114.

[14] 286 Md. at 153-54, 406 A.2d at 420.

[15] 38 Md. 140, 153 (1873).

[16] 286 Md. at 150, 406 A.2d at 418 (emphasis added).

[17] 362 Md. at 309, 765 A.2d at 1150.

[18] *Id.* at 320, 765 A.2d at 121. *See infra* notes 84, 175 and 192.

[19] 530 U.S. 428, 434 (2000) (citations omitted). *See* Chavez v. Martinez, 123 S. Ct. 1994 (2003).

[20] Moran v. Burbine, 475 U.S. 412, 433-34 (1986).

[21] Stein v. New York, 346 U.S. 156, 182 (1953); Jackson v. State, 209 Md. 390, 395, 121 A.2d 242, 244 (1956). *See* Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at *14 (Md. June 13, 2003).

[22] Pappaconstantinou v. State, 352 Md. 167, 180, 721 A.2d 241, 248 (1998) (Raker, J.).

[23] *See* Stokes v. State, 289 Md. 155, 160, 423 A.2d 552, 555 (1980); Keller v. State, 2 Md. App. 623, 627, 236 A.2d 313, 316 (1967) (Murphy, C.J.).

[24] *Pappaconstantinou*, 352 Md. at 180, 721 A.2d at 247-48.

[25] See *Hof*, 337 Md. at 596-97, 655 A.2d at 377-78, for a comprehensive list of many factors in the totality of the circumstances.

[26] Reynolds v. State, 327 Md. 494, 505-507, 610 A.2d 782, 787-88 (1992) ("All of the circumstances of the interrogation, and the particular circumstances of the accused must be examined." *Id.* at 503, 610 A.2d at 786 (citing D. Nissan et al., *Law of Confessions* 1:9 (1980, 1991 Cum.Supp.)). *See* United States v. Braxton, 112 F.3d 777, 783 (4th Cir. 1997).

[27] *Compare* Colorado v. Connelly, 479 U.S. 157, 163-65 (1986) (quoting Townsend v. Sain, 372 U.S. 293 (1963)) *and* Hoey v. State, 311 Md. 473, 482, 536 A.2d 622, 626 (1988) ("[A] confession is only involuntary when the defendant, at the time of his confession, is so mentally impaired that he does not know or understand what he is saying.").

[28] *Hillard*, 286 Md. at 157, 406 A.2d at 422. *See Reynolds*, 327 Md. at 503-504, 610 A.2d at 786-87. The *Winder* Court did not mention "reliability" or "trustworthiness" as an underlying rationale. *See Winder*, 362 Md. at 304-21, 765 A.2d at 113-22.

[29] *See* Ford v. State, 181 Md. 303, 310, 29 A.2d 833, 837 (1943).

[30] *See* Jackson v. Denno, 378 U.S. 368, 384-85 (1964) (The practice of analyzing the trustworthiness of a confession "was unequivocally put to rest in *Rogers v. Richmond*, 365 U.S. 534 (1961), where it was held that the reliability of a confession has nothing to do with its voluntariness.").

[31] *Hof*, 337 Md. at 617, 655 A.2d at 388. *See infra* D.

[32] Gibson v. State, 138 Md. App. 399, 419, 771 A.2d 536, 548 (2001).

[33] Nicholson v. State, 38 Md. 40, 152-54 (1873).

[34] *See Hof*, 97 Md. App. at 252-54, 629 A.2d at 1256-58; *see* Rex v. Warickshall, 1 Leach Cr.C. 263, 168 Eng.Rep. 234 (1783).

[35] Welsh White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1229 (2001).

[36] *Id.*

[37] 110 U.S. 574, 584 (1884).

[38] The *Hillard* rule itself may even be more expansive than *Nicholson* and *Hopt*, given that the defendant in *Hillard* had a lawyer present during the interrogation who "repeatedly sought promises of help in exchange for a statement by Hillard." 286 Md. at 148, 406 A.2d at 417. Furthermore, the defendant and his attorney signed a *Miranda* waiver form which stated, "you are not promised anything to make a statement ...." *Id.*

[39] *See* White, *supra* note 35, at 1234-36; LAWRENCE WRIGHTSMAN AND SAUL KASSIN, CONFESSIONS IN THE COURTROOM, pp. 118-23, (1993).

[40] *See generally* Massiah v. United States, 377 U.S. 201 (1964).

[41] *See* Ashford v. State, 147 Md. App. 1, 36, 807 A.2d 732, 753 (2002) (Moylan, J.), *cert. denied*, 372 Md. 430, 813 A.2d 257 (2002) ("By 1971, the political complexion of the Supreme Court had, as a result of the 1968 election, changed dramatically. It was even called by some the 'Burger-Nixon Court.' To the surprise of almost all observers, however, the new Court did not overrule *Miranda*."). Justice Brennan in his dissent in *Michigan v. Mosley* warned that, "[t]oday's distortion of *Miranda*'s constitutional principles can be viewed only as another step in the erosion, and, I suppose, ultimate overruling of *Miranda*'s enforcement of the privilege against self-incrimination." 423 U.S. 96, 112 (1975) (Brennan, J., dissenting).

[42] 430 U.S. 387 (1977).

[43] Amicus Brief, 219, 221.

[44] 446 U.S. 291, 305 (1980) (Burger, C.J., concurring) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date.").

[45] 530 U.S. at 440 (The Supreme Court held that the *Miranda* decision was "constitutionally based" and could not be overruled by Congress absent an equivalent substitute.).

[46] *See infra* note 65 and accompanying text.

[47] 499 U.S. 279, 285 (1991).

[48] 168 U.S. 532, 542-43 (1897).

[49] *See id.*

[50] "A confession can never be received in evidence where the prisoner has been influenced by any threat or promise." *Id.* at 543 (citations omitted). The Court in *Bram*, cited and quoted from the second Maryland case dealing with the common-law rule. *Id.* at 560 (quoting Biscoe v. State. 67 Md. 6, 8 A. 571 (1887)). Judge Moylan observed in *Hof*, 97 Md. App. at 271, 629 A.2d at 1266, that "Maryland opinions have looked to *Bram* as a leading authority on the common-law test of voluntariness." (citations omitted).

[51] The Supreme Court did not explicitly denigrate *Bram* in two subsequent decisions. *See Withrow*, 507 U.S. at 689; Dickerson v. United States, 530 U.S. 428, 433-34 (2000).

[52] In fact, no Maryland case has even commented on this specific aspect of *Fulminante*.

[53] *See* Johnson v. State, 696 So.2d 326, 329-30 (Fla. 1997).

[54] *See* State v. Coombs, 704 A.2d 387, 391 (Me. 1998) (burden of proof at suppression hearing is beyond a reasonable doubt).

[55] *See* People v. Conte, 365 N.W.2d 648, 655-66 (Mich. 1984). *But see* People v. Givans, 575 N.W.2d 84, 87 (Mich. App. 1997).

[56] *See* Abram v. State, 606 So.2d 1015, 1030-31 (Miss. 1992) (burden of proof at suppression hearing is beyond a reasonable doubt).

[57] *See* State v. Peake, 352 S.E.2d 487, 488 (S.C. 1987).

[58] *See* State v. Nicklasson, 967 S.W.2d 596, 606 (Mo. 1998).

[59] *See* State v. Williams, 664 P.2d 202, 206 (Ariz. 1983); State v. Harwick, 552 P.2d 987, 990-91 (Kan. 1976); Taylor v. Commonwealth, 461 S.W.2d 920 (Ky. 1970); State v. Wallace, 528 S.E.2d 326 (N.C. 2000).

[60] *See* Cox v. State, 47 S.W.3d 244, 251-52 (Ark. 2001); Tillman v. State, 554 S.E.2d 305, 308 (Ga. Ct. App. 2001); State v. Roberts, 631 A.2d 835, 837-38 (Vt. 1993).

[61] *See* State v. Tapia, 767 P.2d 5, 11 (Ariz. 1988); People v. Jones, 949 P.2d 890, 901 (Cal. 1998); People v. York, 537 P.2d 294, 296 (Colo. 1976); Martin v. State, 518 S.E.2d 898, 903 (Ga. 1999) (otherwise generally applying a *per se* exclusionary rule); People v. Hubbard, 302 N.E.2d 609, 614 (Ill. 1973); State v. Whitsel, 339 N.W.2d 149, 153-54 (Iowa 1983); Nicklasson, 967 S.W.2d at 606; Passama v. State, 735 P.2d 321, 323 (Nev. 1987); Rodgers v. Commonwealth, 318 S.E.2d 298, 303-4 (Va. 1984); State v. Gonzales, 731 P.2d 1101, 1109 (Wash. Ct. App. 1986).

[62] State v. Munoz, 972 P.2d 847, 854-55 (N.M. 1998).

[63] White v. State, 465 S.E.2d 277, 279 (Ga. 1996); State v. Goree, 950 P.2d 919, 925-26 (Or. Ct. App. 1997); Williams v. Commonwealth, 360 S.E.2d 361, 365 (Va. 1987).

[64] *See* KAN. STAT. ANN. § 60-460(f) (West 2000); N.Y. McKinney's Crim. Pro. Law 60.45(1); Bisbee v. State, 17 S.W.3d 477, 480 (Ark. 2000); State v. Luton, 927 P.2d 844,

858 (Haw. 1996); Sossamon v. State, 816 S.W.2d 340, 345 (Tex. Cr. App. 1991).

[65] *See* McLeod v. State, 718 So.2d 727, 729-30 (Ala. 1998); Beavers v. State, 998 P.2d 1040, 1044-45 (Alaska 2000); State v. Pinder, 736 A.2d 857, 880 (Conn. 1999); State v. Rooks, 401 A.2d 943, 947 (Del. 1979); United States v. Thomas, 595 A.2d 980, 981 (D.C. 1991); State v. Troy, 858 P.2d 750, 753 (Idaho 1993); People v. Oaks, 662 N.E.2d 1328, 1344-46 (Ill. 1996); Carter v. State, 686 N.E.2d 1254 (Ind. 1997); Taylor v. Commonwealth, 461 S.W.2d 920, 922 (Ky. 1970); State v. Lavalais, 685 So.2d 1048, 1053 (La. 1996); Commonwealth v. Raymond, 676 N.E.2d 824, 833 n.11 (Mass. 1997); State v. Anderson, 298 N.W.2d 63, 65 (Minn. 1980); State v. Scarborough, 14 P.3d 1202, 1210 (Mont. 2000); State v. Ray, 489 N.W.2d 558, 562 (Neb. 1992); State v. Carroll, 645 A.2d 82, 84 (N.H. 1994); State v. Starling, 456 A.2d 125, 129 (N.J. Super. Ct. Law Div. 1983); State v. Corley, 311 S.E.2d 540, 544-45 (N.C. 1984); State v. Bjornson, 531 N.W.2d 315, 319 (N.D. 1995); State v. Bays, 716 N.E.2d 1126, 1137 (Ohio 1999); Gilbert v. State, 951 P.2d 98, 111-12 (Okla. Crim. App. 1997); Commonwealth v. Nester, 709 A.2d 879, 883 (Pa. 1998); State v. Pacheo, 481 A.2d 1009, 1024-25 (R.I. 1984); State v. Dickey, 459 N.W.2d 445, 447-48 (S.D. 1990); Smith v. State, 933 S.W.2d 450, 455-56 (Tenn. 1996); State v. Strain, 779 P.2d 221, 227 (Utah 1989); State v. Broadaway, 942 P.2d 363, 371-72 (Wash. 1997); State v. Farley, 452 S.E.2d 50, 61 (W.Va. 1994); State v. Cydzik, 211 N.W.2d 421, 427 (Wis. 1973); Edwards v. State, 973 P.2d 41, 48-49 (Wyo. 1999).

[66] *See* Saul Kassin and Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats through Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233, 242, 246 (1991).

[67] *See infra* C.3. *See* Burch v. State, 346 Md. 253, 266, 696 A.2d 443, 450 (1997); Jackson v. State, 141 Md. App. 175, 186, 784 A.2d 670, 676-77 (2001), *cert. denied,* 368 Md. 240 (2002); Raras v. State, 140 Md. App. 132, 158, 780 A.2d 322, 337-38 (2001), *cert. denied,* 367 Md. 90 (2001).

[68] *See* Welsh White, *False Confessions and the Constitution: Safeguards against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 111 (1997). *See* State v. Cayward, 552 So.2d 971, 974-75 (Fla. Dist. Ct. App. 1989).

[69] *See* Ball v. State, 347 Md. 156, 178-80, 699 A.2d 1170, 1178-79 (1997).

[70] 327 Md. at 506, 610 A.2d at 787 (citations omitted).

[71] *Id.* at 507, 610 A.2d at 788.

[72] *See* Ireland v. State, 310 Md. 328, 331 (1987) ("Because of the inherent dynamism of the common law, we have consistently held that it is subject to judicial modification in the light of modern circumstances or increased knowledge . . . . Equally well established is the principle that the common law should not be changed contrary to the public policy of this State set forth by the General Assembly.") (citations omitted).

[73] Martin v. State, 113 Md. App. 190, 231, 686 A.2d 1130, 1150 (1996) (Moylan, J.). See Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at *14 (Md. June 13, 2003) (Improper inducements are "coercive as a matter of law.").

[74] 362 Md. at 307, 765 A.2d at 114.

[75] 286 Md. at 150, 406 A.2d at 417. ("[The confession must] first be shown to be free of any coercive barnacles that may have attached by improper means to prevent the expression from being voluntary.").

[76] 307 Md. 233, 252, 513 A.2d 299, 309-310 (1986). Before 1986, it appears that the words "totality of the circumstances" were not utilized in any Court of Appeals decision dealing with common-law voluntariness since 1967 in *Cunningham v. State*, 247 Md. 404, 419-20, 231 A.2d 501, 509-10 (1967).

[77] *See* 327 Md. at 506, 610 A.2d at 787-88 ("In harmony with the approach taken in federal constitutional analysis, Maryland has for the most part applied a 'totality of the circumstances' rule when appraising the voluntariness of confessions under state nonconstitutional law." *Id.* at 504, 610 A.2d at 786).

[78] *See* 337 Md. at 595-96, 655 A.2d at 377-78.

[79] *See* 346 Md. at 266, 696 A.2d at 449-50.

[80] Judge Wilner authored the opinion in *Hillard v. State* in the Court of Special Appeals which was reversed by the Court of Appeals. 40 Md. App. 600, 392 A.2d 1181 (1978), *rev'd* 286 Md. 145, 406 A.2d 415 (1979). Judge Wilner wrote in *Hillard,* "the test of voluntariness is whether an examination *of all the circumstances* discloses that the conduct of law enforcement officials was such to *overbear [the defendant's] will* to resist." 40 Md. App. at 607, 392 A.2d at 1185 (emphasis added in part) (citations omitted). Judge Wilner's use of the "totality of

the circumstances" in *Hillard* in 1978 was consistent with a long line of similar holdings in the Court of Special Appeals from 1968 through 1976, some of which were written by two venerated judges who later became part of the unanimous Court of Appeals' decision in *Hillard*. *See* State v. Robinson, 3 Md. App. 666, 671-72, 240 A.2d 638, 641-42 (1968) (Murphy, C.J.); Dennis v. Warden, 6 Md. App. 295, 299 n.5, 251 A.2d 909, 912 (1969) (Orth, J.); Murphy v. State, 8 Md. App. 430, 435, 260 A.2d 357, 359-60 (1970) (Murphy, C.J.); Ryon v. State, 29 Md. App. 62, 66, 349 A.2d 393, 396-97 (1975) (Orth, C.J.). Most recently, Judge Wilner explained in Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at *14 (Md. June 13, 2003), that a "confession that is preceded or accompanied by threats or a promise of advantage will be held involuntary, *notwithstanding any other factors that may suggest voluntariness*, unless the State can establish that such threats or promises in no way induced the confession." (Emphasis added).

[81] Burch v. State, 346 Md. at 266, 696 A.2d at 449-50 (citations omitted) (emphasis added).

[82] 362 Md. at 307, 312, 765 A.2d at 114, 117 (emphasis added).

[83] 337 Md. at 596-597, 655 A.2d at 377-78.

[84] The Court might have applied so few factors, in part, because the police conduct in *Winder* went "far beyond that in any of our prior cases where improper inducements were recognized." 362 Md. at 317, 765 A.2d at 120. However, the Court, in dicta in Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at *14 (Md. June 13, 2003), indicated no retreat from a strict cause-and-effect analysis of improper promises and threats.

[85] *See* 113 Md. App. at 231, 686 A.2d at 1150.

[86] *See id.* at 309, 765 A.2d at 115.

[87] 327 Md. at 507, 610 A.2d at 788.

[88] *Id.* at 505, 610 A.2d at 787 (emphasis added) (citations omitted). Because the Court in *Reynolds* held that no improper inducements were made, the Court did not *actually apply* the common-law *per se* rule to the non-custodial statements. 327 Md. at 509, 511, 610 A.2d at 789, 790.

[89] *See* 116 Md. App. 509, 517, 698 A.2d 1121, 1125 (1997).

[90] *See* 352 Md. at 174-180, 721 A.2d at 244-48. Because the Court held that there was no State action, the Court did not *actually apply* a *per se* common-law analysis to the non-custodial statement. However, the Court in *Pappaconstantinou,* 352 Md. at 174-75, 721 A.2d at 245, did emphasize the fact that the defendant was in custody when analyzing the first two Maryland cases dealing with the common-law rule, *Nicholson,* 38 Md. at 143, and *Biscoe,* 67 Md. at 8, 8 A. at 571-72. However, the Court of Appeals in *Williams v. State* did not repeat *Winder's* language concerning a "custodial confession" when commenting on the common-law rule. Williams v. State, No. 69. Sept. Term, 2002, 2003 WL 21361726, at *14 (Md. June 13, 2003).

[91] *See* 147 Md. App. 432, 444-47, 809 A.2d 66, 72-74, *cert. denied*, 372 Md. 431, 813 A.2d 258 (2002).

[92] *See* 289 Md. at 158-60, 423 A.2d at 554-55.

[93] *See id.* at 157, 423 A.2d at 553.

[94] Welsh White, *Confessions Induced by Broken Government Promises*, 43 DUKE L. J. 947, 963 n.106 (1994).

[95] 113 Md. App at 229, 686 A.2d at 1149 (emphasis added).

[96] 362 Md. at 320 n.21, 765 A.2d at 121 (emphasis added).

[97] *See id.* at 309, 765 A.2d at 115.

[98] *Id.* at 320 n.21, 765 A.2d at 121.

[99] 499 U.S. at 285-86 (quoting *Bram*, 168 U.S. at 542-43).

[100] *See* 346 Md. at 266, 696 A.2d at 449-50.

[101] *See* 140 Md. App. at 158, 780 A.2d at 337-38.

[102] *See* 141 Md. App. at 186, 784 A.2d at 676-77.

[103] *See* Lodowski v. State, 307 Md. 233, 252, 513 A.2d 299, 309-10 (1986); Gilliam v. State, 320 Md. 637, 650, 579 A.2d 744, 750 (1990); *Hof*, 337 Md. at 595-96, 655 A.2d at 377-78; Johnson v. State, 348 Md. 337, 351, 703 A.2d 1267, 1275-76 (1998) (totality of the circumstances only mentioned in context of the Supreme Court's due process cases). The one exception is Hoey v. State, 311 Md. 473, 483, 536 A.2d 622, 627 (1988), in which the Court mentions the "totality of the circumstances"

in determining "whether particular police conduct is deemed improper."

[104] 38 Md. at 153.

[105] *See* Deems v. State, 127 Md. 624, 630, 96 A. 878, 880 (1916); Hammond v. State, 174 Md. 347, 355, 198 A. 704, 707 (1938); Kier v. State, 213 Md. 556, 562, 132 A.2d 494, 497 (1957); Gill v. State, 265 Md. 350, 353, 289 A.2d 575, 577 (1972); *Hoey*, 311 Md. at 483, 536 A.2d at 627. *See* Williams v. State, No. 69, Sept. Term 2002, 2003 WL 21361726, at *14 (Md. June 13, 2003).

[106] 289 Md. at 161, 423 A.2d at 555. However, the Court in *Ball v. State*, 347 Md. at 175, 699 A.2d at 1178-79, classified the threat in *Stokes* as "a promise that the suspect's wife would not be arrested."

[107] 362 Md. at 311, 765 A.2d at 116 (emphasis added).

[108] 97 Md. App. at 273, 629 A.2d at 1267.

[109] *Id.* (quoting McCormick on Evidence § 148).

[110] Nancy S. Forster and Michael R. Braudes, *The Common Law of Maryland, An Important and Independent Source of Criminal Law and Procedure*, Vol. III., No. 2 J. Cont. Leg. Issues, 199, 209 (1992).

[111] *See* 370 Md. 525, 805 A.2d 1016, *cert. granted*, Maryland v. Pringle, 123 S. Ct. 1571 (2003).

[112] *Id.* at 532, 805 A.2d at 1019.

[113] *See id.* at 547-554, 805 A.2d at 1028-1032. *See generally* Brown v. Illinois, 422 U.S. 590 (1975).

[114] *See id.* However, it can be argued that the *Pringle* Court's "exploration of voluntariness," pursuant to a Fourth Amendment attenuation analysis, was not an independent, common-law analysis of the voluntariness of the confession. First, the Court did not state that it was applying *Winder*'s two-prong, common-law test of voluntariness. Second, if the Court had been actually applying the common-law test, there would have been no reason to apply the constitutional "attenuation" analysis, because of the "well settled principle 'that courts should not decide constitutional issues unnecessarily.'" *Hillard*, 286 Md. at 150 n.1 (citations omitted).

[115] *See* 147 Md. App. at 446-77, 809 A.2d at 73-74.

[116] *See* Kassin and McNall, *supra* note 66, at 242. *See Conte*, 365 N.W.2d at 664 ("[A] promise to a defendant guaranteeing the release of his wife is probably more likely to induce his confession than a promise of some benefit to him.").

[117] Kassin and McNall, *supra* note 66, at 245-46.

[118] *See* Passama v. State, 735 P.2d 321, 323 (Nev. 1987).

[119] *See* 235 Md. 541, 543-44, 201 A.2d 790, 791-92 (1964).

[120] *See* 285 Md. 705, 721-22, 404 A.2d 1073, 1081-82 (1979). *See also* United States v. Harrison, 34 F.3d 886, 891-92 (9th Cir. 1994) ("There are *no* circumstances in which law enforcement officers may suggest that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutor."). *See infra* notes 224 and 225.

[121] 38 Md. at 147 (citing Russell on Crimes, 826) (emphasis added). The Supreme Court in 1897 in *Bram v. United States* later adopted the same expansive language as the defendant argued above in *Nicholson* – "any degree of influence." 168 U.S. at 565.

[122] 67 Md. 6, 7, 8 A. 571, 571 (1887).

[123] *See Bram*, 168 U.S. at 565.

[124] 362 Md. at 312, 765 A.2d at 117. In *Williams v. State*, the Court stated that a "confession that is preceded or accompanied by threats or a promise of advantage will be held involuntary, ... unless the State can establish that such threats or promises *in no way* induced the confession.") (emphasis added). Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at * 14 (Md. June 13, 2003).

[125] *See id.* at 312-13, 318-20, 765 A.2d at 117, 120-22.

[126] *Id.* at 319, 765 A.2d at 121.

[127] *Id.* at 317, 765 A.2d at 119.

[128] *See id.* (citing Ralph v. State, 226 Md. 480, 486, 174 A.2d 163, 166 (1961)) (defendant did not rely on a "single, non-repeated [police] statement," made eight hours earlier).

[129] *See* 348 Md. at 350-51, 703 A.2d at 1275-76.

[130] *See id.* at 347-49, 703 A.2d at 1272-74.

[131] 194 Md. 387, 71 A.2d 487 (1950).

[132] *Id.* at 400, 71 A.2d at 493 (emphasis added).

[133] 213 Md. 556, 563, 132 A.2d 494, 498 (1957).

[134] 113 Md. App. at 231, 686 A.2d at 1150.

[135] 365 N.W.2d at 663.

[136] *Abram*, 606 So.2d at 1030. In *Reynolds v. State*, the Court of Appeals favorably quoted a federal case which utilized the concept "proximate cause." 327 Md. at 506, 610 A.2d at 787-88 (quoting Cole v. Lane, 830 F.2d 104, 109 (7th Cir. 1987)).

[137] 362 Md. at 309, 765 A.2d at 115 (emphasis added).

[138] 286 Md. at 153, 406 A.2d at 420. *See accord* Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at *14 (Md. June 13, 2003).

[139] 224 Md. 550, 559, 168 A.2d 510, 514-15 (1960) (emphasis added).

[140] *See* Bryant v. State, 229 Md. 531, 535, 185 A.2d 190, 192 (1962); Abbott v. State, 231 Md. 462, 465, 190 A.2d 797, 799 (1963); Bean v. State, 234 Md. 432, 439, 199 A.2d 773, 776 (1964).

[141] *See* Smith v. State, 237 Md. 573, 580, 207 A.2d 493, 580-81 (1965). However, almost as many cases from 1961 through 1963 did *not* adopt this narrower standard. *See* Parker v. State, 225 Md. 288, 291, 170 A.2d 210, 211 (1961); Jones v. State, 229 Md. 165, 170, 182 A.2d 784, 787 (1962); Bagley v. State, 232 Md. 86, 92, 192 A.2d 53, 56 (1963).

[142] *See* 110 U.S. at 585.

[143] *Id.* (emphasis added).

[144] 168 U.S. at 549.

[145] 327 Md. at 512, 610 A.2d at 790-91 (citing LaFave and Israel, Criminal Procedure, 6.2 at 440 (1984)) (emphasis added).

[146] White, *supra* note 35, at 1234-36 (emphasis added). *See supra* notes 59-63.

[147] *Winder*, 362 Md. at 309, 765 A.2d at 115. *See accord* Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at *14 (Md. June 13, 2003).

[148] 38 Md. at 153.

[149] *See* 327 Md. at 507, 610 A.2d at 788.

[150] *See* 337 Md. at 595, 655 A.2d at 377.

[151] 362 Md. at 309, 765 A.2d at 115.

[152] 289 Md. at 160, 423 A.2d at 554-55.

[153] *See* 116 Md. App. 580, 603, 698 A.2d 1155, 1166 (1997) (quoting *Nicholson*, 38 Md. at 153). However, this holding may also be explained by the concern for the greater frequency with which children give false confessions induced by promises. *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 458 (1998).

[154] *Winder*, 362 Md. at 311, 765 A.2d at 116. *See Stokes*, 289 Md. at 162, 423 A.2d at 555-56.

[155] 362 Md. at 311, 765 A.2d at 116.

[156] *See Hof*, 337 Md. at 595, 655 A.2d at 377 (citations omitted).

[157] 347 Md. at 174-176, 699 A.2d at 1178-79.

[158] 226 Md. 480, 486, 174 A.2d 163, 166 (1961); *see Hillard*, 286 Md. at 154 n.3, 406 A.2d at 420.

[159] 127 Md. 624, 630, 96 A. 878, 880 (1916).

[160] 70 Md. App. 678, 690-91, 523 A.2d 627, 633 (1987).

[161] 67 Md. at 8, 8 A. at 572.

[162] 148 Md. 34, 60, 129 A. 275, 285 (1925).

[163] 180 Md. 1, 4-5, 22 A.2d 455, 457 (1941).

[164] 68 Md. App. 97, 105, 510 A.2d 270, 274-75 (1986).

[165] *Id.*

[166] Kassin and McNall, *supra* note 66, at 241, 245, 248.

[167] Phillip E. Johnson, *A Statutory Replacement for the Miranda Doctrine*, 24 AM. CRIM. L. REV. 303, 310-11 (1986).

[168] 67 Md. at 7, 8 A. at 571.

[169] *Id.* at 8, 8 A. at 572.

[170] 217 Md. 61, 70, 141 A.2d 487, 491-92 (1958).

[171] *See* 84 Md. App. 230, 241-243, 578 A.2d 810, 815-16 (1990), *rev'd on other grounds,* 328 Md. 38 (1992).

[172] *Id.* at 242, 578 A.2d at 815-16.

[173] *Minehan*, 147 Md. App. at 444-46, 809 A.2d at 72-74, *cert. denied*, 372 Md. 431, 813 A.2d 258 (2002). *See* Facon v. State, 144 Md. App. 1, 25 (2002), *rev'd on other grounds*, No. 30, Sept. Term, 2002, 2003 WL 21361541 (Md. June 13, 2003) (The Court of Special Appeals found nothing improper with the detective's promise to tell the prosecutor that the defendant had a serious drug problem, in part, because the detective emphasized to the defendant that he was "'making no promises' about a drug treatment program.").

[174] 286 Md. at 153, 406 A.2d at 420.

[175] 362 Md. at 315, 765 A.2d at 119.

[176] *Id.*

[177] *See* Grammer v. State, 203 Md. 200, 223-24, 100 A.2d 257, 267-68 (1953).

[178] *See* 223 Md. 158, 170, 162 A.2d 751, 757-58 (1960).

[179] *See* 102 Md. App. 648, 653-54, 651 A.2d 403, 406 (1995). *See* Harrison v. State, No. 1037, Sept. Term, 2002, 2003 WL 21488146, at * 2-4 (Md. App. June 13, 2003).

[180] White, *supra* note 35, at 1234-35.

[181] *See supra* notes 61 and 65 and accompanying text.

[182] 327 Md. at 511, 610 A.2d at 790. The Court noted that one exception to the rule on collateral benefits is a threat or promise to arrest a relative. *See id.* at 512, 610 A.2d at 791 (quoting *Stokes*, 289 Md. at 161, 423 A.2d at 555).

[183] *See* 116 Md. App. at 603, 698 A.2d at 1166.

[184] 38 Md. at 153. This same passage from *Nicholson* was favorably quoted in both *Winder*, 362 Md. at 309, 765 A.2d at 115, and *Reynolds*, 327 Md. at 507, 610 A.2d at 788.

[185] *See* 2 Md. App. 654, 658-59, 236 A.2d 432, 435 (1968) (Murphy, C.J.).

[186] *See* 51 Md. App. 347, 354, 443 A.2d 651, 655 (1982).

[187] *See* 286 Md. at 149, 406 A.2d at 417-18.

[188] 94 Md. App. 107, 120, 615 A.2d 1226, 1232-33 (1992).

[189] 25 Md. App. 162, 176, 335 A.2d 162, 170 (1975).

[190] 36 Md. App. 615, 627, 375 A.2d 1129, 1135 (1977).

[191] 116 Md. App. at 518, 698 A.2d at 1125.

[192] 362 Md. at 314, 765 A.2d at 118.

[193] *Id.*

[194] 348 Md. at 350, 703 A.2d at 1275-76.

[195] *Id.* at 348, 703 A.2d at 1273.

[196] 173 Md. 309, 316-18, 196 A. 95, 98-99 (1937).

[197] *See id.* at 317-18, 196 A. 98-99 (citing 2 Wharton, Criminal Evidence (11th Ed.) 1036; Joy, Amissibility of Confessions, 50).

[198] *See* 181 Md. at 309-10, 29 A.2d at 836 (citing Markley v. State, 173 Md. 309, 317, 196 A. 95, 99 (1938)).

[199] 289 Md. at 160, 423 A.2d at 554-55.

[200] *See id.* at 160 n.2, 423 A.2d at 555.

[201] *See* 370 Md. at 547-554, 805 A.2d at 1028-1032, *cert. granted*, Maryland v. Pringle, 123 S. Ct. 1571 (2003) (implicitly answering the Court of Special Appeals' statement that it "is unsettled whether a promise to benefit a friend justifies finding the subsequent confession involuntary." Pringle v. State, 141 Md. App. 292, 310 (2001)). However, the Court did not explicitly refer to the inducement as "improper." *Id.*

[202] *See* 50 Md. App. 65, 77, 435 A.2d 821, 827 (1981).

[203] 79 Md. App. 517, 522-24, 558 A.2d 446, 448-50 (1989).

[204] *See* 36 Md. App. 371, 378-79, 373 A.2d 975, 979-80 (1977).

[205] *See* 360 U.S. 315, 323 (1959).

[206] *Id.*

[207] 289 Md. at 160, 423 A.2d at 555.

[208] *Id.* (emphasis added).

[209] *See* 372 U.S. 528, 534-35 (1963). Consistent with this due process standard, the majority of cases in the country apply a "totality of the circumstances" test to promises related to relatives' penal status. *Voluntariness of Confession as Affected by Police Statements that Suspect's Relatives will Benefit by the Confession*, 51 A.L.R. 4th 495, 499 (1987).

[210] *See* 327 Md. at 511-12, 610 A.2d at 790-91.

[211] *Id.* at 512, 610 A.2d at 790 (emphasis added).

[212] *See* 56 Md. App. 450, 484-86, 468 A.2d 353, 370-72 (1983).

[213] *See* 79 Md. App. 53, 66, 555 A.2d 535, 541 (1989), *aff'd on other grounds,* 321 Md. 69 (1990).

[214] *See id.*

[215] *Id.*

[216] *See* 851 S.W.2d 238, 253 (Tex. Ct. App. 1993).

[217] 41 Md. App. 641, 644, 398 A.2d 485, 487-88 (1979).

[218] *Id.* at 645, 398 A.2d at 488. The Court favorably analyzed *Rowe* in *Ball*, 347 Md. at 179.

[219] Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 973 (1997). *But see* State v. Rettenberger, 984 P.2d 1009, 1016-17 (Utah 1999).

[220] *See* 56 Md. App. at 482-84, 468 A.2d at 369-71.

[221] *See* 48 Md. App. 637, 643-44, 429 A.2d 287, 290-91 (1981).

[222] *Ball*, 347 Md. at 178, 699 A.2d at 1180 (quoting Rowe v. State, 41 Md. App. 641, 645, 398 A.2d 485, 488 (1979) (quoting Hopkins v. State, 19 Md. App. 414, 424, 311 A.2d 483, 488-89 (1973)). *See* Lewis v. State, 285 Md. 705, 721, 404 A.2d 1073, 1081-82 (1979).

[223] *See Ball*, 347 Md. at 179, 699 A.2d at 1180-81; Finke v. State, 56 Md. App. 450, 490, 468 A.2d 353, 374 (1983) (six different lies were permissible); Watkins v. State, 59 Md. App. 705, 718, 478 A.2d 326, 333 (1984) (Wilner, J.); Whittington v. State, 147 Md. App. 496, 520-25, 809 A.2d 721, *cert. denied*, 373 Md. 408, 818 A.2d 1107 (2003) (applying the "totality of the circumstances" test under both the common-law and due process tests to uphold the voluntariness of a confession given many hours after the police utilized a "bogus" chemical test on the defendant).

[224] Green v. State, 91 Md. App. 790, 796-98, 605 A.2d 1001, 1004-1005 (1992) (falsely telling a juvenile that he could receive the death penalty rendered the statement involuntary).

[225] *See Lewis*, 285 Md. at 721-22, 404 A.2d at 1081-82.

[226] 181 Md. at 309-310, 29 A.2d 836.

[227] *See* 51 Md. App. at 354-55, 443 A.2d at 655. The court rested its decision primarily on other factors. *See id.*

[228] *See* White, *supra* note 94, at 986-87 (quoting Santobello v. N.Y., 404 U.S. 257 (1971)).

[229] *See* 347 Md. at 178-180, 699 A.2d at 1180-81.

[230] *Id.* at 168-69, 699 A.2d at 1175-76.

[231] *See* 20 Md. App. 577, 591-92, 318 A.2d 568, 577-78 (1974).

[232] Ofshe and Leo, *The Truth about False Confessions and Advocacy Scholarship*, 37 CRIM. L. BULL 293, 364-64 n. 356 (2001) [hereinafter *The Truth*]; *See* Ofshe and Leo, *The*

Decision to Confess Falsely, 74 DENV. U. L. REV. 979, 999 n.71, 1097-98, 1101-03 (1997).

[233] *See* 286 Md. at 148, 406 A.2d at 417.

[234] 48 Md. App. 726, 732-35, 429 A.2d 308, 711-13 (1981).

[235] *See* 50 Md. App. at 77-78, 435 A.2d at 827.

[236] *See* 181 Md. at 309-310, 29 A.2d 836 (emphasis added).

[237] *See supra* note 59 and accompanying text.

[238] *See* 307 Md. 552, 515 A.2d 1157 (1986).

[239] *See id.* at 584-85, 515 A.2d at 1173-74.

[240] *See* Allgood v. State, 309 Md. 58, 82, 522 A.2d 917, 928-29 (1987).

[241] *See* 3 John Henry Wigmore 819, at 297.

[242] 327 Md. at 503, 610 A.2d at 786.

[243] 155 Md. 474, 479, 142 A. 497, 499 (1928); *See* State v. Dobbs, 148 Md. 34, 58-59, 69, 129 A. 275, 284-85, 288-89 (1925); *Ford*, 181 Md. at 310, 29 A.2d at 836. This trend in the Court of Appeals ended shortly after the Supreme Court, in Lisenba v. California, 314 U.S. 219, 236 (1941), indicated for the first time that due process voluntariness does not concern itself with the truthfulness of a confession. The Supreme Court stated, "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Id.*

[244] *Ball*, 347 Md. at 175, 699 A.2d at 1179; *Reynolds*, 327 Md. at 504, 610 A.2d at 786 (citations omitted).

[245] *See Jackson*, 378 U.S. at 384-85.

[246] *See supra* notes 153 and 232; Paul Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999); Laurie Magid, *Deceptive Police Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168 (2001).

[247] *See supra* note 153.

[248] *See* Ofshe and Leo, *The Truth, supra* note 232, at 309.

[249] *See id.* at 303.

[250] *See* "FALSE CONFESSIONS, Inside the Prince George's Homicide Unit, Allegations of Abuses Mar Murder Cases," The Washington Post, June 3, 2001, at A1.

[251] White, *supra* note 68, at 150; Ofshe and Leo, *supra* note 232, at 995, 1065, 1072; Ofshe and Leo, *The Truth*, *supra* note 232, at 346, 364-65.

[252] Magid, *supra* note 246, at 1190.

[253] Ofshe and Leo, *supra* note 232, at 1135.

[254] White, *supra* note 68, at 111.

[255] Ofshe and Leo, *supra* note 232, at 1118.

[256] Welsh White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2025-26 (1998); Cassell, *supra* note 246, at 526.

[257] *See* Pringle, 141 Md. App. at 317-18, 785 A.2d at 804-805 (Sonner, J., dissenting), *rev'd*, 370 Md. 525, 805 A.2d 1016 (2002), *cert. granted*, Maryland v. Pringle, 123 S. Ct. 1571 (2003).

[258] Magid, *supra* note 246, at 1210.

[259] 404 U.S. 477, 485-86 (1972) (emphasis added).

[260] 277 Md. 134, 143-44, 255 A.2d 455, 460 (1976) (quoting Day v. State, 196 Md. 384, 399, 76 A.2d 729, 736 (1950)) (emphasis added).

[261] *See Jackson*, 378 U.S. at 378 n.8.

[262] *See* Jones v. State, 188 Md. 263, 270, 52 A.2d 484, 487-88 (1946) (quoting Commonwealth v. Hudson, 70 N.E. 436 (Mass. 1904)).

[263] See Richard P. Gilbert and Charles E. Moylan, Jr., *Maryland Criminal Law: Practice and Procedure*, 39.3, 485, Michie, 1983, for a critique of the Massachusetts Rule.

[264] *See* Brittingham v. State, 306 Md. 654, 665, 511 A.2d 45, 50 (1986).

[265] *See Jackson*, 378 U.S. at 378 n.8 ("[R]econsideration of [voluntariness] by the jury does not, of course, improperly affect the jury's determination of the credibility or probativeness of the confession or its ultimate determination of guilt or innocence.").

[266] As analyzed above, the Court in both *Hillard* and *Winder* did not apply an unqualified "totality of the circumstances" test to improper promises. The Court applied a general "cause and effect" analysis of whether the promises caused the defendant to confess. *See supra* Section C.1.

[267] 337 Md. at 595-97, 655 A.2d at 377-78.

[268] *See* 306 Md. at 663, 511 A.2d at 49-50 (quoting Smith v. State, 189 Md. 596, 603-04 (1948)). From 1965 to 1976, in the four cases dealing with the issue prior to *Brittingham,* the Court of Appeals did not take a position on the issue of which test the jury should apply. *See* Dempsey v. State, 277 Md. 134, 143-44, 355 A.2d 455, 460 (1976); Gill v. State, 265 Md. 350, 358-59, 289 A.2d 575, 579-80 (1972); *Smith*, 237 Md. at 581, 207 A.2d at 497; Presley v. State, 224 Md. 550, 559, 168 A.2d 510, 514-15 (1961).

[269] Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (plurality opinion).

[270] *See* Gilbert and Moylan, *supra* note 263, at 485.

[271] *See* 306 Md. at 662-66, 511 A.2d at 49-51. In *Williams v. State*, the Court of Appeals held that the jury must be instructed about the "very heavy weight" to be accorded a violation of Maryland's prompt presentment rule. Williams v. State, No. 69, Sept. Term, 2002, 2003 WL 21361726, at *17, (Md. June 13, 2003). Thus, if the jury must be instructed on the specifics of this Maryland non-constitutional rule, then it can be argued that the jury should also be instructed in more detail on the specifics of Maryland's non-constitutional, common-law rule of voluntariness with respect to improper promises and threats.

[272] *See Smith*, 189 Md. at 603-604, 56 A.2d at 821-22; Linkins v. State, 202 Md. 212, 223, 96 A.2d 246, 251 (1953); Hall v. State, 223 Md. 158, 172, 162 A.2d 751, 759 (1960).

[273] *Hof*, 337 Md. at 617, 655 A.2d at 388 (emphasis added). The Court used the term "jury reconsideration" two additional times. *Id.* at 618, n.16, 655 A.2d at 389.

[274] *Hillard*, 286 Md. at 150 n.1, 406 A.2d at 418 ("[T]he well settled principle [is] 'that courts should not decide constitutional issues unnecessarily.'") (citations omitted).

[275] *See* Saul Kassin, *The Psychology of Confession Evidence*, AM. PSYCHOLOGIST, 231 (1997).

[276] *See supra* note 39.

[277] WRIGHTSMAN AND KASSIN, *supra* note 39, at 105.

[278] *Id.* at 118-123.

[279] When applicable to a juvenile, the trial court should consider giving a supplementary instruction for the jury to give greater scrutiny to the voluntariness of a confession. *See* McIntyre v. State, 309 Md. 607, 617, 526 A.2d 30, 34-35 (1987). False confessions are more likely to occur among juveniles and mentally retarded suspects. *See* Cassell, *supra* note 246, at 586; *see* Magid, *supra* note 246, at 1192; Comment, Illinois Weakened Attempt to Prevent False Confessions by Juveniles, 33 LOY. U. CHI. L.J. 487 (2002).

[280] 337 Md. at 595, 655 A.2d at 377 (citations omitted) (emphasis added).

[281] *Id.* at 619, 655 A.2d at 389.

[282] Jacobs v. State, 45 Md. App. 634, 656, 415 A.2d 590, 602 (1980).

[283] *See* 306 Md. at 664-65, 511 A.2d at 50-51 (quoting *Hillard*, 286 Md. at 157).

[284] 337 Md. at 597, 617, 655 A.2d at 378, 388.

[285] *Pappaconstantinou*, 352 Md. at 180, 721 A.2d at 248.

[286] White, *supra* note 35, at 1234-35.

[287] GILBERT AND MOYLAN, *supra* note 263, at 485 (citing Jackson v. Denno, 378 U.S. 368 (1964)).

[288] *See generally* Massiah v. United States, 377 U.S. 201 (1964).

[289] *See supra* note 272 and accompanying text.

[290] 327 Md. at 507, 610 A.2d at 788 (quoting *Green v. Scully*, 850 F.2d 894, 901 (2d Cir. 1988)) (emphasis added).

[291] Of course, this would not resolve whether unanimity should be required on the issue.